



## THE CENTRAL REGISTRY STATUTE FOR ABUSE AND NEGLECT MATTERS IS CONSTITUTIONALLY FLAWED

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### EQUAL PROTECTION AND FUNDAMENTAL FAIRNESS CONCERNS

This discussion identifies two perceived flaws with the Central Registry (Registry) maintained by the Department of Children and Families (DCF).<sup>2</sup> I contend that the Registry statute 1) must allow proof of rehabilitation; and 2) intentionally or unintentionally deems parents perpetually unfit to care for children without the necessary proofs to reach such a destructive determination.

The focus of this article is on parents against whom administrative allegations of child abuse or neglect have been substantiated but who have not been criminally convicted, who would seek relief from a permanent placement on the Registry. In plain terms, this discussion concerns ordinary parents who make a one-time mistake, or exercise poor judgment while caring for their own children, and find themselves on the Registry for the balance of their lifetime.

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<sup>1</sup> The author is a New Jersey State Administrative Law Judge who has heard numerous abuse and neglect cases over the years. The opinions herein do not reflect those of the Office of Administrative Law, staff or those who assisted in this article. The author would like to thank Sharon Danks and Susan Baldwin for their skillful assistance and suggestions in writing this article.

<sup>2</sup> N.J. STAT. ANN. § 9:6-8.10a (West, Westlaw through L.2011, c. 46 and J.R. No. 2); N.J. STAT. ANN. § 9:6-8.11 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

It has been my experience that many of the litigants are not sufficiently funded to retain counsel. For these reasons, these cases do not ordinarily find their way to the appellate courts. It has also been my impression and experience that these determinations have enormous implications upon careers or reputations. Indeed, these are administrative proceedings, and yet the penalty or remedy is, in some ways, harsher than penalties imposed in criminal or quasi-criminal proceedings.

A finding of substantiated abuse or neglect flows from the facts of the incident as presented by the DCF. But it is a quantum leap to take those very same facts and condemn someone to the Registry in perpetuity. Placing an individual on the Registry for the balance of the individual's lifetime is comparable to condemning the individual to forever wear a "scarlet letter." A permanent placement on the Registry suggests that the individual possesses a human defect making the individual a *lifetime risk to children*. The type of proof required to make such a draconian finding or conclusion is never presented during the administrative process. No medical or expert testimony is ordinarily presented on this issue.

I believe that the proofs offered at the administrative proceedings do not constitutionally support this process. The statute mandates placement on the Registry without ever considering rehabilitation, mitigation or fitness.

The purpose of this discussion is to evaluate whether there is a constitutional deprivation of the individuals placed on the Registry.

I offer for illustration two fact patterns based upon actual cases. These will provide context to highlight the constitutional implications. The actual names have been replaced with fictitious parties.

### EXAMPLE 1

Steve stated that his daughter, Mary was a difficult and insubordinate child. She was argumentative and did not respond well to verbal discipline. This remained a problem through the date of the hearing.

Mary and her sister, Liz, were fighting and bickering. The bickering continued and escalated throughout the day. At one point, Mary was eating ice cream out of the carton and it began

to leak onto the living room floor. Steve grabbed the carton from Mary and took it into the kitchen. Mary was upset with her father as a result of his actions. Mary and Liz began to fight and argue in the living room. Steve then went to the kitchen area. While in the kitchen, Mary was complaining that she wanted something else to eat. Steve stated that he initially tried to calm his daughter down. However, he became very agitated with her behavior and her insubordination.

While standing behind Mary as she was looking in the kitchen cabinets, Steve struck Mary in the low-back area with a closed fist. Steve described the physical contact as a sharp nudge. Steve demonstrated his arm movement for the court. He stated that he was standing approximately six inches behind Mary. They were both standing upright, with Mary facing away from Steve. He pulled his right arm back approximately six inches, at waist level, and moved it forward into Mary's back. Steve stated that even though his fist was clenched, the action was a "jab" to the back, rather than a punch.

Steve is a large adult male, weighing two hundred pounds. If he had intended to punch and hurt his daughter, his action would have been that of a more traditional punch. Steve described a traditional punch as the arm being cocked back and thrust forward with significant velocity. He stated that a traditional punch did not occur and that he simply "jabbed or poked" his daughter in the back out of frustration. He was agitated and wanted to stop her from being disrespectful and insubordinate. He further stated that it was only one jab to the back, and thereafter, he left the room.

