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CONTENTS

HASTE MAKES WASTE: A CALL TO REVAMP NEW JERSEY'S MEGAN'S LAW LEGISLATION AS-APPLIED TO JUVENILES

Andrew J. Hughes[1]

PRELUDE

New Jersey must revamp its Megan's Law legislation as it applies to juvenile offenders.[2] The New Jersey Legislature hastily enacted its Megan's Law scheme in 1994[3] and failed to consider several important differences between adult sex offenders and juvenile sex offenders, including their respective recidivism rates and amenability to treatment.[4] The current legislation violates the substantive component of the Federal Constitution's Due Process Clause because it infringes upon the fundamental right of juveniles to be free from wide-scale, state-imposed stigmatizations.[5]

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[1] B.A., Philosophy, La Salle University (2004); J.D., Rutgers University School of Law – Camden (2008). The author would like to thank John C. Wright, Esq., Assistant Salem County Prosecutor, and Elizabeth L. Hillman, Professor of Law at Rutgers University – Camden, for their insights and encouragement.

[2] Currently, *all* juveniles who are adjudicated delinquent for the commission of a sex offense are subject to its registration and community notification requirements. *See* N.J. STAT. ANN. § 2C:7-2 (West 2007).

[3] *See* N.J. STAT. ANN. §§ 2C:7-1-11 (West 2007).

[4] *See infra* Section II.

[5] *See infra* Section III.

This note proposes a new Megan's Law scheme.[6] Juveniles under the age of fifteen will be entirely excluded from Megan's Law. Juveniles between the ages of fifteen and seventeen will also be excluded unless the juvenile judge determines by clear and convincing evidence that the juvenile is likely to re-offend.[7] This system adequately safeguards the fundamental liberty interests of juveniles without compromising the safety of the public.[8]

I. AN INTRODUCTION TO MEGAN'S LAW IN NEW JERSEY

A. THE MEGAN KANKA STORY

Megan Kanka was brutally raped and murdered on July 29, 1994 by her neighbor, Jesse Timmendequas.[9] Kanka accepted Timmendequas' invitation to come into his home to see his puppy.[10] After Megan entered, Timmendequas raped her, strangled her to death with a belt, and discarded her body in a nearby park.[11] Timmendequas was a pedophile who had been twice convicted of sex offenses involving young girls.[12] Kanka's parents immediately began a "nationwide crusade to secure passage of sex offender notification laws."[13]

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[6] *See infra* Section IV (B).

[7] *Id.*

[8] *Id.*

[9] *See* State v. Timmendequas, 773 A.2d 18, 23 (N.J. 2001).

[10] *Id.*

[11] *Id.* at 23.

[12] *Id.* at 22. *See also* E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997).

[13] State v. Timmendequas, 737 A.2d 55, 83 (N.J. 1999).

B. NEW JERSEY'S MEGAN'S LAW LEGISLATION

Shortly after this egregious incident,[14] the New Jersey Legislature passed Megan's Law, which imposed registration and notification requirements on convicted sex offenders.[15] The Legislature acted hastily amidst widespread pressure from the public. The Third Circuit detailed the frantic pace at which this legislation was enacted:

> Public reaction to Megan's murder was intense, and New Jersey's governor and legislature responded quickly. By August 15, 1994, two weeks after the discovery of Megan's body, bills providing for registration and community notification had been introduced in the General Assembly. Two weeks later, the General Assembly declared the bills an "emergency," allowing them to bypass committee and be passed the same day.
>
> [R]egistration and community notification bills identical to their General Assembly counterparts were introduced to the Senate on September 12, 1994. After hearing testimony from the ACLU, the New Jersey Coalition of Crime Victims and corrections officials...the Senate Law and Public Safety Committee [revised portions of the bills]. The committee then favorably reported the amended versions to the Senate...which approved the bills on October 3. The General Assembly followed suit by...approving the revised bill on

[14] Several similar incidents occurred within the same general time period. For instance, Westley Dodd abducted, molested, and killed three young boys in the Seattle, Washington area in 1989. Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex Offender Registration and Community Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 165 (2003) [hereinafter Garfinkle, *Coming of Age in America*]. In 1993, the State of Washington executed Dodd by way of public hanging, after he claimed that if he were freed he would rape more kids and enjoy it. *Id.*

[15] *See* N.J. STAT. ANN. § 2C:7-1–11 (West 2007).

> October 20, 1994, and Governor Whitman signed it into law on October 31, 1994.[16]

Under New Jersey's Megan's Law scheme, any person who has been convicted, adjudicated delinquent, or found not guilty by reason of insanity for the commission of a sex offense, as defined in the Act, must register in accordance with the Act's provisions.[17] The Act then requires three levels of community notification depending upon the risk that the offender will re-offend.[18]

The legislation required the New Jersey Attorney General to develop procedures for assessing the risk that an offender would recidivate and ultimately for determining which level of community notification should be imposed upon each of the

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[16] *Verniero*, 199 F.3d at 1081-2. The public placed such heavy pressure upon the Legislature to act that the legislation was signed into law within three months of Megan's body being discovered. *See also Timmendequas*, 773 A.2d at 22 ("The murder of Megan Kanka sparked outrage after the public learned that defendant had been twice convicted of sex offenses against children, and that Megan's community had not been made aware of those convictions."); Doe v. Poritz, 662 A.2d 367, 423 (N.J. 1995) (Stein, J., dissenting) ("The tragic murder of Megan Kanka prompted widespread public concern about the danger posed by released convicted sex offenders. The Legislature responded swiftly, enacting the [Megan's Law statutes].").

[17] N.J. STAT. ANN. § 2C:7-2(a)(1) (West 2007).

[18] *See* N.J. STAT. ANN. § 2C:7-8(c) (West 2007), which reads:

> The regulations shall provide for three levels of notification depending upon the risk of re-offense by the offender as follows:
>
> (1) If the risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;
> (2) If the risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection;
> (3) If the risk of re-offense is high, the public shall be notified through means 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.

state's convicted offenders.[19] As a result, the Attorney General developed the Registrant Risk Assessment Scale ("RRAS") to be used as a guide throughout New Jersey.[20]

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[19] *See* N.J. STAT. ANN. § 2C:7-8(d) (West 2007), which provides:

> In order to promote uniform application of the notification guidelines required by this section, the Attorney General shall develop procedures for evaluation of the risk of re-offense and implementation of community notification. These procedures shall require, but not be limited to, the following:
>
> (1) The county prosecutor of the county where the person was convicted and the county prosecutor of the county where the registered person will reside, together with any law enforcement officials that either deems appropriate, shall assess the risk of re-offense by the registered person;
> (2) The county prosecutor of the county in which the registered person will reside, after consultation with local law enforcement officials, shall determine the means of providing notification.

The Attorney General commissioned a panel of forensic experts to assist in carrying out this task. Glenn E. Ferguson, Roy J. Eidelson, and Philip H. Witt, *New Jersey's Sex Offender Risk Assessment Scale: Preliminary Validity Data*, 26 J. PSYCHIATRY & L. 327, 336 (1998).

[20] A brief description of precisely how the RRAS functions follows:

> The RRAS is a 13-item scale designed to be scored by trained personnel with access to the offender's criminal case file. For each item, the respondent judges whether the offender's behavior qualifies as "low risk," "moderate risk," or "high risk." The items are divided roughly equally between "static" and "dynamic" predictors of risk. The static variables—those that are not amenable to change—include details of the offender's criminal history such as the degree of force used against the victim, degree of contact (e.g., penetration), age of the victim, the victim's relationship to the offender, the number of past sexual offenses, the duration of the offensive behavior, and any history of antisocial acts. The dynamic variables—those amenable to change over time—include length of time since the last offense (while at risk), response to sex-offender-specific treatment, substance abuse, therapeutic support, residential support, and employment/educational stability.

Ferguson, Eidelson & Witt, *supra* note 19, at 329-30.

The law establishing the Megan's Law sex offender Internet registry was signed into law on July 23, 2001.[21] New Jersey's Megan's Law sex offender Internet registry contains information pertaining to sex offenders determined to pose a relatively high risk of re-offense ("Tier III offenders") and, with limited exceptions, sex offenders determined to pose a moderate risk of re-offense ("Tier II offenders").[22] An individual is subject to the requirements of Megan's Law for the duration of his or her life but may petition the Superior Court to terminate the obligation after fifteen years from the date of conviction.[23]

C. NEW JERSEY CASE LAW

The New Jersey Supreme Court upheld Megan's Law against various constitutional challenges in *Doe v. Poritz*.[24] The court ruled that the registration and community notification laws did not violate the Ex Post Facto, Double Jeopardy, Cruel and Unusual, or Equal Protection Clauses of the Federal Constitution or analogous provisions of the New Jersey Constitution and did not deprive the individual of the right to

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[21] N.J. STAT. ANN. §§ 2C:7-12-19 (West 2007).

[22] *Id. See also* New Jersey State Police, N.J. Sex Offender Internet Registry, http://www.state.nj.us/njsp/info/reg_sexoffend.html (last visited Mar. 31, 2008).

[23] *See* N.J. STAT. ANN. § 2C:7-2(f) (West 2007), which provides:

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

[24] 662 A.2d 367, 372.

his or her privacy.[25] The court also held that the Legislature intended for the law to apply to juvenile offenders.[26]

In *In re Registrant J.G.*, the New Jersey Supreme Court narrowed the scope of Megan's Law as applied to juveniles. In that case, the court ruled that any Megan's Law registration or notification requirements imposed upon juveniles adjudicated delinquent for sexual offenses committed when they were under the age of fourteen shall terminate when the juvenile reaches age eighteen, if the Law Division determines by clear and convincing evidence that the delinquent is not likely to pose a threat to others.[27]

The *J.G.* court recognized that the Attorney General Guidelines and the RRAS did not distinguish adult offenders from juvenile offenders, and it encouraged the Attorney General to review and modify the Guidelines to "reflect factors and issues unique to such youthful offenders."[28] The Attorney General responded by issuing a new Juvenile Risk Assessment Scale ("JRAS"), which took effect on June 1, 2006.[29]

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[25] *Id.* at 423.

[26] *See Doe*, 662 A.2d at 404. *See also In re* Registrant J.G., 777 A.2d 891, 912-14 (N.J. 2001) (ruling that the Legislature clearly intended for Megan's Law to apply to juveniles).

