MEGAN'S LAW AS APPLIED TO JUVENILES: PROTECTING CHILDREN AT THE EXPENSE OF CHILDREN?

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I. INTRODUCTION

There is nothing more enraging than an innocent child falling victim of a violent crime, especially when that crime is of a sexual nature. Moreover, that rage is buttressed by a deep sense of betrayal when the perpetrator of such a crime is a neighbor and member of the community. The rape and murder of seven-year-old Megan Kanka incited precisely these emotions and, in the process, united a community to ensure that such a crime would never happen again.[1] Indeed, these efforts led to the enactment of the sex offender registration and notification law known as Megan's Law.[2]

Since its inception, Megan's Law has been the subject of debate on all levels, from constitutional to social to political. The debates continue at the present time, more than two years after the law's enactment. The purpose of Megan's Law is to facilitate the disclosure of information about dangerous sex offenders so that the community can protect itself and its children.[3] In the interest of making this information as comprehensive as possible, the legislature made the coverage of Megan's Law very broad. Accordingly, even juvenile sex offenders are required to register with state law enforcement agencies.[4]

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[1]*See Man Charged in 7-Year-Old Neighbor's Killing*, N.Y. TIMES, August 1, 1994, at B5. On July 29, 1994, Megan Kanka was lured into the house of a neighbor and convicted sex offender, Jesse Timmendequas. *Id.* Once inside, Mr. Timmendequas raped and strangled her to death, and her body was discovered the following day in a park three miles from her home. *Id.* Within 24 hours, the residents of the community where Megan lived were calling for laws to be enacted to provide communities with notice that a convicted sex offender lives in their neighborhood. *Id.*

[2]N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995).

[3]N.J. STAT. ANN. § 2C:7-1 (WEST 1995).

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

While such a requirement is wholly consistent with the legislature's noble purpose, it does not appear to be consistent with the purposes and philosophies that have permeated the juvenile justice system since its inception.[5]

This Comment will discuss the potential problems caused by requiring juvenile sex offenders to register under Megan's Law. Part II will explain Megan's Law and its progression through the legislative process, highlighting the numerous challenges to Megan's Law in the court system, and specifically concentrating on the New Jersey Supreme Court's decision in *Doe v. Poritz*.[6] Turning to Megan's Law as applied to juveniles, Part II will also address the development of the modern juvenile justice system, the conflict in policy between Megan's Law and the New Jersey Code of Juvenile Justice, and the potential constitutional concerns that this application raises. Part III will examine the sex offender registration statutes of other states, focusing on whether and to what extent those laws apply to juveniles. Finally, Part IV will reach the conclusion that applying Megan's Law to juveniles is not consistent with established juvenile justice policies, and may even be unconstitutional as applied to them. In this regard, this Comment concludes that the New Jersey Legislature should follow the lead of other states and limit the application of Megan's Law to reduce the severity of its effects on juveniles.

II. MEGAN'S LAW

Megan's Law was drafted broadly and enacted swiftly so that the children of New Jersey would be protected from future harm at the hands of convicted sex offenders.[7] The means of registration and community notification, however, caused a state and indeed a nation to become divided. Consequently, Megan's Law has remained in a virtual state of dormancy since its inception.[8] If the issue raised by Megan's Law was whether innocent children should be

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[5]*See generally* Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984). Since its inception, the central philosophy of the Juvenile Justice System was rehabilitation. *Id.* at 147. Confidentiality, relaxed constitutional protections and mitigated sentencing standards were common means used to institute this philosophy. *Id.* at 150-51. *See also* text accompanying notes 133-140.

[6]142 N.J. 1, 662 A.2d 367 (1995) (holding that New Jersey's sex offender registration and notification statute was constitutional).

[7]*See Cases Set Against New Jersey Sex-Offender Registry: Arguments Pit Public Safety, Rights of Those who have Paid Penalty*, DALLAS MORNING NEWS, February 11, 1995, at 10A.

[8]*See* Rocco Cammarere, *War: Victims v. Defendants; Megan's Law Ruling Nears in Third Circuit*, N.J. LAW., January 29, 1996, at 1.

protected from the evil of sexual predators, no controversy would exist. The rights of innocent children, however, are not the only rights at stake. Rather, Megan's Law affects the rights of *every* man, woman, and child living under the United States and New Jersey Constitutions. It is for that reason that there have been obstacles at every stage of its progression. Following Megan's Law through these stages highlights the causes, effects, and potential solutions to these obstacles.

A. IN THE LEGISLATURE

The New Jersey Legislature passed Megan's Law seeking to arm law enforcement officials with additional information to combat sexual offenders who prey on children.[9] The legislature determined that the recidivous nature of those who commit sexual offenses against children and the danger they pose to the public necessitated this additional weapon.[10] Consisting of provisions both for registration and community notification, Megan's Law was "designed to give people a chance to protect themselves and their children."[11]

The registration provisions of Megan's Law apply to persons who have been "convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sex offense."[12] In enacting Megan's Law, the leg-

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[9]N.J. STAT. ANN. § 2C:7-1(b) (West 1995). The statute provides:

> 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.

[10]N.J. STAT. ANN. § 2C:7-1(a) (West 1995). The statute provides:

> 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.

Id.

[11]Doe v. Poritz, 142 N.J. 1, 13, 662 A.2d 367, 372-73 (1995).

[12]N.J. STAT. ANN. § 2C:7-2(a) (West 1995).

islature embraced a broad yet delineated definition of the term 'sex offense,' going so far as to include even the attempt of certain offenses.[13] Depending on the offender's current legal status in society, the offender must register within specified time limits[14] or be subject to additional prosecution for non-

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[13]N.J. STAT. ANN. § 2C:7-2(b) (1995). The statute provides:

> b. For the purposes of this act a sex offense shall include the following:
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> (1) Aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1 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;
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> (2) A conviction, adjudication of delinquency, or acquittal by reason of insanity for aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1; endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S. 2C:24-4; endangering the welfare of a child pursuant to paragraph (4) of subsection b. of N.J.S. 2C:24-4; luring or enticing pursuant to section 1 of P.L.1993, c. 291 (C. 2C:13-6); criminal sexual contact pursuant to N.J.S. 2C:14-3b. if the victim is a minor; kidnapping pursuant to N.J.S. 2C:13-1, criminal restraint pursuant to N.J.S. 2C:13-2, or false imprisonment pursuant to N.J.S. 2C:13-3 if the victim is a minor and the offender is not the parent of the victim; or an attempt to commit any of these enumerated offenses if the conviction, adjudication of delinquency or acquittal by reason of insanity is entered on or after the effective date of this act or the offender is serving a sentence of incarceration, probation, parole or other form of community supervision as a result of the offense or is confined following acquittal by reason of insanity or as a result of civil commitment on the effective date of this act;
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> (3) A conviction, adjudication of delinquency or acquittal by reason of insanity for an offense similar to any offense enumerated in paragraph (2) or a sentence on the basis of criteria similar to the criteria set forth in paragraph (1) of this subsection entered or imposed under the laws of the United States, this state or another state.

N.J. STAT. ANN. § 2C:7-2(b) (West 1995) (emphasis added).

[14]N.J. STAT. ANN. § 2C:7-2(c) (West 1995). Persons under supervision in the community, whether on probation, parole, furlough, work release, or a similar program, are re-

compliance.[15] The offender must also periodically verify his address with the appropriate law enforcement agency.[16] If the offender does not commit another offense within fifteen years of the conviction or adjudication that led to the registration requirement, the requirement can be terminated upon proof that the offender is not a threat to the safety of others.[17]

The registration requirement is satisfied upon the submission of a form signed by the offender stating that he or she is aware of the duty to register and

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quired to register at the time such supervision begins, or no later than 120 days from the effective date of the statute. N.J. STAT. ANN. § 2C:7-2(c)(1) (West 1995). Persons confined in a correctional or juvenile facility or under a sentence of involuntary commitment are required to register prior to their release. N.J. STAT. ANN. § 2C:7-2(c)(2) (West 1995). Persons moving to New Jersey from another state or returning to New Jersey are required to register within 70 days of such arrival or return, or 120 days from the effective date of the statute, whichever is longer. N.J. STAT. ANN. § 2C:7-2(c)(3) (West 1995). Persons who were convicted before the statute was enacted and are not confined or under supervision as of the effective date of the statute are required to register within 120 days from said effective date. N.J. STAT. ANN. § 2C:7-2(c)(4) (West 1995). A registered sex offender must also notify the proper authorities within 10 days prior to a change of address. N.J. STAT. ANN. § 2C:7-2(d) (West 1995).

[15]N.J. STAT. ANN. § 2C:7-2(a) (West 1995). The statute provides, in part:

> A person who fails to register as required under this act shall be guilty of a crime of the fourth degree.

Id.

[16]N.J. STAT. ANN. § 2C:7-2(e) (West 1995). Persons subject to notification under N.J. STAT. ANN. § 2C:7-2(b)(1) or due to a sentence imposed on similar criteria to those enumerated therein, as specified in N.J. STAT. ANN. § 2C:7-2(b)(3), are required to verify their address every 90 days. Persons subject to notification under N.J. STAT. ANN. § 2C:7-2(b)(2) or an offense similar to any offense enumerated therein, as specified in N.J. STAT. ANN. § 2C:7-2(b)(3), are required to verify their address annually.

[17]N.J. STAT. ANN. § 2C:7-2(f) (West 1995). The statute provides:

> A person required to register under this act may make application to the Superior Court of this State to terminate the obligation upon proof that the person has not committed an offense within 15 years following conviction or release from a correctional facility for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others.

Id.

reregister.[18] This form must also include basic information as to the offender's physical characteristics, place of residence, and the offense that prompted the registration requirement.[19] A central registry of this information is maintained by the Superintendent of the New Jersey State Police,[20] and is available to any law enforcement agency in the State of New Jersey, the United States, or any other state.[21] Bearing a heavy presumption of responsibility,[22] these agencies and the officials who possess and distribute the records maintained pursuant to this statute are immune from liability for any discretionary decision to release them, unless the decision was made with gross negligence or in bad faith.[23]

In addition to the registration requirement, the statute provides for notification to the communities in which the registered offender intends to reside.[24] The extent to which the community is notified depends on a subjective deter-

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[18]N.J. STAT. ANN. § 2C:7-4(b)(1) (West 1995).

[19]N.J. STAT. ANN. §§ 2C:7-4(b)(1) - (3) (West 1995). The personal information required on this form includes the offender'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, and date and place of employment. *Id.* Information required on this form relating to the offense committed includes the date and place of each conviction, adjudication or acquittal by reason of insanity, indictment number, fingerprints, and a brief description of the offense which requires registration. *Id.* Any additional information deemed necessary by the Attorney General of New Jersey may also be required. *Id.*

[20]N.J. STAT. ANN. § 2C:7-4(d) (West 1995).

[21]N.J. STAT. ANN. § 2C:7-5(a) (West 1995).

[22]*See* Doe v. Poritz, 142 N.J. 1, 18-19, 662 A.2d 367, 376 (1995) ("We assume that the strongest message will be delivered, and repeated, by the Governor and other public officials at all levels, as well as by community and religious leaders and the media, that this is a law that must be used only to protect and not to punish . . . .").

[23]N.J. STAT. ANN. § 2C:7-5(b) (West 1995). The immunity granted to public officials, employees and agencies is further extended to "any person who provides or fails to provide information relevant to the procedures set forth in this act," unless it is the result of a "willful or wanton act of commission or omission." N.J. STAT. ANN. § 2C:7-9 (West 1994).

[24]N.J. STAT. ANN. § 2C:7-6 (West 1995) governs notification regarding those offenders released from correctional facilities or adjudicated delinquent, requiring the authorities to notify their intended community within 45 days of the date the chief law enforcement officer of the municipality is informed of the offender's intended residence. N.J. STAT. ANN. § 2C:7-7 (1995) governs notification regarding those offenders who are relocating to a new municipality. Under both of these sections, if the appropriate municipality does not have a police force, the Superintendent of the State Police is required to make the notification.

mination of the offender's risk of re-offense by the county prosecutor.[25] To aid in this determination, the statute specifies certain conditions which indicate either a reduction or increase in the risk of re-offense.[26]

Offenders are classified in one of three categories: low, moderate, or high risk.[27] If an offender is classified as a low risk, the statute mandates that only law enforcement agencies likely to encounter the offender be notified of his or her presence in the community.[28] If an offender is classified as a moderate risk, not only must law enforcement be notified, but schools and religious and

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[25]N.J. STAT. ANN. § 2C:7-8 (West 1995); *see infra* text accompanying note 32 (setting forth the appropriate prosecutors who will make this determination).

[26]N.J. STAT. ANN. § 2C:7-8(b) (West 1995). The statute provides:

> Factors relevant to risk of re-offense shall include, but not be limited to, the following:
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> > (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, and (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, and (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.

[27]N.J. STAT. ANN. § 2C:7-8(c) (West 1995). The New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1, 22, 662 A.2d 367, 378 (1995), referred to these levels as "Tiers." Tier One notification corresponds with low risk; Tier Two notification corresponds with moderate risk; and Tier Three notification corresponds with high risk. *Id.* at 22, 662 A.2d at 378.

[28]N.J. STAT. ANN. § 2C:7-8(c)(1) (West 1995).

youth organizations in the community must be notified as well.[29] A high risk classification requires the notification of those members of the public likely to encounter the offender in addition to law enforcement and community organizations.[30] To promote the uniform application of the notification requirement, the statute requires the State Attorney General to establish procedures for determining the risk of re-offense and providing notification to the community.[31] Under these procedures, county prosecutors and other law enforcement officials perform the risk assessment and determine the means of notification.[32] The statute creates a twelve-member advisory counsel to assist the State Attorney General in promulgating these guidelines.[33]

Despite the valid purpose of Megan's Law and the checks placed on authorities by the legislature, the statute has been repeatedly challenged as unconstitutional. Only through an analysis of these decisions can one begin to see the full panoply of issues implicated by Megan's Law.

B. IN THE COURTS

Concern as to the constitutionality of Megan's Law mounted from the moment the statute was conceived.[34] The first challenge resulted in a preliminary

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[29]N.J. STAT. ANN. § 2C:7-8(c)(2) (West 1995).

[30]N.J. STAT. ANN. § 2C:7-8(c)(3) (West 1995).

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

[32]N.J. STAT. ANN. § 2C:7-8(d) (West 1995). The statute provides, in pertinent 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. *See supra* note 26 (providing the criteria by which an offender's risk of re-offense is determined).