## EXAMPLE 2

Jean and her husband, Bill, had three children between them. As of October 1, 1986, Jean was nineteen years old. The relationship between Jean and Bill was tumultuous. Bill was abusive and had a drug problem. He had been stealing Jean's money and jewelry to support his drug habit. The Division of Youth and Family Services (DYFS) alleged Jean left her three children unattended. The Initial Response Report stated:

Last night Jean left children unsupervised while she went out to look for father. She went to other houses looking for Bill because he stole her money to buy drugs. She was upset and left her three children or infants alone. She traveled about the neighborhood looking for Bill. She went to other homes. She believed he was in the neighborhood using drugs. She was engaged in a search for Bill. Her attention was fully taken from her children. Her action left the three infants or toddlers at risk.

Jean was charged with neglect, and the charges were sustained. Jean subsequently married a different man and raised all four of her children. She has held employment for twenty years at a State developmental center where severely disabled individuals reside, has risen from a washroom employee in to supervisor with this agency, and has otherwise been law-abiding. Jean wanted to become a foster mother some twenty years later but could not because of the events that occurred when she was nineteen years old and married to a drug addict. She remains on the Registry after more than twenty years.

## CENTRAL REGISTRY

The child abuse registry statute provides that the department *shall not issue* a certificate or renewal of registration to a prospective or current childcare provider if there is a substantiated charge of abuse or neglect in the Registry against the prospective or current provider or household member.<sup>3</sup> This is a lifetime prohibition.

Generally, when an allegation of child abuse or neglect is received by the DCF an investigation ensues. There are two possible outcomes resulting from an abuse or neglect referral: the allegations may be either “substantiated” or “unfounded.”<sup>4</sup> The finding of “unsubstantiated” was eliminated in recent

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<sup>3</sup> N.J. STAT. ANN. § 30:5B-25.3(d) (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>4</sup> N.J. ADMIN. CODE § 10:129-5.3(a) (West, Westlaw through Jan. 2, 2011; 43 N.J. Reg. No. 1).

agency amendments.<sup>5</sup> If neglect or abuse is substantiated, the parent or guardian found to have abused or neglected a child is placed on the Registry.<sup>6</sup> The placement is *permanent*.<sup>7</sup> These statutes do not allow any expungement or rehabilitation action once a finding of abuse or neglect has been confirmed.<sup>8</sup>

The reports that are forwarded to the Registry are to remain confidential,<sup>9</sup> but may be disclosed to a myriad of authorized governmental agencies subject to certain restrictions.<sup>10</sup> Release of the Registry information is allowed to entities investigating other allegations of child abuse.<sup>11</sup> Some of those entities include local police, a physician who suspects abuse, the courts or a grand jury, and certain researchers.<sup>12</sup> The Registry is also utilized in conjunction with the “Family Day Care Provider Registration Act.”<sup>13</sup> The Registry may be checked by sponsoring organizations for the names of prospective or current providers or household members of prospective or current providers.<sup>14</sup>

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<sup>5</sup> N.J. ADMIN. CODE § 10:129A-3.3(a)(3), *repealed by* 37 N.J. Reg. 5004(b) (Dec. 19, 2005).

<sup>6</sup> N.J. STAT. ANN. § 9:6-8.10a(e) (West, Westlaw through L.2011, c. 46 and J.R. No. 2); N.J. STAT. ANN. § 9:6-8.11 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>7</sup> N.J. ADMIN. CODE § 10:129-6.1(b) (West, Westlaw through Feb. 7, 2011; 43 N.J. Reg. No. 3).

<sup>8</sup> “Unfounded” findings may be expunged, but not “substantiated” findings. *See* N.J. STAT. ANN. § 9:6-8.10a(e); N.J. STAT. ANN. § 9:6-8.11 (West, Westlaw through L.2011, c. 46 and J.R. No. 2); N.J. STAT. ANN. § 9:6-8.40a(a) (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>9</sup> N.J. STAT. ANN. § 9:6-8.10a(a) (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>10</sup> § 9:6-8.10a(b)-(g).

<sup>11</sup> § 9:6-8.10a(b).

<sup>12</sup> *Id.*

<sup>13</sup> N.J. STAT. ANN. § 30:5B-16 to -25.4 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>14</sup> § 9:6-8.10a(b)(10). *See also* N.J. STAT. ANN. § 30:5B-25.3a (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

Such information may also become available when DYFS<sup>15</sup> or the courts evaluate a person as a potential childcare giver.