[27] *J.G.*, 777 A.2d at 912. The *J.G.* court discussed several instances in which the law distinguishes between juveniles under age fourteen and juveniles age fourteen and over, including confessions outside of the presence of one's parent, the authorization of fingerprints and retention of photographs for criminal identification purposes, and the release of juveniles on their own recognizance. *Id.* at 904-5. The court also acknowledged the common law principle that children between the ages of seven and fourteen are presumed to lack the capacity to entertain a criminal intent. *Id.* at 905 (quoting State v. Monahan, 104 A.2d 21 (1954) (Heher, J. concurring)) (citations omitted). The court asserted that its holding best reflected the legislative objectives behind both Megan's Law and the Juvenile Code. *Id.* at 912.

[28] *J.G.*, 777 A.2d at 910.

[29] *In re* Registrant T.T., 907 A.2d 416, 423 (N.J. 2006). The Juvenile Risk Assessment Scale, and the manual explaining how to use the scale, are posted on the New Jersey Division of Criminal Justice website. N.J. Division of Criminal Justice, Juvenile Risk Assessment, http://www.nj.gov/oag/dcj/megan/jras-manual-scale-606.pdf (last visited Mar. 31, 2008).

The United States Court of Appeals for the Third Circuit heard a constitutional challenge to New Jersey's Megan's Law legislation in *E.B. v. Verniero*.[30] In that case, appellants again argued that Megan's Law violated the Ex Post Facto and Double Jeopardy Clauses of the Constitution.[31] The court found that the legislation could not be characterized as punitive and therefore held that it did not violate these constitutional provisions.[32]

II. THE LEGISLATIVE MISUNDERSTANDINGS: FAILING TO ACCOUNT FOR THE FUNDAMENTAL DIFFERENCES BETWEEN ADULT AND JUVENILE SEX OFFENDERS

A. THE LEGISLATURE'S OVERSIGHT

Following the murders of Megan Kanka and other children, the public demanded that the New Jersey Legislature act immediately.[33] When the Legislature enacted its Megan's Law scheme, it was undoubtedly concerned with the reportedly high recidivism rates among sex offenders. This concern was expressly stated in the statute.[34] In *Doe*, the New Jersey

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[30] 119 F.3d 1077 (3d Cir. 1997).

[31] *Id.* at 1081.

[32] *Id.*

[33] *See supra* notes 13-16 and accompanying text.

[34] 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 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.

Supreme Court discussed the Legislature's overriding concern with the recidivism rates of sex offenders and their apparent inability to respond to treatment.[35] The court later endorsed the Legislature's findings in this regard by asserting, "Concerning the basic facts…there is no dispute…the relative recidivism rate of sex offenders is high compared to other offenders; treatment success of sex offenders exhibiting repetitive and compulsive characteristics is low… ."[36]

Curiously, the Legislature never made any distinctions between adult sex offenders and juvenile sex offenders, and naively assumed that the studies relied upon to show the high recidivism rates and low amenability to treatment for adults

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N.J. STAT. ANN. § 2C:7-1 (West 2007) (emphasis added).

[35] The court opined:

> Based on statistical and other studies the Legislature could have found, and presumably did find, the following facts, essentially reflected in its statement of purpose, and its enactment of the laws:
>
> [S]tudies describing recidivism by sex offenders indicate the severity of the problem the Legislature addressed in Megan's Law. Studies report that rapists recidivate at a rate of 7 to 35%; offenders who molest young girls, at a rate of 10 to 29%, and offenders who molest young boys, at a rate of 13 to 40%. Further, of those who recidivate, many commit their second crime after a long interval without offense. In cases of sex offenders, as compared to other criminals, the propensity to commit crimes does not decrease over time….
>
> [S]uccessful treatment of sex offenders appears to be rare. … [V]ery few offenders sentenced to ADTC [Adult Diagnostic and Treatment Center] ever meet the dual standards required for parole from ADTC. Indeed, according to Department of Correction's statistics between 1980 and 1994 only 182 inmates were paroled from ADTC. . . . [T]he large majority of ADTC inmates leave only after having served their maximum sentence.

Doe v. Poritz, 662 A.2d 367, 374 (N.J. 1995) (quoting Response Brief for Attorney General at 6-8).

[36] *Id.* at 374 n.1.

could be accurately applied to juveniles.[37] This assumption is incorrect. Studies continually demonstrate that juvenile sex offenders are far less likely to recidivate than adult offenders.

B. ADULT SEX OFFENDERS AND JUVENILE SEX OFFENDERS RECIDIVATE AT DIFFERENT RATES

The studies the New Jersey Legislature found credible suggested that adult sex offenders are reasonably likely to recidivate.[38] For instance, one expert in the field of psychology, Dr. Margaret Alexander, reviewed recidivism rates across seventy-nine studies for treated and untreated adult sex offenders, reporting a 20.1% recidivism rate for treated rapists (23% untreated), 14.4% recidivism rate for treated child

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[37] In failing to make this critical distinction, the court declared, "On the critical issue of recidivism, the Legislature presumably adopted the view suggested in the following information, supportive of that stated in the studies relied on by the Attorney General: ... As a group, *sex offenders* are significantly more likely than other offenders to reoffend with sex crimes or other violent crimes... ." *Id.* at 375 (emphasis added). Four years later, the New Jersey Supreme Court again failed to make the imperative distinction between adults and juveniles, when it opined, "The underpinning of Megan's Law is that *sex offenders* are more likely to recidivate than other offenders." *Timmendequas*, 737 A.2d at 149 (emphasis added). The court continued to cite three studies (conducted by the California Department of Justice, Washington State, and the Justice Department) that the Attorney General relied upon. None of those studies distinguished between adult and juvenile offenders. *Doe*, 662 A.2d at 375.

The New Jersey Legislature was not the only deliberative body that failed to distinguish between adult and juvenile sex offenders. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (see *infra* note 119) as part of the Federal Violent Crime Control and Law Enforcement Act of 1994, which required each state to implement some form of registry of convicted sex offenders. 42 U.S.C. § 14071 (2006). The federal legislative debates also never mentioned juvenile sex offenders. Garfinkle, *Coming of Age in America*, *supra* note 14, at 177.

[38] *See supra* note 35. Many studies conflict on this issue because recidivism is difficult to conclusively measure. Dennis Waite et al., *Juvenile Sex Offender Re-Arrest Rates for Sexual, Violent Nonsexual and Property Crimes: A 10-Year Follow Up*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 313, 316 (2005) [hereinafter Waite, *A 10-Year Follow Up*]. Studies often vary in terms of sample size, statistical methodology, type and length of treatment, and how recidivism is defined (whether by re-arrest or some other means). *Id.*

molesters (25.8% untreated) and a 19.7% recidivism rate for treated exhibitionists (57.1% untreated).[39]

Juvenile sex offenders, however, are not likely to recidivate. The New Jersey Legislature never took this reality into account when it rushed to promulgate its Megan's Law scheme in 1994, and a plethora of data is now available to reveal the Legislature's error. For example, Brannon and Troyer examined follow-up data collected four years after an initial study of thirty-six juvenile sex offenders in the Idaho Division of Child and Family Services residential treatment program. Only one of the thirty-six original juvenile sex offenders had committed a subsequent sexual crime.[40] Elizabeth Letourneau and Michael Miner expressed similar results:

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[39] Lisa C. Trivits and N. Dickon Reppucci, *Application of Megan's Law to Juveniles*, 57 AM. PSYCHOLOGIST 690, 699 (2002) [hereinafter Trivits, *Application of Megan's Law to Juveniles*]. The authors also discussed a meta-analysis, conducted by Hanson and Bussiere (1998), of sixty-one studies of sex offenders in institutions and in the community (fifty-two contained data exclusively on adults). They concluded that rapists had a sexual recidivism rate of 18.9% and child molesters had a recidivism rate of 12.7% during an average follow up period of four to five years. *Id.* at 699-700. Because juvenile sex offenders were included in some of the data used for the study conducted by Hanson and Bussiere, the lower recidivism rates cannot necessarily be attributed only to adults. *Id.*

[40] *Id.* at 698. Although the Brannon and Troyer study was limited because it failed to account for unreported sexual offenses or arrests in other states, the article cited several other studies to emphasize its position:

> [A]n earlier review by Davis and Leitenberg (1987) concluded that reincarceration for a sexual offense among adolescent sex offenders was low, with most studies reporting rates around 10%. Alexander (1999) conducted a narrative review of 79 studies examining juvenile and adult sex offenders who had received treatment. Across studies, the recidivism rates for treated [juvenile sex offenders] was 7.1%. In a review by Weinrott (1996), the majority of juvenile sexual recidivism studies reported sexual recidivism rates at or below 14%. ... A recent review of the literature by the Office of the Juvenile Justice and Delinquency Prevention similarly concluded that the rates of recidivism for [juvenile sex offenders] are low (Righthand and Welch, 2001).

Id.

> [T]he evidence suggests that *sexual recidivism rates of juvenile sex offenders are low*—both statistically and as compared with nonsexual recidivism rates. For example, of 25 studies that reported sexual recidivism rates for juvenile offenders (wherein recidivism was defined either as new arrest or new convictions), the mean rate of recidivism was 9%. These same youths were more than six times as likely to be rearrested for nonsexual crimes. By comparison, a review of 61 studies of adult sex offenders reported a mean sexual recidivism rate of 13.4% (*49% higher than for juveniles*) and a mean general recidivism rate of 36.3%. Thus, juveniles appear to be *less likely to reoffend sexually*....[41]

Several justifications exist to account for the disparities in the recidivism rates of adult sex offenders and juvenile sex offenders. First, juveniles often engage in behavior that is merely exploratory and will not be repeated, particularly if negative consequences are attached.[42] Trivits and Reppucci

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[41] Elizabeth J. Letourneau and Michael H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293, 300 (2005) [hereinafter Letourneau, *Juvenile Sex Offenders*] (emphasis added) (citations omitted). The authors continued by stating, "the majority of juvenile sex offenders do not continue as career sex offenders. Again, this information should be greeted with enthusiasm, but appears to have been largely overlooked or even disbelieved by policy makers and providers." *Id.* at 300-01.