[33]N.J. STAT. ANN. § 2C:7-11 (West 1995). In its final form, 11 of the council seats were filled by members of the police, prosecutors, and victim rights advocates, and the final seat was filled by Megan Kanka's mother, Maureen. Kathy Barrett Carter, *With an Asterisk, Judge Rules Megan's Law Constitutional but Temporarily Bars Warnings to Public*, Newark STAR LEDGER (N.J.), February 23, 1995, at 1. *Id.*

[34]Russ Bleemer, *Assembly to Senate: You Figure Out the Tough Parts*, N.J. L.J., Sep-

injunction issued by the United States District Court for the District of New Jersey that barred Passaic County officials from initiating the notification process.[35] Megan's Law faced another set-back just two months later in *Artway v. Attorney General*.[36] In that case, United States District Judge Nicholas H. Politan held that both Tier Two and Tier Three notification are "unconstitutional in their *retroactive* application," and barred the authorities from taking action consistent with those provisions.[37] As the defendants in *Artway* were appealing this decision, the New Jersey Supreme Court presented the most comprehensive constitutional analysis of Megan's Law to date.[38]

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tember 5, 1994, at 5. Due to the celerity with which Megan's Law passed through the New Jersey General Assembly, Assemblymen, Senators, staffers, and even the Governor's office were concerned with the constitutional issues that Megan's Law implicated. *Id.*

[35]Christopher Kilbourne, *Federal Judge Blocks Officials from Enforcing Megan's Law*, BERGEN COUNTY RECORD, January 4, 1995, at A1. The Plaintiff in Diaz v. Whitman, No. 94-6376 (D.N.J. 1995), Angel Diaz, completed more than 10 years in prison for rape, and was subject to the provisions of Megan's Law even though it was not a part of the original sentence imposed upon him at trial. *Id.*

[36]876 F. Supp. 666 (D.N.J. 1995).

[37]*Id.* at 692 (emphasis added). Judge Politan opined that the effect of Tier Two and Tier Three notification constituted punishment which, in its retroactive application, violates the Ex Post Facto Clause of the United States Constitution. *Id.* (citing U.S. CONST. ART. I, § 10). Judge Politan arrived at this conclusion by applying the test for determining whether an act is penal or regulatory in nature as set forth by the United States Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). 876 F. Supp at 692. The seven factors of the test are:

> (1) Whether the sanction involves an affirmative disability or restraint; (2) whether [the sanction] has historically been regarded as a punishment; (3) whether [the sanction] comes into play only on a finding of scienter; (4) whether [the sanction's] operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which [the sanction] applies is already a crime; (6) whether an alternative purpose to which [the sanction] may rationally be connected is assignable for it; and (7) whether [the sanction] appears excessive in relation to the alternative purpose assigned . . . .

372 U.S. at 168-69. Judge Politan found the second factor to be most problematic in the case of Megan's Law because public humiliation has historically been a common punishment, stating that the statute would effectively brand sex offenders "such that they will be exposed to public humiliation rising to the level of punishment." 876 F. Supp. at 687.

[38]Doe v. Poritz, 142 N.J. 1, 662 A.2d 367 (1995). The plaintiff, "John Doe," was a first time offender who had been released from the Adult Diagnostic and Treatment Center at Avenel after successfully completing treatment. *Id.* at 26, 662 A.2d at 380. He had not re-

In *Doe v. Poritz*, the New Jersey Supreme Court upheld the constitutionality of Megan's Law, but announced that judicial review of the prosecutor's decision regarding the level and means of community notification is required prior to notification.[39]

Chief Justice Wilentz,[40] writing for the majority, began the opinion by setting forth the court's interpretation of the statute, making whatever changes, revisions and clarifications that were necessary to ensure its survival.[41] The most significant of these changes was the addition of a judicial review requirement for those offenders who are subject to either Tier Two or Tier Three notification.[42] The Chief Justice also mandated changes regarding the scope of Tier Two and Tier Three notification to ensure that they were not more extensive than was required to effectuate their purpose.[43]

Chief Justice Wilentz began the analysis of Doe's substantive claims by addressing the constitutional arguments that implementation of Megan's Law constitutes punishment: specifically, the Ex Post Facto[44], Bill of Attainder[45],

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offended since his release, had successfully integrated in the community where he was living and working, and also offered proof that Megan's Law would cause him to lose his job. *Id.*

[39]*Id.* at 12, 662 A.2d at 372.

[40]Chief Justice Wilentz was joined by Justices Handler, Pollock, O'Hern, Garibaldi, and Coleman. *Id.* at 147, 662 A.2d at 442. Justice Stein filed a dissenting opinion. *Id.*

[41]*Id.* at 28-29, 662 A.2d at 381.

[42]*Id.* at 30-32, 662 A.2d at 382-83. This judicial review is not automatic, and thus must be sought by the person subject to notification. *Id.* at 30, 662 A.2d at 382. The proceeding does not have to be afforded in a court, but could instead take place through an agency created by the legislature for this purpose, as long as the basic elements of due process are satisfied. *Id.* at 40, 662 A.2d at 387. The proceeding must be *in camera*, and the standard rules of evidence do not apply. *Id* at 31, 662 A.2d at 382-83.

[43]*Id.* at 35, 662 A.2d at 384-85. The court limited Tier Two notification to only those organizations having women or children under their custody who are likely to encounter the offender. *Id.* at 35, 662 A.2d at 384. Likewise, Tier Three notification was also limited to only those in the community who are likely to encounter the offender, such as the immediate neighborhood of the offender's residence, all schools within the municipality, and schools in adjacent municipalities that are close in proximity to the offender's residence, place of work, or school. *Id.* at 36-37, 662 A.2d at 385. Additionally, the Chief Justice cautioned that for an offender to be classified in Tier Three, the risk of re-offense must be substantially higher than that for a Tier Two offender. *Id.* at 33, 662 A.2d at 383.

[44]*Id.* at 44, 662 A.2d at 389. The Ex Post Facto Clause states that "No State shall . . . pass any ex post facto Law . . . ." U.S. CONST. art. I, §10, cl. 1.

[45]Doe v. Poritz, 142 N.J. 1, 76, 662 A.2d 367, 405 (1995). The Bill of Attainder

Double Jeopardy[46] and Cruel and Unusual Punishment claims.[47] The Chief Justice first looked to the legislative intent behind Megan's Law to determine if it was regulatory or punitive, searching for a punitive intent that would be dispositive of a finding of punishment.[48] In concluding that the legislature had absolutely no punitive intent in the registration and notification laws, the Chief Justice stated that "[t]hey were designed simply and solely to enable the public to protect itself from the danger posed by sex offenders, such offenders widely regarded as having the highest risk of recidivism."[49]

Based on this analysis, the court held that Megan's Law was purely remedial.[50] Not only was the legislative intent remedial, opined the Chief Justice, but any arguably punitive impact on those subject to its provisions is simply "the inevitable consequence of these remedial provisions . . . ."[51] Therefore, the Chief Justice concluded that since Megan's Law is purely remedial, it does not constitute punishment under any relevant constitutional analysis. As such, the court held that the constitutional prohibitions against ex post facto laws, double jeopardy, bills of attainder, and cruel and unusual punishment were not violated.[52]

Clause states that "No State shall . . . pass any Bill of Attainder . . . ." U.S. CONST. art. I, §10, cl. 1; *see also* text accompanying note 52.

[46]*Doe*, 142 N.J. at 45-46, 662 A.2d at 389-90. The Double Jeopardy Clause states that "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[47]*Doe*, 142 N.J. at 76, 662 A.2d at 405. The Cruel and Unusual Punishment Clause states: "[N]or cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[48]*Doe*, 142 N.J. at 46, 662 A.2d at 390. In determining whether Megan's Law was tantamount to a "punishment," the Chief Justice relied solely on federal case law despite the fact that plaintiff based his challenges on both the United States and New Jersey Constitutions, stating that "[n]o suggestion of merit has been made that New Jersey's Constitution in relation to these challenges (as distinguished from the procedural due process challenge) should be interpreted in any way different from the Federal Constitution." *Id.* at 42, 662 A.2d at 388.

[49]*Id.* at 73, 662 A.2d at 404. Chief Justice Wilentz noted that even a statute with a purely remedial intent can constitute punishment if it has a punitive impact, but that impact must "come from aspects of the law unnecessary to accomplish its regulatory purposes." *Id.* at 46, 662 A.2d at 390.

[50]*Id.* at 74, 662 A.2d at 404.

[51]*Id.*

[52]*Id.* at 76, 662 A.2d at 405. Chief Justice Wilentz briefly addressed the factors used in the analysis of challenges under the Bill of Attainder Clause, as they are slightly different

The court next considered the plaintiff's argument that the provisions of Megan's Law violated his right to privacy under both the United States and New Jersey Constitutions.[53] In rejecting this argument, Chief Justice Wilentz first stated that the information disclosed under the registration provisions is public information, and therefore the right to privacy is not implicated.[54] Chief Justice Wilentz observed, however, that the notification provisions do implicate a privacy interest due to the "disclosure of the plaintiff's home address and . . . the *totality* of the information disclosed to the public."[55] Thus, while these bits of information alone may be public and non-confidential, once they are combined into a single package and disseminated to the public, a pri-

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than the traditional punishment analysis. *Id* at 76-77, 662 A.2d at 405-06. The factors are "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes;' and (3) whether the legislative record 'evinces a [legislative] intent to punish.'" *Id.* at 76, 662 A.2d 405 (quoting Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 846-47 (1984)). The Chief Justice decided, however, that even if Megan's Law involved the type of requirements that have historically been held to be punishment, as he believed it did not, the historical prong of this test is not dispositive of the issue, and the plaintiff's bill of attainder claim failed as well. *Id.* at 77, 662 A.2d at 406.

[53]*Id.* The right to privacy under the Federal Constitution is found in the Fourteenth Amendment, wherein it states, in pertinent part: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The right to privacy under the New Jersey Constitution arises from the declaration of the "right to life, liberty, and the pursuit of happiness." N.J. CONST. art. I, § 1. Under both constitutions, the right to privacy is derived from the concept of personal liberty. *Doe*, 142 N.J. at 77, 662 A. 2d at 406.

[54]*Id.* at 79, 662 A.2d at 407. "[A]n individual cannot expect to have a constitutionally protected privacy interest in matters of public record." *Id.* (quoting Doe v. City of New York, 15 F.3d 264, 268 (2d Cir. 1994)). The Chief Justice noted that the right of public access to all court records is guaranteed under New Jersey Court Rule 1:38, and in most counties an individual's criminal record can be obtained upon presentation of the individual's name and address. *Id.* at 79, 662 A.2d at 407. Further, such information is routinely released when an inmate is paroled. *Id.* at 79-80, 662 A.2d at 407. Other basic registration information is available to the public through the Division of Motor Vehicles. *Id.* at 80, 662 A.2d at 407. Information as to the offender's physical characteristics are likewise not protected since they are exposed to public view. *Id.*

[55]*Id.* at 82, 662 A.2d at 408 (emphasis added). The Chief Justice stressed the significance of the privacy of the home: "We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* (quoting United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, (1994)). In this regard, the Chief Justice was particularly concerned with the possibility of harassment due to this disclosure. *Id.* at 84, 662 A.2d at 409.

vacy interest is implicated.[56] Balancing this privacy interest against the state's interest in disclosure, Chief Justice Wilentz concluded that the infringement on plaintiff's right to privacy was justified by the state's interest in protecting the public from the dangers posed by sex offenders.[57]

The Chief Justice reached the same result under the New Jersey Constitution, stressing the fact that the limited nature of the disclosure comports with the requirement that "the invasion of the fundamental right to privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose."[58] Therefore, although the plaintiff has a privacy interest that is infringed upon by the notification provisions of Megan's Law, the state's countervailing interest in community safety is compelling, and plaintiff's right to privacy under both the State and Federal Constitutions is not violated.[59]

The court next addressed plaintiff's equal protection argument.[60] The plaintiff argued that classifying him with sex offenders who, unlike him, have not completed treatment, contravenes his right to be treated as an individual under the Equal Protection Clause.[61] Chief Justice Wilentz responded to this

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[56]*Id.* at 87, 662 A.2d at 411.

[57]*Id.* at 87-88, 662 A.2d at 411. The Chief Justice considered seven factors in balancing these interests:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. at 88, 662 A.2d at 411 (citing Faison v. Parker, 823 F. Supp. 1198, 1201 (E.D. Pa. 1993) (citing United States v. Westinghouse Elec. Corp., 638 F. 2d 570, 578 (3d Cir. 1980))). *Id.* at 88-89, 662 A.2d at 411-12. Chief Justice Wilentz noted that not only was plaintiff's expectation of privacy limited due to the public nature of the information, but the state's interest is clear and compelling. *Id.* at 89, 662 A.2d at 412.

[58]*Id.* at 90, 662 A.2d at 412 (quoting In re Martin, 90 N.J. 295, 318, 447 A.2d 1290, 1302 (1982)). The New Jersey Supreme Court applies a balancing test similar to federal courts in issues of privacy. *Id.*

[59]*Id.* at 91, 662 A.2d at 413.

[60]*Id.*

[61]*Id.* at 91, 662 A.2d at 413. Plaintiff made this claim under both the New Jersey and

argument by emphasizing that "[e]qual protection does not preclude the use of classifications, but requires only that those classifications not be arbitrary."[62] Again stressing the legitimacy of the state's interest in protecting the public from sex offenders, Chief Justice Wilentz concluded that Megan's Law does not violate the equal protection requirement under the Federal Constitution.[63]

Under the New Jersey Constitution, noted the court, equal protection analysis can at times be broader than that under the Federal Constitution.[64] The balancing test applied under the New Jersey Constitution considers "the nature of the right affected, the extent to which the government action interferes with that right, and the public need for such interference."[65] Despite this broadened approach, The majority determined that the public interest still outweighed the plaintiff's rights, and thus rejected the equal protection claim under the New Jersey Constitution as well.[66]

The plaintiff also claimed that the Administrative Procedure Act precluded the Attorney General's authority to promulgate the guidelines in Megan's Law.[67] Although disagreeing with the Attorney General that the guidelines

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Federal Constitutions. *Id.* The Equal Protection Clause of the Federal Constitution states: " No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The New Jersey Constitution, though not explicitly mentioning it, has been interpreted to confer this right in Article I, paragraph 1 wherein it states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, § 1. *See* Right to Choose v. Byrne, 91 N.J. 287, 304-05, 450 A.2d 925, 934 (1982) ("In New Jersey, equal protection of the laws is assured not only by the Fourteenth Amendment to the United States Constitution, but also by Art. I, par. 1 of the state Constitution.") (citation omitted).

[62]Doe v. Poritz, 142 N.J. 1, 91, 662 A.2d 367, 413 (1995) (citing State v. Mortimer, 135 N.J. 517, 641 A.2d 257 (1994), *cert. denied*, 115 S. Ct. 440 (1994)). Since the plaintiff is neither a member of a suspect class nor claiming the implication of a fundamental right, the court reasoned that the classification must merely be rationally related to a legitimate public interest. *Doe*, 142 N.J. at 92, 662 A.2d at 413.

[63]*Doe*, 142 N.J. at 93, 662 A.2d at 414.

[64]*Id.* at 94, 662 A.2d at 414. *See*, e.g., Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (statute that does not violate Equal Protection Clause under the Federal Constitution nonetheless violates equal protection under the New Jersey Constitution).