Thus, while the information contained in the Registry is considered confidential, clearly, some courts have observed that a significant number of governmental bodies or their employees and other select groups have access to this stigmatizing information.<sup>16</sup> Moreover employers are at liberty to request registry information on employment applications. Failure to answer these applications truthfully and accurately could result in a loss of employment. And in today's high-paced electronic world, information, once obtained, can spread quickly and widely, intentionally or unintentionally. Although it might be argued that there is an expectation that the information found by those who have access to the Registry will be kept confidential, even the seemingly most secure government entities, such as the U.S. military, have experienced leaks of highly confidential or sensitive information.<sup>17</sup> Today, confidentiality is a matter of degree, not certainty.

## PARENTING AND DUE PROCESS

In *Bohn v. County of Dakota*, the court discussed the basic rights associated with parenting:

[W]ayne Bohn forcibly interceded to break up a fight between his two sons, one of whom then ran to a neighbor's house . . . . The incident prompted

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<sup>15</sup> § 30:5B-25.3a.

<sup>16</sup> *In re Allegations of Sexual Abuse at E. Park High Sch.*, 714 A.2d 339, 346 (N.J. Super. Ct. App. Div. 1998).

<sup>17</sup> In the most recent high-profile leak of classified material, a website known as WikiLeaks began publishing tens of thousands of diplomatic cables after its founder, Julian Assange, received them from Bradley Manning, a soldier who downloaded the materials to a disc while stationed in Iraq. Massimo Calibresi, *WikiLeaks' War on Secrecy: Truth's Consequences*, TIME (Dec. 2, 2010), <http://www.time.com/time/world/article/0,8599,2034276,00.html>.

an investigation by the Dakota County Department of Social Services, which concluded that there was “substantial evidence” of child abuse by the [boys’ parents, Wayne and Sharon Bohn]. Although the Bohns disputed this conclusion, the Department assigned a child-protection worker to the case, pursuant to statute, and the social worker met with the Bohns and their children repeatedly in an attempt to remedy the presumed problems stemming from the alleged child abuse.<sup>18</sup>

The *Bohn* court recognized the sanctity and importance of familial relationships, and stated:

The privacy and autonomy of familial relationships involved in a case like this are unarguably among the protectible [sic] interests which due process protects. We can conceive of no more important relationship, no more basic bond in American society, than the tie between parent and child. . . . [T]he Supreme Court stated that the interest of a widower “in the children he has sired and raised, undecidedly warrants deference and, absent a powerful countervailing interest, protection.”<sup>19</sup>

## STIGMA, REPUTATION, AND CONSTITUTIONAL PROTECTION

The United States Supreme Court held, in 1971, that a protectable liberty interest may be implicated “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him.”<sup>20</sup> The Court

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<sup>18</sup> *Bohn v. County of Dakota*, 772 F.2d 1433, 1434-35 (8th Cir. 1985) (footnote omitted).

<sup>19</sup> *Id.* at 1435 (emphasis added) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). *But see* *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (“[The] liberty interest in family integrity is limited by the compelling government interest in the protection of children --- particularly where the children need to be protected from their own parents.”).

<sup>20</sup> *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

reasoned that “where the State attaches a ‘badge of infamy’ to the citizen, due process comes into play.”<sup>21</sup> A year later, the Court suggested that a government employee’s liberty interest would be implicated if he were dismissed based on charges that “imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.”<sup>22</sup>

The case of *Valmonte v. Bane* involved the question of an individual’s good name and standing, and whether the interest in protecting that reputation constituted a protectable liberty interest.<sup>23</sup> “Valmonte had to prove that her inclusion on the New York State Central Register would result in stigma, that is, in ‘public opprobrium’ and damage to her reputation.”<sup>24</sup> The court found “that the disclosure of Valmonte’s status on the list to prospective employers was enough publication to implicate her reputation.”<sup>25</sup> The court stated that “[t]here is no dispute that Valmonte’s inclusion on the list potentially *damages her reputation by branding her as a child abuser*, which certainly calls into question her ‘good name, reputation, honor, or integrity.’”<sup>26</sup>

The State of New York argued, that “there is no ‘stigma’ attached to [Valmonte’s] inclusion [on the Central Register] because there is no disclosure of information on the Central Register except to authorized state agencies or potential employers in the child care field.”<sup>27</sup> The court rejected this argument, and stated:

Dissemination to potential employers, however, is the precise conduct that gives rise to

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<sup>21</sup> *Id.* (citation omitted).

<sup>22</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972).

<sup>23</sup> *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994).