See also Waite, *A 10-Year Follow-Up*, *supra* note 38, at 314 ("While there is some evidence to support [the perception that sex offenders pose an inordinate risk of recidivism] among adult offenders...this is particularly troublesome when applied to all adolescents who commit sexual offenses. It ignores developmental psychology related to adolescent sexual development and behavior....") (quotations omitted).

[42] Trivits, *Application of Megan's Law to Juveniles*, *supra* note 39, at 696 (citations omitted). *See also* Alexis O. Miranda and Colette Corcoran, *Comparison of Perpetration Characteristics Between Male Juvenile and Adult Sexual Offenders: Preliminary Results*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 179, 185 (2000) (detailing a study that found juvenile sex offenders often engage in sexual behavior that "some researchers have associated with developmentally appropriate sexual curiosity rather than with pedophilia [such as digital fondling]") (citations omitted).

explained, "[t]he transition to sexual maturation can be difficult, possibly leading to the appearance of abnormal sexual behavior that simply needs correction or treatment, not the potentially lifelong stigma associated with sex offender registration and notification statutes."[43]

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[43] Trivits, *Application of Megan's Law to Juveniles*, *supra* note 39. The authors continued:

> We do not contend that all acts of sexual misconduct are exploratory in nature, and we do not advocate the "boys will be boys" attitude adhered to several decades ago. As explained by Becker and Johnson, the motivation behind sexual behaviors by children and adolescents…may range from exploration to well thought out and purposeful behavior to gratify one's sexual desires. Incidents of sexual offending should be corrected, not ignored, and offenders should be held accountable in accordance with the law. … However…many policymakers [are] bent on severely punishing all adolescent sexual misconduct as criminal and labeling [juvenile sex offenders] as highly deviant, despite a paucity of data on what constitutes normal and abnormal sexual development. Moreover, such a punitive attitude may not be necessary to prevent sexual recidivism in adolescents because most adolescents desist when social and/or legal correction is applied.

Id. at 697 (citations omitted).

Letourneau and Miner suggest that juvenile sex offenders, as a class, are similar to all other juvenile delinquents and dissimilar to adult sex offenders. *See* Letourneau, *Juvenile Sex Offenders*, *supra* note 41, at 300 ("The belief that 'sex offenders are a very unique type of criminal' is not supported when applied to juvenile offenders.") (citations omitted). The authors asserted:

> The general delinquency literature has established that youth antisocial behavior is predicated (directly or indirectly) by individual characteristics (e.g., low IQ); peer characteristics (e.g., associating with delinquent peers and not associating with prosocial peers); family characteristics (e.g., low parental monitoring; low parental warmth); and school characteristics (e.g., low school involvement, high drop out and suspension rates). Very different characteristics have been hypothesized as relevant in the development and/or maintenance of juvenile sexual offending…. However, the empirical literature supports the view that *juvenile sex offenders, as a group, are similar in their characteristics to other juvenile delinquents and do not represent a distinct or unique type of offender.*

Another justification for the disparity is that juvenile sex offenders are more responsive to treatment than adult sex offenders. The New Jersey Legislature carelessly overlooked this fact when it concluded that juveniles should be included within the purview of Megan's Law.[44] Two prominent scholars in the field of psychology, Federoff and Moran, "[e]mphasized that mental health professionals must use caution in discussing the treatment of sex offenders."[45] They argued, "[o]verzealous conclusions drawn from single studies with methodological flaws have led to many misconceptions about sex offenders, including the notion that sex offenders cannot be cured."[46]

Many studies demonstrate that juvenile sex offenders are capable of being cured. Dennis Waite discussed one such study:

> Worling and Curwen (2000) recently completed a recidivism study on a sample of 58 juveniles, ages 12-19, who participated in a 12-month community-based sex offender treatment program compared to a group of 90 offenders who received only an initial assessment, refused treatment, or dropped out before 12 months. The follow-up period ranged from 2-10 years. The study indicated a *72% reduction in sexual recidivism, 41% in violent, nonsexual recidivism, and 59% in nonviolent reoffending for the sample.* [47]

Id. at 297 (emphasis added).

[44] *See supra* note 36 and accompanying text.

[45] Trivits, *Application of Megan's Law to Juveniles*, *supra* note 39, at 698. *See also* J.P. Federoff and B. Moran, *Myths and Misconceptions About Sex Offenders*, 6 CAN. J. HUM. SEXUALITY 263 (1997).

[46] *Id.*

[47] Waite, *A 10-Year Follow Up*, *supra* note 38, at 315 (emphasis added). Waite also discussed Dr. Alexander's study (see *supra* note 39 and accompanying text), which suggested that juveniles respond well to treatment, and the efficacy of the treatment programs demonstrates a strong argument for their continued existence. *Id. See also* Michael H. Miner and Rosemary Munns, *Isolation and Normlessness: Attitudinal Comparisons of Adolescent Sex Offenders, Juvenile Offenders, and Nondelinquents*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 491, 492 (2005) ("Scant evidence supporting

The drastic decline in recidivism for individuals that completed the treatment program is not surprising, given the fact that juveniles are especially malleable and, as one expert in the field suggested, "very much in flux."[48]

The foregoing evidence strongly reinforces an indisputable but disappointing reality: the New Jersey Legislature failed to distinguish between adult sex offenders and juvenile sex offenders when it hastily promulgated its Megan's Law scheme in 1994. This oversight has unnecessarily subjected many juveniles throughout the state to registration and community notification requirements that were enacted in response to studies that addressed the recidivism rates of adult sex offenders.

III. NEW JERSEY'S MEGAN'S LAW SYSTEM IS UNCONSTITUTIONAL AS-APPLIED TO JUVENILES BECAUSE IT VIOLATES THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION

A. AN INTRODUCTION TO THE SUBSTANTIVE COMPONENT OF THE FEDERAL CONSTITUTION'S DUE PROCESS CLAUSE

New Jersey's Megan's Law system is unconstitutional as-applied[49] to juveniles because it violates the substantive

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that adolescents who commit sex crimes have substantially different treatment needs than other youthful offenders exists.") (citations omitted); Trivits, *Application of Megan's Law to Juveniles*, *supra* note 39, at 697 ("Childhood has been viewed as a time of development, and children have generally been considered more malleable than adults. The potential benefits of early intervention and treatment should, therefore, take on added significance for juveniles.").

[48] Waite, *A 10-Year Follow Up*, *supra* note 38 at 314.

[49] As-applied constitutional challenges are distinct from facial constitutional challenges. The California Supreme Court offered a concise discussion of the differences between the two challenges in *Tobe v. City of Santa Ana*:

> A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of the individual.

component of the Federal Constitution's Due Process Clause.[50] "The Due Process Clause…guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against governmental interference with certain

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> To support a determination of facial unconstitutionality, voiding the statute as whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.
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> An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual *or class of individuals* who are under allegedly impermissible present restraint or disability as a result of the manner of circumstances in which the statute or ordinance has been applied, or (2) an injunction against application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the *facts of a particular case*… .

892 P.2d 1145, 1152 (Cal. 1995) (emphasis added) (citations and quotations omitted). This note argues only that New Jersey's Megan's Law scheme is unconstitutional as-applied to juveniles. It expresses no opinion concerning the statute's facial validity.

[50] U.S. CONST. amend. XIV, § 1. The amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

Id. Juveniles enjoy the protections afforded by Due Process Clause's substantive component. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

fundamental rights and liberty interests."[51] In *Glucksberg*, the Supreme Court opined:

> [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. ... [T]he Fourteenth Amendment forbids the government to infringe ... fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.[52]

Therefore, legislation that infringes upon a fundamental right will be subject to strict judicial scrutiny and struck down unless the government can prove that it is narrowly tailored to serve a compelling government interest.

B. THE SUPREME COURT HAS EXPLICITLY LEFT OPEN THE POSSIBILITY THAT MEGAN'S LAW LEGISLATION COULD BE SUBJECT TO A SUBSTANTIVE DUE PROCESS ATTACK.

The Supreme Court has twice ruled on challenges to state Megan's Law statutes.[53] In *Connecticut Department of Public Safety*, the Court reversed the judgment of the Second Circuit,

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[51] Washington v. Glucksberg, 521 U.S. 702, 719-720 (1997).

[52] *Id.* at 721 (quotations and citations omitted). *See also* Chavez v. Martinez, 538 U.S. 760, 775 (2003) ("[T]he Due Process Clause also protects certain 'fundamental liberty interests' from deprivation by the government...unless the infringement is narrowly tailored to serve a compelling state interest. Only fundamental rights and liberties which are 'deeply rooted in this Nation's history and tradition'...qualify for such protection.") (citations omitted); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) ("Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'") (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[53] *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003), *and* Smith v. Doe, 538 U.S. 84 (2003). The cases were argued and decided on the same day.

which had held that public disclosure of Connecticut's sex offender registry deprived registered sex offenders of a liberty interest and violated the Due Process Clause.[54] The Second Circuit asserted that registrants should be entitled to a "predeprivation" hearing to determine whether they are to be considered "currently dangerous."[55] The Supreme Court reversed because the Connecticut statute did not factor "current dangerousness" into its registration provisions, and due process "does not require the opportunity to prove a fact that is not material to the State's statutory scheme."[56]

The Court acknowledged that the Respondent's claim might have actually been a substantive due process challenge "'recast in procedural due process terms.'"[57] Although the Second Circuit held that the statute deprived the registrants of a liberty interest, the Supreme Court explicitly left open the substantive due process issue.[58]

On the same day, the Supreme Court also upheld provisions of the Alaska Megan's Law statute against the attacks of two convicted sex offenders.[59] The sex offenders argued that the statute was unconstitutional, as applied to them, on the grounds

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[54] *Conn. Dep't. of Pub. Safety*, 538 U.S. at 4.

[55] *Id.*

[56] *Id*

[57] *Id.* at 8 (quoting Reno v. Flores, 507 U.S. 292, 308 (1993)).

