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Doe v. Poritz: A Constitutional Yield to an Angry Society

Lori N. Sabin

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INTRODUCTION

On July 29, 1994, in Hamilton Township, New Jersey, a seven-year-old girl named Megan Kanka was lured into a neighbor's house by a man who offered to show her his new dog.¹ Megan's neighbor pulled her into his bedroom, strangled her with a belt and then sexually assaulted her.² The neighbor was Jesse Timmendequas, a twice-convicted sex offender who had served six years in prison for a previous attempted assault on a child.³

Publicity about the crime provoked public outrage stemming from the fact that someone with a background of sex crimes had lived in the community anonymously.⁴ The New Jersey Legislature responded to the outcry by approving a controversial state statute requiring every convicted sex offender to register with the police after release from prison.⁵ Known as Megan's Law, the statute also mandates community notification regarding the whereabouts of certain convicted sex offenders, depending upon the seriousness of their offense and the likelihood of recidivism.⁶

† Due to the controversial nature of Megan's Law, its constitutionality is continually being debated in both the judicial and legislative branches of government. As such, at the time this Note is published, various topics discussed herein may have changed. The information contained in this Note is current as of March 1996.

1. Ana Puga, *Justice Dept., ACLU Clash on N.J. Bid to Register Sex Offenders*, BOSTON GLOBE, Feb. 26, 1995, at 17.

2. *Id.*

3. Fergus Kelly, *Do Sex Offenders Have a Right to Privacy?*, THE TIMES (London), Dec. 17, 1995, at 3. Jesse Timmendequas is expected to stand trial for the kidnap, sexual assault, and felony-murder of Megan Kanka, beginning February 19, 1996. Brendan Schurr, *House Where Girl Was Slain Is Razed For Park*, SEATTLE TIMES, Dec. 25, 1994, at A3. See also *Sex-Crime Defendant Seeks Alias For Victim*, CHI. TRIB., Oct. 25, 1995, at 10 (discussing Timmendequas's request that Megan Kanka be identified by alias in front of the jury, due to widespread publication of "Megan's Law").

4. Robert L. Jackson, *Sex Offender Notification Laws Facing Legal Hurdles*, L.A. TIMES, Aug. 8, 1995, at A5. Jesse Timendequas had lived across the street from Megan Kanka with two other convicted sex offenders. Anna Quindlen, *Megan's Law*, S.F. CHRON., Aug. 9, 1994, at A19.

5. Jackson, *supra* note 4, at A5. See generally N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-5 (West 1995). The bill was enacted into law just three months after Megan's slaying. Commentators say Megan's Law was the product of "politics and passion." Michelle Ruess, *Second Thoughts About Megan's Law Concern Growing Over Ripple Effects*, REC. N. N.J., Feb. 19, 1996, at A1. Apparently, lawmakers ignored witnesses who raised questions regarding the law. *Id.* Assembly members did not hold committee meetings—passing Megan's Law was declared a legislative emergency. *Id.*

6. Jackson, *supra* note 4, at A5. See N.J. STAT. ANN. § 2C:7-6 (West 1995). Megan's Law sets forth a three-tiered scheme by which the sex offender's risk of reoffense is ranked. Different levels of community notification are provided based upon the sex offender's rating. See discussion *infra* notes 53-61 and accompanying text. A recidivist is defined as a habitual criminal. BLACK'S LAW DICTIONARY 1269 (6th ed. 1990).

Two months after the enactment of Megan's Law, a New Jersey man, using the pseudonym John Doe, challenged the constitutionality of the statute based upon its retroactive application.⁷ Doe claimed the sex offender registration and notification statutes violate several constitutional provisions, including protection from ex post facto laws,⁸ bills of attainder,⁹ double jeopardy, cruel and unusual punishment, and privacy infringement.¹⁰ In a 6-1 decision, the New Jersey Supreme Court held that the registration and community notification laws did not violate any of the constitutional clauses that Doe cited.¹¹ The court did, however, require that a process of judicial review be added to the statute's guidelines, so as to promote judicial fairness and due process for offenders subject to public notification.¹² With this addition, the court held the legislation would be valid and effective immediately upon all convicted sex offenders.¹³

This Note will analyze the New Jersey Supreme Court decision in *Doe v. Poritz*, focusing particularly on its impact to sex offenders convicted before the law's enactment. Part I will discuss the facts of *Poritz*, the procedural history and the appeal to the United States Supreme Court. Part II will discuss the New Jersey sex offender registration and notification laws and how the decision in *Poritz* modified the statutes to include a process of judicial review. Part III will focus on the ex post facto clause of the United States Constitution and the meaning of "punishment" within the clause when

7. *Doe v. Poritz*, 661 A.2d 1335 (N.J. Super. 1995), *aff'd*, 662 A.2d 367 (N.J. 1995).

8. An ex post facto law is defined as "[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." BLACK'S LAW DICTIONARY 580 (6th. ed. 1990). The United States Constitution and New Jersey Constitution bar enactment of ex post facto legislation. See U.S. CONST. art. I, § 10, cl. 1; N.J. CONST. art. IV, § 7, cl. 3. In addition, forty-six of the fifty state constitutions also ban ex post facto laws. Only Delaware, Hawaii, New York, and Vermont have no such provision. Stated broadly, the constitutional clauses prohibit any law which, in relation to the past offense or its punitive consequences, alters the situation of the offender to his disadvantage. See discussion *infra* notes 78-95 and accompanying text.

9. A bill of attainder is defined as "a legislative act, regardless of form, that applies to either named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." BLACK'S LAW DICTIONARY 165 (6th. ed. 1990). The *Poritz* court held Megan's Law did not violate the prohibition against bills of attainder because such prohibition applies only to punitive legislation, not to regulations. See *Doe v. Poritz*, 662 A.2d 367, 406 (N.J. 1995) (holding that Megan's Law is a regulatory measure and not punishment for past crime). Likewise, because the court found that Megan's Law is not punitive, it similarly disposed of the prohibition against cruel and unusual punishment and the challenge to Double Jeopardy Clause. *Id.*

10. The court held that Megan's Law does not violate a protection of Doe's privacy because the public is already permitted to review prior arrest and conviction records. *Poritz*, 662 A.2d at 407. The court found that disclosure of the offender's age and legal residence or a description of his vehicle would not infringe on an expectation of privacy because the records of the Department of Motor Vehicles are also public records. *Id.* See generally N.J. STAT. ANN § 47:1A-2 (1989). The court further found the offender did not have a reasonable expectation of privacy in matters already exposed to public view, such as physical appearance. *Poritz*, 662 A.2d at 407 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

11. *Poritz*, 662 A.2d 367.

12. *Id.* at 420-21. See discussion *infra* notes 62-77 and accompanying text.

13. *Poritz*, 662 A.2d at 422.

applied to sex offenders convicted prior to the law's enactment. Part IV will analyze why the case was not correctly decided and how the United States Supreme Court should rule on the matter. Based on prior holdings, this Note will anticipate whether the Court will affirm *Poritz* or reverse it as a violation of the United States Constitution. Finally, this Note will conclude with a discussion of whether sex offender notification laws are punitive in nature and effect, and thus, violate the ex post facto clause of Article 1, Section 10 of the United States Constitution and article 4, section 7 of the New Jersey State Constitution.¹⁴

I. FACTS OF *DOE V. PORITZ*

The plaintiff John Doe was indicted and charged in June of 1985 with sexual assault for molesting two teenage boys.¹⁵ Doe entered into a plea agreement for a term of imprisonment not to exceed 15 years.¹⁶ In September of 1985, Doe was examined by a psychologist at the Adult Diagnostic and Treatment Center in Avenel, New Jersey (hereinafter ADTC).¹⁷ Center staff determined that Doe's conduct was characterized by a pattern of repetitive and compulsive behavior.¹⁸ In February 1986, Doe was sentenced to a ten-year term of imprisonment at ADTC with a three-year period of parole ineligibility.¹⁹ After Doe allegedly participated in all aspects of the treatment program offered to him at ADTC, his primary therapist recommended he be considered for parole.²⁰ After interviewing Doe in the fall of 1991, the review board concluded Doe "was 'capable of making an acceptable social adjustment'" and, therefore, recommended Doe's release on supervised parole.²¹

Doe contended that he had complied with all the provisions of his parole release, including participation in aftercare psychological treatment.²² He now rents an apartment and is employed.²³ Although Doe admits that his

14. U.S. CONST. art. I, § 10, cl. 1 provides: "No State shall . . . pass any Bill of Attainder [or] ex post facto Law . . ." Similarly, N.J. CONST. art. IV, § 7, cl. 3 provides: "The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." For purposes of this Note, both the United States Constitution and New Jersey Constitution will be referred by the author as "Constitution".

15. *Doe v. Poritz*, 661 A.2d. 1335, 1337 (N.J. Super. 1995), *aff'd*, 662 A.2d 367 (N.J. 1995).

16. *Id.* at 1337-38.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* Doe's sentence and parole requirements terminated in June of 1992.