[65]*Doe*, 142 N.J. at 94, 662 A.2d at 414 (citing Brown v. City of Newark, 113 N.J. 565, 573-74, 552 A.2d 125, 130 (1989)).

[66]*Id.* at 95, 662 A.2d at 415.

[67]*Id.* The Administrative Procedure Act, N.J. STAT. ANN. §§ 52:14B-1 to -15 (West

were merely "internal department communications," the court nevertheless determined that the guidelines were not subject to the requirements of the Administrative Procedure Act.[68]

Finally, the plaintiff argued that the notification provisions of Megan's Law implicated liberty interests in privacy and reputation, and therefore procedural protections were constitutionally required pursuant to both the New Jersey and Federal Constitutions.[69] The court agreed that these interests are impaired by the notification provisions of Megan's Law in that they would "expose plaintiff to public opprobrium, not only identifying him as a sex offender but also labeling him as potentially currently dangerous, and thereby undermining his reputation and standing in the community."[70] Under the Federal Constitution,

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1986), "requires that prior to the adoption of an administrative rule, an agency must provide thirty days notice of its intent to issue the rule, publish a summary and explanation of the rule, and afford 'all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing.'" *Id.* (quoting N.J. STAT. ANN. § 52:14B-4 (West 1986)).

[68]*Doe*, 142 N.J. at 99, 662 A.2d at 417. The Chief Justice found that the guidelines failed the following six-part test set forth in Metromedia v. Division of Taxation, 97 N.J. 313, 331-32, 478 A.2d 742, 751 (1984):

> Whether the action: (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Id. at 96-97, 662 A.2d at 415-16. Chief Justice Wilentz determined that the Attorney General's guidelines failed on the last three factors, which were the most important and weighty of the six. *Id* at 97-98, 662 A.2d at 416-17.

[69]*Id.* at 99-100, 662 A.2d at 417. The Fourteenth Amendment of the United States Constitution states, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1. The concept of due process is not explicitly mentioned in the New Jersey Constitution, but it has been interpreted to arise in Article One, section one, *supra* note 61. The rights to privacy and reputation are "founded in the Fourteenth Amendment concept of personal liberty." 142 N.J. at 100, 662 A.2d at 417 (citing Whalen v. Roe, 429 U.S. 589, 598 (1977); Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir. 1994)).

[70]*Id.* at 103, 662 A.2d at 419. The Chief Justice was referring solely to Tier Two and

then, the court asserted that the plaintiff is guaranteed due process before the implementation of Tier Two or Tier Three notification.[71]

Under the New Jersey Constitution, the court applied a similar analysis and the reached an identical result.[72] The court noted that although the right to reputation is not explicitly enumerated, it "is a part of the right of enjoying life and pursuing and obtaining safety and happiness which is guaranteed by our fundamental law."[73] Since the stigma resulting from community notification would be great, Chief Justice Wilentz reasoned that the plaintiff's liberty interest in reputation was implicated in Tier Two and Three notification.[74] Therefore, the court concluded that the plaintiff is guaranteed due process under the New Jersey Constitution as well.[75]

Chief Justice Wilentz completed his due process analysis by discussing the doctrine of fundamental fairness under the New Jersey Constitution.[76] This doctrine is designed to protect citizens from arbitrary governmental actions and procedures, even where such protection is required by the Federal Constitution.[77] According to the Chief Justice, the doctrine of fundamental fairness is applied in cases where a person is being "subjected to potentially unfair treatment and there [is] no explicit statutory or constitutional protection to be invoked."[78] Therefore, Chief Justice reasoned that even if the constitutional

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Tier Three notification, as Tier One notification does not implicate these interests. *See id; see also supra* text accompanying notes 27-30 and 42-43 for a discussion of the different tier levels of sex offender notification.

[71] *Id.* at 104, 662 A.2d at 419. For an explanation of what is required of this process see *supra* text accompanying note 42.

[72] *Id.* The Chief Justice noted that the only difference in the analysis under the New Jersey Constitution is that a protected interest in reputation can be found "without requiring any other tangible loss." *Id.*

[73] *Id.* at 104-05, 662 A.2d at 419-20 (quoting Neafie v. Hoboken Printing & Publishing Co., 75 N.J.L. 564, 567, 68 A. 146, 147 (E. & A. 1907).

[74] *Id.* at 106, 662 A.2d at 420.

[75] *Id.* This due process protection arises to protect "against injustice and against the unequal treatment of those who should be treated alike." In re Div. of Criminal Justice State Investigators, 289 N.J. Super. 426, 437, 674 A.2d 199, 205 (App. Div. 1996) (quoting Greenberg v. Kimmelman, 99 N.J. 552, 568, 494 A.2d 294, 302 (1985)).

[76] Doe v. Poritz, 142 N.J. 1, 108, 662 A.2d 367, 421.

[77] *Id.*

[78] *Id.* at 109, 662 A.2d at 422. "The doctrine . . . is often employed when narrowed

protection of due process did not apply to the plaintiff, because a Tier Two or Tier Three classification could subject the plaintiff to serious consequences, New Jersey's doctrine of fundamental fairness requires procedural protections to ensure that the classification is representative of the plaintiff's particular circumstances.[79]

Accordingly, pursuant to the above determinations and analytical modifications, Chief Justice Wilentz concluded that Megan's Law is constitutional under both the New Jersey and United States Constitutions.[80] The Chief Justice acknowledged the potential for vigilantism and harassment, but refused to base the constitutionality of Megan's Law on an assumption that such action will occur.[81] "To rule otherwise," declared the majority of the New Jersey Supreme Court, "is to find that society is unable to protect itself from sexual predators by adopting the simple remedy of informing the public of their presence."[82]

Justice Stein filed a dissenting opinion,[83] beginning with a comparison of Megan's Law to similar provisions in other states, and concluding that Megan's Law is much more extensive than its counterparts.[84] The Justice, unlike the majority, concentrated on the potential effects that Megan's Law would have on those offenders subject to its provisions, noting specifically two incidents of vigilantism that recently had occurred.[85] Using these incidents as a

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constitutional standards fall short of protecting individual defendants against unjustified harassment, anxiety , or expense." *Id.* (quoting State v. Yoskowitz, 116 N.J. 679, 731, 563 A.2d 1, 27 (1989) (Handler, J., dissenting) (citation omitted in original)).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 110, 662 A.2d at 422.

[82] *Id.* at 109, 662 A.2d at 422.

[83] *Id.* at 111, 662 A.2d at 423 (Stein, J., dissenting).

[84] *Id.* at 121-24, 662 A.2d at 428-30 (Stein, J., dissenting).

[85] *Id.* at 124-26, 662 A.2d at 430-31 (Stein, J., dissenting). The first incident involved a Warren County, New Jersey man who had been released from prison after serving a prison term for child molestation. *Id.* at 125, 662 A.2d at 430 (Stein, J., dissenting). A father and his son broke into this man's house after receiving notification from law enforcement of the offender's presence in their community, and proceeded to physically assault a man whom they thought was the offender, but who in actuality was just another man who lived in the house. *Id.* The man who was assaulted required hospitalization as a result of the attack. *Id.* The second incident noted by Justice Stein involved a demonstration by the Guardian Angels, a civilian group, outside the home of a released sex offender's mother. *Id.* at 125-26, 662

backdrop, Justice Stein then proceeded to consider the plaintiff's ex post facto argument.[86]

The focus placed on the effects of Megan's Law by Justice Stein was in direct contravention of the majority's analysis regarding whether the Megan's Law constituted a punishment, stating that "[the majority's] inquiry both begins—and ends—with legislative intent."[87] The Justice continued by presenting a historical analysis of the United States Supreme Court decisions in this area, and concluded that although legislative intent is relevant to the punishment issue, it is by no means dispositive.[88] Instead, opined the Justice, there must be "[a] comprehensive and balanced inquiry into whether the Notification Law imposes punishment."[89] This inquiry, according to Justice Stein, should place a greater importance on the probable effects that Megan's Law would have on the covered offenders.[90]

Justice Stein reasoned that there was a high probability that sex offenders subject to the provisions of Megan's Law would suffer "severe, disruptive, and perhaps intolerable consequences."[91] Thus, the Justice concluded that Megan's Law imposed punishment within the meaning of the Ex Post Facto

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A.2d at 430 (Stein, J., dissenting). Members of the group made it known that they would physically assault the offender if they saw him, and the leader of the group stated, "Let the criminal have a taste of being the victim." *Id.* at 126, 662 A.2d at 431 (quoting Rosemarie Ross, *Rapist Beware: Residents' Fear Turns to Anger, Revenge*, THE NORTH JERSEY HERALD & NEWS, January 6, 1995, at A1).

[86]*Id.* at 127, 662 A.2d at 431 (Stein, J., dissenting).

[87]*Id.* at 128, 662 A.2d at 431 (Stein, J., dissenting).

[88]*Id.* at 137-38, 662 A.2d at 437 (Stein, J., dissenting).

[89]*Id.* at 138, 662 A.2d at 437 (Stein, J., dissenting).

[90]*Id.* In looking at the history of such punishment, Justice Stein compared Megan's Law to the "scarlet letter," noting that public scorn, humiliation, and embarrassment have a rich history in this country as a traditional means of imposing punishment. *Id.* at 138-40, 662 A.2d at 437-38 (Stein, J., dissenting). "[H]umiliation and stigma were the essential, and at times sole, elements of colonial punishment." *Id.* at 140, 662 A.2d at 438 (Stein, J., dissenting).

[91]*Id.* at 143, 662 A.2d at 439 (Stein, J., dissenting). Justice Stein believed that such consequences could arise since it is probable that offenders subject to Tier Two and Tier Three notification will be "well known, easily identifiable, and likely target[s] of widespread community rejection, antipathy, and scorn." *Id* at 143, 662 A.2d at 439-40 (Stein, J., dissenting).

Clause.[92] Justice Stein noted that although the legislature deserves deference on this issue, it remains the duty of the court to ensure that a statute is constitutional, and in upholding that duty, the Justice would hold that Megan's Law is a "retroactively imposed punishment prohibited by the Ex Post Facto Clause of the Constitution."[93]

Although *Doe* appeared to resolve whatever reservations existed regarding the constitutionality of Megan's Law, the battle continued in federal court. On February 1, 1996, Judge Nicholas Politan was again presented with a challenge to Megan's Law.[94] In a letter opinion, Judge Politan maintained the position previously taken in *Artway* with regard to the constitutionality of Megan's Law and issued a preliminary injunction on behalf of the plaintiff sex offender.[95] The first issue presented in the case was whether the Rooker-Feldman abstention doctrine, made relevant by the New Jersey Supreme Court's decision in *Doe*, affected the court's subject matter jurisdiction.[96] This doctrine states that the United States Supreme Court has the sole authority to hear direct appeals of decisions rendered by the highest court of a state.[97] As such, lower federal courts do not have the requisite subject matter jurisdiction to review these decisions.[98] Stating that E.B. was not allowed to raise his constitutional challenges in state court, Judge Politan held that the Rooker-Feldman abstention doctrine did not affect the district court's subject matter jurisdiction.[99]

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[92]*Id* at 143, 662 A.2d at 440. *See supra* note 59 for the text of the Ex Post Facto Clause. Justice Stein also pointed out that the majority's due process analysis was inconsistent with its punishment analysis on this issue because they recognized the deprivation of rights sufficient to require procedural protections without recognizing that this deprivation constituted punishment for Ex Post Facto purposes. Doe v. Poritz, 142 N.J. 1, 144, 662 A.2d 367, 440 (1995) (Stein, J., dissenting).

[93]*Id.* at 147, 662 A.2d at 442 (Stein, J., dissenting).

[94]E.B. v. Poritz, 914 F. Supp. 85 (D.N.J. 1996).

[95]*Id.* at 88; *see supra* text accompanying notes 36-37 for a discussion of the holding in *Artway*.

[96]*Id.* at 88.

[97]*Id.*

[98]*Id.*

[99]*Id.* at 89. Judge Politan believed that the reason E.B.'s constitutional claims were not considered by the state courts was because the hearing provided in *Doe* applied only to the Tier classification, and E.B.'s current challenge was against Megan's Law in its entirety.

The second issue was whether a preliminary injunction was a proper remedy.[100] Judge Politan set forth four elements that are necessary for the issuance of a preliminary injunction and concluded that each one of them was satisfied.[101] Therefore, such an injunction was a proper remedy and the judge enjoined Tier Two and Tier Three notification.[102]

A more serious setback in the enforcement of Megan's Law occurred on March 13, 1996, when United States District Judge John Bissell issued a preliminary injunction that, for the first time, did not just apply to an individual plaintiff, but instead prohibited the prosecutors in every New Jersey county from enforcing the notification provisions of Megan's Law pending the outcome of the appeal in *Artway*.[103] When this highly anticipated appeal was finally decided, many questions were left unanswered, as the Third Circuit Court of Appeals partially vacated the judgment of the district court on the grounds that Artway's challenges to Tier Two and Tier Three notification were not ripe for adjudication.[104] On the justiciable claims, Judge Becker agreed with the district court that the registration and Tier One notification provisions are constitutional.[105] Therefore, this highly anticipated decision did not substantially alter the status of Megan's Law.[106]

Id. at 90.

[100]*Id.*

[101]*Id.* The four elements that must be established before a preliminary injunction can be issued are: "(1) the likelihood that the plaintiff will prevail on the merits; (2) the extent to which the plaintiff is being irreparably harmed; and, where relevant, (3) the extent to which the defendant or other interested persons will suffer irreparable harm if the injunction is issued; and (4) the extent to which the public interest favors the granting of the requested relief." *Id.*

[102]*Id.* at 91.

[103]Terry Pristin, *Federal Judge Curbs Law on Sex-Offense Disclosure*, N.Y. TIMES, March 15, 1996, at B5. Daniel J. Carluccio, the Prosecutor of Ocean County, New Jersey was quoted as saying that the rationale for the broad application of this injunction was that "[i]f the law violates one person's rights, it certainly violates everyone else's." *Id.*

[104]Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1271 (3d Cir. 1996). Senior District Judge Shadur wrote a concurring opinion. *Id.* Judge Becker stated that Mr. Artway's Tier Two and Three notification claims were not ripe because he had not yet been classified under the notification provisions, and because the factual record was incomplete. *Id.* at 1251.

[105]*Id.* at 1271.

[106]"[T]he court's decision left the law locked in legal limbo." Robert Hanley, *'Megan's*

Judge Becker attempted to alter the punishment analyses applied by the district court and the New Jersey Supreme Court.[107] The Judge synthesized a complex and uncertain body of federal case law, creating a three-part test to determine whether a legislative measure has a puntaive effect.[108] In this attempt to clarify the punishment analysis, however, Judge Becker actually added to the uncertainty surrounding the future of Megan's Law.[109] This uncertainty arose because Judge Becker held that Mr. Artway's challenges to Tier Two and Tier Three notification were not justiciable on ripeness grounds, yet the opinion suggests that there is a high probability, under the third part of his test, that both Tier Two and Tier Three notification are unconstitutional.[110] *Artway* represents the present status of Megan's Law in the federal courts.[111]

C. AS APPLIED TO JUVENILES

The New Jersey Legislature specifically included juveniles in their defini-

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Law' is Questioned as Injunction is Extended, N.Y. TIMES, July 10, 1996, at B6.