[58] *Id.* Justice Rehnquist's majority opinion asserted, "Because the question is not properly before us, we *express no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process*." *Id.* at 8 (emphasis added). Justice Souter made the same point in his concurring opinion: "[T]oday's holding does not foreclose a claim that Connecticut's dissemination of registry information is actionable on a *substantive due process principle*." *Id.* at 9 (Souter, J., concurring) (emphasis added). Justice Scalia also left open the possibility in his concurring opinion: "Absent a claim (which respondent has not made here) that the liberty interest in question is so fundamental as to implicate so called 'substantive' due process, a properly enacted law can [provide all the process that is due]." *Id.* at 8 (Scalia, J., concurring).

[59] *Smith*, 538 U.S. 84.

that it violated the Ex Post Facto Clause of the Constitution.[60] The Supreme Court agreed with both the district court and the Ninth Circuit that the intent of the Alaska Legislature was to create a "civil, nonpunitive regime."[61] The primary goal was to protect the public from convicted sex offenders, not punish the offenders.[62] Therefore, the Ex Post Facto Clause of the Constitution was not violated. Again, however, the Court declined to address the substantive due process issue.[63]

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[60] *Id.* at 91.

[61] *Id.* at 96; "[A]n imposition of restrictive measures on sex offenders adjudged to be dangerous is a 'legitimate nonpunitive governmental objective and has been historically so regarded." *Id.* at 93 (quoting Kansas v. Hendricks, 521 U.S. 346, 363 (1997)).

[62] *Smith*, 538 U.S. at 99.

[63] *Id.* at 102. Justice Kennedy opined, "Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion." *Id.*

Justice Stevens dissented, and he mandated that his dissent apply equally to both of the Megan's Law decisions. *Id.* at 110. He argued:

> These two cases raise questions about statutes that impose affirmative obligations on convicted sex offenders. The question in [Smith] is whether the Alaska Sex Offender Registration Act is an ex post facto law, and in [Conn. Dep't of Pub. Safety] it is whether Connecticut's similar law violates the Due Process Clause.
>
> The Court's opinions in both cases fail to decide whether the statutes deprive the registrants of a constitutionally protected interest in liberty. If no liberty interest were implicated, it seems clear that neither statute would raise a colorable constitutional claim. Proper analysis of both cases should therefore *begin* with a consideration of the impact of the statutes on the registrants' freedom.

Id. at 110-11 (emphasis added) (citations omitted).

C. A SUBSTANTIVE DUE PROCESS ATTACK ON NEW JERSEY'S MEGAN'S LAW LEGISLATION AS-APPLIED TO JUVENILES

In order to prove that New Jersey's Megan's Law legislation violates the substantive component of the Due Process Clause, the class challenging the legislation must demonstrate that it (1) infringes upon a fundamental right or liberty interest of juvenile sex offenders and (2) is not narrowly tailored to serve a compelling government interest.[64]

1. Defining the Right in Question: "The Right of Juveniles to be Free from Wide-Scale, State-Imposed Stigmatizations"

In order to determine whether the government infringed upon a fundamental right, the court must first precisely define the right that is in question. A court's determination of how narrowly or broadly to define the right in question is often critical to its due process analysis.[65] The Supreme Court offers

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[64] *See supra* note 52 and accompanying text.

[65] *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006). In *Hernandez*, members of forty-four same sex couples asserted that legislation restricting marriage to same sex couples violated the Due Process Clause and the Equal Protection Clause of the New York Constitution. *Id.* at 5. The court first defined the right in question *narrowly*, as the right to marry a same sex partner. *Id.* at 10. It then examined that right and ultimately determined that the right to marry a same sex partner was not fundamental; it certainly was not deeply rooted in the collective conscious of the people or the history and traditions of the nation. *Id.* Therefore, the restrictive legislation was only subject to rational basis scrutiny, which the court found that it easily satisfied. *Id.*

Had the court began its due process analysis by defining the right in question *broadly* (perhaps as the right to marry, or the right to marry a human being of one's choosing, or the right to freely engage in private intimate relations) the case may have been decided differently. For example, the Supreme Court has already held that the right to marry is a fundamental right. *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978). Therefore, legislation that infringes upon this right must be subject to *strict* judicial scrutiny, as opposed to the minimally probing rational basis scrutiny, which the *Hernandez* court applied. The legislation at issue in *Hernandez* might have failed to pass constitutional muster under strict judicial scrutiny. This case provides one powerful example of the consequences that can result from the court defining the right in question narrowly or broadly.

little guidance on the issue of precisely how to define the right in question.[66] This lack of guidance has led several courts to engage in a confused analysis on the issue. For instance, in *Glucksberg*, the Court opined:

> [T]he Court of Appeals stated that "properly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "is there a right to die?" Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty interest as "the right to choose a humane, dignified death, and "the liberty to shape death."... [W]e have a tradition of carefully formulating the interest at stake in substantive due process cases. ... The Washington statute at issue in this case prohibits "aiding another person to attempt suicide," and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.[67]

The *Glucksberg* Court was certainly not the only court to offer either scant or tortured analysis while attempting to properly define the right in question for substantive due process analysis. In *Bowers v. Hardwick*, the plaintiff alleged that a Georgia statute criminalizing sodomy violated his substantive due process rights.[68] The Court failed to offer any useful

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[66] For instance, the *Glucksberg* Court merely acknowledged, "we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." 521 U.S. at 721. In *Chavez v. Martinez*, the Court asserted that "vague generalities, such as 'the right not to be talked to' will not suffice." 538 U.S. 760, 776 (2003).

[67] 521 U.S. at 722-23 (citations omitted). Essentially, the Court listed many different potential liberty interests, acknowledged that the Court has a duty to "be careful" in these substantive due process situations, and then arbitrarily defined the interest in question without giving any satisfactory analysis.

[68] 478 U.S. 186, 188 (1986).

analysis in narrowly defining the right in question as the right to engage in homosexual sodomy.[69] In *Lawrence v. Texas*,[70] a case involving similar facts, the Court explicitly overturned *Bowers*, and broadly defined the right in question as the right of private, consenting adults to freely engage in intimate affairs without unwarranted government intrusion.[71] Although the Court concluded that the *Bowers* Court "fail[ed] to appreciate the extent of the liberty interest at stake,"[72] it declined to provide a compelling discussion on precisely how to properly define the right in question for substantive due process purposes.[73]

A court presiding over a substantive due process challenge to New Jersey's Megan's Law legislation as-applied to juveniles should define the right in question as the *right of juveniles to be*

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[69] *Id.* at 190.

[70] 539 U.S. 558 (2003).

[71] *Id.* at 564.

[72] *Id.* at 567.

[73] *Id.* The Court opined:

> The case [involves] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Id. at 578.

Although the Court explicitly overturned *Bowers*, it did so without articulating precisely how a court should proceed in defining the right in question for substantive due process purposes. It presumably acted only under the *Glucksberg* Court's directive to "be careful." For a comprehensive discussion of the ambiguities in the majority's decision, see Justice Scalia's dissent. 539 U.S. at 586. To observe a state court's haphazard attempt to precisely define the right in question for substantive due process analysis, see *Hernandez*, 855 N.E.2d at 10 (defining the right in question narrowly, as the "right to marry a same sex partner," after declaring that it had a rational reason to "draw a line" between the broad right to marry and the narrow right to marry a partner of the same sex).

free from wide-scale, state-imposed stigmatizations. This serves as an appropriate and responsible definition that undoubtedly satisfies the *Glucksberg* directive to carefully define the right at issue,[74] as well as the *Chavez* requirement that the asserted liberty interest be more than a "vague generality."[75] Electing to define the right as such would also satisfactorily take into account the extent of the liberty interest at stake, an imperative consideration as evidenced by the *Lawrence* court.[76] Under the limited guidance that the Supreme Court offers, this definition of the right is most appropriate.[77]

2. The Right of Juveniles to be Free from Wide-Scale, State-Imposed Stigmatizations is a Fundamental Right

Under substantive due process analysis, if a court determines that the government infringed upon a fundamental right, the legislation in question will be subject to strict judicial scrutiny; otherwise it will be subject to rational basis scrutiny.[78] In order for a court to determine whether a right should be classified as fundamental, it must ascertain whether it is "deeply rooted" in the history and traditions of the nation or so "implicit in the

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[74] *See supra* note 66, for analysis of *Glucksberg*.

[75] *See supra* note 66, for analysis of *Chavez*.

[76] *See supra* note 70 and accompanying text for analysis of *Lawrence*.

[77] If a court were to define the right in question more narrowly, perhaps as the right of juveniles to be free from community notification requirements implemented to protect the public, it would certainly fail to take into account the extent of the liberty interest at stake, and would make the same flaw as the *Bowers* Court. However, if the court were to define the right in question more broadly, perhaps as the right of juveniles to grow and mature without interference from the state, it would likely fail to satisfy the *Chavez* requirement that the asserted right be more than a 'vague generality.' *See supra* note 66, for analysis of *Chavez*. Defining the right in question as *the right of juveniles to be free from wide-scale, state-imposed stigmatizations* serves as an accurate "middle ground" approach.

[78] *See supra* note 51-52 and accompanying text.

concept of ordered liberty" that neither liberty nor justice would exist if they were sacrificed.[79]

The Supreme Court has always been reluctant to deem a right fundamental and thereby expand the concept of substantive due process. The *Glucksberg* Court opined:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside of the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.[80]

Notwithstanding the Court's hesitance expressed in *Glucksberg*, the Court has still found many rights to be fundamental over the years.[81] In *Roe v. Wade*, the Court

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[79] *See, e.g.*, *Glucksberg*, 521 U.S. at 721.

[80] 521 U.S. at 720 (citing Moore v. East Cleveland, 431 U.S. 494, 502 (1977)) (quotations and citations omitted). *See also Chavez*, 538 U.S. at 775 (arguing that "Many times...we have expressed our reluctance to expand the doctrine of substantive due process, in large part 'because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'") (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)) (citations omitted).

In expressing its reluctance to deem a right fundamental, the Court may have failed to acknowledge the potentially devastating injustices that could flow from being overly cautious in categorizing a right as fundamental, particularly since "guideposts for reasonable decisionmaking are scarce and open-ended." By way of illustration: If a court were to error by *mistakenly* ruling that the right at issue is *not* fundamental, the plaintiff could be denied the existence of a fundamental right. Yet if the court were to error by *mistakenly* ruling that the right as issue *was* fundamental, an individual could be afforded more protection under the law than he or she is due, and would therefore receive a windfall. Eventually, the Supreme Court may implement some form of "guideposts for reasonable decisionmaking in this unchartered area." In the interim, concepts of logic, justice, and fairness suggest that the court error on the side of granting "too much" protection to individuals when fundamental rights are at stake.