23. *Id.* Doe has a master's degree and works in a New Jersey consulting firm as a research associate. John S. Furlong, *What To Do If John Doe Walks in the Door*, N.J.L.J., Oct. 20, 1995, at 11.

employer and fellow employees are aware of his past, he claims community notification under Megan's Law will jeopardize his job, family, participation in civic organizations and his membership in a New Jersey health club.²⁴

In early 1995, Doe brought suit in New Jersey Superior Court against Deborah Poritz, the Attorney General of the state of New Jersey, seeking to enjoin application of both the registration and notification laws. Doe challenged the statutes as a violation of his right to privacy, due process and equal protection. Doe further contended the laws were *ex post facto* in nature, and were cruel and unusual punishment.²⁵ The Superior Court upheld the statute's constitutionality and Doe appealed. The New Jersey Supreme Court granted review.²⁶

Acting within five months, the New Jersey Supreme Court affirmed the lower courts ruling. The court held Megan's Law was constitutional but required the Attorney General of New Jersey to implement a process of judicial review before public notification would be given effect.²⁷ The court held thereafter, the Attorney General's guidelines for notification would be valid and effective immediately.²⁸

In October 1995, Doe appealed to the United States Supreme Court, however, the justices declined to hear his case.²⁹ Commentators believe the Court rejected his case due to the pending appeal of *Artway v. Attorney General of New Jersey*,³⁰ a similar case involving a sex-offender who was convicted before Megan's Law was enacted.³¹ In *Artway*, the United States District Court in New Jersey held the notification provision of Megan's Law was unconstitutional when applied retroactively to sex-offenders.³² The Third Circuit Court of Appeals is expected to hear the *Artway* challenge and make a ruling which will bind all cases in the state of New Jersey.³³ If either *Poritz* and/or *Artway* is appealed, and the Third Circuit rules differently

24. Maureen Castellano, *Judge Calls Megan's Vulnerable; N.J. to Appeal*, N.J.L.J., Jan. 9, 1995, at 5. This is all despite the fact that Doe's former doctors at ADTC have deemed him no longer a threat to society.

25. Doe v. Poritz, 661 A.2d 1335, 1339 (N.J. Super. 1995).

26. Poritz, 662 A.2d 367 (N.J. 1995).

27. *Id.* Prior to the court's holding in *Poritz*, the public notification process could take place at any time, without notice or an opportunity to be heard by the registrant. *Poritz* changed that, creating a hearing process to satisfy due process concerns. Since *Poritz*, the prosecutor must promptly notify the registrant of the tier classification decision as well as his or her right to a hearing in order to contest the decision. See discussion *infra* notes 62-77 and accompanying text.

28. *Poritz*, 662 A.2d at 423. See discussion of Attorney General's guidelines *infra* notes 65-70 and accompanying text.

29. Rocco Cammarere, *War: victims v. defendants; Megan's Law ruling nears in 3rd Circuit*, N.J. LAW, Jan. 29, 1996, at 1.

30. 876 F. Supp. 666 (D.N.J. 1995) (appeal pending, Nos. 95-5157, 95-5194, 95-5195 (3d Cir.)).

31. Michelle Ruess, *Megan's Law Goes to Court*, REC., Oct. 25, 1995, at A1. See discussion of *Artway v. Attorney General of New Jersey*, *infra* notes 126-135 and accompanying text.

32. See generally *Artway v. Attorney Gen. of New Jersey*, 876 F. Supp. 666 (D.N.J. 1995).

33. Cammarere, *supra* note 29, at 1.

than the New Jersey Supreme Court did in *Poritz*, it is likely that the United States Supreme Court will then hear both cases together and make an ultimate ruling on the constitutionality of Megan's Law. Such a ruling would bind all states nationwide.³⁴

II. SEX-OFFENDER REGISTRATION AND NOTIFICATION LAWS

A. Federal Legislation: *The 1994 Violent Crime Control and Law Enforcement Act*

In 1994 Congress enacted legislation requiring states, as a condition of federal funding for drug control,³⁵ to enact registration and notification laws covering convicted sex offenders.³⁶ The Violent Crime Control and Law Enforcement Act, like Megan's Law, requires most sex offenders to verify their addresses annually, and more dangerous sex offenders to do so every ninety days.³⁷ Under the Federal Act, those convicted of a criminal offense

34. Ruess, *supra* note 31, at A1.

35. Funding under this section is used to assist states in carrying out programs which improve the criminal justice system, with special emphasis on a nationwide drug control strategy. States which do not comply will lose 10% of their money which would otherwise be allocated to them under 42 U.S.C. § 3756 (1995). See generally 42 U.S.C. § 3756 (1995). Small states could lose about \$200,000 for noncompliance with the federal bill, larger states could lose approximately \$2 million. See *Sex-Offender Laws Pushed by Reno*, S.F. CHRON., Apr. 8, 1995, at A4.

36. The federal statute was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994). This provision, called the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, is part of the 1994 Omnibus Crime Bill. The bill is named after an 11-year-old boy who was abducted in 1988. See Jackson, *supra* note 4. The Act authorizes the Attorney General to establish guidelines for state programs. The specific language of the bill is codified in 42 U.S.C. § 14071, and requires "a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" or a person who is a "sexually violent predator" to register a current address with a designated state law enforcement agency. Jacob Wetterling Act §§ 170101(a)(1)(A) & (B), 108 Stat. at 2038, codified at 42 U.S.C. § 1407(a)(1) (1995). The requirement continues until 10 years have passed since the offender was released from prison, placed on parole, supervised release, or probation, and the person who knowingly fails to register is subject to criminal penalty. §§ 170101(b)(6)(A) & (C), 108 Stat. at 2041, codified at 42 U.S.C. § 14071(c) (1995). Many states have enacted sex-offender registration statutes, see ALASKA STAT. §§ 12.63.020, 18.65.087, 28.05.048, 33.30.035 (1995); ARK. STAT. ANN. § 12-12-901 - 12-12-909 (1995); CAL. PENAL CODE § 290 (West 1988 & Supp. 1996); IDAHO PENAL CODE § 18-8301 - 18-8311 (1994); ILL. STAT. ANN. Ch. 730 (1996); IND. CODE ANN. § 5-2-12-1 - 5-2-12-13 (Burns 1995); KAN. STAT. ANN. § 22-4901 - 22-4910 (1995); KY. REV. STAT. ANN. §§ 17.500 - 17.540, 17.990 (Michie 1995); ME. REV. STAT. ANN. tit. 34-A, § 11001-11004 (1995); MICH. STAT. ANN. §§ 4.475(1) - 4.475(12) (1994) (effective Oct. 1, 1995); MISS. CODE ANN. § 45-33-17 (1995); NEV. REV. STAT. ANN. § 207.152 (Michie 1995); N.M. STAT. ANN. §§ 29-11A-1 - 29-11A-8 (1995); N.Y. CORRECT. LAW §§ 168-a-v (Consol. 1995) (effective Jan. 21, 1996); OKLA. STAT. tit. 57 §§ 581-587 (1995); S.D. CODIFIED LAWS § 22-22-38 (1995); UTAH CODE ANN. § 77-27-21.5 (1995); WASH. REV. CODE § 9A.44.130 (1995); W. VA. CODE §§ 61-8F-1 - 61-8F-8 (1995); WIS. STAT. § 175.45 (1994); WYO. STAT. §§ 7-19-301 - 7-19-306 (1995).

37. See 42 U.S.C. § 14071(b)(3) (1995). See discussion of New Jersey's verification requirements *infra* notes 48-49 and accompanying text.

against a minor or those convicted of a second violent offense must comply with the registration requirements for ten years.³⁸

For sexually violent predators, the registration requirement terminates upon a determination that the offender no longer suffers from the personality disorder that makes the person likely to engage in a predatory sexually violent offense.³⁹ Offenders who fail to register or who fail to keep such registration current are subject to criminal sanctions of the state where registration is required.⁴⁰ Unlike Megan's Law, the federal provision does not require public notification. The Act only requires notification to state and local law enforcement and does not apply the registration requirements retroactively.⁴¹

B. New Jersey's Megan's Law

1. Registration Statute

New Jersey's law is aimed primarily at protecting minors and other potential victims of sexually violent offenses.⁴² The law requires convicted sex offenders to appear at local police stations for fingerprinting and photographing.⁴³ Registrants must also complete a registration form that includes a physical description, the offense involved, home address, employment or school address, vehicle used, license plate number, and any other information the Attorney General deems necessary to assess future risk of crime.⁴⁴

For offenders in custody, registration is carried out in prison.⁴⁵ The requirements apply to all convicts, all juveniles found delinquent because of

38. 42 U.S.C. § 14071(b)(6)(A). The statute's legislative history does not provide any justification for choosing this length of time. See generally H.R. REP. NO. 392, 103d Cong., 1st Sess. (1993).

39. 42 U.S.C. § 14071(b)(6)(B).

40. 42 U.S.C. § 14071(c). See discussion of New Jersey's penalty for failure to register *infra* note 52 and accompanying text.

41. 42 U.S.C. § 14071(d). The federal Act allows for public notification, however, it does not mandate it. See 42 U.S.C. § 14071(d)(3). Of the forty states that have adopted sex offender registration laws, (including New Jersey), five states do not apply their laws retroactively: Arkansas; Colorado, Florida, Illinois, and Kansas. Doe v. Poritz, 662 A.2d 367, 428 (N.J. 1995).