[107]*Artway*, 81 F. 3d at 1263; *see supra* notes 37, 44-52.

[108]*Artway*, 81 F. 3d at 1263. Simply stated, the three parts to the test are: (1) the actual purpose of the legislation; (2) the objective purpose of the legislation; and (3) the effect the legislation has on those subject to its provisions. *Id.*

[109]*See* Shannon P. Duffy, *3rd Circuit Upholds Portion of Megan's Law*, THE LEGAL INTELLIGENCER, April 15, 1996, at 1.

[110]*Artway*, 81 F.3d at 1266. "Artway marshals strong reasons that notification would have devastating effects." *Id.* Judge Becker speaks of the forcefulness of Artway's arguments on the issue of punishment in more than one instance. *See id.* at 1265-66.

[111]Two notable cases decided after Artway did not significantly alter its status. First, in W.P. v. Poritz, 931 F. Supp. 1199 (1996), Judge Bissell granted the state's motion for summary judgment, holding that the notification provisions of Megan's Law were constitutional. As to the future of Megan's Law, the most significant implication of this decision was Judge Bissell's mention of a recent United States Supreme Court decision, United States v. Ursery, 116 S. Ct, 2135 (1996), which he felt "reject[ed] the philosophical foundation of *Artway*: that a universal rule for the definition of 'punishment' can and should be derived through a 'synthesis' [of recent Supreme Court decisions]." 931 F. Supp. at 1208-09. This decision was appealed to the Third Circuit Court of Appeals, which heard arguments on October 21, 1996. W.P. v. Verniero, No. 95-5416 (3d Cir. 1996). Although the court has not yet reached a decision, the tenor of the arguments "made it clear that [Judge Becker] was troubled by the retroactive aspects of the legislation." Michael Booth, *Federal Court Again Signals Trouble for Megan's Law*, N.J. L.J., October 28, 1996, at 5. In re C.A., 146 N.J. 71, 679 A.2d 1153 (1996) held that offenses for which convictions were not obtained could be considered when determining an offender's tier level under Megan's Law.

tion of those individuals subject to the registration and notification provisions of Megan's Law.[112] The New Jersey Supreme Court in *Doe* also recognized juveniles as members of the class of offenders subject to the law's provisions.[113] The right to be treated distinctly as a juvenile is created and defined by state legislatures, and they are "free to restrict or qualify that right, so long as it does not create an arbitrary or discriminatory classification scheme."[114] It follows then, that courts must follow the legislature's decision to subject juveniles to the provisions of Megan's Law, unless the decision is unconstitutional.[115] In addition to this constitutional barrier, the legislature should consider the various policies that their decision implicates, to ensure that it is consistent with its own firmly established policies concerning the treatment of juveniles in the criminal justice system.[116]

In *In re B.G.*,[117] these constitutional and policy aspects were addressed by the appellate division as B.G., a juvenile sex offender, sought to invalidate the application of Megan's Law to juveniles on both policy and constitutional grounds.[118] B.G. was twelve years old when he was adjudicated delinquent for

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[112]N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995). Throughout the statute the legislature refers to juvenile offenders as "person[s] adjudicated delinquent," and the dispositions imposed on them as "adjudication[s] of delinquency." *Id.*

[113]Doe v. Poritz, 142 N.J. 1, 21, 662 A.2d 367, 377 (1995). Chief Justice Wilentz stated: "The registration requirement applies to all convicts, all juveniles, no matter what their age, found delinquent because of the commission of those offenses . . . ." *Id.*

[114]In re A.L., 271 N.J. Super. 192, 198, 638 A.2d 814, 817 (App. Div. 1994) (citing Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977), cert. denied, 434 U.S. 1088 (1978); United States v. Bland, 472 F.2d 1329, 1333-34 (D.C. Cir. 1972), cert denied , 412 U.S. 909 (1973)).

[115]*Id.* (quoting People v. Hana, 504 N.W.2d 166, 175 (Mich. 1993)).

[116]*See infra* text accompanying notes 117-132.

[117]289 N.J. Super. 361, 674 A.2d 178 (App. Div. 1996).

[118]*Id.* at 366-67, 674 A.2d at 180-81. For B.G.'s specific challenges in this regard, *see infra*, text accompanying notes 146-148. B.G.'s additional claims were that statements made to a detective by the victim of the assault, J.B., were not "sufficiently trustworthy to be admitted into evidence;" that the trial court improperly allowed a drawing made for, and statements made to, a psychologist to be admitted into evidence; that B.G was denied due process and the right to compulsory process when the judge did not allow another juvenile, L.G., to testify; that B.G. was denied effective assistance of counsel as a result of certain omissions by his attorney at trial; that allowing the state to use "a turtle to demonstrate the alleged sexual assault, and to ask leading and suggestive questions" was improper; "that part of [B.G.'s] disposition ordering him to serve sixty days at Warren Acres was illegal because

the sexual assault of his eight-year-old step-brother, J.B.[119] A court sentenced B.G. to three years of probation and sixty days of incarceration at the Warren Acres Detention Center.[120] Upon announcing this sentence, the judge also informed B.G. of his obligation to register under the provisions of Megan's Law.[121]

In response, B.G. set forth three arguments that specifically centered on his status as a juvenile offender.[122] First, B.G. argued that "Megan's Law as applied to juveniles is contrary to the philosophy of the juvenile code and [therefore] its application to [him] and all other juveniles is void," and hence violates N.J.S.A. 2A:4A-48, notwithstanding the *Doe* opinion.[123] In the alternative, B.G. argued that if the court found Megan's Law applicable to juveniles, his obligation to register must end on his eighteenth birthday, as mandated by N.J.S.A. 2A:4A-47.[124] B.G.'s third and final argument was that the

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the code of juvenile justice prohibits the incarceration of a developmentally disabled juvenile in a correctional facility;" and that Megan's Law as a whole was invalid on the constitutional bases of ex post facto, double jeopardy, due process, and cruel and unusual punishment. *Id.*

[119]*Id.* at 365, 674 A.2d at 180.

[120]*Id.* Fifty of the sixty days of this sentence were suspended, and his continued probation was dependent on his continued attendance at counseling sessions and school. *Id.*

[121]*Id.* at 355-56, 674 A.2d at 180.

[122]*Id.* at 366-67, 674 A.2d at 181.

[123]*Id.* N.J. STAT. ANN. § 2A:4A-48 (West 1987) provides:

> No disposition under this act shall operate to impose any of the civil disabilities ordinarily imposed by virtue of a criminal conviction, nor shall a juvenile be deemed a criminal by reason of such disposition. . . . The disposition of a case under this act shall not be admissible against the juvenile in any criminal or penal case or proceeding in any other court except for consideration in sentencing, or as otherwise provided by law.

Id.

[124]In re B.G., 289 N.J. Super. 361, 366-67, 674 A.2d 178, 181 (App. Div. 1996). N.J. STAT. ANN. § 2A:4A-47(a) (West 1987) provides, in pertinent part:

> Any order of disposition entered in a case under this act shall terminate when the juvenile who is the subject of the order attains the age of 18, or three years from the date of the order whichever is later unless such order involves incarceration or is sooner terminated by its terms or by order of the court.

trial court abused its discretion when it authorized the disclosure of his identity to the public, and that furthermore, the statute which provided for such disclosure "violates longstanding state and federal policy decisions regarding the privacy rights of juvenile offenders."[125]

The appellate division rejected each of B.G.'s arguments. Writing for a divided three-judge panel, Judge Shebell recited the provisions of Megan's Law and the portions of the *Doe* opinion that demonstrated the legislature's intentional application of the law to juveniles.[126] In doing so, Judge Shebell did not directly address the substance of B.G.'s policy argument, except to note that it was neither raised at the trial level nor specifically addressed by the Court in *Doe*.[127] Thus, it appeared that Judge Shebell was not willing to engage in a policy analysis of an issue that was clearly supported by both the legislature and the state's highest tribunal.[128]

In dismissing B.G's second argument, Judge Shebell again afforded the legislature considerable deference by presuming that it had made its determination to apply Megan's Law to juveniles with full knowledge of the provisions of the juvenile code.[129] He concluded that the requirements of Megan's Law "cannot be deemed part of a disposition entered in a case under [N.J.S.A. 2A:4A-47]," and therefore B.G.'s obligation to register does not end on his eighteenth birthday.[130]

Judge Shebell quickly dismissed B.G.'s third argument by stating that he was "satisfied that the [trial] judge . . . did not err in her application of [N.J.S.A. 2A:4A-60(f)]" to the present circumstances.[131] According to the

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Id.

[125]*B.G.*, 289 N.J. Super. at 366, 674 A.2d at 181; *see* N.J. STAT. ANN. § 2A:4A-60 (West Supp. 1996).

[126]*B.G.*, 289 N.J. Super. at 372-73, 674 A.2d at 184-85.

[127]*Id.* at 372, 674 A.2d at 184.

[128]*Id.* at 372-73, 674 A. 2d at 184-85.

[129]*Id.* at 373, 674 A.2d at 185. "The Legislature must be presumed to know the provisions of the juvenile code, and it nonetheless provided for continuing application of Megan's Law to juvenile offenders." *Id.*

[130]*Id.*

[131]*Id.* at 371-72, 674 A.2d at 184. Judge Shebell cited to In re B.C.L., 82 N.J. 362, 413 A.2d 335 (1980), which held that a Juvenile Court judge did not abuse his discretion when he allowed the disclosure of a juvenile's identity and information as to the offense committed.

Judge, the trial court did not abuse its discretion when it ordered the public disclosure of B.G.'s identity.[132]

Judge Shebell's deferential decision left unanswered the central question of whether Megan's Law, as applied to juveniles, is consistent with the Juvenile Code. Additionally, it raises concerns as to whether this application has any constitutional significance. In making such a determination, the juvenile justice system must be explored from its inception to the present day, with a special emphasis on the policies and philosophies which underlie juvenile delinquency decisionmaking.

1. HISTORY AND DEVELOPMENT OF THE MODERN JUVENILE JUSTICE SYSTEM

The modern juvenile justice system was established in 1899 with the creation of the first juvenile court in Cook County, Illinois.[133] The underlying ideal of that court, and the system that arose therefrom, was that children should not be dealt with as criminals.[134] Rather, the state was to act as a parent, protecting instead of punishing the child.[135] In doing so, the function of the system was "to investigate, diagnose, and prescribe treatment, not to adjudicate guilt or fix blame."[136] Thus, rehabilitation became the central tenet of the juvenile justice system.[137]

To remain consistent with these objectives, the juvenile justice system "used informal and flexible procedures to diagnose the causes of and prescribe the cures for delinquency."[138] Since the emphasis in this system was on re-

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[132]In re B.G., 289 N.J. Super. 361, 371-72, 674 A.2d 178, 184 (App. Div. 1996).

[133]SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (1974) [hereinafter DAVIS, RIGHTS OF JUVENILES]. The establishment of this court "marked the first implementation of a separate judicial framework whose sole concern was directed to problems and misconduct of youth." *Id.* at 2

[134]*Id.* at 3.

[135]*Id.* The court's parental role derives from the English doctrine of *parens patriae* wherein children whose welfare was neglected by their parents became wards of the crown. *Id.* at 2.

[136]SOL RUBIN, JUVENILE OFFENDERS AND THE JUVENILE JUSTICE SYSTEM 2 (1986).

[137]Barry C. Feld, *Criminalizing the Juvenile Court: A Research Agenda for the 1990s*, in JUVENILE JUSTICE AND PUBLIC POLICY 59, 67-68 (Ira M. Schwartz ed., 1992) [hereinafter Feld, *Criminalizing the Juvenile Court*].

[138]*Id.* at 61.

habilitation instead of punishment, the rigid procedural protections found in the criminal courts were not necessary, and were in fact seen as an impediment to the successful treatment of a juvenile offender.[139] Accordingly, one of the primary concerns with sentencing was to "avoid the stigma of adult prosecutions," which could be detrimental to the continued treatment and rehabilitation of the juvenile offender.[140]

Toward the middle part of this century, however, prominent legal commentators expressed concern as to the effectiveness and practicality of this patriarchal juvenile justice system.[141] These concerns were manifested in several decisions of the United States Supreme Court that significantly altered the procedural informality of the juvenile system.[142] The first Supreme Court decision to have such an effect was *In re Gault*.[143]

In *Gault*, the Supreme Court held that juveniles were entitled to due process protections in delinquency hearings.[144] In so holding, Justice Fortas refused to

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[139]PAUL R. KFOURY, CHILDREN BEFORE THE COURT: REFLECTIONS OF LEGAL ISSUES AFFECTING MINORS 43 (1987).

[140]Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 825 (1988) [hereinafter Feld, *The Juvenile Court Meets the Principle of Offense*].

[141]*See* Kent v. United States, 383 U.S. 541, 555-56 (1966). Justice Fortas pointedly stated:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. . . . There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id.

[142]KFOURY, *supra* note 139, at 48.

[143]387 U.S. 1 (1967). Other decisions involving juveniles had been decided up to this time, but none of them had as significant an effect as *Gault*. *See e.g.* Haley v. Ohio, 332 U.S. 596 (1948) (holding that the method used to obtain a juvenile's confession violated the Due Process Clause of the Fourteenth Amendment); Gallegos v. Colorado, 370 U.S. 49 (1962) (holding that the youth of an offender was an important factor in determining whether a confession was obtained in violation of the Due Process Clause).

[144]*Gault*, 387 U.S. at 30-31.

extend as much protection to juveniles as is afforded to adult criminal offenders, stating instead that the delinquency hearing "must measure up to the essentials of due process and fair treatment."[145] According to Justice Fortas, this essential protection consists of notice of the charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.[146]

Further protection was afforded to juveniles three years later in *In re Winship*,[147] wherein the Supreme Court raised the burden of proof in delinquency hearings to the same level mandated in adult criminal proceedings—proof beyond a reasonable doubt.[148] Justice Brennan justified this additional protection on the grounds that a juvenile could be subjected to the stigma that accompanies a finding of a criminal violation "on proof insufficient to convict him were he an adult."[149] Since a delinquency hearing is "comparable in seriousness" to a felony prosecution, Justice Brennan found no justification for allowing juveniles less protection solely because of their age.[150]

The Court's subsequent decision in *McKeiver v. Pennsylvania*,[151] departed from this course of extending greater constitutional protections to juveniles and refused to extend due process to juveniles beyond the limits established in *Gault* and *Winship*.[152] Noting that the protections given to juveniles in previous cases were necessary to establish due process, Justice Blackmun held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[153] While not oblivious to the problems plaguing the juvenile

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[145]*Id.* at 30 (quoting Kent, *supra* note 167, at 562).