[81] 521 U.S. at 720. The *Glucksberg* Court ruled, "In a long line of cases, we have held that...the 'liberty' specifically protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and

declared that the liberty interest implicated by the substantive component of the Due Process Clause encompassed the right of a woman to receive an abortion. [82] It provided a useful discussion that shed light on its determination that the right in question was fundamental.[83]

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upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* (citations omitted).

[82] 410 U.S. 113, 154 (1973).

[83] The Court opined:

> In 1828, New York enacted legislation that...was to serve as a model for early anti-abortion statutes. ... By 1840, when Texas had received the common-law, only eight American states had statutes dealing with abortion. It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought...to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.
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> Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950s a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. ... In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code. ...
>
> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a

The right of juveniles to be free from wide-scale, state-imposed stigmatizations is fundamental; it is deeply rooted in the history and traditions of the nation and implicit in the concept of ordered liberty.[84] This is evidenced by the fact that all fifty states have separate juvenile codes that seek to protect the confidentiality of juvenile proceedings.[85] These codes originated as a direct result of the recognition that juveniles and adults should not be treated alike under the law.[86]

In *In re Gault*, the Court discussed the history of the juvenile court movement and its underlying rationale. The Supreme Court explained:

> The Juvenile Court movement began in this country at the end of the last century. From the juvenile court statute adopted in Illinois in 1899, the system has spread to every state in the Union, the District of Columbia, and Puerto Rico. The constitutionality of juvenile court laws has been sustained in over 40 jurisdictions against a variety of attacks.
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> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he. How has he become what he is, and what had best be done in his interest and the interest of the state to save him

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> limitation, the opportunity to make this choice was present in this country well into the 19th century.

Id. at 138-41.

[84] *See supra* note 52 and accompanying text.

[85] Smith v. Daily Mail Pub. Co., 443 U.S. 97, 105 (1979).

[86] *In re* Gault, 387 U.S. 1, 15-16 (1967).

> from a downward career." The child—essentially good, as they saw it—was made "to feel that he is the object of (the state's) care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalism, were to be "clinical" rather than punitive.[87]

Jeffrey A. Butts, Ph.D, a senior research associate at the Program of Law and Behavior, Urban Institute, in the District of Columbia, explained that confidentiality has been "an integral part of the traditional juvenile justice model, based upon the theory that publicly designating a juvenile as a law violator would stigmatize a young person. This stigma would then encourage the juvenile to adopt a deviant self-image and reduce the potential for rehabilitation."[88]

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[87] *Id.* at 14-16 (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909)). *See also In re* Winship, 397 U.S. 358, 365 (1970).

[88] Jeffrey A. Butts, *Can We Do Without Juvenile Justice?*, 15 CRIM. JUST. 50, 55 (2000) [hereinafter Butts, *Can We Do Without Juvenile Justice*]. The article suggested that some states have begun to relax some of their confidentiality requirements. Yet this does not contradict the notion that the right of juveniles to be free from wide-scale, state-imposed stigmatizations is a fundamental right. The basic fundamental interest of preserving confidentiality remains in tact; states have only begun to loosen the strict requirements in limited circumstances. For example, some states have enacted laws that require "juvenile records to remain open longer or prevented the sealing or destruction of juvenile records altogether, typically those involving violent or serious offenses." *Id.*

Many scholars agree with Dr. Butts' theory that states have promoted confidentiality in order to avoid stigmatizing a young person and thereby allow him or her to enter adulthood with a clean slate. *See, e.g.*, SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 89 (1998); Sandra M. Ko, Comment, *Why do they Continue to get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to aJury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161 (2003); Sacha M. Coupet, Comment, *What to do with the Sheep in Wolf's Clothing: The*

States have long recognized that imposing stigmas upon juveniles runs contrary to the rehabilitative goals of the juvenile justice system and could cause juveniles to commit additional anti-social acts.[89] The right of juveniles to be free from wide-scale state-imposed stigmatizations must be classified as fundamental for substantive due process purposes. Therefore, the legislation will be subject to strict judicial scrutiny and struck down unless it is narrowly tailored to serve a compelling government interest.

3. Distinguishing Paul v. Davis

In *Connecticut Department of Public Safety*, the Supreme Court explicitly left open the question of whether Connecticut's Megan's Law system violated principles of substantive due process.[90] The majority opinion discussed the Supreme Court case of *Paul v. Davis*.[91] In *Paul*, the petitioner police department distributed flyers to local merchants that contained mug shot photographs of possible shoplifters.[92] Respondent, whose name and photograph appeared on the flyer, claimed that this practice violated his constitutional rights under the substantive component of the Due Process Clause.[93] The Court rejected respondent's contention and ruled that mere injury to character, even if defamatory, does not constitute the deprivation of a fundamental liberty interest.[94]

Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System, 148 U. PA. L. REV. 1303 (2000).

[89] Davis v. Alaska, 415 U.S. 308, 319 (1974).

[90] 538 U.S. at 8.

[91] 424 U.S. 693 (1976).

[92] *Id.* at 695.

[93] *Id.* at 696-97.

[94] *Id.* at 702. The Court ruled, "While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause…."

The *Paul* decision does not serve as an obstacle to establishing that the right of juveniles to be free from wide-scale, state-imposed stigmatizations is a fundamental right for substantive due process analysis. First, the *Paul* decision did not concern juveniles; it dealt solely with the substantive due process rights of an adult man who allegedly suffered damage to his reputation.[95] Also, the "damage to reputation" and stigma allegedly imposed upon the respondent in *Paul* was unquestionably of far lesser degree and magnitude than that suffered by a juvenile under New Jersey's Megan's Law scheme.[96] It is also persuasive that the Supreme Court in *Connecticut Department of Public Safety* acknowledged the *Paul* decision, yet still left open the possibility of respondent proving that Connecticut's Megan's Law system deprived him of a liberty interest.[97] The *Paul* decision notwithstanding, the right

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[95] *Id.* at 697.

[96] In *Paul*, the police department distributed flyers to approximately 800 merchants in the Louisville metropolitan area. Under New Jersey's Megan's Law scheme, a juvenile who is adjudicated to be a Tier II or Tier III offender will likely have his or her mug shot and information posted on the Internet database and available to the public worldwide. *Paul* was decided in 1976, prior to the birth of the Internet and other advances in modern technology. At that time, the Court was unable to contemplate how far-reaching and devastating a stigma the State would later be capable of imposing.

[97] In *Connecticut Department of Public Safety*, respondent failed to advance a substantive due process challenge to Connecticut's Megan's Law system, and instead brought only a limited procedural due process challenge. The Court ruled:

> In *Paul v. Davis*, we held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. Petitioners urge us to reverse the Court of Appeals on the ground that, under *Paul v. Davis*, respondent has failed to establish that petitioners have deprived him of a liberty interest. We find it unnecessary to reach this question, however, because even assuming, *arguendo*, that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut Statute.

Later, the Court opined:

> It may be that respondent's claim is actually a substantive challenge...recast in procedural due process terms.

of juveniles to be free from wide-scale, state-imposed stigmatizations is so deeply rooted in the history and traditions of the nation, and implicit in the concept of ordered liberty, that it must be classified as a fundamental right.

4. New Jersey's Megan's Law Legislation Cannot Survive Strict Judicial Scrutiny

Since the right at issue in the present matter must be defined as the right of juveniles to be free from wide-scale, state-imposed stigmatizations, which has been demonstrated to be a fundamental right, New Jersey's restrictive Megan's Law legislation must be subjected to strict judicial scrutiny.[98] In order to survive this heightened scrutiny, the State must show that the legislation is narrowly tailored to serve a compelling state interest.[99]

a. The Legislation Does Not Serve a Compelling State Interest

New Jersey's Megan's Law legislation cannot satisfy the compelling interest test because, in light of the vast amounts of powerful data demonstrating that juvenile sex offenders are unlikely to recidivate,[100] the State does not have a compelling interest in protecting its citizens from juvenile sex offenders.[101]

> Nonetheless, respondent expressly disavows any reliance on the substantive component of the [Due Process Clause], and maintains…that his challenge is strictly a procedural one. … Because the question is not properly before us, *we express no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process.*

538 U.S. at 6-8. (emphasis added) (quotations and citations omitted).

[98] *See supra* notes 51-52 and accompanying text.

[99] *Id.*

[100] *See supra* Section II.

[101] If a court determines that the legislation does not serve a compelling government interest, then it will decline to determine whether the legislation is narrowly tailored to meet the asserted interest.

The Supreme Court has never advanced a "test" to determine whether the government's asserted interest is "compelling." Justice Souter offered some guidance in his concurring opinion in *Glucksberg* by stating, "How compelling the interest…must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it."[102] Also relevant to this determination is the Supreme Court's statement that the government's interest in preventing crime becomes more compelling when the government "musters convincing proof that the arrestee…presents a demonstrable danger to the community."[103]

In the present case, the juveniles have a significant liberty interest at stake and New Jersey's Megan's Law scheme places an extensive burden upon that interest. Therefore, Justice Souter's guidance requires the government's interest to be particularly compelling. In light of the information presented in Section II, the government should not be able to meet this standard. To reiterate, juvenile sex offenders are far less likely to recidivate than adult sex offenders and are proven to be much more amenable to treatment.[104] Therefore, the state does not have a compelling interest in protecting the public from this class.

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[102] *Glucksberg*, 521 U.S. at 773, n.12 (Souter, J., concurring) (citing Planned Parenthood of Southeastern P.A. v. Casey, 505 U.S. 833, 871-874 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.)).

[103] U.S. v. Salerno, 481 U.S. 742, 750 (1974). The Court stated, in dictum, that the government has a compelling interest in preventing crime. *Id*. *See also* Schall v. Martin, 467 U.S. 253, 264 (1984) (asserting that the government had a compelling interest in protecting the community from crime). However, one could not assume that any statute or ordinance that is tenuously related to crime prevention automatically satisfies the "compelling interest" prong in a substantive due process inquiry. For example, the government could not claim that a statute that imposed a mandatory minimum prison sentence upon senior citizens who failed to wear their safety belt served the compelling government interest of crime prevention. The government would be forced to define its interest with a greater degree of specificity. Surely, under the hypothetical provided above, the government would fail to satisfy the compelling interest prong.