42. The registration law that New Jersey adopted pursuant to the federal act is located in N.J. STAT. ANN. §§ 2C:7-1 to 7-4. Those required to register are sex offenders who have been convicted of crimes such as: aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping; endangering the welfare of a child; luring or enticing; criminal sexual contact if the victim is a minor and kidnapping; criminal restraint; or false imprisonment if the victim is a minor and the offender not the parent; and in all cases an attempt to commit any of the above. N.J. STAT. ANN. § 2C:7-2(b)(1) and (2).

43. N.J. STAT. ANN. § 2C:7-4(b).

44. *Id.* Other information that may be relevant in assessing risk of reoffense might include criminal and correction records; nonprivileged personnel, treatment and abuse records; and evidentiary genetic markers. *Id.*

45. N.J. STAT. ANN. § 2C:7-2(c).

the commission of sex offenses, and all persons found not guilty by reason of insanity.⁴⁶ The requirements also apply to sex offenders convicted elsewhere who relocate to New Jersey.⁴⁷

Registrants whose conduct is repetitive and compulsive must verify their addresses with their local law enforcement agency quarterly; other registrants must do so annually.⁴⁸ Upon relocation to another municipality, re-registration is required, and any change of address requires notice to local law enforcement agencies.⁴⁹

Registration is a lifetime requirement. Fifteen years after conviction or release from a correctional facility, an offender can apply to terminate registration by presenting evidence to a court that the offender is not likely to pose a threat to the safety of others.⁵⁰ Registration records are open to any law enforcement agency in any state and any federal law enforcement agency.⁵¹ Failure to comply with the registration law is a fourth-degree crime.⁵²

2. Notification Statute

Part of the New Jersey registration statute requires local law enforcement to notify communities of certain sex offenders in the neighborhood.⁵³ This community notification law provides for three levels of notification, from limited to extensive, depending on the degree of the risk of reoffense.⁵⁴ All

46. N.J. STAT. ANN. § 2C:7-2(a).

47. N.J. STAT. ANN. § 2C:7-2(c)(3).

48. N.J. STAT. ANN. § 2C:7-2(e).

49. N.J. STAT. ANN. § 2C:7-2 (c)(2)(3); Ruess, *supra* note 5, at A1.

50. N.J. STAT. ANN. § 2C:7-2(f).

51. N.J. STAT. ANN. § 2C:7-5(a).

52. N.J. STAT. ANN. § 2C:7-2(a). Persons convicted of a fourth degree crime are subject to eighteen months in jail. Furlong, *supra* note 23, at 12.

53. N.J. STAT. ANN. §§ 2C:7-6 to 7-11. The following states provide, in their registration statutes, some form of community notification: Alaska, Arizona, California, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, and Washington. New Jersey's statute is unique in that it is the only one in which community notification is mandatory for those in the highest risk category rather than up to the discretion of local officials.

54. N.J. STAT. ANN. § 2C:7-8(c) provides:

(1) If the risk of reoffense is low, law enforcement agencies likely to encounter the person registered shall be notified;

(2) If risk of reoffense is moderate, organizations in the community including schools, religious, and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection;

(3) If risk of reoffense is high, the public shall be notified through means in accordance with the Attorney General's guidelines, designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

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

registrants are subject to law enforcement notification at a minimum.⁵⁵ Police will notify neighbors of sex offenders deemed to be at high risk for reoffense.⁵⁶ Notification will be given to school officials and religious and community group leaders of those offenders deemed to be at a moderate risk of reoffense.⁵⁷ For those that are low risk offenders, only law enforcement officials will receive notification.⁵⁸

The New Jersey Law also provides guidelines to determine the risk of reoffense.⁵⁹ Such factors include whether the offender is released on probation or parole, whether he is receiving counseling, treatment, or therapy, the physical condition of the offender, such as advanced age or illness, and whether the offender served the maximum term.⁶⁰ Other considerations are whether a weapon was used in the offense, the relationship between the victim and the offender, whether the offender's behavior is characterized as

55. N.J. STAT. ANN. § 2C:7-1(b).

56. N.J. STAT. ANN. § 2C:7-8(c)(3). Of approximately 1,107 sex offenders who were ranked by prosecutors, 56 offenders were found to be high-risk, subject to neighborhood notification. Ruess, *supra* note 5, at A1.

57. N.J. STAT. ANN. § 2C:7-8(c)(2). 527 out of approximately 1,107 ranked sex offenders in New Jersey were considered moderate-risk offenders and subject to notification to schools near their residences and other agencies dealing with women or children. Ruess, *supra* note 5, at A1.

58. N.J. STAT. ANN. § 2C:7-8(c)(1). 524 sex offenders, ranked out of approximately 1,107 in New Jersey, were deemed to pose a low risk to the community and are not subject to community notification. Ruess, *supra* note 5, at A1. For an example of how one court has applied the Attorney General's guidelines to a convicted sex offender found to be a moderate-risk, see *In re G.B.*, 669 A.2d 303 (N.J. Super. 1995).

59. See N.J. STAT. ANN. 2C:7-8(b). The registration law provides a nonexclusive list of factors to be considered in assessing the risk of reoffense:

- (1) Conditions of release that minimize risk of reoffense, 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 or reoffense, including but not limited to advanced age or debilitating illness;
- (3) Criminal history factors indicative of high risk of re-offense, including:
 - (a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior;
 - (b) Whether the offender served the maximum term;
 - (c) Whether the offender committed the sex offense against a child;
- (4) Other criminal history factors to be considered in determining risk, including:
 - (a) The relationship between the offender and the victim;
 - (b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury;
 - (c) The number, date and nature of prior offenses;
- (5) Whether psychological or psychiatric profiles indicate a risk of recidivism;
- (6) The offender's response to treatment;
- (7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence; and
- (8) Recent threats against persons or expressions of intent to commit additional crimes.

N.J. STAT ANN. § 2C:7-8(b).

60. *Id.*

repetitive or compulsive, the number of sexual offenses the offender has been convicted of, and the offender's recent behavior or intent to commit additional crimes.⁶¹

3. Judicial Review Proceedings

Though the New Jersey Supreme Court upheld the law's constitutionality, the *Poritz* court noted the notification statute impinges on former sex offenders' liberty interests.⁶² As such, the law entitles the offenders protection of procedures designed to assure the risk of reoffense and extent of notification is evaluated fairly before notification is implemented.⁶³ The court concluded that judicial review through a summary proceeding should be available prior to notification if requested by any person determined to be a moderate or high risk offender.⁶⁴

The court ordered the Attorney General to formulate procedures which would ensure an offender is given timely notice to challenge the notification.⁶⁵ If the offender files an objection with the court, a date will be set for a summary hearing and decision on the issue.⁶⁶ A judge will be

61. *Id.*

62. *Doe v. Poritz*, 662 A.2d 367,419-420 (N.J. 1995) (after conviction, "classification as a 'repetitive' and 'compulsive' sex offender inflicts a greater stigma than that resulting from the conviction for a sex offense when there is no such classification." (quoting *State v. Howard*, 539 A.2d 1203 (N.J. 1988)).

Under Tier One, only the prosecutor and local law enforcement would receive notification and [the offender] would be free, to the degree possible, to rehabilitate his name and standing in the community. However, if classified in Tier Two or Three, [the offender's] name and standing in the community would be threatened to the extent that his prior undisclosed criminal history and his new classification become known. We conclude that the consequences to [the offender's] reputation from classification in Tier Two or Three implicate a liberty interest.

Id. at 419.

63. *Id.* at 381. The court based its finding on New Jersey's doctrine of fundamental fairness, noting: "Fundamental fairness serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily." *Id.* at 420.

64. *Id.* at 381. Only those offenders who are categorized as tier two (moderate-risk) or tier three (high-risk) will be privileged with the opportunity for a judicial hearing prior to notification. This is because only moderate or high-risk offenders are subject to community notification.

65. *Id.* The written notice shall inform the offender of the proposed level and specific details of notification. *Id.* It shall further inform him that unless the offender applies to the court on or before the date mentioned in the notice, the notification will go into effect. *Id.* If the offender makes such application prior to that time, no notification will be made until and unless affirmed by the court. *Id.* If the proposed level of notification is reversed, then the prosecutor provides notification in accord with the reasons for reversal. *Id.*

66. *Id.* at 382.

appointed and a hearing conducted. A three-judge panel will review the conclusions of the deciding judge to ensure fairness in treatment.⁶⁷

Furthermore, a bench manual will be maintained by the court to guide the reviewing judges throughout the state of New Jersey in their determinations.⁶⁸ The court noted the legislature may designate or create an agency to oversee the different levels of classifications rather than place the burden on state courts.⁶⁹ The court suggested it might be preferable to have an agency make the determinations to promote uniformity in notification matters.⁷⁰

Additionally, the court held the judicial proceedings would be civil, not criminal.⁷¹ As such, counsel will not be provided for those sex offenders through the Public Defender's Office. This is because the Sixth Amendment to the United States Constitution provides that assistance of counsel shall be afforded only in criminal prosecutions.⁷²

The court proposed to remedy this problem by ordering designated judges to assign counsel to indigent claimants on a pro bono basis.⁷³ Chief Justice Wilentz⁷⁴ directed the fifteen selected judges in New Jersey to choose the

67. *Id.* The purpose of the three-judge panel is to oversee the fair treatment of the appointed judge's decision.

68. *Id.* at 386.