[146]*Id.* at 61.

[147]397 U.S. 358 (1970).

[148]*Id.* at 368.

[149]*Id.* at 367.

[150]*Id.* at 366 (citing *Gault*, 387 U.S. at 36).

[151]403 U.S. 528 (1971).

[152]*Id.* at 545; *see supra* text accompanying notes 144-150.

[153]*McKeiver*, 403 U.S. at 545. This issue had been considered previously in DeBacker v. Brainard, 396 U.S. 28 (1969), but the juvenile's appeal was dismissed as not appropriate for the resolution of the jury trial issue because the hearing at issue preceded the Court's decisions in Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. Illinois, 391 U.S. 194 (1968), which established that jury trials were not constitutionally required in all circumstances.

justice system at that time, the Justice believed that to require jury trials in delinquency hearings would be counter to the ideals that the juvenile justice system was founded upon.[154] To take this step, opined the Justice, "would tend once again to place the juvenile squarely in the routine of the criminal process."[155]

Due process protections are not the only protections granted to juvenile offenders. The United States Supreme Court has also extended the protection of the double jeopardy clause to adjudications of delinquency,[156] and has recognized a strong interest in preventing the disclosure of information regarding juvenile offenders to the public.[157] Accordingly, juveniles enjoy constitutional interests in liberty and privacy.[158] The Equal Protection Clause is also available to juveniles.[159]

The Supreme Court's decisions in *Gault* and *Winship* were based at least in part on the concern that the juvenile justice system had evolved into the adult system; therefore, juveniles needed some of the same protections that are afforded to adults.[160] The Court justified this line of decisions by looking at the

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[154]*McKeiver*, 403 U.S. at 545. Justice Blackmun stated: "There is a possibility . . . that the jury trial . . . will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.*

[155]*Id.* at 547.

[156]*See* Breed v. Jones, 421 U.S. 519 (1975). Chief Justice Burger reasoned that as jeopardy refers to risk, there is "no persuasive distinction . . . between the [juvenile] proceeding conducted in this case . . . and a criminal prosecution." *Id.* at 531. Thus, the unanimous Court held that juveniles, like adult criminal offenders, are protected by the Double Jeopardy Clause. *Id.* at 541

[157]*See* Davis v. Alaska, 415 U.S. 308 (1974) (noting that a state's interest in preserving the confidentiality of juvenile offenders, although a strong and considerable interest, is not paramount to the constitutional right of confrontation).

[158]*See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678 (1977) (juvenile right to privacy in abortion setting); New Jersey v. T.L.O., 469 U.S. 325 (1985) (juvenile right to privacy in high school setting).

[159]*See* In re K.V.N., 116 N.J. Super. 580, 584; 283 A.2d 337, 339 (App. Div. 1971) (Noting that the United States Supreme Court's decisions in *Gault*, *Winship*, and *Kent* provide juveniles with equal protection under the Fourteenth Amendment "in appropriate aspects of the juvenile system.").

[160]*See* In re Gault, 387 U.S. 1, 36 (1967). Justice Fortas stated that "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* at 36. The justice also pointed out that, at the time of his opinion, in over half of the states, juve-

sentences imposed under each system and noting their similarities.[161] Since both juveniles and adults were subjected to a loss of liberty, juveniles deserved greater protection than they were already being afforded.[162] The Court limited this protection, however, in the interest of maintaining the rehabilitative nature of the juvenile system.[163]

Recently though, the focus on the sentence has lessened, as commentators, courts, and the public have begun to look at the offense committed as the basis for juvenile justice reform.[164] This shift in focus is the result of statistics that show that juveniles are not only committing more crimes, but increasingly serious and violent crimes.[165] This in turn has lead many of these commentators to question the effectiveness of the rehabilitative model of juvenile justice.[166] Accordingly, as the severity and incidence of juvenile crime increases, many argue that sentences should become more severe, and thus more punitive.[167]

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niles can be confined within the same institution as adult offenders. *Id.* at 50. *See also* In re Winship, 397 U.S. 358, 365-66 (1970) ("[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . . .").

[161]*See* Feld, *The Juvenile Court Meets the Principle of Offense*, *supra* note 140, at 826.

[162]*Id.*

[163]*See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

[164]*See* Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167 (1980) [hereinafter Feld, *Juvenile Court Legislative Reform*]. "Although chronologically juveniles, their criminal conduct is indistinguishable from that of adult offenders." *Id.* at 171.

[165]*See* Feld, *Juvenile Court Legislative Reform*, *supra* note 164, at 235. "Juveniles are disproportionately involved in criminal activity and their involvement in serious crime is increasing faster than the rates of crime in general." *Id. But Cf.* Barry Krisberg, *Youth Crime and Its Prevention: A Research Agenda*, in JUVENILE JUSTICE AND PUBLIC POLICY 1, 2 (Ira M. Schwartz ed., 1992) (stating that the empirical data on the incidence of juvenile delinquency is inadequate and unreliable because of technical problems in the way it is collected and measured).

[166]*See* Feld, *Criminalizing the Juvenile Court*, *supra* note 137, at 71. The author states that the therapeutic system does not reduce recidivism, or provide positive intervention, and functions so as to cause a disparity in results between serious and non-serious offenders. *Id.*

[167]Ira M. Schwartz, *Juvenile Crime-Fighting Policies: What the Public Really Wants*, in JUVENILE JUSTICE AND PUBLIC POLICY 214, 214-215 (Ira M. Schwartz ed., 1992) [hereinafter Schwartz, *Juvenile Crime-Fighting Policies*]. *See generally* Feld, *The Juvenile Court Meets the Principle of Offense*, *supra* note 140 (noting the shift in the juvenile justice system from a rehabilitation model to a punishment model and the ramifications it has for the future of traditional juvenile justice policies).

Some states are indeed moving in this direction—away from rehabilitative ideals and toward punitive ones.[168]

This shift is also fueled by the widespread belief that the juvenile justice system is not an effective tool in preventing juvenile crime and has failed to effectively rehabilitate youthful offenders.[169] Reflecting this general shift to more serious sentences, the New Jersey Legislature revised the Code of Juvenile Justice ("Juvenile Code").[170] The revised version still maintains a strong interest in the treatment and rehabilitation of juvenile offenders, creating a virtual hybrid of the punitive and rehabilitative models.[171] No matter which

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[168]Schwartz, *Juvenile Crime-Fighting Policies*, *supra* note 167, at 214-216. The author made specific note of the state of Michigan, which in 1988 enacted a package of juvenile justice bills that "provided for stiffer penalties for juvenile law violators and made it easier to try young people in the adult courts and have them sentenced to adult prisons." *Id.* at 214.

[169]*See* Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System*, 22 PEPP. L. REV. 907, 908 (1995). "Most Americans . . . believe that [the increase in serious juvenile crime] is caused by the failure of the juvenile justice system." *Id.*

[170]N.J. STAT. ANN. §§ 2A:4A-20 to -49 (West Supp. 1996). The focus of the overhaul of New Jersey's Juvenile Justice System, according to New Jersey General Assembly Speaker Chuck Haytaian, was to contain an explosion in youth violence by putting more young offenders in prison. David Glovin, *Rebuilding Juvenile Justice Series: Delinquent Justice*, BERGEN COUNTY RECORD, June 5, 1994, at A33.

[171]*See* N.J. STAT. ANN. § 2A:4A-21 (West Supp. 1996). The statute states, in pertinent part:

> This act shall be construed so as to effectuate the following purposes:
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> a. To preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of juveniles coming within the provisions of this act;
>
> b. Consistent with the protection of the public interest, to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor an adequate program of supervision, care and rehabilitation, *and a range of sanctions designed to promote accountability and protect the public*;
>
> . . .

approach the Juvenile Code takes, it is not in peaceful coexistence with Megan's Law.

2. MEGAN'S LAW AND THE REHABILITATION MODEL OF JUVENILE JUSTICE

If the Juvenile Code is premised primarily on the ideas of rehabilitation and treatment of juvenile offenders, the application of Megan's Law to these offenders is not sound policy. Megan's Law is not rehabilitative in any sense of the word. The Legislature and the New Jersey Supreme Court both refer to it as a purely protective measure.[172] Further, not only does it not promote rehabilitation, but it in fact hinders what little chance at rehabilitation juvenile sex offenders already have by isolating them, degrading them, and reminding them every day of the unfortunate incident which led them down their current path.[173]

Specifically, Megan's Law conflicts with two fundamental concerns of a rehabilitative model: confidentiality and stigmatization. Confidentiality is a hallmark of the juvenile justice system.[174] Since the inception of the juvenile

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Id. (emphasis added). The emphasis in subsection b, above, represents the most recent change made to this section, demonstrating the legislature's move toward an increasingly punitive philosophy of juvenile justice.

[172]Doe v. Poritz, 142 N.J. 1, 73; 662 A.2d 367, 404 (1995). *See supra* text accompanying notes 11, 49-52.

[173]*See The Revised Report from the National Task Force on Juvenile Sex Offending, 1993 of The National Adolescent Perpetrator Network*, 44 JUV. & FAM. CT. J. 1, 113 (1993). The Task Force's model policy concerning the release of juvenile sex offender treatment information to the offender's school states: "[S]ome people, knowing the sexual offending history of a juvenile, might treat that juvenile differently which could be harmful to the juvenile's self esteem and counterproductive to treatment progress." *Id.*

[174]Smith v. Daily Mail Publishing Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring). "A state's interest in preserving the anonymity of its juvenile offenders" is an interest of "the highest order." *Id.* The United States Supreme Court recognizes the strength of the confidentiality interest, but has not found it to be strong enough to take precedent over constitutional protections such as the freedom of the press. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (state's interest in protecting the identity of juvenile crime victim does not outweigh right of access to criminal trials under the First Amendment.); Smith, 443 U.S. 97 (1979) (when information as to juvenile delinquent is lawfully obtained, the First and Fourteenth Amendments prohibit state from preventing its publication.); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam) (state cannot prevent the publication of information relating to a juvenile offender after such information is publicly revealed without violating the First and Fourteenth Amendments); Davis v. Alaska, 415 U.S. 308, 319 (1974) ("the right of confrontation is paramount to the State's policy of protecting a juvenile offender.").

justice system, the public's access to the names of juvenile offenders, to juvenile delinquency proceedings, and to the records of those proceedings has been prohibited.[175] This is derived from the belief that publicity and disclosure of juvenile delinquency information will not allow a juvenile offender to forget the mistakes of his youth, and as such, would impair his effective rehabilitation.[176]

The New Jersey Legislature recognized this policy by enacting a statute that restricts the disclosure of juvenile information.[177] Under this statute, all social, medical, psychological, and legal records of the courts, probation division, and law enforcement agencies are to be "strictly safeguarded from public inspection" and can only be made available to specified individuals and institutions.[178] It permits records of law enforcement agencies to be disclosed to other state and federal law enforcement agencies for law enforcement purposes only, and to the public only when necessary to execute an arrest warrant.[179] In some instances, the juvenile's identity, the offense involved, and the adjudication or disposition, if requested, may be disclosed to the victim or victim's immediate family, to the investigating law enforcement agency, to the law en-

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[175]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 612 (1982) (Burger, C.J., dissenting). *But see* In re Gault, 387 U.S. 1, 24 (1967) (stating that confidentiality in juvenile proceedings "is more rhetoric than reality").

[176]Smith, 443 U.S. at 108, n.1. Justice Rehnquist cites to clinical studies to show that the harm to rehabilitation that publicity causes is fact and not merely hypothesis. *Id.*

[177]N.J. STAT. ANN. § 2A:4A-60 (West Supp. 1996).

[178]N.J. STAT. ANN. § 2A:4A-60(a) (West Supp. 1996). The statute provides, in pertinent part:

> Such records shall be made available only to: (1) Any court or probation division; (2) The Attorney General or county prosecutor; (3) The parents or guardian and to the attorney of the juvenile; (4) The Department of Human Services, if providing care or custody of the juvenile; (5) Any institution or facility to which the juvenile is currently committed or in which the juvenile is placed; (6) Any person or agency interested in a case or in the work of the agency keeping the records, by order of the court for good cause shown, . . .; (7) The Juvenile Justice Commission . . . .

Id.

[179]N.J. STAT. ANN. § 2A:4A-60(b) (West Supp. 1996). When disclosing to the public, the warrant must be for a "commission of an act that would constitute a crime if committed by an adult." *Id.*

forcement agency in the municipality of the juveniles residence, to the principal at the school the juvenile attends, or to a party in a subsequent legal proceeding that involves the juvenile.[180] Such disclosure requires the approval of the court.[181]

The statute mandates that a juvenile's identity be disclosed to the public when the offense committed is serious enough to so warrant, but only if such disclosure will not result in any "specific and extraordinary harm" to the juvenile.[182] The statute also authorizes this information to be used in establishing and maintaining a central registry for the purpose of the free exchange of information to other law enforcement agencies throughout New Jersey and the United States.[183] The court has the authority to allow the media or general

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[180]N.J. STAT. ANN. § 2A:4A-60(c) (West Supp. 1996). If the offense giving rise to the adjudication, disposition or charge was committed on school property, on a school bus, at a school-sponsored function, against an employee or official of the school, or when custody resulted from information provided by school officials, the principal of that school must be notified of the juveniles identity, adjudication, disposition or charge. N.J. STAT. ANN. § 2A:4A-60(d) (West Supp. 1996). The principal must also be notified if the offense would constitute a crime had the offender been an adult, and: it resulted in death or serious bodily injury or an attempt thereof; "involved the unlawful use or possession of a firearm or other weapon;" involved a controlled dangerous substance; was accompanied by motivations based on race, color, religion, sexual orientation or ethnicity; or would be a first or second degree crime. *Id.* The law enforcement or prosecuting agency may also disclose information about one or more juveniles to the school principal if the information would help the principal maintain the order, safety, or discipline in the school, or would help establish programs in furtherance of the juvenile's continued development. N.J. STAT. ANN. § 2A:4A-60(e) (West Supp. 1996). All such information disclosed to a principal is to remain confidential, except that the principal may disclose it to members of the faculty or staff to the extent that it will help maintain the order, safety, or discipline of the school environment. *Id.*

[181]N.J. STAT. ANN. § 2A:4A-60(c) (West Supp. 1996).

[182]N.J. STAT. ANN. § 2A:4A-60(f) (West Supp. 1996). The statute provides:

> Information as to the identity of a juvenile adjudicated delinquent, the offense, the adjudication and the disposition shall be disclosed to the public where the offense for which the juvenile has been adjudicated delinquent if committed by an adult would constitute a crime of the first, second or third degree, or aggravated assault, destruction or damage to property to an extent of more than $500.00, unless upon application at the time of disposition the juvenile demonstrates a substantial likelihood that specific and extraordinary harm would result from such disclosure in the specific case. Where the court finds that disclosure would be harmful to the juvenile, the reasons therefor shall be stated on the record.