<sup>24</sup> *Id.* at 999-1000 (citing *Bohn v. County of Dakota*, 772 F.2d 1433, 1436 n.4 (8th Cir. 1985)).

<sup>25</sup> *Id.* at 1000 (citation omitted).

<sup>26</sup> *Id.* (quoting *Roth*, 408 U.S. at 573) (emphasis added).

<sup>27</sup> *Id.*



stigmatization. In *Brandt*, we stated that if a plaintiff “is able to show that prospective employers are likely to gain access to his personnel file and decide not to hire him, then the presence of the charges in his file has a *damaging effect on his future job opportunities*.” In the instant situation, although Valmonte’s presence on the Central Register will not be disclosed to the public, it will be disclosed to any employer statutorily required to consult the Central Register. Since Valmonte states that she will be applying for child care positions, her status will automatically be disclosed to her potential employers. Under *Brandt*, that dissemination satisfies the “stigma” requirement.<sup>28</sup>

New Jersey courts have recognized that one’s reputation could be irrevocably injured when information contained in the Registry is shared with even a few private citizens, and protecting one’s good name and reputation is a protectable private interest under the New Jersey Constitution.<sup>29</sup>

## MEGAN’S LAW

A comparison of Megan’s Law<sup>30</sup> with the abuse and neglect registry statute illustrates well the disparate nature of two laws that seemingly have a similar purpose. Megan’s Law requires registration of sex offenders convicted after its effective date and all prior-convicted offenders whose conduct was found to be repetitive and compulsive.<sup>31</sup> The sexual offenses that trigger the

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<sup>28</sup> *Id.* (emphasis added) (citations omitted) (quoting *Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 45 (2d Cir. 1987)).

<sup>29</sup> *See In re Allegations of Sexual Abuse at E. Park High Sch.*, 714 A.2d 339, 346 (N.J. Super. Ct. App. Div. 1998).

<sup>30</sup> Formally known as the Registration Law, N.J. STAT. ANN. § 2C:7-1 (West, Westlaw through L.2011, c. 46 and J.R. No. 2), and the Community Notification Law, N.J. STAT. ANN. § 2C:7-6 to -11 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>31</sup> N.J. STAT. ANN. § 2C:7-2b (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

laws for those previously convicted are aggravated sexual assault, sexual assault, aggravated criminal sexual contact, and kidnapping.<sup>32</sup> Also included are various related laws concerning 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 foregoing.<sup>33</sup>

The Community Notification Law, which is part of Megan's Law, requires the local chief of police to give notification of the registrant's presence in the community.<sup>34</sup> Such notification is also required if the registrant changes address (presumably whether within or outside of the community, although the statutory language refers only to the latter).<sup>35</sup> The law provides for three levels or tiers of notification. They are:

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

(2) If risk of re-offense 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 re-offense 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

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<sup>32</sup> § 2C:7-2b(1).

<sup>33</sup> § 2C:7-2b(2).

<sup>34</sup> § 2C:7-6.

<sup>35</sup> N.J. STAT. ANN. § 2C:7-7 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

required by paragraphs (1) and (2) of this subsection.<sup>36</sup>

Notably, all of these are lifetime requirements *unless the registrant has been offense-free for fifteen years* following conviction or release from a correctional facility (whichever is later) and, on application to terminate these obligations, can persuade the court that he or she is not likely to pose a threat to the safety of others.<sup>37</sup> No such termination provision is included in the “administrative” abuse registry.<sup>38</sup>

Undisputedly, a Megan’s Law registrant poses a more serious risk to society than do persons placed on the child abuse registry through an administrative proceeding. Megan’s Law matters involve criminal prosecutions. Many of the offenses are unspeakable and with a risk of recidivism.<sup>39</sup> It could be argued that some Megan’s Law registrants (i.e. sex offenders) suffer from mental illness, in the extreme.<sup>40</sup> Nevertheless, the registrants are afforded two very distinct protections not offered to a DYFS abuse or neglect registrant. First, notification regarding a Megan’s Law registrant is tiered.<sup>41</sup> Second, and more significantly, a Megan’s Law registrant can petition to be removed from the sex offender registry after fifteen years.<sup>42</sup>

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<sup>36</sup> N.J. STAT. ANN. § 2C:7-8c(1)-(3) (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>37</sup> § 2C:7-2f.