69. *Id.*

70. *Id.* The court stated:

We do not suggest that entities other than the courts could not constitutionally afford the process required to meet the constitutional obligation. For instance, the Legislature could designate or create an appropriate agency to oversee tier classifications and manner of notification, so long as the basic elements of due process, such as notice, an opportunity to be heard and to confront witnesses, are provided. Such an agency may better promote uniformity in these matters than would the courts. We do not suggest that one is better than the other but simply want to note that our decision does not prevent further legislative action in this area.

Id.

71. See Martin L. Haines, *Making Myth Into Law*, N.J.L.J., Dec. 18, 1995, at 23.

72. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

73. Haines, *supra* note 71, at 23.

74. Chief Justice Wilentz wrote the majority opinion in *Doe v. Poritz*, 662 A.2d 367 (N. J. 1995).

“best and brightest” attorneys in the state to represent the sex offenders.⁷⁵ John Furlong, Doe’s attorney in the *Poritz* case, fears the pro bono program may lead sex offenders who lose their plea to turn around and sue their attorneys for misrepresentation.⁷⁶ Others argue that Megan’s Law is a creature of the legislature, and as such, should be backed by proper state funding. They claim the attorneys of New Jersey should not be funding, through pro bono assignments, legislative mandates.⁷⁷

III. CONSTITUTIONAL CHALLENGE

A. *Ex Post Facto* Clause

The Constitution explicitly orders that no state shall pass any ex post facto law.⁷⁸ The Ex Post Facto Clause prohibits a state from enacting any law which imposes punishment for an act which was not punishable when committed or increases the amount of punishment annexed to a crime when it was committed.⁷⁹

The drafters of the Constitution placed great emphasis on the principle that, in the new Union recently released from tyranny of British rule, citizens should not be faced with the prospect that their conduct—innocent when carried out—could be rendered criminal after the fact.⁸⁰ Therefore, the Ex Post Facto Clause was included in the Constitution.

The Ex Post Facto Clause has been interpreted by the courts as a prohibition against state governments passing laws which have the effect of punishing citizens for conduct that would not have been punishable when committed.⁸¹ Such a provision assures that citizens can rely on the present meaning of legislative acts and will be given fair and explicit notice of any change in the law.⁸²

75. Tim O’Brien, *Welcome To Megan’s List; Wilentz Conscripts ‘Best and Brightest’ of Private Bar for Onslaught of Tier Challenges*, N.J.L.J., Oct. 2, 1995, at 1. The Chief Judge probably desires the ‘best and the brightest’ attorneys to represent appealing sex offenders so as to avoid a possible Sixth Amendment challenge regarding inadequate counsel. *See id.*

76. *Id.* Furlong notes that the burden shifts to the sex offender to prove, by a preponderance of the evidence that the classification is not a fair assessment of his likelihood to reoffend. He claims: “Prosecutors are immune from liability, but not private lawyers, and you can be [sure] that some offenders who lose will turn around and sue their lawyer.” *Id.* (quoting Furlong).

77. *Id.*

78. U.S. CONST. art. I, § 10.

79. *Id.* *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (holding that relief under the Ex Post Clause is not an individual’s right to less punishment, but lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was committed).

80. *Artway v. Attorney Gen. of New Jersey*, 876 F. Supp. 666, 671 (D.N.J. 1995) (citing *Calder v. Bull*, 3 U.S. (3. Dall.) 386, 389 (1798)). The Constitution prohibits both Congress and states from enacting ex post facto laws. U.S. CONST. Art. I, §§ 9, 10.

81. *Artway*, 876 F. Supp. at 671.

82. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

The United States Supreme Court has struggled with developing an accurate test to determine whether a law is ex post facto. In *Calder v. Bull*,⁸³ the Court began by establishing the framework for ex post facto analysis. This framework, known as the *Calder* categories, provides a law will violate the ex post facto prohibition if it changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when it was committed.⁸⁴ Later on, in *Kring v. Missouri*,⁸⁵ and *Thompson v. Utah*,⁸⁶ the Court broadened the *Calder* categories to include any law which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage or deprives a defendant of a substantial right involved in his liberty. However, in *Collins v. Youngblood*,⁸⁷ the Court reversed and held that cases such as *Kring* and *Thompson* departed from the original meaning of the Ex Post Facto Clause and thus, overruled both cases, re-establishing the *Calder* categories as the controlling definition of the ex post facto law.⁸⁸

Even prior to *Collins v. Youngblood*, the Supreme Court expressed reliance on the *Calder* categories when deciding *Weaver v. Graham*.⁸⁹ In *Weaver*, the Court held that repealing a Florida statute which reduced amounts of "good-time" for good conduct deducted from a prisoner's sentence violated the Ex Post Facto Clause when applied to a prisoner whose crime was committed before the new statute's enactment.⁹⁰ The test the *Weaver* Court used for measuring legislation against the ex post facto provision in the Constitution ensured that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly

83. 3 U.S. (3 Dall.) 386 (1798).

84. In *Calder*, the Court interpreted the ex post facto provision to prohibit: (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; (2) Every law that aggravates a crime, or makes it greater than it was, when committed; (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; (4) Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Id.* at 389.

85. 107 U.S. 221 (1882), *overruled by* *Collins v. Youngblood*, 497 U.S. 37 (1990).

86. 170 U.S. 343 (1898), *overruled by* *Collins v. Youngblood*, 497 U.S. 37 (1990).

87. *Collins v. Youngblood*, 497 U.S. 37 (1990).

88. *Id.* (holding that disadvantage and deprivation of a substantial right is not the proper test to be applied, but rather, the appropriate test is whether the statute is punishment). Citing *Calder*, the *Youngblood* Court held a law will violate the Ex Post Facto Clause if it (1) punishes as a crime an act previously committed, which was innocent when done; (2) makes more burdensome the punishment for a crime, after its commission; or (3) deprives one charged with a crime of any defense available according to the law at the time the act was committed. *Id.*

89. 450 U.S. 24 (1980).

90. *Id.* Mr. Weaver was sentenced to 15 years in prison for second-degree murder. *Id.* at 25. At the time of his sentencing, the Florida statute provided a formula for deducting gain-time [good-time] credits from sentences. *Id.* at 26 (citing FLA. STAT. § 944.27(1) (1975)). According to the formula, the authorities granted five, ten, and fifteen days per month off the prisoner's respective years in prison. *Id.* In 1978, the Florida Legislature repealed the statute and enacted a new formula for monthly gain time deductions saying authorities shall grant three, six, and nine days for the same corresponding in-prison years. *Id.*

changed. Such a holding restricts governmental power by restraining arbitrary and potentially vindictive legislation.⁹¹

The *Weaver* Court found that two critical elements must be present for a law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before it was enacted, and it must disadvantage the offender affected by it.⁹² The Court held a law does not have to impair a vested right to violate the ex post facto prohibition.⁹³ It is not an individual's right to diminished punishment that is deemed critical to granting relief under the Ex Post Facto Clause, but rather, lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.⁹⁴ Thus, even if a statute merely alters penal provisions accorded by the legislature, it violates the Ex Post Facto Clause if the statute is both retrospective and more onerous than the law in effect on the date of the offense.⁹⁵

B. Meaning of Punishment

In deciding whether the registration and notification laws were more burdensome than the law in effect on the date of Doe's crime, the *Poritz* court engaged in an ex post facto analysis of the statutes, focusing on the purpose of the legislation. The court found if the statute imposed a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it would be considered penal. However, if it imposed a disability not to punish but to accomplish some other legitimate governmental purpose, then it would not be considered penal for purposes of constitutional analysis.⁹⁶ The court concluded that the controlling characterization of the statutes would depend on the evident purpose of the legislature.⁹⁷

1. Legislative Intent

In assessing the legislature's intent in creating the sex offender registration and notification laws, the court found the statutes were remedial in

91. *Id.* at 28.

92. *Id.* at 27 (citing *Lindsey v. Washington*, 301 U.S. 397, 401 (1937), and *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1795)). In *Poritz*, the sex offender registration and notification laws apply to John Doe because of acts that he committed years before the statute's enactment. Therefore, the legislation as applied to him is retroactive.

93. *Weaver*, 450 U.S. at 29.

94. *Id.* at 30.

95. *Id.* at 30-31.

96. *Doe v. Poritz*, 662 A.2d 367, 395 (N.J. 1995).

97. *Id.* at 392 (noting: "Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction [will] turn[] on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose'. . . ." (quoting *United States v. Salerno*, 481 U.S. 739, 747 (1987))).

nature—crafted to accomplish a legitimate governmental purpose.⁹⁸ The court noted that the laws were designed solely to enable the public to protect itself from danger posed by sex offenders who are widely regarded as having the highest risk of recidivism.⁹⁹

Despite Doe's contention that the law imposes a retributive and deterrent effect upon all convicted sex offenders, the court found that the law did not constitute punishment because it was not designed for deterrent or retributive purposes.¹⁰⁰ The court noted the deterrent and retributive effects are not the design of the statute, but rather, the inevitable consequence of the remedial provisions.¹⁰¹

98. *Id.* at 422-23. N.J. STAT. ANN. § 2C:7-1 provides:

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

N.J. STAT. ANN. § 2C:7-1 (West 1995).