[104] *See supra* Section II(B).

b. The Legislation is Not Narrowly Tailored to Meet the State's Asserted Interest

The previous section demonstrates that New Jersey should not be able to prove that its restrictive Megan's Law legislation serves a compelling state interest. Even assuming, *arguendo*, that the state would be able to satisfy this requirement, it would certainly fail to satisfy the second prong of substantive due process analysis because the legislation is not narrowly tailored to meet the compelling state interest. In order for legislation to pass this prong, it cannot be over-inclusive or under-inclusive. Although the legislation does not need to be perfectly drawn,[105] the state must demonstrate that its classification is "precisely tailored."[106]

The Ninth Circuit case of *Nunez by Nunez v. City of San Diego*[107] provides helpful guidance to this analysis. In *Nunez*, the plaintiffs challenged the constitutionality of the city's juvenile curfew ordinance.[108] The court subjected the ordinance to strict judicial scrutiny.[109]

First, the court ruled that the government satisfied the first prong of substantive due process analysis because the government had "a compelling interest in reducing juvenile crime and juvenile victimization."[110] However, the court found

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[105] *See* Vance v. Bradley, 440 U.S. 93, 108 (1979) ("The provision 'does not offend the Constitution simply because the classification' is not made with mathematical nicety.") (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

[106] Plyler v. Doe, 457 U.S. 202, 217 (1982).

[107] 114 F.3d 935 (9th Cir. 1997).

[108] *Id.* at 938.

[109] *Id.* at 946. The plaintiffs challenged the statute on equal protection grounds. However, courts employ the same strict scrutiny analysis to resolve equal protection claims as they do to resolve substantive due process claims. The *Nunez* court asserted that, "In order to survive strict scrutiny, the classification created by the juvenile curfew ordinance must be narrowly tailored to promote a compelling government interest." *Id.*

[110] *Id.* at 947. The government did not satisfy this prong by merely asserting that it had an interest in preventing crime (as New Jersey would presumably attempt to do in this matter). It also had an interest in protecting the community's youth. The court asserted, "The City's interest in protecting the

that the ordinance did not satisfy the second prong because it was not narrowly tailored to meet the asserted compelling interest.[111] The court ruled that, in order for the ordinance to be narrowly tailored, it needed to "ensure that the broad curfew [minimized] any burden on minors' fundamental rights."[112] The ordinance failed to meet that requirement because it did not provide exceptions for many legitimate activities.[113] The court held:

> [I]n the eyes of many, the crippling effects of crime demand stern responses. With the Act, however, the District has chosen to address the problem through means that are stern to the point of unconstitutionality. Rather than a narrowly drawn, constitutionally sensitive response, the District has effectively chosen to deal with the problem by making thousands of this city's innocent juveniles prisoners at night in their homes.[114]

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safety and welfare of minors is also a compelling interest." *Id.* at 946. It continued, "The City claims its interest in protecting minors from the dangers of public places at night is particularly compelling...." *Id.*

[111] *Id.* at 948-49.

[112] *Id.* at 948.

[113] *Id.* The court opined:

> [T]he curfew's blanket coverage restricts participation in, and travel to or from, many legitimate recreational activities, even those that may not expose their special vulnerability. In this regard, it is significant that San Diego rejected a proposal to tailor the ordinance more narrowly by adopting the broader exceptions used in the ordinance upheld. ... We therefore conclude that the City has not shown that the curfew is a *close fit to the problem of juvenile crime and victimization because the curfew sweeps broadly....*

Id. at 948-49 (emphasis added).

[114] *Id.* at 949.

Much of the analysis that the *Nunez* court provided is relevant to our inquiry. New Jersey's Megan's Law legislation is extremely over-inclusive. It applies to *all* juvenile sex offenders, regardless of whether they pose a threat to the community. This is unacceptable, particularly in light of the vast amount of information available to prove that very few juveniles actually pose a significant threat of re-offending.[115] Much like the city in *Nunez,* New Jersey recognized that the effects of crime warranted stern actions, and responded by enacting overly broad, sweeping legislation that includes the entire class of juvenile sex offenders. Rather than enacting a "narrowly drawn, constitutionally sensitive response,"[116] the state legislature carelessly subjected thousands of juveniles to the severe stigmas that attach to its Megan's Law requirements.[117] New Jersey's Megan's Law scheme fails to satisfy the second prong of substantive due process analysis because it is not narrowly tailored to meet the asserted government interest.

The government certainly has an interest in protecting its citizens against crime and, more specifically, against repeat attacks by sex offenders who have been convicted or adjudicated delinquent.[118] Yet New Jersey's Megan's Law legislation infringes upon the liberty interest of juveniles to be free from wide-scale, state-imposed stigmatizations—an interest that is so deeply rooted in the history of our nation as to be deemed fundamental. Therefore, our Supreme Court requires that it be struck down unless it is narrowly tailored to serve a compelling

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[115] *See supra* Section II(B).

[116] *Nunez*, 114 F.3d at 949.

[117] As the District of New Hampshire asserted in *McCollester v. City of Keene*, New Jersey's Megan's Law legislation is "a bull in a china shop of constitutional values." 586 F. Supp. 1381, 1385 (D.N.H. 1984).

[118] *See supra* notes 9-13 and accompanying text. The attacks on Megan Kanka and other children prompted widespread fear throughout the New Jersey community. Both parents and non-parents throughout the community are entirely justified in fearing for the well being of the state's children and wanting to protect them against criminals that prey upon such a vulnerable class. In light of such fears, the government should act to protect the state's children. However, it must legislate within constitutional parameters. The government is never licensed to violate the Federal Constitution, even if acting in good faith to dispel widespread fears.

government interest. New Jersey's legislation, as-applied to juveniles, does not satisfy this strict constitutional scrutiny.

VI. RECOMMENDATION: PROPOSING A HYBRID TEST TO SAFEGUARD JUVENILES' CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS WHILE CONTINUING TO PROTECT THE PUBLIC

A. THE DISPARITY OF TREATMENT OF JUVENILES AMONG THE STATES

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registry Act,[119] which required all states to implement some form of sex offender registry.[120] Under the statute, any state that failed to implement an adequate program would not receive ten percent of the funds that it would have received under the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3765).[121]

Although all states are now required to maintain a registry, their treatment of juveniles widely varies. Many states explicitly impose some form of registration requirements upon juvenile offenders, but these states differ in their application.[122] Other

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[119] The Act maintains, in pertinent part:

> (1) State guidelines. The Attorney General shall establish guidelines for state programs that require:
> (A) a person who is convicted of a criminal offense against a victim who is a minor or is convicted of a sexually violent offense to register a current address...; and
> (B) a person who is a sexually violent predator to register a current address....

42 U.S.C. § 14071(a) (2006).

[120] *Id*. *See also supra* note 37.

[121] 42 U.S.C. § 14071(g) (2006)

[122] *Compare*, N.J. STAT. ANN. § 2C:7-2 (West 2007) (imposing its Megan's Law system upon juveniles without any limitations) *with* CAL. PENAL CODE § 290(d)(1) (West 2006) (juveniles included within Megan's Law only if they had

states do not expressly include or exclude juveniles, and leave considerable room for judicial interpretation.[123] Two states have explicitly moved juveniles outside of their statutory scheme.[124] One may reasonably speculate that the states differ in their treatment of juveniles because legislatures typically do not educate themselves about the characteristics of juvenile offenders prior to enacting their Megan's Law statutes.[125]

B. THE PROPOSAL

This note has demonstrated that New Jersey must overhaul its Megan's Law system as it applies to juveniles. It should adopt an approach that appropriately corresponds to the vast amount of information now available concerning juvenile sex offenders. Although juvenile sex offenders, as a class, have been proven to be unlikely to recidivate, the Legislature should also consider the interest of the public in extreme cases where particular juveniles are determined to be likely to recidivate. This note proposes that New Jersey should expressly remove all juveniles under the age of fifteen from its Megan's Law system and give juvenile judges discretion to impose Megan's Law's registration and notification requirements upon juveniles

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been in the custody of the Department of Corrections and Rehabilitation); IOWA CODE § 692A.2(6) (2006) (juvenile is subject to registration provisions unless the juvenile judge waives the requirement); *and* ALASKA STAT. § 12.63.100(3) (2006) (imposing registration requirements upon juvenile offenders that have been tried and convicted as adults).

[123] *See, e.g.*, FLA. STAT. ANN. § 775.21 (West 2006); MD. CODE ANN., CRIM. PROC. § 11-701 (West 2006); MONT. CODE. ANN. § 46-23-501-8 (2006); NEB. REV. STAT. ANN. § 29-4003 (LexisNexis 2006); N.H. REV. STAT. ANN. § 651-B:1-9 (2006).

[124] *See* ALA. CODE §§ 13A-11-200 to 203 (2006) ("If any person, *except a delinquent child*...residing in Alabama, has been convicted, or shall be convicted in any state or municipal court in Alabama, or federal court...shall, upon his or her release from legal custody, register with the sheriff of the county..."(emphasis added)); N.M. STAT. ANN. § 29-11A-3(D)(1) (West 2007) (definition of "sex offender" limited to one that is "convicted" of committing a sex offense).

[125] Both Federal Congress and the New Jersey Legislature failed to do so. *See supra* note 37.

between the ages of fifteen and seventeen if he or she finds, by clear and convincing evidence, that that juvenile is likely to re-offend. This approach adopts aspects of the most rational state systems currently in force and strikes an appropriate balance between the need to safeguard juveniles' constitutionally protected liberty interests and the need to protect the public.

1. Using Age as a Determinative Requirement: Excluding All Juveniles Under the Age of Fifteen from Megan's Law Requirements Adequately Considers the Vast Amount of Data Now Available on Juvenile Sex Offenders

The proposed system forbids judges from imposing Megan's Law registration or notification requirements upon juveniles who are under the age of fifteen. Some states currently use age as a determinative factor in determining whether to subject juveniles to Megan's Law. For example, Ohio excludes juveniles from its Megan's Law scheme unless the juveniles are age fourteen or older,[126] and South Dakota excludes juveniles from its Megan's Law system unless the juveniles are age fifteen or older.[127]

Excluding juveniles under the age of fifteen is preferable because it properly takes into account the data available on juvenile sex offenders. Youths often engage in sexual behavior as a means of exploration, without possessing deviant motives.[128] As these youths mature and develop, they will be less likely to engage in exploratory sexual conduct. Removing juveniles under the age of fifteen from New Jersey's Megan's

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[126] *See* OHIO REV. CODE § 2950.01(M) (West 2007).