<sup>38</sup> See N.J. STAT. ANN. § 9:6-8.40a (West, Westlaw through L.2011, c. 46 and J.R. No. 2) (directing the Division of Youth and Family Services to “expunge” a “report, complaint, or allegation” that is deemed “unfounded”). By implication, substantiated reports are not expunged.

<sup>39</sup> See N.J. STAT. ANN. § 2C:7-1a (West, Westlaw through L.2011, c. 46 and J.R. No. 2) (citing the “danger of recidivism” by sex offenders and those who commit predatory acts against children). See also *Doe v. Poritz*, 662 A.2d 367, 374-76 (N.J. 1995).

<sup>40</sup> See *id.* See also N.J. STAT. ANN. § 2C:7-8(b)(5)-(7); N.J. STAT. ANN. § 2C:47-1 (requiring the completion of a psychological evaluation for offenders convicted of certain crimes); *In re Civil Commitment of W.X.C.*, 8 A.3d 174 (N.J. 2010).

<sup>41</sup> See § 2C:7-8c.

<sup>42</sup> See § 2C:7-2f.

Administrative abuse or neglect registrants must remain on the Registry for the rest of their lives.<sup>43</sup> And, there is no tiered system to distinguish the levels of conduct. Administrative registrants are placed on the same Registry as criminals. To illustrate, a twenty-one-year-old father who spans his child too hard may be found, after an administrative hearing, to have committed abuse or neglect. He could be placed on the same registry with criminals, and he must remain on the abuse Registry, with those who are convicted of crimes, for the rest of his life. The disparate treatment of a Megan's Law registrant compared to that of an abuse/neglect registrant is remarkable, and a violation of equal protection and fundamental fairness. Imagine a Megan's Law registrant (sex offender) being discharged from one registry, while a mother who excessively spanked her child is perpetually bound to the child abuse registry. This disparity must be examined and appropriately addressed.

## REHABILITATION, DIVERSIONARY PROGRAMS, AND EXPUNGEMENTS

Our criminal and civil justice systems recognize that people periodically make poor decisions, exercise poor judgment, and even commit illegal acts. The criminal justice system permits conditional discharges,<sup>44</sup> pretrial intervention<sup>45</sup> and *de minimis* motions to dismiss,<sup>46</sup> expungements<sup>47</sup> and rehabilitation. In furtherance of this notion, the Legislature passed the Rehabilitated Convicted Offenders Act, which provides:

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<sup>43</sup> See § 9:6-8.40a.

<sup>44</sup> N.J. STAT. ANN. § 2C:36A-1(West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>45</sup> N.J. STAT. ANN. § 2C:43-12 to -22 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>46</sup> N.J. STAT. ANN. § 2C:2-11(West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>47</sup> N.J. STAT. ANN. § 2C:52-1 to -32 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

The Legislature finds and declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record.

Therefore, the Legislature finds and declares that notwithstanding the contrary provisions of any law or rule or regulation issued pursuant to law, a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless N.J.S. 2C:51-2 is applicable or unless the conviction relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought.<sup>48</sup>

It is the policy of New Jersey not to discriminate, by law, regulation or otherwise, because of a conviction of a crime,<sup>49</sup> yet that is precisely the impact when someone is administratively placed on the abuse/neglect registry. Indeed, the Registry cases heard at the Office of Administrative Law do not involve crimes.<sup>50</sup> Therefore, a showing of rehabilitation should be permitted.

Remarkably, the manual for residential child care facilities permits proofs of rehabilitation for certain criminal offenses.<sup>51</sup> For example, a non-felon is presumptively barred, but may present *proof of rehabilitation* as follows:

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<sup>48</sup> N.J. STAT. ANN. § 2A:168A-1 (West, Westlaw through L.2011, c. 46 and J.R. No. 2) (emphasis added).

<sup>49</sup> See *id.*

<sup>50</sup> See N.J. STAT. ANN. § 52:14B-2(b) (West, Westlaw through L.2010, c. 103, and J.R. No. 6).

<sup>51</sup> N.J. ADMIN. CODE § 10:127-5.6(g) (West, Westlaw through Jan. 3, 2011; 43 N.J. Reg. No. 1) (permitting rehabilitation for certain criminal offenses). Those who are convicted of felonies are permanently barred. See § 10:127-5.6(e).

(g) For crimes and offenses other than those cited in (e) above, an individual may be eligible to receive a certificate or to administer or work at a facility if the individual has affirmatively demonstrated to the Department clear and convincing evidence of rehabilitation.

1. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

i. The nature and responsibility of the position at the facility that the convicted individual would hold, has held or currently holds, as the case may be;

ii. The nature and seriousness of the offense;

iii. The circumstances under which the offense occurred;

iv. The date of the offense;

v. The age of the individual when the offense was committed;

vi. Whether the offense was an isolated or repeated incident;

vii. Any social conditions that may have contributed to the offense; and

viii. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of those who have had the individual under their supervision.<sup>52</sup>

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<sup>52</sup> § 10:127-5.6(g).

Similarly, the licensing requirements for family child care registration (*i.e.*, daycare operators) permit proof of rehabilitation.<sup>53</sup> These facilities are, in effect, daytime parents. But parents or guardians do not reap the benefits of the rehabilitation policy like those with criminal convictions in an institutional setting. Consider the situation where a daycare provider operates out of his or her home. And assume either the provider or the provider's spouse has a criminal history. Should the provider be granted a State license? The DCF regulations clearly permit the provider, substitute provider, or alternate provider to present proof of rehabilitation.<sup>54</sup> The DCF must consider evidence of the offender's rehabilitation.

Another clear example of permissible rehabilitation is in the certified nurse aide (CNA) field. CNA's provide long-term medical care to the infirm and elderly.<sup>55</sup> A CNA may receive a State license even after being convicted of a disqualifying crime.<sup>56</sup> Many elderly CNA clients are as vulnerable as toddlers or infants. A CNA license may be issued, even after a criminal conviction, upon clear and convincing proof of rehabilitation. The CNA elements for rehabilitation state in relevant part:

[N]o person shall be disqualified from certification on the basis of any conviction disclosed by a criminal history record background check . . . if the person has affirmatively demonstrated to the Commissioner of Health and Senior Services clear and convincing evidence of the person's rehabilitation. In determining whether a person has affirmatively demonstrated rehabilitation, the following factors shall be considered:

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<sup>53</sup> N.J. ADMIN. CODE § 10:126-5.2(a)(10) (West, Westlaw through May 2, 2011; 43 N.J. Reg. No. 9).

<sup>54</sup> *Id.*

<sup>55</sup> See *Nursing and Psychiatric Aides*, U.S. BUREAU OF LAB. STAT. (Dec. 19, 2009), <http://www.bls.gov/oco/ocos327.htm>.

<sup>56</sup> N.J. ADMIN. CODE § 8:39-43.2(a) (West, Westlaw through May 2, 2011; 43 N.J. Reg. No. 9).

- (1) the nature and responsibility of the position which the convicted person would hold, has held or currently holds, as the case may be;
- (2) the nature and seriousness of the offense;
- (3) the circumstances under which the offense occurred;
- (4) the date of the offense;
- (5) the age of the person when the offense was committed;
- (6) whether the offense was an isolated or repeated incident;
- (7) any social conditions which may have contributed to the offense; and
- (8) any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of those who have had the person under their supervision.<sup>57</sup>

Notably, the above-mentioned regulations address convictions and the amount of latitude criminals are granted for licensing cases, even when the license involves caring for children or the aged and infirm. It is critical to distinguish criminal cases from the present analysis. Parents are not afforded equal rights in administrative cases when it comes to establishing rehabilitation.

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<sup>57</sup> N.J. STAT. ANN § 26:2H-83(b)(1)-(8) (West, Westlaw through L.2011, c. 46 and J.R. No. 2).



Consider a young mother who, at age twenty-one, commits neglect while suffering from postpartum depression and is placed on the Registry. Suppose her condition was temporary and she fully recovers. Suppose she raises her own children, they go to college, and at age fifty she wants to work as a daycare provider or wants to be a foster mother. Should she be penalized for a condition related to rearing children that is thirty years in her past? Or should she be able to petition for removal from the Registry, just as criminals are afforded the opportunity to demonstrate rehabilitation? On the surface, perpetual placement of a temporarily ill person on the Registry would also appear to violate the Americans with Disabilities Act<sup>58</sup> or the New Jersey Law Against Discrimination.<sup>59</sup>

## PUBLIC POLICY

One might ask why a child abuser should be helped. We must keep in mind that the types of cases under consideration here do not involve the classic criminal child abuser. These are exclusively administrative charges under discussion. The majority of the administrative cases over which I have presided involve parental discipline or neglect of the registrant's own child. The events almost always occur within the family unit. In most cases, there is no public threat. Many of the cases involve indigent families. Free lawyers are not assigned. The cases rarely reach the appellate court. How could it be that employment barriers are knocked down by rehabilitation statutes for criminal offenders,<sup>60</sup> but the same barriers remain in place for parents who over-discipline their children? This is contrary to State policy and common sense.