99. *Poritz*, 662 A.2d at 375. The court stated:

As a group, sex offenders are significantly more likely than other repeat offenders to reoffend with sex crimes or other violent crimes, and that tendency persists over time. A 15-year follow-up study by the California Department of Justice of 1,362 sex offenders arrested in 1973 found that 19.7% were rearrested for a subsequent sexual offense. Those first arrested for rape by force or threat had the highest recidivism rate, 63.8% for any offense, and 25.2% for a subsequent sex offense. Sex offenders were five times as likely as other violent offenders, and more than six times as likely as all types of offenders, to reoffend with a sex offense. Similarly, a Washington State study of 1,373 adult male sex offenders convicted between 1985 and 1991 and released by the end of 1991 showed that after seven years of follow-up, 12% were rearrested for sex offenses and an additional 3% were rearrested for violent offenses. Of the 110 offenders reconvicted of a sex offense, 43% were reconvicted of a more serious sex offense

Id.

100. *Id.* at 391 (noting that laws are deemed punitive if the penal effect is caused by a part of the law which does not serve a regulatory purpose). "We find it difficult to accept the notion that the Registration and Notification Laws are designed or are likely to deter repetitive and compulsive offenders who were not previously deterred by the threat of long-term incarceration." *Id.* at 404.

101. *Id.*

Even assuming that removing the shield of anonymity constitutes deterrence, and therefore is arguably punitive, that is the inevitable consequence of these remedial measures It is not intended as punishment but rather is a consequence that is simply unavoidable, for it goes to the very heart of the remedy: that which is allegedly punitive, the knowledge of the offender's record and identity, is precisely that which is needed for the protection of the public.

Id.

Furthermore, the court explained the remedial nature of the law by noting the statute only applies to persons found to be repetitive and compulsive sex offenders, i.e., those most likely to reoffend.¹⁰² In addition, the law applies to those persons without culpability such as those found not guilty by reason of insanity—all classes of persons whom the court found would be excluded if punishment were the goal.¹⁰³

Moreover, the court held if the statute is to effectuate its remedial purpose, the law must apply to all sex offenders, including those convicted prior to the statute's enactment.¹⁰⁴ If the statute did not apply to those offenders, the law's effectiveness would be severely limited.¹⁰⁵ If the Legislature chose to exempt previously-convicted offenders, the court reasoned that the notification provision would not have provided protection on the day it became law because it would not have applied to anyone.¹⁰⁶ The court held there would be no justification for protecting children of the future from the risk of reoffense by future offenders, but not today's children from the risk of reoffense by previously-convicted offenders.¹⁰⁷

2. Legislative Effect

In *Poritz*, Justice Stein disagreed with the majority's analysis and conclusion, implying the majority relied too much on legislative history and too little on reality. In a very persuasive dissenting opinion, Justice Stein rejected the court's use of exclusive reliance on legislative intent, noting that determination of punishment should depend on the purposes actually served by the sanction, not the underlying nature of the proceeding which gave rise to the sanction.¹⁰⁸ He concluded the laws were punishment in effect.

In his dissent, Justice Stein stated that the court should have used factors taken from the case of *Kennedy v. Mendoza-Martinez*¹⁰⁹ to determine whether the New Jersey registration and notification laws are punitive or

102. *Id.*

103. *Id.* at 372.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The court noted the number of already-convicted sex offenders vastly exceeds the number of those who, after passage of the notification law, will be convicted and released.

108. *Id.* at 431 (Stein, J., dissenting) (quoting *United States v. Halper*, 490 U.S. 435, 447 n.7 (1989)).

109. 372 U.S. 144, 168-69 (1963). In *Mendoza-Martinez*, the issue concerned the constitutionality of provisions of the Nationality Act of 1940 and the Immigration and Nationality Act of 1952, that mandated loss of citizenship for the offense of leaving or remaining outside the country to evade military service. The statutes were challenged as imposing punishment without due process, in that the prospective deportees were not accorded rights guaranteed by the Fifth and Sixth Amendments, including notice, compulsory process, confrontation, trial by jury, and assistance of counsel. In determining that the sanction of deportation constituted punishment, the Court referred to tests traditionally applied to determine whether an Act of Congress is penal or regulatory. The determining factors came to be known as the seven-factor *Mendoza-Martinez* test. *Id.* at 168-69.

regulatory.¹¹⁰ These factors include whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, and whether it comes into play on a finding of scienter.¹¹¹ Other factors include whether the law's operation will promote traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose may be assignable for the law, and whether the law appears excessive in relation to the alternative purpose for which it is assigned.¹¹²

For example, in *In re Reed*,¹¹³ the California Supreme Court applied the *Mendoza-Martinez* test and held that sex offender registration was punishment. The petitioner was convicted of soliciting "lewd or dissolute conduct" and was ordered to register as a sex offender.¹¹⁴ Applying the *Mendoza-Martinez* factors, rather than looking at legislative intent, the court held that mandatory registration of sex offenders who were convicted under a misdemeanor disorderly conduct statute was an affirmative restraint in effect and therefore constituted punishment.¹¹⁵

110. *Poritz*, 662 A.2d at 433 (Stein, J., dissenting). The *Poritz* majority rejected the *Mendoza-Martinez* factors in determining whether the statute imposes punishment. The court argued that the *Mendoza-Martinez* factors are more properly applied when the question is whether a proceeding should be characterized as civil or criminal, not whether the sanction involved is remedial or punitive. *Id.* at 403.

111. *Mendoza-Martinez*, 372 U.S. at 168.

112. *Id.* at 168-69. In *State v. Noble*, a case involving retroactive application of Arizona's sex offender registration statute, the Arizona Supreme Court noted that the *Mendoza-Martinez* factors focus appropriate attention on the effects of the registration requirement of convicted sex offenders and on the rationality between the requirement and its purported non-punitive function. These factors were used to determine whether the Arizona registration statute was punitive. The court found, though registration had historically been regarded as punishment, because the Arizona statute limits access to the information, the stigma resulting from registration is limited. The court held that if the statute extended to community notification [such as New Jersey's law, there would be a stigmatic effect. The potential stigma would have convinced the *Noble* court that the statute operates primarily as punishment, and thus may not be applied retrospectively. *State v. Noble*, 829 P.2d 1217, 1222-23 (Ariz. 1992).

113. 663 P.2d 216 (Cal. 1983). California law requires convicted sex offenders to register with the local police chief or county sheriff and to furnish a current address, fingerprints, and photograph, as well as any information deemed necessary by California's Department of Justice. *See* CAL. PENAL CODE §§ 290-290.7 (West 1988 & Supp. 1996). The statute imposes the same requirements on persons convicted of sexual crimes in other states who subsequently relocate to California. *See* § 290(a)(2). Following initial registration at the time of release, parole, probation, or relocation to the state, sex offenders must inform law enforcement officials of any changes of address in writing within ten days. *See* § 290(f). Failure to do so results in mandatory jail sentences that increase in length depending on the severity of the underlying offense and the number of prior violations. *See* § 290(g). California also has a "900" telephone number which members of the public can call to find out whether an individual is a registered offender. *See* § 290.4(a)(3). The operator will provide the offender's physical description, town of residence, and zip code. *See* § 290.4 (a)(2)-(3). To obtain such information, the caller must provide the first and last names and middle initial of the suspected offender. *Id.*

114. *In re Reed*, 663 P.2d 216 (Cal. 1983).

115. *Id.* at 217. The analysis in this case was on whether the registration statute violated the constitutional prohibition against cruel and unusual punishment, rather than ex post facto prohibitions. However, because the analysis both centers on whether the statute is punishment, the decision is relevant in an ex post facto context as well.

A similar argument can be made about public notification under Megan's Law. By notifying the public of a sex offender's presence in the community, the state imposes an affirmative disability on the offender because the offender will be forced to experience a lifetime stigma that will attach from the notification.¹¹⁶

a. Historical Punishment

Justice Stein wrote in *Poritz* that a comprehensive and balanced inquiry should be made into whether the notification law imposes punishment. Such consideration should include whether its impact, the widespread publicizing of information concerning sex offenders within their community, is consistent with practices historically employed as punishment in the past.¹¹⁷

One such practice historically utilized for punishing criminals was public humiliation and degradation.¹¹⁸ Such method of punishment, developed during the seventeenth century, was branding, in which a single letter representing the first letter of the crime committed was burned onto the wrongdoer's face.¹¹⁹ Murderers were branded with the letter "M," thieves with a "T," fighters and brawlers with an "F," and vagrants with a "V."¹²⁰ Historians note the branding had the effect of a spell.¹²¹ It took the criminal out of ordinary relations with humanity, and enclosed him in a sphere by himself.¹²²

The purpose of branding in the seventeenth century was to make certain persons or groups of persons easily identifiable and thus, easily ostracized or

116. If everyone in the community knows the horrible crime(s) that the offender is supposed to have committed, people will view him in light of those offenses and treat him like an outcast. Psychologists believe that offenders who are released into a community that treats them like an animal, rather than a human being, sooner or later believe themselves that they are animals and so behave accordingly. See Joan Abrams, *Sex Offenders: After Prison Confined to Their New Life*, LEWISTON MORN. TRIB., Dec. 5, 1993, at 1A. Offenders believe that public notification may lead to increases in recidivism rates. One offender subjected to public notification stated: "A lot of offenders still in prison would crack under the pressure I've been under," and some will be driven to commit crimes again." *Id.*

117. *Doe v. Poritz*, 662 A.2d 367, 437 (1995) (Stein, J., dissenting).