[127] *See* S.D. CODIFIED LAWS § 22-24B-2 (2007) ("Any juvenile fifteen years or older shall register as a sex offender if that juvenile has been adjudicated of a sex crime [as defined under South Dakota laws], or an out-of-state or federal offense that is comparable to the elements [of the South Dakota laws,] or any crime committed in another state if the state also requires a juvenile adjudicated of that crime to register as a sex offender in that state.").

[128] *See supra* notes 42-43 and accompanying text.

Law scheme would reduce the likelihood that an individual becomes unduly stigmatized for an exploratory act.[129]

Even if a juvenile under the age of fifteen engages in an illegal sexual act in order to gain sexual gratification, it is inappropriate for a state to impose such a wide-scale stigma upon him or her, and thereby label the juvenile at such a young age. Our nation has historically acknowledged many important differences between children and adults.[130] Imposing such a severe stigma upon a young juvenile would cause the juvenile to suffer unjustified harms and would increase the likelihood that he or she would adopt a deviant self-image.[131] Individuals under the age of fifteen who perform these acts should be punished,[132] but not subject to such wide-scale stigmatizations.

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[129] *Id.* *See also supra* note 43 for a discussion that suggests experts are not clear on what constitutes normative sexual development in juveniles.

[130] *See, e.g.*, *In re* Gault, 387 U.S. 1, *supra* note 86 and accompanying text.

[131] *See* Butts, *supra* note 88, at 53.

[132] *See* Trivits, *Application of Megan's Law to Juveniles*, *supra* note 39, at 697.

The authors assert:

> Incidents of sexual offending should be corrected, not ignored, and offenders should be held accountable in accordance with the law. ... However...many policymakers [are] bent on severely punishing all adolescent sexual misconduct as criminal and labeling [juvenile sex offenders] as highly deviant, despite a paucity of data on what constitutes normal or abnormal sexual development. Moreover, such a punitive attitude may not be necessary to prevent sexual recidivism in adolescents because most adolescents desist when social and/or legal correction is applied.

2. Conferring Additional Discretion to the Juvenile Judge While Providing Legislative Guidance to Safeguard the Juveniles' Constitutionally Protected Liberty Interests and Protect the Public

Under the proposed approach, New Jersey would bestow an additional amount of discretion to juvenile judges.[133] Several states currently grant juvenile judges full discretion to determine whether to subject juveniles to its Megan's Law scheme.[134] However, allowing juvenile judges to retain full

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[133] This notion should not concern the Legislature. New Jersey already entrusts tremendous discretion to its juvenile judges in fashioning juvenile dispositions. For instance, if a juvenile is adjudicated delinquent, the New Jersey Code of Juvenile Justice gives the court the power to order incarceration, or any one of the more than *twenty* listed dispositions. *See* N.J. STAT. ANN. § 2A:4A-43(b) (West 2007). Included within these twenty listed dispositions is the discretion to "[o]rder that the juvenile satisfy any other conditions reasonably related to the rehabilitation of the juvenile." N.J. STAT. ANN. § 2A:4A-43(b)(18) (West 2007).

A recent New Jersey case depicted the level of discretion afforded to juvenile judges to fashion juvenile dispositions. *See* State *ex rel.* D.A., 897 A.2d 425 (N.J. Super. App. Div. 2006). In that case, the juvenile entered a guilty plea to acts that would have constituted endangering the welfare of a child if committed by an adult. *Id.* at 425. He was sentenced to a three-year period of probation with credit for time spent in juvenile detention and was obligated to register under Megan's Law. *Id.* at 425-6. In addition, as an "additional and unnegotiated condition of probation," the judge required the juvenile to advise the parents of any girl he planned to date of the terms of his disposition, including his Megan's Law status. *Id.* at 426. Under Megan's Law, the juvenile would have probably been only a Tier I offender, which would have required him to register with local law enforcement agencies. *Id.* at 428-29. Nevertheless, the judge was compelled by the "spirit of Megan's Law" to impose additional notification requirements upon the juvenile. *Id.* at 426-27. The Appellate Division upheld the juvenile judge's ruling, and the New Jersey Supreme Court denied the petition for certification. *Id.* at 428-29. *See In re* D.A., 907 A.2d 1015 (N.J. 2006) (*denying* petition for certification).

The juvenile judge believed that the particular facts of the case warranted additional notification requirements. An adult criminal judge would not have had the power to impose such additional notification requirements. Clearly, New Jersey already entrusts its juvenile judges with great discretion in fashioning dispositions.

[134] *See, e.g.*, ARIZ. REV. STAT. § 13-3821(D) (LexisNexis 2007) ("The court *may* require a person who has been adjudicated delinquent for an act that would constitute an offense specified [under this section] to register pursuant to

discretion over the matter, without any legislative guidance, may fail to safeguard the constitutionally protected liberty interests of juveniles and also fail to protect members of the public.

a. *Legislative Guidance Safeguards Constitutional Interests*

Megan's Law's registration and notification requirements infringe upon the fundamental liberty interest of juveniles to be free from wide-scale state-imposed stigmatizations, so the restrictive legislation must be narrowly tailored to meet a compelling government interest in order to survive strict judicial scrutiny.[135] Our proposal requires the juvenile judge to find, by clear and convincing evidence, that the juvenile will be likely to recidivate.[136] The legislative guidance that the proposed system

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this section.") (emphasis added); MONT. CODE ANN. § 41-5-1513(1)(d) (2007) ("If a youth is found to be a delinquent youth, the youth court may enter its judgment making one or more of the following dispositions…in the case of a delinquent youth who has been adjudicated for a sexual offense…and is required to register as a sexual offender…exempt the youth from the duty to register if the court finds that…registration is not necessary for protection of the public and that relief from registration is in the public's best interest.").

[135] *See supra* Section III(A).

[136] North Carolina takes a similar approach, by requiring the judge make a threshold finding that the juvenile is a "danger to the community" prior to imposing Megan's Law's registration and notification requirements. N.C. GEN. STAT. § 14-208.26 (2006). The statute reads, in pertinent part:

> When a juvenile is adjudicated delinquent for a violation of [first degree rape, second degree rape, first degree sexual offense, second degree sexual offense, or attempted rape or sexual offense] and the juvenile was at least eleven years of age at the time of the commission of the offense, the court shall consider whether the juvenile is a *danger to the community.* If the court finds that the juvenile is a danger to the community, then the court shall consider whether the juvenile should be required to register with the county sheriff in accordance with this Part. The determination as to whether the juvenile is a danger to the community and whether the juvenile shall be ordered to register shall be made by the presiding judge at the dispositional hearing. If the judge rules that the juvenile is a danger to the community and that the juvenile shall register, then an order shall be entered requiring the juvenile to register. The court's findings regarding whether the juvenile is a danger to the community and whether the juvenile shall register shall be entered into the court record. *No juvenile may be required*

offers ensures compliance with substantive due process mandates for two reasons.

First, the proposed legislation serves a compelling state interest because it targets offenders who actually pose a threat to the general public. New Jersey's current legislation should fail the first prong of substantive due process analysis because it does not serve a compelling government interest.[137] Juvenile sex offenders, as a class, are not likely to recidivate.[138] Therefore, the state does not have a compelling interest in protecting the public from repeat attacks by juvenile sex offenders. The proposed legislation only targets juvenile offenders, between the ages of fifteen and seventeen, whom the court deems likely to recidivate. The state has a compelling interest in protecting the public from this "special" class of juvenile offenders.

Also, the proposed legislation will satisfy the second prong of substantive due process analysis because it is narrowly tailored to serve the asserted compelling state interest. Even if New Jersey's current legislation can be declared to serve a compelling state interest, it is wildly over-inclusive because it applies to *all* members of the class, regardless of whether they pose a legitimate threat to the community.[139] The proposed legislation is not over-inclusive because it will affect only those juveniles that are found to pose a legitimate threat to the community.

> *to register under this Part unless the court first finds that the juvenile is a danger to the community.*

Id. (emphasis added).

Although the North Carolina legislation requires the judge to determine that the juvenile poses a danger to the community prior to subjecting him or her to its Megan's Law requirements, our proposal offers greater protection to the juvenile offender. North Carolina subjects *all* juvenile offenders over the age of eleven to its Megan's Law system, so long as the court determines that the juvenile poses a risk to the community. That approach is not appropriate in light of the information readily available concerning juvenile offenders. *See supra* Section II (B).

[137] *See supra* Section III (C)(4)(a).

[138] *See supra* Section II (B).

[139] *See supra* Section III (C)(4)(b).

Therefore, it is narrowly drawn, or "precisely tailored"[140] to meet the compelling government interest.

b. Legislative Guidance Protects the Public

Granting juvenile judges absolute discretion, without any legislative guidance, could also serve to compromise public protection. For example, under the proposed approach the judge is *required* to impose the registration and notification requirements upon the juvenile if he or she finds that the juvenile is likely to recidivate. A judge that possesses full discretion over the matter could decline to impose these requirements despite a finding that the juvenile is likely to recidivate.[141] By setting forth a precise standard for juvenile judges to follow, the Legislature will be acting to ensure that members of the public are protected from the juvenile offenders who actually pose a threat to the community.

c. An Additional Benefit: Alleviating the State of its Heavy Burden of Implementing Megan's Law

New Jersey endures a very heavy burden in implementing its Megan's Law system. It subjects nearly 12,000 individuals to its Megan's Law registration and notification requirements.[142] Currently, every individual who has been convicted, adjudicated

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[140] *See Plyler*, 457 U.S. at 217 (1982).