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<sup>58</sup> 42 U.S.C.A. §§ 12101-12112 (West, Westlaw through P.L. 112-9, approved Apr. 14, 2011).

<sup>59</sup> N.J. STAT. ANN §§ 10:5-1 to -49 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>60</sup> *E.g.*, N.J. STAT. ANN § 2A:168A-1 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

## EQUAL PROTECTION

The right to equal protection of the laws is guaranteed by both the Federal Constitution and State Constitutions.<sup>61</sup> It is incumbent upon the court to apply the constitution as written and ensure the equal protection of the laws to all. Irrational or arbitrary distinctions have no place in our system of justice, for where conspicuously artificial lines are drawn and the law “lays an unequal hand on those who have committed intrinsically the same quality of offense . . . , it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”<sup>62</sup> The purpose behind the concept of equal protection is the requirement that there be “uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.”<sup>63</sup>

In *Caviglia v. Royal Tours of America*, the New Jersey Supreme Court discussed equal protection and due process by stating:

When evaluating substantive due process and equal protection challenges under the New Jersey Constitution, this Court applies a balancing test. That test weighs the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. We require that the means selected by the Legislature bear a real and substantial relationship to a permissible legislative purpose.<sup>64</sup>

In short, the constitutional balancing test gleaned from *Caviglia* consists of weighing (1) the nature of the affected right,

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<sup>61</sup> U.S. CONST. amend. XIV, § 1 (West, Westlaw through P.L. 112-9, approved Apr. 14, 2011); *Caviglia v. Royal Tours of Am.*, 842 A.2d 125, 132 (N.J. 2004) (recognizing that N.J. CONST. art. 1, para. 1 includes an implied right to equal protection of the laws) (further citation omitted).

<sup>62</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (further citation omitted).

<sup>63</sup> *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

<sup>64</sup> *Caviglia*, 842 A.2d at 132 (citations and quotations omitted).

(2) the extent to which the government restriction intrudes upon it, and (3) the public need for the restriction.

Typically, equal protection claims are asserted in the context of classifications including race, religion, age, or disability. However, our courts have also found that equal protection was denied when a criminal defendant was denied entry into the pre-trial intervention program (PTI).<sup>65</sup> In *State v. Kowitski*, a resident of one county whose court system did not have a PTI program sought admission into a neighboring county's PTI program.<sup>66</sup> He was denied entry into the neighboring county's PTI because his crime had been committed outside the county.<sup>67</sup> Indeed, a PTI applicant does not fall within the classifications mentioned above. Yet the denial of PTI was nonetheless held to be a violation of equal protection because similarly situated individuals were being treated dissimilarly by the state.<sup>68</sup> A lack of equal access to the PTI program was held to violate due process.<sup>69</sup>

## CONCLUSION

The nature of the affected right at issue here is substantial. Parenting is a highly protected area. Placement on the Registry may prevent a parent from coaching his child<sup>70</sup> or interfere with employment opportunities. Applying the *Caviglia* criteria to the abuse/neglect Registry, it is clear that the registrant's equal protection right is violated if the registrant is placed on the Registry as a result of a non-criminal (administrative) case.<sup>71</sup> The affected right (*e.g.*, parenting) has been described as one of

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<sup>65</sup> See *State v. Kowitski*, 367 A.2d 459, 463 (N.J. Super. Ct. Law Div.1976).

<sup>66</sup> *Id.* at 460.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 463.

<sup>69</sup> *Id.* at 461-62 (discussing the arbitrary lack of access to PTI on the basis of geographical differences).

<sup>70</sup> This assumes the local police take action to stop a parent from coaching.

<sup>71</sup> *Caviglia v. Royal Tours of Am.*, 842 A.2d 125, 132 (N.J. 2004).

the most basic protected constitutional rights.<sup>72</sup> Enormous deference must be awarded parents absent a powerful countervailing (public) interest.<sup>73</sup> Parental rights must be afforded more consideration than is granted under the present statutory scheme. Many parents work as teachers, daycare providers, coaches, nurses, and health aides, and in other fields that involve working with children. One unfortunate parenting mistake and they can become unemployed and stigmatized. Criminals are granted considerably more relief through rehabilitation policies, diversionary programs, or expungement proceedings than are ordinary parents that make a parenting mistake. Serious acts of violence against children are resolved through criminal proceedings and in family court. This discussion is about those cases that involve parenting mistakes or errors that fall into the non-criminal domain.