118. Jon Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1360.

119. *Id.* at 1361 (citing HARRY E. BARNES, *THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN* 43 (Patterson Smith, rev. ed. 1972)).

120. Brilliant, *supra* note 118, at 1361.

121. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 53-54 (Ohio State U. Press, 1962).

122. *Id.*

But the point which drew all eyes, and, as it were, transfigured the wearer, so that both men and women, who had been familiarly acquainted with Hester Prynne, were now impressed as if they beheld her for the first time, was that SCARLET LETTER, so fantastically embroidered and illuminated upon her bosom. It has the effect of a spell, taking her out of the ordinary relations with humanity, and inclosing [sic] her in a sphere by herself.

Id.

set apart. An example of branding [without fire] was the requirement in Nazi Germany that Jewish persons wear the Star of David on a sleeve so they might be easily identified.¹²³

As society's view of these measures changed over time, however, American courts began to declare various forms of branding to be cruel and unusual punishment in violation of the United States Constitution.¹²⁴ Most recently, in February of 1995, a federal district judge likened the New Jersey sex offender notification law to the kind of branding utilized in colonial times, and found the notification law unconstitutional because it imposes punishment upon the released sex offender.¹²⁵

b. *United States District Court v. New Jersey Supreme Court*

1. *Artway v. Attorney General of New Jersey*

In *Artway v. Attorney General of New Jersey*, the federal court examined Megan's Law and came to a conclusion contrary to *Poritz*.¹²⁶ The *Artway* court held that the notification provision is punishment and cannot be applied retroactively or it would violate the Ex Post Facto Clause of the Constitution.¹²⁷

Artway involved a forty-nine year old resident of New Jersey who had served time in prison for a sodomy conviction.¹²⁸ Upon his release from

123. *Artway v. Attorney Gen. N.J.*, 876 F. Supp. 666, 687 (D.N.J. 1995).

124. Brilliant, *supra* note 118, at 1362. In Illinois, a judge forced drunk drivers to place an apology and a photograph in local newspapers. The judge justified the sentence by noting the "open and public admission . . . make[s] it more likely that the [offender] will not commit further crimes." Such sentencing subjects the offender to punishment by public humiliation. *Id.* at 1363 (citing Joseph R. Tybor, *Unusually Creative Judges Now Believe Some Punishments Can Fit the Times*, CHIC. TRIB., July 3, 1988, § 3, at 1, col. 1). In a Florida case, the court required a convicted drunk driver to place a bumper sticker in his car that read: "CONVICTED D.U.I.-RESTRICTED LICENSE." The court continually referred to this requirement as punishment. *Id.* at 1369 (citing *Goldschmitt v. Florida*, 490 So. 2d 123, 124 (Fla. Ct. App. 1986)). The most extreme case was in Oregon, where the court subjected a released child molester to a punitive requirement that he place a sign on both sides of his car and on the door of his home stating in three-inch lettering: "DANGEROUS SEX OFFENDER-NO CHILDREN ALLOWED." *Id.* at 1365-66 (citing *State v. Bateman*, 95 Or. App. 456, 771 P.2d 314 (1989)). See also Rosalind K. Kelley, *Sentenced To Wear The Scarlet Letter: Judicial Innovations In Sentencing-Are They Constitutional?*, 93 DICK. L. REV. 759 (1989); Jeffrey C. Filcik, *Signs Of The Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & CONTEMP. L. 291 (1990); Leonore H. Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613 (1988).

125. *Artway*, 876 F. Supp. at 687.

126. *Artway* held that New Jersey's notification statute applied in retrospect to sex offenders is a violation of the Ex Post Facto Clause of both the federal and state constitutions. *Poritz*, on the other hand, upheld the statute's constitutionality, holding that the statute does not impose punishment, and therefore, is not ex post facto.

127. *Artway*, 876 F. Supp. at 691.

128. *Judge Strikes Down Portion of New Jersey Sex Offender Law*, OREGONIAN, Mar. 1, 1995, at A12. Alexander Artway was convicted in 1965 of statutory rape and in 1969 of sodomizing a 21-year-old woman.

prison, Artway was required to register in the state of New Jersey as a convicted sex offender pursuant to Megan's Law.¹²⁹ Artway claimed in his pleadings that Megan's Law deprived him of his right to due process, equal protection and privacy, that the law violates the constitutional prohibition against cruel and unusual punishment, ex post facto laws and protection from bills of attainder.¹³⁰

The Federal District Court upheld the registration requirement but struck down the provisions allowing community notification for sex offenders sentenced prior to passage of the law.¹³¹ The *Artway* court barred the state from releasing to the public any information on sex offenders whose crimes were committed before Megan's Law took effect on October 31, 1994.¹³² The court wrote that a privacy interest is implicated when the government assembles diverse pieces of information into a single package and disseminates that package to the public.¹³³ Such notification ensures that a person cannot assume anonymity—it prevents a person's criminal history from fading into obscurity and being completely forgotten.¹³⁴

The *Artway* court held the notification law constituted additional punishment upon convicted sex offenders because such notification is likely to result in the ostracizing of the offender, incite violence against him, reduce his job opportunities, and make it more difficult for him to lead a normal life.¹³⁵

2. *E.B. v. Poritz*

Similarly, on February 1, 1996, in *E.B. v. Poritz*, United States District Court Judge Politan¹³⁶ barred New Jersey authorities from effecting their plans to notify residents in Englewood, New Jersey about a released sex offender and murderer, known under the alias of "E.B."¹³⁷

129. *Artway*, 876 F. Supp. at 668. Artway had been classified by psychiatrists as being a repetitive and compulsive sex offender.

130. *Id.* at 669.

131. *Id.* at 692.

132. *Id.*

133. *Id.* at 688.

134. *Id.*

135. *Id.* Artway is now pending appeal in the United States Court of Appeals for the Third Circuit.

136. Judge Politan served as the presiding judge in *Artway v. Attorney Gen. of New Jersey* where he held the notification law to be unconstitutional when applied in retrospect. See discussion *supra* notes 126-135 and accompanying text.

137. *E.B. v. Poritz*, 914 F. Supp. 85 (D.N.J. 1996). In 1974, E.B. pled guilty to three separate offenses of sexual abuse against young boys and was subsequently sentenced to thirty-three years in the Adult Diagnostic and Treatment Center (ADTC). *Id.* Thereafter, in 1976, E.B. pled guilty to two separate counts of murder and was subsequently sentenced to two concurrent terms of twenty years' incarceration. This sentence was to run consecutive to the sentence for his sexual assaults. *Id.*

On June 15, 1989, E.B. was released from prison, subject to supervised parole until July 23, 2006.¹³⁸ In accordance with Megan's Law, E.B. registered with the Englewood Police Department on February 25, 1995.¹³⁹ Eight months after his registering, on October 24, 1995, E.B. learned that he had been classified as a high risk offender.¹⁴⁰ As a result, the Bergen County Prosecutor's Office sought to notify the community of E.B.'s criminal history.¹⁴¹

After attempting, unsuccessfully, to halt the proposed notification in New Jersey state courts,¹⁴² E.B. brought suit in Federal District Court requesting a Temporary Restraining Order to prevent such notification until an expected appellate decision is made on the constitutionality of Megan's Law.¹⁴³ The United States District Court granted the injunction, noting that the notification law improperly imposes punishment on someone who has already paid his debt to society, thus, stigmatizing him and subjecting him to possible vigilante attacks.¹⁴⁴

138. *Id.* On June 5, 1979, E.B. was paroled from the sexual offense sentence after serving only five years and ten months of a thirty-three year sentence. *Id.* E.B. then served his concurrent twenty-year sentences for murder. *Id.* He was paroled slightly ten years later. *Id.* E.B. currently receives aftercare treatment at the Adult Diagnostic and Treatment Center, attends Church regularly, is married and owns a home in Englewood, New Jersey. *Id.*

139. *Id.*

140. *Id.* See discussion of tier classifications *supra* notes 54-61 and accompanying text.

141. The Prosecutor proposed to notify the following: all public and private educational institutions and organizations within a one-half mile radius of E.B.'s home, as well as people who reside or work within a one-block radius of E.B.'s home. *E.B.*, 914 F. Supp. at 85.

142. E.B. applied for judicial review of the tier three classification and of the proposed notification. *Id.* On December 7, 1995, the New Jersey Superior Court, Law Division, held a hearing and on December 18, 1995, affirmed the Prosecutor's tier classification and permitted notification to all public and private educational institutions and licensed day care centers and summer camps in Englewood, Teaneck, Bergenfield, Tenafly, Englewood Cliffs, Leonia and Fort Lee, New Jersey. *Id.* Further, the court ordered notification to all residences within a one-block radius of E.B.'s home. *Id.* E.B. also filed and was granted a Notice of Appeal and Emergent Application for a Stay of Notification issued from the New Jersey Superior Court, Appellate Division on December 20, 1995. *Id.* Subsequently, the court affirmed the Law Division on December 22, 1995, but granted effect to the Stay until December 26, 1995. *Id.* On January 18, 1996, the New Jersey Supreme Court denied E.B.'s petition for certification of appeal. *Id.* E.B. then brought suit in Federal District Court on January 19, 1996, challenging the proposed notification. *Id.*

143. *Id.* A decision is pending in the 3rd U.S. Circuit Court of Appeals in the case of *Artway v. Attorney Gen. of N.J.*, 876 F. Supp. 666 (D.N.J. 1995) (appeal pending, Nos. 95-5157, 95-5194, 95-5195 (3d Cir.)).