Id.

[183]N.J. STAT. ANN. § 2A:4A-60(g) (West Supp. 1996).

public to attend delinquency proceedings, again under the restriction that it will not cause harm to the juvenile.[184] The statute provides for criminal penalties in the event that such information is disclosed in a manner inconsistent with its provisions.[185]

"The obvious intent of the Legislature is that disclosure of juvenile records is to be the exception, not the rule."[186] This recognizes the balance that must be reached between "the public's right to know and the deterrent effect of disclosure against the particular juvenile's prospects for rehabilitation."[187] It would be simple to conclude that because of this balance and New Jersey's strong interest in protecting the community from sex offenders, a juvenile's interest in confidentiality is not in conflict with Megan's Law. A closer analysis shows otherwise.

Under Megan's Law, an offender's prospects for rehabilitation are considered, but only as one of many factors that go into the tier level determina-

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[184]N.J. STAT. ANN. § 2A:4A-60(i) (West Supp. 1996). The statute provides, in pertinent part:

> The court may, upon application by the juvenile or his parent or guardian, the prosecutor or any other interested party, including the victim or complainant or members of the news media, permit public attendance during any court proceeding at a delinquency case, where it determines that a substantial likelihood that specific harm to the juvenile would not result . . . . The court shall have the authority to limit and control the attendance in any manner and to the extent it deems appropriate.

Id.

[185]N.J. STAT. ANN. § 2A:4A-60(h) (West Supp. 1996). The statute provides:

> Whoever, except as provided by law, knowingly discloses, publishes, receives, or makes use of or knowingly permits the unauthorized use of information concerning a particular juvenile derived from records listed in subsection a. or acquired in the course of court proceedings, probation, or police duties, shall, upon conviction thereof, be guilty of a disorderly persons offense.

Id.

[186]In re Release of Juveniles' Identities to Wise, 204 N.J. Super. 71, 497 A.2d 905 (Ch. Div. 1985). *But Cf.* In re B.C.L., 82 N.J. 362, 413 A.2d 335 (1980) (stating that disclosure is the rule, not the exception, when referring to the former N.J. STAT. ANN. § 2A:4-65 (1977), which is the present day N.J. STAT. ANN. § 2A:4A-60 (West Supp. 1996)).

[187]82 N.J. at 375.

tion.[188] Rehabilitation of the juvenile is by no means accorded the significance given in the juvenile disclosure statute.[189] Megan's Law unjustifiably converts a juvenile's confidentiality interest from one of the "highest order," to one of almost no importance.[190] Most significant is the level of disclosure allowed by Megan's Law in comparison to the juvenile disclosure statute. The juvenile disclosure statute accords juveniles this strong interest in confidentiality when all that is at stake is the release of the juvenile's identity, the offense, the adjudication, and the disposition.[191] Under Megan's Law, however, the disclosure would include the juvenile's address, physical description, a photograph, fingerprints, employment or school address, and if applicable, the vehicle used, and its license plate number.[192] The *Doe* court recognized the significance of the disclosure mandated by Megan's Law, noting that it is a compilation of "diverse pieces of information into a single package" that would otherwise not be connected.[193] Such a comprehensive package of information was not envisioned by the drafters of the juvenile disclosure statute, or the courts that have interpreted it.[194]

Additionally, under Megan's Law the balance between the public's right to know and the juvenile offender's prospects for rehabilitation is a factor only in determining the extent of the disclosure, not whether disclosure is going to be permitted at all, as is the case with the juvenile disclosure statute.[195] Also, under the juvenile disclosure statute, specific consideration is given to the likelihood that harm will occur to the juvenile as a result of such disclosure, and if

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

[189]N.J. STAT. ANN. § 2A:4A-60(f) (West Supp. 1996).

[190]Chief Justice Wilentz, in *Doe*, casts serious doubt on the ability of sex offenders to be rehabilitated at all, thus undermining a juvenile's interest in confidentiality before it can even be asserted. Doe v. Poritz, 142 N.J. 1, 15-17, 662 A.2d 367, 374-75 (1995).

[191]N.J. STAT. ANN. § 2A:4A-60(f) (West Supp. 1996).

[192]*See Doe*, 142 N.J. at 21, 662 A.2d at 377.

[193]*Id.* at 87, 662 A.2d at 411. The court noted that this compilation of information was significant enough to implicate an offender's privacy interest under the Fourteenth Amendment. *Id.* See *supra* text accompanying note 55-56.

[194]*See* N.J. STAT. ANN. § 2A:4A-60 (West Supp. 1996); *see also* In re B.C.L., 82 N.J. 362, 413 A.2d 335 (1980).

[195]*See* N.J. STAT. ANN. § 2C:7-8 (West 1995), *supra* text accompanying notes 25-32.

the likelihood is high, the disclosure can be avoided.[196] Under Megan's Law, however, notification is mandatory, and the likelihood of harm to the offender might only be relevant as to the breadth of the notification.[197] Therefore, under Megan's Law, not only is a juvenile's confidentiality interest not given much weight, but in a case where it is deemed significant, it still will not prevent the compilation and disclosure of this information in some form. Thus, much more is at stake for a juvenile offender under Megan's Law; if anything, a juvenile's confidentiality interest is deserving of greater protection, not less.

Related to this confidentiality interest is the juvenile justice system's historical avoidance of any disposition that would stigmatize the juvenile as a criminal.[198] In fact, much of the structure of the juvenile justice system is derived from the interest in avoiding the stigma of adult criminal convictions in delinquency proceedings.[199] Avoiding the criminal stigma in juvenile proceedings is of great importance, because it can penalize a juvenile throughout his life through isolation, the inability to make new acquaintances, the inability to participate in certain activities, and the reduced potential of gaining employment.[200]

The New Jersey Code of Juvenile Justice plainly establishes the strong interest in confidentiality.[201] The Juvenile Code states that "[n]o disposition under this act shall operate to impose any of the civil disabilities ordinarily imposed by virtue of a criminal conviction, nor shall a juvenile be deemed a

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[196]N.J. STAT. ANN. § 2A:4A-60(f) (West Supp. 1996); *see supra* text accompanying note 182.

[197]*See* N.J. STAT. ANN. § 2C:7-8 (West 1995), *supra* notes 25-32.

[198]*See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring). Justice White noted the "legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal" as one of the system's methods of keeping the detrimental effects of a delinquency adjudication to a minimum. *Id.*

[199]Feld, *The Juvenile Court Meets the Principle of Offense*, *supra* note 140, at 825. "To avoid stigmatizing a youth, hearings were confidential, access to court records limited, and children were found to be delinquent rather than guilty of committing a crime." *Id.*

[200]*See* United States v. Glasgow, 389 F. Supp. 217, 224 n. 18 (D.C. 1975) (listing "'curtailment of employment opportunity, quasi-criminal record, harm to personal reputation in the eyes of family and friends and public reinforcement of antisocial tendencies'" as possible effects of juvenile adjudications of delinquency.) (quoting The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime*, at p.16 (1967)).

[201]N.J. STAT. ANN. §§ 2A:4A-20 to -49 (West Supp. 1996).

criminal by reason of such disposition."[202] Consistent with this, the Juvenile Code states as its purpose "to provide for the care, protection, and wholesome mental and physical development of juveniles," and expresses concern for their rehabilitation, health, safety, and welfare.[203] Clearly, Megan's Law is the antithesis of these concerns.

The effective rehabilitation of youths will be nearly impossible if they are not able to let their delinquent history "fad[e] into obscurity and be wholly forgotten."[204] Further, Megan's Law does not even consider the protection of the offender a relevant concern.[205] The only protective interest in Megan's Law is that of the public—a valid concern, but certainly not the only concern. The court in *Doe* gave almost no consideration to two recent instances of violence against sex offenders whose names were released under the provisions of the law.[206] If such incidents can occur in the public setting at large, it will only be that much more prevalent in the setting of a school or other youth organization.[207] Given the constant fear, apprehension, and instability that will be inherent in the lives of these youths, it is not likely that any of them will experience the "wholesome mental and physical development" that is necessary for them to mature in to productive and law abiding adults.

It should be noted that the Juvenile Code *does* specify the public's interest and protection as a relevant concern, but Megan's Law *does not* further these interests to the degree that it hinders them. The public's interest is not protected by stigmatizing these youths and preventing their successful reintegration into society.[208] Instead, the public's interest would be more effectively satisfied if these offenders were provided the individual treatment and rehabili-

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[202]N.J. STAT. ANN. § 2A:4A-48 (West Supp. 1996).

[203]N.J. STAT. ANN. § 2A:4A-21 (West Supp. 1996).

[204]Doe v. Poritz, 142 N.J. 1, 87, 662 A.2d 367, 411 (1995).

[205]See N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995).

[206]*See supra* note 85 for a description of these two incidents of violence.

[207]The United States Supreme Court has shown special concern for the heightened possibility of violence and disturbances in the High School setting. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting) (noting how armbands worn by high school students in protest of the Vietnam War "caused comments, warnings by other students, the poking of fun at them, and a warning . . . that other, nonprotesting students had better let them alone.").

[208]*See In Megan's Name*, THE STAR-LEDGER (N.J.), July 14, 1996, at p. 2. "We need laws that keep child molesters off the street, not a list that tells us where they live." *Id.*

tation mandated in the Juvenile Code. If this treatment is provided, these youthful offenders are less likely to become tomorrow's adult sex offenders.[209]

Further, Megan's Law promotes in juvenile offenders, as well as all other offenders, an image that there is no hope for them ever to integrate and function successfully in society.[210] Youths, in particular, *need* confidence and helpful assistance from society and the law.[211] Megan's Law is basically a "white flag" in the battle against sex offenders; when these offenders are children, it is a "white flag" signaling a surrender of their future and their chance at a productive adult life. In these ways, Megan's Law is in direct conflict with the Juvenile Code, and indeed with the idea of a healthy, safe, and successful life for the youthful offenders who fall within its grasp.

The solution to this conflict in policy lies where it began—with the legislature.[212] The legislature is presumed to have had knowledge of the provisions of the Juvenile Code when it drafted Megan's Law, especially since the Juvenile Code was revised during the same session that Megan's Law was enacted.[213] This being a purely legislative issue, any reviewing court presented with a challenge on these grounds will, absent constitutional violations, read the statutes in a way that they can coexist.[214] However, the fact that the statutes can be read as consistent under the rules of interpretation does not necessarily mean that they are in fact consistent. It is not unreasonable to say that there is an overlap in the purposes of Megan's Law and the Juvenile Code, and

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[209]The National Task Force on Juvenile Sex Offending stated that "[j]uveniles whose sexually abusive behaviors become patterned or repetitive are likely to continue abusive behaviors as adults if an effective intervention is not provided." *The Revised Report from the National Task Force on Juvenile Sexual Offending, 1993 of The National Adolescent Perpetrator Network*, 44 JUV. & FAM. CT. J. 1, 47 (1993).

[210]"If a young offender starts his adult life with a criminal record, it is likely that he will consider his chances for a respectable and rewarding future to be minimal." United States v. Glasgow, 389 F. Supp. 217, 224 (D.C. 1975).

[211]*See id.* (noting that certain juvenile provisions, most notably a provision for setting aside a juvenile offender's conviction, can "[have] a curative effect which facilitates the accomplishment of the correction of the antisocial tendencies of young offenders, and thus furthers the central goal of rehabilitation.").

[212]In re B.C.L., 82 N.J. 362, 376, 413 A.2d 335, 342 (1980).

[213]*See* In re B.G., 289 N.J. Super. 361, 373, 674 A.2d 178, 185 (App. Div. 1996).

[214]When interpreting statutes, New Jersey courts give "primary regard . . . to the fundamental purpose for which the legislation was enacted," and "the spirit of the law will control the letter." In re Release of Juveniles' Identities to Wise, 204 N.J. Super. 71, 74-75, 497 A.2d 905, 907 (Ch. Div. 1985).

thus a consistent reading can be derived therefrom.[215] But when one steps back and observes the effects that Megan's Law has on juveniles, there is a clear deviation from the rehabilitative policies that permeate the Juvenile Code—a deviation which persists no matter how the two statutes are interpreted.

3. MEGAN'S LAW AND THE PUNISHMENT MODEL OF JUVENILE JUSTICE

If the Juvenile Code is viewed as a system based primarily on punishment, then the policy issues raised above, although still existent, become less pronounced. However, a new issue arises in its place: the issue of constitutionality.[216] Since rehabilitation is the primary justification for the limited amount of procedural rights given to juvenile offenders, once it is no longer the centerpiece of juvenile policy, constitutional concerns arise.[217] Given the harsh effects that Megan's Law will have on juvenile offenders, these constitutional concerns are profound.

a. Due Process

The primary constitutional concern with the application of Megan's Law to juveniles is whether it violates the Due Process guarantees of both the United States and New Jersey Constitutions.[218] As set forth above, juveniles have limited procedural rights, and indeed do not receive many of the protections that are ordinarily required in criminal proceedings.[219] In fact, it is a common perception that these limited rights are not even effectively delivered to juve-

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[215]Protection of the public is a central purpose of both Megan's Law and the Juvenile Code. *See* N.J. STAT. ANN. § 2C:7-1 (West 1995), *supra* notes 9 and 10 (purpose of Megan's Law); N.J. STAT. ANN. § 2A:4A-21 (West Supp. 1996), *supra* note 171 (purpose of the Juvenile Code).

[216]For the purposes of this Comment, not all of the possible constitutional claims that could be raised will be addressed, as the author has chosen to limit his constitutional discussion to only those claims that he feels are most seriously implicated in the case of juvenile sex offenders. *See supra* notes 44-79 for other constitutional claims which have been raised in court decisions regarding Megan's Law.

[217]*See* Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 576 (1957) ("When we do not give children in trouble adequate institutions, we do not merely fail them, we deprive them of constitutional rights.").

[218]U.S. CONST. amend XIV. § 1, *supra* note 69; N.J. CONST. art. I, § 1, *supra* note 61.

[219]*See supra* text accompanying notes 139-155.

niles in delinquency proceedings.[220] As such, juveniles are subjected to increasingly punitive sentences, without the attendant procedural protections.[221]

Megan's Law is no exception to this alarming trend. Although the court in *Doe* concluded that Megan's Law is not punishment for the purposes of various constitutional challenges, it did recognize the punitive impact that it had on subjected offenders.[222] In fact, the court found that the law so affects an offender's liberty interests that due process protections must be implemented in the proceedings to determine the tier level of notification.[223] These effects are arguably even more severe for juvenile offenders.

By including "adjudications of delinquency" in the coverage of Megan's Law, the legislature created a procedural deficiency for juveniles.[224] In delinquency proceedings, juveniles are not afforded the full protection of the constitution.[225] Most significant, they are not afforded a trial by jury.[226] While a

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[220]Feld, *Criminalizing the Juvenile Court*, supra note 137, at 77-78 (acknowledging that there is "a substantial gulf between theory and reality" in the procedural protections provided to juvenile offenders).