[141] Since Megan's Law is such a controversial and politically sensitive topic, this situation could arise under many different circumstances. For example, a judge possessing full discretion that is morally opposed to Megan's Law because of the stigma that it attaches to the offenders may *never* impose the requirements, regardless of the juvenile's dangerousness. However, the proposed system sets a definitive standard; the judge must find, by clear and convincing evidence, that the juvenile is likely to recidivate. In a state that offers no legislative guidance, the juvenile judges would all be free to impose their own standards. For example, the judge in one county might impose Megan's Law requirements upon a juvenile only upon a finding that the juvenile is likely to reoffend "beyond a reasonable doubt," while the judge in another county might impose the Megan's Law requirements only upon a finding, by clear and convincing evidence, that the juvenile is "extraordinarily likely" to re-offend.

[142] Telephone Interview with Criminal Records Headquarters, New Jersey State Police (January 17, 2007). *See also* Klaas Kids Foundation, http://www.klaaskids.org/st-njer.htm.

delinquent, or found not guilty by reason of insanity for commission of a sex offense must register in accordance with the provisions of Megan's Law.[143] The State is responsible for providing each individual with a "tier" by assessing the risk that he or she will recidivate.[144] The Prosecutor performs this task using the RRAS for adult offenders and the recently promulgated JRAS for juvenile offenders.[145] The court provides review hearings for registrants that object to the risk assessment or the subsequent notification requirements.[146]

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[143] *See* N.J. STAT. ANN. § 2C:7-2, *supra* note 17 and accompanying text.

[144] *See* N.J. STAT. ANN. § 2C:7-8, *supra* notes 18-20 and accompanying text.

[145] *Id.* Salem County Assistant Prosecutor John C. Wright explained, "The assessment is a highly factual process that requires that the Prosecutor's Office to examine the history, treatment and diagnosis of the offender to determine risk. The assessment is crucial, because it effectively determines the level of notification." Interview with John C. Wright, Salem County Assistant Prosecutor, in Salem, N.J. (January 19, 2007). *See also In re* Registrant G.B. for a discussion of New Jersey's tiering process. 685 A.2d 1252 (N.J. 1996).

[146] *G.B.*, 147 N.J. at 75.

The court asserted:

> For registrants who raised objections to the notification, the Court provided a judicial hearing at which a judge would be able to evaluate the merits of the parties' contentions. At the hearing, the State was given the burden of going forward with its *prima facie* case, consisting of that evidence justifying the proposed risk level and manner of notification. Once the prosecutor met the burden of going forward with the *prima facie* case, the offender bore the burden of persuading the court by a preponderance of the evidence that the proposed tier designation and notification did not conform with the laws and the Scale. As long as the prosecutor satisfied his or her burden, the trial court had to "affirm the prosecutor's determination unless it [was] persuaded by a preponderance of the evidence that it [did] not conform to the laws and Guidelines." If the court overruled the prosecutor's proposed tier designation, it had to state on the record the reason why the proposed designation did not conform to the law.

Id. at 75-76 (quoting *Doe v. Poritz*, 142 N.J. at 32) (citations omitted).

If the State concludes that an offender poses a low risk of re-offending (Tier I), the State is required to notify local law enforcement agencies.[147] If the State concludes that an individual poses a moderate risk of re-offending (Tier II), it must notify community organizations (e.g., religious organizations and scouts) in addition to local police departments.[148] If the State determines that the individual poses a high risk of re-offending (Tier III), it must create a warning flyer concerning the offender and deliver it to every residence within a one-mile radius of the offender's home, in addition to notifying appropriate organizations and the police department.[149] Information pertaining to all Tier III and, with limited exceptions, Tier II offenders is contained in the New Jersey Sex Offender Internet Registry.[150]

If an offender moves to a new address, that person must notify the law enforcement agency with which he or she was previously registered and re-register with the appropriate law enforcement agency within ten days.[151] A person who fails to register under the Act is guilty of fourth degree crime.[152]

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[147] *See* N.J. STAT. ANN. § 2C:7-8, *supra* note 17.

[148] *Id.*

[149] *Id.* John C. Wright stated, "[Effectuating notice] can be as easy as notifying a police department, or as "manpower consuming" as notifying everyone within a one-mile radius of a registrant's home. The latter option often takes days to complete." Interview with John C. Wright, Assistant Salem County Prosecutor, *supra* note 145.

[150] *See* N.J. STAT. ANN. §§ 2C:7-12-19, *supra* notes 21 and 20. As of the beginning of the year (2007), 2,169 individuals were contained in New Jersey's Sex Offender Internet Registry. The New Jersey Sex Offender Internet Registry web page provides a statistical breakdown by county, showing the number of offenders from each county that are contained in the database. http://www.state.nj.us/njsp/info/reg_sexoffend.html (read the terms, click "I accept", then follow "Statistics" hyperlink).

[151] N.J. STAT .ANN. § 2C:7-2(d) (West 2007). John C. Wright detailed the practical burdens that this requirement imposes upon the state:

> Registrants tend to move frequently. It is not uncommon for a registrant to be without a home and be supported through public programs. Unfortunately, that may mean that the registrant is placed in "temporary" housing such as a motel. The length of the stay is often long enough for the

It is likely that the New Jersey Legislature did not accurately anticipate the costs that the State would incur in implementing its Megan's Law system.[153] The current system drains the state of significant resources and forces law enforcement officers to perform trivial tasks that do not serve to protect the public against crime. For instance, state prosecutors must prosecute fourth degree crimes when the offenders fail to register.[154] State investigators must travel around their jurisdiction to ensure that

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> county to complete notification before the registrant is placed elsewhere. The result is repeated notifications of the same registrant.

Interview with John C. Wright, Assistant Salem County Prosecutor, *supra* note 145.

[152] N.J. STAT. ANN. 2C:7-2(a) (West 2007). Recently, the New Jersey Supreme Court ruled that failure to annually verify one's address is not itself a fourth degree crime. *State v. Gyori*, 887 A.2d 156 (N.J. 2005) (*citing* 862 A.2d 1178, (N.J. App. Div. 2004) (Wecker, J., dissenting)). The New Jersey Supreme Court ruled that the Legislature did not provide proper notice of a penalty for failing to annually verify an address. The court held that the Legislature did provide proper notice that failure to register, re-register, or notify the appropriate law enforcement agency of a change in an address, will be penalized.

[153] *See* New Jersey Legislative Fiscal Estimate to Assembly No. 84 (Sept. 26, 1994):

> The Department of Law and Public Safety estimates the cost of implementing this bill to maintain a central registry at $196,016 in the first year following enactment. This estimate includes $134,365 for salary and fringe benefits for three staff and for five day's services of one deputy attorney general to prepare and propose the notification and registration rules required in this bill. This estimate also includes $37,500 for materials and supplies, and $37,500 for one-time equipment costs. Assuming an annual inflation rate of approximately six percent in the second year for salaries and deducting one-time data processing equipment and other costs, the department estimates the bill's second and third year costs at $176,383 and $172,582, respectively.

Id.

[154] Interview with John C. Wright, Salem County Assistant Prosecutor, *supra* note 145.

sex offenders reside at the provided address, create informational flyers and distribute them to local residents, and testify at grand jury in order to indict fourth degree failure to register crimes.[155] Salem County Assistant Prosecutor John C. Wright explained:

> Megan's Law enforcement presents unique challenges to New Jersey prosecutors. There is no question in my mind that the community notification act is a fundamentally valuable tool. In principle it provides the public with information that if properly used helps protect the most vulnerable groups within our citizenship. However, it also is a service to the citizens of New Jersey to periodically step back and ask if the intentions of the law are being achieved. [A] reasonable person [may] question the…current system, especially in light of resources that must be brought to bear to enforce it. For example, is there a way to be more effective and still streamline efficiency? Should juveniles be subject to the same requirements as adults?
>
> An honest look at the current community notification system raises legitimate questions about its effectiveness and efficiency. Perhaps it is time that the New Jersey Legislature examined the current statue with an eye to keeping it strengths and excising its weaknesses.[156]

The proposed system will allow the state to allocate its funds more efficiently and will allow law enforcement officers to spend more time performing tasks that will better serve the public interest. The Legislature would relieve the state of part of its burden in implementing Megan's Law by excluding all juveniles under the age of fifteen from its registry, and removing all juveniles between the ages of fifteen and seventeen unless the juvenile judge finds, by clear and convincing evidence, that the

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[155] *Id.*

[156] *Id.*

juvenile is likely to recidivate. The current proposal will effectively save significant state resources without sacrificing the public's security.

CONCLUSION

Juvenile sex offenders are not likely to ever re-offend.[157] The New Jersey Legislature carelessly assumed that juvenile sex offenders recidivate at the same rate as adult sex offenders, without a scintilla of empirical evidence to support its assumption.[158] In light of widespread pressure from the public, and its apparent misunderstandings concerning juvenile sex offenders,[159] the Legislature adopted sweeping legislation that subjected all juvenile sex offenders to Megan's Law's registration and notification requirements.

New Jersey's current Megan's Law scheme is unconstitutional as-applied to juveniles.[160] It infringes upon the fundamental right of juveniles to be free from wide-scale, state imposed stigmatizations.[161] Since juvenile sex offenders, as a class, are not likely to recidivate, the government does not have a compelling interest in protecting the public against repeat offenses.[162] Also, the legislation is wildly over-inclusive because it applies to *all* juvenile sex offenders, regardless of whether they pose a threat to the community.[163]

This note proposes a new Megan's Law scheme for New Jersey.[164] All juveniles under the age of fifteen should be

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[157] *See supra* Section II (B).

[158] *See supra* Section II (A).

[159] *See supra* Sections I and II (A).

[160] *See supra* Section III.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *See supra* Section IV.

excluded from Megan's Law requirements.[165] This directive is appropriate in view of the fact that young juveniles are particularly malleable and often engage in exploratory sex acts.[166] The state acts improperly when it imposes rigid, unforgiving stigmas upon members of this class.[167] Juveniles between the ages of fifteen and seventeen should be subject to Megan's Law's requirements if the juvenile judge finds, by clear and convincing evidence, that the juvenile is likely to recidivate.[168] This directive safeguards the constitutional rights of juveniles while adequately protecting members of the public.[169] The legislation serves a compelling government interest because it protects the public against individuals that actually pose a threat to the community.[170] It is also narrowly tailored to serve that interest because it only affects individuals who are deemed likely to recidivate, rather than the entire class.[171] The New Jersey Legislature should adopt the proposed Megan's Law system.

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[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*