144. James Ahearn, *Would-Be Senators Play To The Galleries On E.B. Toricelli and Zimmer Should Know Better*, R. N. N.J., Feb. 7, 1996, at N7. E.B. presented the court with a threatening letter which he received at his residence on January 31, 1996. The letter was submitted as proof that E.B. would suffer irreparable harm if community notification was permitted. The letter states as follows:

It is disgusting that they would allow a filthy repulsive piece of garbage like you out of prison. They should have sent you to the gas chamber. You deserved to die. Anyone who assaults children does not have the right to live. We do not want the likes of you in our neighborhood[sic]. You should go back to prison where you can be around bums, criminals and sub-humans like you. People like you never change. You will always be a criminal. Go away, we do not want you here. We do not want

IV. WAS *PORITZ* CORRECTLY DECIDED?A. *Vigilantism*

The problems enumerated by the *Artway* and *E.B.* courts have been documented in several incidents where released offenders have found it very difficult to lead normal lives once the public received notification of their reintegration into society. Offenders who have been targeted after notification have been driven from communities or otherwise harassed.

In July of 1993, the home of a convicted child rapist was burned to the ground after his neighbors were warned of his release from prison.¹⁴⁵ Furthermore, a survey conducted by Washington State Institute for Public Policy at Evergreen State College revealed that over a three-year period, fourteen notification-related incidents took place in Washington.¹⁴⁶ The incidents ranged from situations where offenders and sometimes their families, received taunts, to a case in which one offender was punched in the nose when he opened his door.¹⁴⁷

More recently, in early 1995, a father and his son broke into a Phillipsburg, New Jersey home looking for a released child molester who had been identified by county police.¹⁴⁸ Law-enforcement authorities had provided community residents with the address where the offender was to reside and distributed photographs of him.¹⁴⁹ The father and son assaulted the wrong individual. Their victim was a forty-one-year-old truck driver who had been staying at the home of the released sex offender.¹⁵⁰ The beating was so severe the victim had to be hospitalized.¹⁵¹

to live in fear that you will assault and kill [our] innocent children. You should kill yourself, you will never have a normal life, you have no good reason for living. You know that you are not normal and you know you need to die. Kill yourself and end the misery you have caused so many people. Make all the suffering go away, kill yourself and the sooner the better.

E.B., 914 F. Supp. at 91.

145. Lisa Anderson, *Demand Grows to ID Molesters, States Weigh Children's Safety Versus Offender's Rights*, CHI. TRIB., Aug. 15, 1994, at 1.

146. *Id.* Since Washington activated community notification, vigilante incidents have included arson, death threats, slashed tires, and loss of employment. See Jackson, *supra* note 4.

147. Anderson, *supra* note 145, at 1.

148. John Ritter, *Critics Say Law's Behind Surge In Vigilantism*, USA TODAY, Jan. 12, 1995, at A7. Michael Groff, age 25, was released from prison after serving four years of a 10-year sentence for sexual assault and endangering the welfare of a child. See *2 N.J. Men Charged in Beating Sparked By Sex Offender Law*, CHI. TRIB., Jan. 11, 1995, at 3 [hereinafter *2 N.J. Men*].

149. Ron Devlin, *Megan's Law: A New Scarlet Letter*, THE MORNING CALL, Jan. 15, 1995, at A1.

150. *Id.*; *2 N.J. Men*, *supra* note 148, at 3.

151. *Id.* Kenneth J. Kerekes Sr. and his son, Kenneth Jr., have been charged with assault, conspiracy, harassment, burglary, and criminal mischief. See Ritter, *supra* note 148, at A7.

Additionally, some residents of New Jersey protested outside the home of a convicted sex offender's mother.¹⁵² The residents handed out fliers to pedestrians with large pictures of the sex offender and the warning "BEWARE" in block letters.¹⁵³ The fliers also included a phone number to call to report the offender's location.¹⁵⁴ Some of the residents hinted they might take the law into their own hands if the offender appeared.¹⁵⁵ Two men stated: "We're waiting for him to come down . . . [we're] going to beat him up."¹⁵⁶ Another resident stated: "Let the criminal have a taste of being the victim."¹⁵⁷

1. New Jersey Supreme Court's Response to Vigilantism

The New Jersey Supreme Court, in deciding *Poritz*, did not concede that such vigilante acts have taken place or would in the future.¹⁵⁸ One reason the court had for upholding the constitutionality of Megan's Law was the justices' refusal to 'speculate' that the notification requirements would lead to a punitive response from the community, or that the media would not act responsibly in dealing with the public disclosures required by the law.¹⁵⁹ The court stated the strongest message would be delivered by the governor and other public officials as well as by community and religious leaders and the media, that this is a law that must be used to protect and not to punish, and all citizens must conform their conduct accordingly.¹⁶⁰ However, based on the history of past vigilante attacks, it is clear that the public has not

152. *Doe v. Poritz*, 662 A.2d 367, 430 (N.J. 1995) (Stein, J., dissenting) (quoting Rosemarie Ross, *Rapist, Beware: Residents' Fear Turns to Anger, Revenge*, N.J. HERALD & NEWS, Jan. 6, 1995, at A1, A4).

153. *Id.*

154. *Id.*

155. *Id.* (quoting Ron Day, *Rapist Beware: Angels Hand Out His Photo in Passaic*, N.J. HERALD & NEWS, Jan. 6, 1995, at A1, A4).

156. *Id.*

157. *Id.* at 431.

158. The court noted, "We do not perceive in this case a society clamoring for blood, demanding the names of previously convicted sex offenders in order to further punish them, but rather families concerned about their children who want information only in order to protect them." *Id.* at 377.

159. The court noted:

This Court has no right to assume that the public will be punitive when the Legislature was not, that the public, instead of protecting itself as intended, will attempt to destroy the lives of those subject to the laws, and this Court has no right to assume that community leaders, public officials, law enforcement authorities, will not seek to educate the public concerning the Legislature's intent, including appropriate responses to notification information . . . and this court has no right to assume the media will not act responsibly.

Id. at 376.

160. *Id.* The court warned that vigilantism and harassment would not be tolerated and refused to assume that the public would engage in it. *Id.*

conformed its conduct as the *Poritz* court anticipated. In fact, Justice Wilentz noted at the end of his majority opinion that the court had trepidation about its ruling.

We sail on truly uncharted waters, for no other state has adopted such a far-reaching statute. Despite the unavoidable uncertainty of our conclusion, we remain convinced that the statute is constitutional. To rule otherwise 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.¹⁶¹

While the remedy may seem simple to the *Poritz* court, due to the public harassment and vigilantism that has taken place, the registration and notification statutes have been facing legal challenges throughout the country.¹⁶² Registration statutes have routinely been upheld in Alaska, Arizona, Illinois, New Hampshire, and Washington.¹⁶³ However, a California court struck down a similar registration statute because it applied to a

161. *Id.* at 422. "What government faced here was a difficult problem, a question of policy, and it understandably decided that public safety was more important than the potential for unfair, and even severe, impact on those who had previously committed sex offenses." *Id.* at 422-23. However, it is unclear whether notification really makes a difference in preventing sexual assaults. In New Jersey, for example, even though police informed a community of a released sex offender, a 15-year-old boy was still lured into the offender's apartment and sexually assaulted. See Christi Parsons, *Notice Laws on Molesters Raise Flags*, CHI. TRIB., Nov. 8, 1995, at 1. See also Deborah Coombe, *Megan's Law Fails to Prevent Sex Attack*, STAR-LEDGER (Newark, N.J.), July, 31, 1995, at 1.

162. See Kathy B. Carter, *Retroactive Sex Crime Law Raises Thorny Issue*, STAR-LEDGER (Newark, N.J.), Jan. 15, 1995, at 1. Only two days after Megan's Law became effective, a federal district judge ordered a temporary injunction to prevent the enforcement of public notification. The defendant was a convicted rapist who had been released on January 1, 1995, the day the law became effective. The defendant was the first sex offender to challenge New Jersey's registration and notification statute. The District Court judge thought the notification provisions of the law could have a "punitive impact" upon the released offender and would subject the offender to "stigma and ostracism." The judge further thought that release of the information would harm the offender who had paid his debt to society, more than hurt the public by not identifying him. See *Diaz v. Whitman*, No. 94-6376 (D.N.J. Jan. 2, 1995). See also Bruce Fein, *Bill of Rights Not a Suicide Pact*, WASH. TIMES, Jan. 17, 1995, at A14.