[221]*Id.* at 82.

[222]Doe v. Poritz, 142 N.J. 1, 75, 662 A.2d 367, 405 (1995); *see supra* text accompanying note 51. *But Cf.* Artway v. Attorney General, 876 F. Supp. 666 (D.N.J. 1995), *supra* text accompanying notes 36-37 (holding that Tier Two and Tier Three notification constitute punishment and, as such, violate the Ex Post Facto Clause of the United States Constitution); Doe v. Poritz, 142 N.J. 1, 662 A.2d 367 (1995) (Stein, J., dissenting) (concluding that Tier Two and Tier Three notification constitute punishment for the purpose of constitutional challenges).

[223]*Doe*, 142 N.J. at 30, 662 A.2d at 382; see *supra* text accompanying note 42.

[224]N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995); *see supra* text accompanying note 12. It should be noted that once an offender is within the strictures of Megan's Law, before the most comprehensive levels of notification can be imposed, all offenders, whether juvenile or adult, are entitled to the same judicial review. *See* Doe v. Poritz, 142 N.J. 1, 30, 662 A.2d 367, 382 (1995). However, this does not diminish the fact that the initial entry into the coverage of Megan's Law occurs with less procedural protections.

[225]*See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that the Sixth Amendment right to a jury trial was not applicable to juvenile delinquency proceedings).

[226]*Id.* "Trial by jury in criminal cases is fundamental to the American scheme of justice . . . ." Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The trial by jury arises under the Sixth Amendment to the United States Constitution, and is incorporated to the states through the Fourteenth Amendment. *Id.* The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

delinquency proceeding is not a criminal proceeding, this appears to be so only in theory; in reality the juvenile system is not materially different from its criminal counterpart.[227] Further, the right to jury trial is of such a fundamental nature, that "there is no constitutionally sufficient reason to deprive the juvenile of this right."[228] Under the increasingly punitive model of juvenile justice, this argument becomes all the more forceful.[229]

Additionally, the Supreme Court has acknowledged that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."[230] It cannot be disputed that Megan's Law, despite its remedial motivations, potentially imparts a severe penalty on those who fall within its provisions. The court in *Doe* recognized this, and history concurs.[231] Due process requires that an individual subject to such serious punishment be afforded a trial by jury regardless of whether that individual is an adult or a juvenile.[232]

By providing for judicial review of an offender's tier classification, The *Doe* court limited the strength of this argument.[233] This judicial review affords

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[227]*See* DeBacker v. Brainard, 396 U.S. 28, 38 (1969) (Douglas, J., dissenting) ("Whether there is a criminal trial charging a criminal offense, whether in conventional terms or in the language of delinquency, all of the procedural requirements of the Constitution and Bill of Rights come into play."). *See* Feld, *The Juvenile Court meets the Principle of Offense*, *supra* note 140, at 821 ("As the juvenile court system deviates from the Progressive ideal, it increasingly resembles, both procedurally and substantively, the adult criminal court system.").

[228]*DeBacker*, 396 U.S. at 38 (Douglas, J., dissenting). Justice Douglas noted that even under the traditional rehabilitative philosophy of the juvenile system, the right to a jury trial persists because "the Constitution is the supreme law of the land." *Id.*

[229]*See* Hon. Earl Warren, *Equal Justice for Juveniles*, 15 JUV. CT. JUDGES J. 14, 16 (Fall 1964) ("[Juveniles] deserve much more than being afforded only the privileges and protections that are applied to their elders.")

[230]*Duncan*, 391 U.S. at 159-60 (citing District of Columbia v. Clawans, 300 U.S. 617 (1937)). The crime at issue in Duncan was a simple battery, carrying a sentence of imprisonment for up to two years and a fine. *Id.* at 160.

[231]Doe v. Poritz, 142 N.J. 1, 30, 662 A.2d 367, 382 (1995). For a brief historical analysis of punishment and a comparison to Megan's Law, see *id.* at 138-40, 662 A.2d at 437-38 (Stein, J., dissenting).

[232]Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[233]*Doe*, 142 N.J. at 30, 662 A.2d at 382 (1995). See also, *supra* text accompanying notes 42.

juveniles, as well as adult offenders, additional due process protections before they are subjected to Tier Two and Tier Three notification, the harshest provisions of Megan's Law.[234] This does not change the fact that juvenile offenders still are initially subjected to Megan's Law with less procedural protection. It does, however, affect the severity of the punishment that a juvenile will be subjected to before receiving these additional protections. It can be argued in the alternative that classification under Megan's Law at any level is serious, and will carry with it social and civil penalties beyond that provided within the statute. In fact, one of the incidents of vigilantism that occurred against an offender subject to Megan's Law occurred before any level of community notification was instituted.[235] These incidents are strong evidence that being classified under Megan's Law at any level can lead to potentially severe consequences. As such, any juvenile offender who is subject to Megan's Law has a solid basis for demanding that the tier level decision be made with nothing less than full procedural protections.

Applying the Sixth Amendment's right to a jury trial to juvenile offenders in the context of Megan's Law would not necessarily mean a reconsideration of the Supreme Court's holding in *McKeiver*.[236] The reason for this is that the punitive impact that Megan's Law will have on juvenile offenders is not only more serious than the typical juvenile sentence, but is the antithesis of what the juvenile justice system represents.[237] Megan's Law is a special situation not so much because of how closely it resembles a criminal sentence, but because of how little it resembles a juvenile disposition. The Court in *McKeiver* was not faced with such a diametric sentence.[238] If they had, the outcome would likely

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[234]*Doe*, 142 N.J. at 30, 662 A.2d at 382.

[235]*Id.* at 125-26, 662 A.2d at 430 (Stein, J., dissenting). The offender, Carlos Diaz, was supposed to be subject to Tier Two notification, but was successful in pursuing an injunction to prevent the notification from being implemented. *Id.* With information extracted from court documents before any community members were notified, members of the Guardian Angels marched and protested and threatened violence in the area surrounding Mr. Diaz's mother's home. *Id.* at 126, 662 A.2d at 430 (Stein, J., dissenting).

[236]*See supra* text accompanying notes 151-55.

[237]*See supra* notes 134-140, describing the philosophy of the juvenile system.

[238]McKeiver v. Pennsylvania, 403 U.S. 528 (1971). The sentence in McKeiver was a commitment at an appropriate juvenile facility. *Id.* at 535, 538. The Court hinted that McKeiver might indeed be reconsidered in the future: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." *Id.* at 551.

have been different. The counter-argument is that providing full procedural protection only to juvenile sex offenders would cause implementation problems and uncertainty. The solution to this is to provide full procedural protection to all juvenile offenders. Otherwise, severe sentences like Megan's Law will be imposed in violation of the constitutional rights of juveniles. Therefore, if this trend away from rehabilitative goals continues, due process requires that jury trials be afforded to all juvenile offenders, thus reversing the holding of *McKeiver*, but continuing to honor the principles for which it stands.

B. Equal Protection

The lack of due process raises the additional constitutional concern of equal protection.[239] Juvenile offenders are subject to the same punishment as adults for the same crimes, yet they are not afforded the same procedural protections.[240] Both the Fourteenth Amendment of the Federal Constitution and Article I, paragraph 1 of the New Jersey Constitution "seek[] to protect against injustice and against the unequal treatment of those who should be treated alike."[241] Megan's Law potentially impinges on an offender's right to privacy, a fundamental right under the United States Constitution to which the compelling interest test should be applied.[242] Under this test, New Jersey must show that Megan's Law's application to juveniles adjudicated of delinquency is narrowly tailored to a compelling government interest.[243]

Protecting the community from the harm presented by sex offenders is a

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[239]*See supra* note 69 for text of Due Process Clause.

[240]In re Gault, 387 U.S. 1, 61 (1966) (Black, J., Concurring). "[I]t would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards." *Id.*

[241]State v. Lagares, 127 N.J. 20, 34, 601 A.2d 698, 705 (1992) (quoting Barone v. Dep't. of Human Servs., 107 N.J. 355, 367, 526 A.2d 1055, 1062 (1987) (citation omitted)).

[242]Allen v. Bordentown City, 216 N.J. Super. 557, 571, 524 A.2d 478, 485 (Law Div. 1987) ("[T]he compelling interest test is applicable to any equal protection challenge to a fundamental right of minors."). More specifically, Megan's Law could impinge on an offender's "'right to be let alone,' [a right deemed] as the most comprehensive of rights and the right most valued by a civilized society" by Justice Brandeis in *Olmstead*. Doe v. Poritz, 142 N.J. 1, 100, 662 A.2d 367, 417 (1995) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[243]*Allen*, 216 N.J. Super. at 571, 524 A.2d at 485 (Law Div. 1987).

substantial, and indeed compelling government interest; however, it does not appear that the means set forth by the legislature in Megan's Law are narrowly tailored to that purpose.[244] If juvenile sex offenders were provided with the process already due them under the Fourteenth Amendment, this disparity would not exist. By not providing this protection to juveniles, Megan's Law stands on unsecure constitutional grounds.

The additional level of process accorded through judicial review of an offender's tier classification could have an effect on this analysis in that it changes the rights that are implicated by Megan's Law's application to juveniles.[245] The court in *Doe* did not find the same interests at issue in Tier One notification as it found in Tiers Two and Three, concluding that only the latter deserved additional protections.[246] Under this view, the interest at issue would not be deemed fundamental, and thus rational basis review would be applied.[247] Although under the more punitive model of juvenile justice many of the concepts that once justified relaxed procedures are no longer available, a rational basis would not be difficult to find.[248] Thus, whether Megan's Law as applied to juveniles violates equal protection principles depends on how much consideration is given to the judicial review provided in *Doe*.

III. THE TREATMENT OF JUVENILE SEX OFFENDERS IN OTHER STATES

The Jacob Wetterling Crimes Against Children Act[249] mandates that every state enact a law governing the registration of sexually violent offenders by September 13, 1997.[250] States that do not comply with this requirement will

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[244]Doe v. Poritz, 142 N.J. 1, 89, 662 A.2d 367, 412 (1995).

[245]*See supra* text accompanying notes 42.

[246]*See Doe*, 142 N.J. at 104, 662 A.2d at 419.

[247]*Id.* at 92, 662 A.2d at 413. "A classification that does not impact a suspect class or impinge upon a fundamental constitutional right will be upheld if it is rationally related to a legitimate government interest." *Id.*

[248]Under rational basis review, as long as there is some rational basis for the classification at issue, a challenge to that classification will fail, even if the stated rational basis was not considered by the legislature. *See* Williamson v. Lee Optical, 348 U.S. 483 (1955) (holding that a statute that prohibited opticians from fitting or duplicating lenses without an opthamologist's or optometrist's prescription was constitutional).

[249]42 U.S.C. § 14071 (1995).

[250]42 U.S.C. § 14071(f)(1) (1995).

not receive the full amount of federal funding that they would otherwise be allocated.[251] Therefore, at present, forty-nine states have some form of sex offender registration law.[252] Of those states, thirty-three do not include juveniles in the class of offenders required to register as sex offenders,[253] five of which specifically exclude juveniles from the coverage of their statute.[254] New Jersey joins the remaining sixteen states which *do* subject juveniles to the provisions of their sex offender registration laws.[255] Seventeen states, not including New

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[251]42 U.S.C. § 14071(f)(2)(A) (1995). The statute states: "A state that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3765)." *Id.*

[252]Nebraska does not have a law covering the registration and notification of sex offenders.

[253]The states are Alabama (ALA. CODE §§ 13A-11-200 to -203 (Michie 1975)), Alaska (ALASKA STAT. §§ 12.63.010 to .63.100 (Michie 1996)), Arkansas (ARK. CODE ANN. §§ 12-12-901 to -909 (Michie 1995)), Connecticut (CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1996)), Delaware (DEL. CODE ANN. tit. 11, § 4120 (Supp. 1996)), Florida (FLA. STAT. ANN. § 775.21 (West Supp. 1997)), Georgia (GA. CODE ANN. § 42-1-12 (Supp. 1996)), Hawaii (HAW. REV. STAT. § 707-743 (Supp. 1995)), Idaho (IDAHO CODE § 18-8303 (Supp. 1996)), Illinois (730 ILL. COMP. STAT. 150/2 to 150/10.9 (West Supp. 1996)), Kansas (KAN. STAT. ANN. §§ 22-4901 to -4910 (1995)), Kentucky (KY. REV. STAT. ANN. §§ 17.510 to .540 (Michie 1996)), Louisiana (LA. REV. STAT. ANN. §§ 15:542 to :549 (West Supp. 1997)), Maine (ME. REV. STAT. ANN. tit. 34-A, §§ 11101 to 11144 (West Supp. 1996)), Maryland (MD. ANN. CODE art. 27, § 792 (1957)), Missouri (MO. ANN. STAT. §§ 566.600 TO .625 (West Supp. 1997)), Montana (MONT. CODE ANN. §§ 46-23-501 to -508 (1995)), Nevada (NEV. REV. STAT. ANN. §§ 207.151 to .155 (Michie Supp. 1995)), New Hampshire (N.H. REV. STAT. ANN. §§ 632-A:12 to A:17 (1996)), New Mexico (N.M. STAT. ANN. §§ 29-11A-1 to 11A-8 (Michie 1996)), New York (N.Y. CORRECTION LAW §§ 168-a to 168-v (McKinney Supp. 1997)), North Carolina (N.C. GEN. STAT. §§ 14-208.5 to 208.13 (Supp. 1996)), North Dakota (N.D. CENT. CODE § 12.1-32-15 (Supp. 1995)), Ohio (OHIO REV. CODE ANN. §§ 2950.01 to 2950.99 (Anderson 1996)), Oklahoma (OKLA. STAT. ANN. tit. 57, §§ 581 to 587 (West Supp. 1996)), Pennsylvania (42 PA. CONS. STAT. ANN. §§ 9791 to 9799 (West Supp. 1996)), Rhode Island (R.I. GEN. LAWS § 11-37.1 (West Supp. 1996)), South Dakota (S.D. CODIFIED LAWS §§ 22-22-30 to -22-41 (Supp. 1996)), Tennessee (TENN. CODE ANN. §§ 40-39-102 to -39-108 (Supp. 1996)), Utah (UTAH CODE ANN. § 77-27-21.5 (1996)), Vermont (VT. STAT. ANN. tit. 13, §§ 5401 to 5413 (Supp. 1996)), West Virginia (W. VA. CODE §§ 61-8F-1 to -8F-9 (Supp. 1996)), and Wyoming (WYO. STAT. §§ 7-19-301 to -306 (1977)).

[254]The states are: Alabama (ALA. CODE §§ 13A-11-200 to -203 (Michie 1975)), Kansas (KAN. STAT. ANN. §§ 22-4901 to -4910 (1995)), Kentucky (KY. REV. STAT. ANN. §§ 17.510 to .540 (Michie 1996)), Louisiana (LA. REV. STAT. ANN. §§ 15:542 to :549 (West Supp. 1997)), and Wyoming (WYO. STAT. §§ 7-19-301 to -306 (1977)).