There is no public need for the lifetime placement on a registry for parents who commit minor acts of neglect or abuse. Government should not intrude into poor decision-making by a parent to the extent that the resulting governmental action *permanently brands* the parent. It is an overbroad and arbitrary response that assumes a parent must be designated a permanent risk to children, without any competent proof supporting the designation. This type of conclusion requires significantly more psychiatric, psychological or similar expert proofs. Social, mental and economic factors should be evaluated before an individual is placed on the Registry. The individual's maturity, history of substance abuse or alcoholism, status as a single parent, experience of unwanted pregnancy, and lack of employment all may be relevant. A long-term placement on the Registry may make sense if certain conditions are proven to exist, but in the absence of such proofs there is no constitutional basis to place an individual on the Registry for the rest of that individual's lifetime. Greater proofs are necessary to brand someone in perpetuity.

Parenting is one of the most rewarding, but also one of the most difficult jobs a person may undertake. Many parenting decisions are made under emotional or stressful circumstances. Parents may believe they are acting in the child's best interest,

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<sup>72</sup> Bohn v. Dakota County, 772 F.2d 1433, 1435-36 (8th Cir. 1985).

<sup>73</sup> *Id.* at 1435 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

but decide, upon reflection, that their actions were debatable or flat-out wrong. A few examples of these debatable actions include using corporal punishment by hitting a child with a belt for shoplifting; leaving an infant at home to pursue the child's father, who stole the rent money; or spanking a child for being extraordinarily disrespectful to adults, and, in the process of spanking him, fracturing the child's thumb. These parents are *permanently branded* as child abusers if they are placed on the Registry. This remedy is overbroad, unnecessary and excessive. It does not serve any valid governmental purpose when weighed against the harm to the parent.

There is no public need to place the non-criminal parent on the same or comparable registry as the criminal parent convicted of child abuse or neglect. Completely dissimilar citizens are being treated in similarly harsh ways (*e.g.*, Megan's Law registrant versus DYFS neglect registrant). Equal protection is being denied to the parents who committed minor child neglect while other citizens who commit much more serious offenses escape long-term implications through diversionary programs, expungements, and rehabilitation submissions. There is a breakdown in logic or rationale that does not square with due process.

Perception is reality when it comes to a stigma created by the Registry scheme. Those who access the Registry presumably cannot, or may not, separate the criminal child abuser (*e.g.*, a sex offender) from the parental abuser (a father who spanked his son). The statutory scheme applies a rigid paradigm and non-discretionary penalty criteria to child rearing, which is an enormously challenging endeavor. Every parent is different, and every child is different. Neither the DCF nor the administrative law judges have any discretion when dealing with poor parental decision-making.<sup>74</sup> Placement on the Registry is the statutory penalty, even for non-criminal or marginal cases of abuse or neglect.<sup>75</sup>

I question whether one bad parental decision or one bad parental judgment should be recorded in perpetuity, in a government registry open to government employees and

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<sup>74</sup> N.J. STAT. ANN. § 9:6-8.11 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>75</sup> *Id.*

government employers, without the opportunity to have the entry removed upon a clear showing of rehabilitation, or removed for some other valid reason. I am mindful that the protection of children is the underlying purpose of the Registry. However, a convicted criminal can have an offense expunged, or can apply for a conditional discharge.<sup>76</sup> Even Megan's Law registrants are afforded remedial relief from the registry under certain conditions.<sup>77</sup> But once an individual's name is placed on the abuse or neglect Registry it cannot be removed, even when the placement results from an administrative matter. I contend the creation of a non-removable record in the Registry is an extraordinary remedy and is inconsistent with other areas where the Legislature permits rehabilitation, expungements, and diversionary programs, protects those with disabilities, and protects parenting rights. In its present form, the Registry is unconstitutional. It deprives parents of the right to redemption where others are afforded the same opportunity, for more egregious violations of law. For these reasons, other remedies or procedures affording due process, equal protection and fundamental fairness should be considered at the legislative or appellate level.

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<sup>76</sup> N.J. STAT. ANN. § 2C:36A-1(West, Westlaw through L.2011, c. 46 and J.R. No. 2); N.J. STAT. ANN. § 2C:52-1 to -32 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

<sup>77</sup> N.J. STAT. ANN. § 2C:7-2(f) (West, Westlaw through L.2011, c. 46 and J.R. No. 2).