163. *Rowe v. Burton*, 884 F. Supp. 1372, 1388 (D. Alaska, 1994); *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992); *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991); *State v. Costello*, 643 A.2d 531, 534 (N.H. 1994); *State v. Ward*, 869 P.2d 1062, 1068 (Wash. 1994) (holding that registration statutes are not punishment because they do not alter prior standards to the disadvantage of an offender).

minor category of sex offenders.¹⁶⁴ Community notification statutes have also been struck down as unconstitutional in Louisiana¹⁶⁵ and Alaska.¹⁶⁶

2. Future Effect of Megan's Law

The likely consequence of the registration and notification law is that sex offenders subject to its notification provision will simply avoid the requirements by moving, for example, to another neighborhood under an assumed name. One sex offender who is currently receiving treatment at the Adult Diagnostic and Treatment Center in Avenal, New Jersey, said, "I would be so afraid somebody would find out about me . . . and if they did find out, I'd just move out of state. I wouldn't have a choice. I would be forced to run from one place to the next. My greatest fear is I'd have to start my life over."¹⁶⁷

Forcing people to move from state to state in fear of their lives is punishment of a type that was not applicable to sex offenders who were convicted before Megan's Law was enacted. The United States Supreme Court has held that an increase in punishment regardless of its extent is ex post facto and therefore unconstitutional.¹⁶⁸

Applied to John Doe in the *Poritz* case, the sex offender notification law should be declared an increase in punishment because Doe will likely be subject to constant community harassment, endangered with the possibility of vigilante attacks, and burdened with the probability of losing his current job and remaining unemployable. This will all be due to branding and stigma that will attach to Doe once the public is informed that he is a released sex offender.¹⁶⁹

164. *In re Reed*, 663 P.2d 216, 222 (Cal. 1983). In this case, the petitioner was convicted of soliciting "lewd or dissolute conduct" from an undercover officer in a public restroom. *Id.* at 216. The individual was subsequently required to register as a sex offender. *Id.* The California Supreme Court held that mandatory registration of a sex offender convicted under misdemeanor disorderly conduct violates the California Constitution's cruel and unusual punishment provision. *Id.* at 222. The court determined that registration was punishment based on the factors enumerated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *Id.* at 218.

165. *See State v. Babin*, 637 So. 2d 814, 824 (Ct. App. La. 1994) (holding that a sex offender's condition of probation mandating public notification violated the Ex Post Facto Clause of both the United States and Louisiana Constitutions because the statute was not in effect before commission of the crime).

166. *See Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska, 1994) (holding that the plaintiff had a meritorious claim that the public notification provision in the Alaska Registration Act was punitive and violative of the Ex Post Facto Clause of the United States Constitution).

167. Mike Kelly, *Megan's Dilemmas*, REC. N. N.J., July 30, 1995.

168. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

169. Justice Stein stated:

The community's reaction to such notice is impossible to predict, but given the normal range of human emotion one reasonably could anticipate that notice of the presence of a sex offender will trigger fear, suspicion, hostility, anger, evasive behavior, ostracism, and in some cases derision, epithets and violence. To be sure,

By informing the public of Doe's presence, the community notification law will jeopardize his chances of reintegrating into society and leading a productive life.¹⁷⁰ Community notification destroys the anonymity that is crucial to reintegration. If the community treats Doe, a reformed sex offender, as a criminal, he will be unable to become a productive member of society.

Rehabilitation is an important aspect of an offenders life—it enables one to function as a law-abiding citizen, inapt to commit another sexual offense.¹⁷¹ With the notification law in place, there remains the possibility that other offenders will not be as willing to plead guilty to crimes out of fear the offense will brand them for the rest of their lives. Should a judge or jury find offenders not guilty, the likelihood of those individuals offending again is great, especially since therapeutic treatment will not have been provided to them.¹⁷²

And where will the New Jersey Legislature draw the line between which criminal releases to publicize? Today the community is told about convicted sex offenders in the community. Tomorrow, will communities be told of the release of convicted murderers, arsonists, robbers, etc.? At what point will those who have been convicted and served their sentence be allowed to live normal and productive lives? The Supreme Court must draw a bright line

the sex offender's quality of life will be adversely affected. Depending on circumstances, the sex offender might lose employment, friends, standing in the community, and might very well be subjected to community hostility so pervasive as to induce the offender to relocate.

Doe v. Poritz, 662 A.2d 367, 439 (D.N.J. 1995) (Stein, J., dissenting).

170. Public notification infringes on a former offender's rights. However, many people believe that a sex offender has given up his rights when he committed a sexual offense. Ann Cannahan, *Police Registry Shows 616 Sex Offenders Living in Area 285 Reside in Denver; List Stir Controversy*, ROCKY MTN. NEWS, Dec. 10, 1995, at A4 (quoting a resident saying: "I disagree with the notion that they've paid their debt to society. I don't believe the people have rights anymore.") See also Joan Abrams, *Sex Offenders: After Prison Confined To Their New Life*, LEWISTON MORN. TRIB., Dec. 5, 1993, at 1A, (quoting another neighborhood resident: "As convicted criminals, they should have a diminished expectation of privacy. A lot of their rights are forfeited by their decision to commit crime . . . and if they don't like it, too bad."). Other people argue that offenders' concerns regarding their anxiety, stigmatization, and unfairness are outweighed by the unfairness they showed their victims. See Laurie Clark, *Gallardo Case-Sexual Assault Survivors Face Fear, Anxiety Also*, SEATTLE TIMES, July 29, 1993, at 2.

171. Psychologists say that sex offenders need better socialization to prevent reoffense, not isolation which results from notification laws. See Andrea Bernstein, *Will Notification Laws Help?* CHIC. TRIB., Jan. 28, 1996, at 6.

172. The United States Department of Justice estimates the recidivism rate of untreated sex offenders to be about 60%. See Ann Carnahan, *Police Registry Shows 616 Sex Offenders Living In Area 285 Reside In Denver; Lists Stir Controversy*, ROCKY MTN. NEWS, at 4A. Executive Director of New Jersey Civil Liberties Union has claimed that community notification laws cause sex offenders to run from their family, avoid treatment, and hide out from the public in order to maintain anonymity. See Jackson, *supra* note 4. See also Joe Mahoney, *Life For Sex Offenders After Prison Debate Continues Over Rights Of Parolees And Their Neighbors*, THE TIMES (Albany, N.Y.), Sept. 18, 1994, at A1 (quoting a Boston-based forensic psychologist experienced in working with rapists, "While there may be no 'cure' for sex offenders, they can be given 'good control of their urges' if they participate in therapy programs").

rule and bar all public notification if the offender was convicted prior to the enactment of a notification statute.

Granted, society regards sexual crimes as the most horrendous and evil attacks imaginable, especially when small children, such as Megan Kanka, are victimized.¹⁷³ In fact, most individuals would want to know if a sex offender resides in their neighborhood. However, though communities may desire such notification, this Note's analysis has shown that there is no constitutional right to that information, especially if the sex offender was convicted prior to the enactment of the notification law.¹⁷⁴

CONCLUSION

The *Poritz* court justified the ex post facto application to released offenders on the need for societal safety.¹⁷⁵ The court held despite the possible severity of impact on sex offenders' loss of anonymity, that result is not a constitutional bar to society's attempt at self-defense.¹⁷⁶ Accordingly, the court chose to risk unfairness to previously convicted sex offenders over unfairness to children and women who might suffer due to ignorance of the offender's presence in the community.¹⁷⁷ Such a holding is based on fear and emotionalism, rather than on deep-rooted constitutional principles embedded in our nation's legal system.¹⁷⁸

Article VI of the United States Constitution provides that the Constitution shall be the supreme law of the land whereby all judges must abide.¹⁷⁹ The Founders never claimed that courts may balance prospective danger to the public over an individual's constitutional rights, such as protection from ex

173. See *supra* p. 1.

174. The focus of this Note has been on the ex post facto violation of the registration and notification laws. Therefore, the author is not addressing whether the law is unconstitutional *per se*.

175. *Poritz*, 662 A.2d 367, 422 (N.J. 1995).

176. *Id.* at 372.

177. *Id.*

178. At least one commentator, who has admitted her belief that Megan's Law is unconstitutional, noted: "My desire to keep my children safe is not rooted in fairness, nor in reason. . . My desire to protect, in fact, brings out the vigilante in me. I want to protect my own children even if it infringes on the rights of others." See Elizabeth Simpson, *Singling Out Sex Offenders: When Heart Wins Over Mind*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), Feb. 11, 1996, at B1.

179. U.S. CONST. art. VI, provides:

The Laws of the United States which shall be made in Pursuance of the Constitution; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

post facto laws.¹⁸⁰ The purpose of the Constitution was to lay down the foundation for a unified government, one that would recognize and respect the rights of each individual in society. Relying on that purpose and the textual language of the framers, it is clear that the constitutional rights of one individual should not yield to the emotional fear of an angry society.

Tested against the historical uses and purposes of punishment, public notice and public ostracism of sex offenders fall within the parameters of punishment as practiced when the Constitution was adopted.¹⁸¹ The inescapable identification, scorn, and humiliation that public notice creates on sex offenders is strikingly reminiscent of punishments commonly imposed in the colonial period.¹⁸² Accordingly, community notification, regardless of its aim, has the functional effect of increasing a sex offender's punishment retroactively in violation of the Ex Post Facto Clause of the Constitution. Therefore, because John Doe has a constitutional right to be free from application of ex post facto laws, and because the sex offender notification statute is ex post facto, the United States Supreme Court should reverse the New Jersey high court's ruling in the *Poritz* case and bar retroactive application of the notification law to sex offenders who were convicted prior to the law's enactment.

*Lori N. Sabin**

180. U.S. CONST. art I, § 10. Once an offender has served his sentence, his constitutional rights are restored to some degree, and may not be unilaterally revoked by an ex post facto law, absent new wrongdoing on his part.

181. *Poritz*, 662 A.2d 367, 439 (N.J. 1995) (Stein, J., dissenting).

182. *Id.*

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