[255]Excluding New Jersey, the states are: Arizona (ARIZ. REV. STAT. ANN. §§ 13-3821

Jersey, supplement their registration statutes with community notification provisions.[256] Only eight of these states apply their provisions to juvenile offenders.[257]

The extent to which juvenile offenders are held to the registration and notification obligations varies from state to state, and there does not appear to be a general consensus on how the laws should be applied to them once that choice is made. One thing that is clear is that juvenile sex offenders in New Jersey are subject to the most strict requirements of any state.

Most of the states that apply their sex offender registration laws to juveniles either provide for lesser periods of registration, special requirements for juveniles before they can qualify for registration, or allow special waiver mechanisms for juvenile offenders. For example, in Minnesota, Oregon, and Texas, the period of registration lasts only ten years.[258] In Mississippi, juve-

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to -3825 (West Supp. 1996)), California (CAL. PENAL CODE § 290 (West Supp. 1997)), Colorado (COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1996)), Indiana (IND. CODE ANN. §§ 5-2-12-1 to -12-13 (West Supp. 1996)), Iowa (IOWA CODE ANN. §§ 692A.1 to 692A.15 (West Supp. 1996)), Massachusetts (MASS. GEN. LAWS ANN. ch. 22C, § 37 (West 1994)), Michigan (MICH. COMP. LAWS ANN. §§ 28.721 to .732 (West Supp. 1996)), Minnesota (MINN. STAT. ANN. §§ 243.165 to .166 (West 1996)), Mississippi (MISS. CODE ANN. §§ 45-33-1 to -19 (Supp. 1996)), Oregon (OR. REV. STAT. §§ 181.585 to .602 (1995)), South Carolina (S.C. CODE ANN. §§ 23-3-400 to -490 (Law. Co-op. Supp. 1995)), Texas (TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1996)), Virginia (VA. CODE ANN. §§ 19.2-298.1 to -298.3 (Michie 1996)), Washington (WASH. REV. CODE ANN. § 9A.44.130 (Supp. 1997)), and Wisconsin (WIS. STAT. ANN. § 175.45 (West Supp. 1996)).

[256]The States are: Arizona (ARIZ. REV. STAT. ANN. § 13-3825(H) (West Supp. 1996)), California (CAL. PENAL CODE § 290(m)-(n) (West Supp. 1997)), Colorado (COLO. REV. STAT. ANN. § 18-3-412.5(6.5) (West Supp. 1996)), Florida (FLA. STAT. ANN. § 775.21 (West Supp. 1997)), Illinois (730 ILL. COMP. STAT. 152/101 to 152/130 (West Supp. 1996)),)), Indiana (IND. CODE ANN. § 5-2-12-11 (West Supp. 1996)), Iowa (IOWA CODE ANN. § 692A.13 (West Supp. 1996)), Mississippi (MISS. CODE ANN. § 45-33-17 (Supp. 1996)), New York (N.Y. CORRECTION LAW § 168-p (McKinney Supp. 1997)), North Carolina (N.C. GEN. STAT. § 14-208.10 (Supp. 1996)), North Dakota (N.D. CENT. CODE § 12.1-32-15 (Supp. 1995)), Oregon (OR. REV. STAT. § 181.589 (1995)), Pennsylvania (42 PA. CONS. STAT. ANN. § 9798 (West Supp. 1996)), Rhode Island (R.I. GEN. LAWS § 11-37.1-11 (West Supp. 1996)), Texas (TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1996)), Washington (WASH. REV. CODE ANN. § 4.24.540 (Supp. 1997)), and West Virginia (W. VA. CODE § 61-8F-5 (Supp. 1996)).

[257]The states are: California (CAL. PENAL CODE § 290(m)-(n) (West Supp. 1997)), Colorado (COLO. REV. STAT. ANN. § 18-3-412.5(6.5) (West Supp. 1996)), Indiana (IND. CODE ANN. § 5-2-12-11 (West Supp. 1996)), Iowa (IOWA CODE ANN. § 692A.13 (West Supp. 1996)), Mississippi (MISS. CODE ANN. § 45-33-17 (Supp. 1996)), Oregon (OR. REV. STAT. § 181.589 (1995)), Texas (TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1996)), and Washington (WASH. REV. CODE ANN. §§ 13.40.215 to .217 (Supp. 1997)).

[258]MINN. STAT. ANN. § 243.166 (West 1996); OR. REV. STAT. § 181.600 (1995); TEX.

niles are required to register only after they have twice been adjudicated of a sex offense.[259] Whether a juvenile is required to register in Arizona is up to the discretion of the court issuing the delinquency adjudication, and if the court so chooses to require it, it only lasts until the offender reaches the age of 25.[260] Likewise, in Iowa the decision to require juvenile registration is also up to the discretion of the juvenile court.[261] In Indiana, juveniles are only required to register if it is proven by clear and convincing evidence that they are likely to re-offend.[262] Similarly, in South Carolina only juveniles who were convicted in adult criminal proceedings are required to register.[263]

REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1996). This ten year period is not specific to juveniles, but the mandated registration period for all sex offenders required to register under these laws. *Id.*

[259]MISS. CODE ANN. § 45-33-1(1) (Supp. 1996). Adult offenders are required to register upon their first conviction or acquittal by reason of insanity. *Id.*

[260]ARIZ. REV. STAT. ANN. § 13-3821(C) (West Supp. 1996).

[261]IOWA CODE ANN. § 692A.2 (West Supp. 1996). The statute provides, in pertinent part:

> A person who is convicted, as defined in section 692A.1, of either a criminal offense against a minor or a sexually violent offense as a result of an adjudication of delinquency in juvenile court shall not be required to register as required in this chapter if the juvenile court finds that the person should not be required to register under this chapter. . . .

Id. This section appears to show a presumption in favor of limiting the application of these requirements to juvenile offenders. *Id.*

[262]IND. CODE ANN. § 5-2-12-4(2) (West Supp. 1996). The statute provides, in pertinent part:

> (2) a child who: (A) is at least fourteen (14) years of age; (B) is on probation, is on parole, or is discharged from a facility by the department of correction as a result of an adjudication as a delinquent child for an act that would be an offense described in subdivision (1) if committed by an adult; and (C) is found by a court by clear and convincing evidence to be likely to repeat an act that would be an offense described in subdivision (1) if committed by an adult; . . .

Id.

[263]S.C. CODE ANN. § 23-3-430 (Law. Co-op. Supp. 1995). The statute provides, in pertinent part: "Any person, regardless of age, residing in the State of South Carolina who has been convicted in this State [of the named offenses] . . . shall be required to register pur-

Unlike the other states, Colorado's registration law allows any subjected offender, juvenile or adult, to petition for release from its provisions in a way that will likely benefit juvenile offenders.[264] The determination of whether one is qualified to partake of Colorado's petition procedure is determined by a sliding scale that is based on the seriousness of the offense that led to the requirement.[265] Thus, for more serious offenses, an offender must wait 20 years before petitioning the court for release, while for less serious offenses it drops to 10 years. For the least serious offenses, petitions may be made after 5 years.[266] Provisions such as these will help those juvenile offenders who committed only minor offenses, specifically those offenses that can be characterized as experimentation or the result of youthful curiosity, to avoid the consequences of an unduly long period of registration.[267]

One of the states most deferential to the rights of juvenile sex offenders is Washington.[268] Interestingly, when New Jersey began drafting Megan's Law, Governor Christine Todd Whitman called upon the Legislature to enact a provision similar to that currently in effect in Washington.[269] The legislative history of Washington's statute shows a clear intent on behalf of the legislature to make it easier for juvenile offenders to be relieved of the registration requirement.[270] State Representative Hargrove, the sponsor of the amendment to the waiver statute that provided additional protection to Washington's juveniles, told the House Judiciary Committee that "[t]he thrust of [his] amendment is to make it easier for a juvenile to wash their record clean and start over as an

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suant to the provisions of this Article." *Id.*

[264]COLO. REV. STAT. § 18-3-412.5(8) (West Supp. 1996).

[265]*Id.*

[266]COLO. REV. STAT. ANN. § 18-3-412.5(7) (West Supp. 1996).

[267]State v. Heiskell, 916 P.2d 366, 369 (1996). Representative Mike Hargrove's concern for offenses that could best be described as consensual or "playing doctor" was noted in the court's opinion. *Id.*

[268]*See* WASH. REV. CODE ANN. § 9A.44.130 (Supp. 1997).

[269]*Whitman Latest to Urge Laws on Notices of Sex Offenders*, N.Y. TIMES, August 6, 1994, at p. 24.

[270]*See* State v. Heiskell, 916 P.2d 366 (1996) (holding that a juvenile offender who committed his offense at the age of 14 must wait two years before he is eligible for waiver of the registration requirement). The court discussed the relevant legislative history surrounding the waiver of juveniles specifically. *Id.* at 369.

adult."[271]

The Washington statute allows those juvenile sex offenders who committed their offense when they were age fifteen or older to be relieved of the duty to register if it is shown by clear and convincing evidence that registration will not serve the Legislature's purpose as defined in the registration statute and other statutes.[272] Those juveniles who are fourteen years of age or less at the time the offense is committed, must register for two years, and thereafter may be relieved of the duty to register if during that time they did not re-offend, and in addition can prove by a preponderance of the evidence that their continued registration will not serve the statute's purposes.[273] This lower standard of proof "was to make it easier for younger juveniles to obtain a waiver."[274]

The community notification provisions enacted by other states also demonstrate the harshness of Megan's Law on juveniles. In California and Texas, the juvenile's identity is not released, and other information is available only upon request.[275] Colorado requires not only that the information be requested, but that the requesting party have a demonstrated need to know it.[276] The disclosure of the offender's home address is prohibited in Indiana, and notification can only be made to schools and institutions or agencies dealing with the care or supervision of children.[277] Most significant, in each of these eight

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[271]*Id.* at 369.

[272]WASH. REV. CODE ANN. § 9A.44.140(4) (West Supp. 1997). The statute lists the following statutes as relevant to this purpose analysis: WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1997) (sex offender registration); WASH. REV. CODE ANN. § 10.01.200 (West Supp. 1997) (notice to defendants of obligation to register); WASH. REV. CODE ANN. § 43.43.540 (West Supp. 1997) (reimbursement to counties for central registry); WASH. REV. CODE ANN. § 46.20.187 (West Supp. 1997) (notice when applying for or renewing a driver's license or identicard); WASH. REV. CODE ANN. § 70.48.470 (West Supp. 1997) (notice to sheriffs in county inmate will reside); WASH. REV. CODE ANN. § 72.09.330 (West Supp. 1997) (notice to inmates upon release).

[273]WASH. REV. CODE ANN. § 9A.44.140(4) (West Supp. 1997).

[274]State v. Heiskell, 916 P.2d 366, 369 (1996).

[275]CAL. PENAL CODE § 290(m) (West Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1(5) (West Supp. 1996).

[276]COLO. REV. STAT. ANN. § 18-3-412.5(6.5)(c) (West Supp. 1996). The statute provides that "[a] local law enforcement agency may release information . . . when necessary for public protection and upon request and demonstration of a need to know."

[277]IND. CODE ANN. § 5-2-12-11 (West Supp. 1996).

states, community notification is permissive.[278] In New Jersey, it is mandatory.[279]

The concern that existed in other states for the effect that registration and community notification might have on juveniles was not adopted by the New Jersey Legislature. Megan's Law groups juvenile sex offenders together with adults, subjecting them to a lifetime of registration and notification. Under the New Jersey law, the only opportunity to terminate the registration requirement comes after 15 years. Furthermore, juveniles are subject to the same review standard as adults.[280] The New Jersey Statute does not accord juveniles any of the deference supplied in the registration provisions of other states, and as such, ignores a population of offenders that have traditionally received additional protections.

IV. CONCLUSION

The increase in both the incidence and seriousness of crime committed by juveniles is a serious problem facing state legislatures. Motivated by the popular view that the primary cause of this problem is the leniency inherent in the sentencing of juveniles, the legislatures are more frequently responding by enacting tougher and more punitive laws pertaining to juvenile crime. As such, the substantive focus of the juvenile justice system is shifting from rehabilitation to retribution and deterrence, and from guidance to punishment. In revising the Juvenile Code, the New Jersey Legislature followed this popular trend. However, this shift in focus has not been accompanied by the requisite shift in procedure, implicating serious deficiencies and concerns within the juvenile justice system. Megan's Law, as applied to juvenile sex offenders, is a perfect example of this conflict between substance and procedure.

The debate over whether the notification provisions of Megan's Law constitute punishment is far from over, but one thing is clear: Megan's Law is much more serious than the typical juvenile disposition. Many states recognize this with regard to their respective sex offender registration and notification stat-

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[278]CAL. PENAL CODE § 290(m) (West Supp. 1997); COLO. REV. STAT. ANN. § 18-3-412.5(6.5)(c) (West Supp. 1996); IND. CODE ANN. § 5-2-12-11 (West Supp. 1996); IOWA CODE ANN. § 692A.13(7) (West Supp. 1996); MISS. CODE ANN. § 45-33-17 (Supp. 1996); OR. REV. STAT. § 181.589 (1995); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1(5) (West Supp. 1996); WASH. REV. CODE ANN. §§ 13.40.217 (Supp. 1997).

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

[280]N.J. STAT. ANN § 2C:7-2(f) (1995), *supra* note 17. In making the requisite showing that the offender does not pose a threat to the safety of others, the burden of persuasion is on the offender. *See* Doe v. Poritz, 142 N.J. 1, 22, 662 A.2d 367, 378 (1995).

utes, but New Jersey is not one of them. More consequential is the fact that this more serious sentence is imposed upon juveniles with the same relaxed procedure as the typical juvenile disposition. As such, a juvenile's constitutional right to due process and equal protection of the laws is infringed by the notification provisions of Megan's Law. There is no justification for the infringement of these fundamental constitutional rights, especially when the rights are those of a juvenile. [281]

The primary purpose for which Megan's Law was enacted—to protect children and the public from sex offenders—has received far too narrow an interpretation. Since today's juvenile offenders are tomorrow's adult offenders, the public's interest in protecting its children from juvenile sex offenders would best be served by early intervention and a continued focus on the traditional juvenile justice notions of confidentiality and rehabilitation. In this regard, New Jersey should follow the example of other states and limit Megan's Law's application so that the effects on juvenile sex offenders are not as severe, nor as extensive, as they presently are. As long as juveniles are subject to the harsh provisions of Megan's Law, they are entitled to the same constitutional protections afforded to adult offenders. Otherwise, the cost of protecting society's children will be paid at the expense of the self-confidence, future, and constitutional rights of juveniles.

[281] *See* Paulsen, *supra* note 241, at 550 ("If the result of an adjudication of delinquency is substantially the same as a verdict of guilty, the youngster has been cheated of his constitutional rights by false labeling.").