

## **Megan's Law and the Offenders Constitutional Rights**

Children are our future and healthy children make for a better future. There are circumstances beyond the control of parents that occur when sexual offenders have inappropriate contact with children. Sexual offenses include molestation, forcible rape, sodomy, lewd acts, exposing oneself to others, statutory rape among other classifications. This can affect their emotional and psychological well being. Good parents do their best to keep their children safe and there are laws in place to help notify them of offenders living in the area. Megan's Law<sup>1</sup> and similar laws enacted in each state require registration and community notification of sexual offenders moving into an area and is a resource available to the public to help them assess the risk in the community they live and work in. However, it is not enough to "protect" everyone from abuse. When an offender is placed on "Megan's Law" list the offender's name, address, physical features, height/weight description, and a photo are listed along with the penal code violation and description of crime. With all the "private" information being made "public" offenders have tried repeatedly to show that Megan's Law violates their constitutional right to privacy. Megan's Law does not violate the constitutional rights of convicted sex offenders and provides community notification of convicted offenders for the benefit of a potentially safer community.

Megan's law was born of an unfortunate turn of events when a 7 year old Megan Kanka went for a ride on her bicycle around her block. She disappeared and was later discovered dead. A neighbor, a twice convicted sex offender, had moved across the street just prior to her disappearance and later confessed to the crime and admitted that he lured her inside with the

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<sup>1</sup> <http://www.meganslaw.ca.gov>

promise to see a puppy. He then strangled, raped, and killed her. Neither the family nor the community was aware that the new neighbor and 3 others living in the same home were convicted sexual offenders. The notification system allows the community to be aware when a convicted offender moves in or works nearby. Making the community aware is important because it allows one to make the determination of how they may interact with a particular offender that is a neighbor, if at all. One may make the decision to move or purchase pepper spray. It is an option that may allow one the extra comfort in an otherwise uncomfortable situation. Also, the notification system is public information that although unfortunate for the offender is a requirement due to the level of his or her offense. An argument can be made that once they are on the list the probability of crime will decrease and the risk for re-offense drops. In cases of violent offenders, if they want to re-offend they will no matter what.<sup>2</sup> They can and will find a way without any care of being on a list. By being aware a family can take extra measures to protect themselves and their family.

Offenders continue to challenge the laws by showing it is in violation of their constitutional right to privacy. In 1995, Plaintiff Doe asserted the notification process infringes on this Equal Protection Rights. Plaintiff argued he should not be treated and placed under the same category as other more serious sex offenders especially since he had completed rehabilitation counseling treatment. By being placed on the same list he asserted his Equal Protection Rights were violated as he was entitled to be treated as any other non-offender and integrated back into society without it being on public notice. Plaintiff argues his equal protection rights under the Fourteenth Amendment were violated and he was not treated the

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<sup>2</sup> Doe v. Poritz, 662 A. 2d 367 - NJ: Supreme Court 1995

same under the law. The courts reasoned the state interests in public disclosure substantially outweigh plaintiff interest in privacy. The information was deemed to be “not deserving of a particularly high degree of protection”. Offenders needed to undergo testing in order to assess the risk they posed and if there was any chance of posing a future risk based on the severity of a past offense then was deemed to be beneficial to the community and justified the release of the information on the notification system. *The courts held that under both the State and Federal Constitutions, that neither the registration, nor the Notification Law violates the right to privacy.* (Doe v. Poritz, 662 A. 2d 367 - NJ: Supreme Court 1995).<sup>3</sup>

Plaintiffs argued they should not be on the required to register per Megan’s Law post incarceration as they had already served the time in relation to the crime and should not be subject to further “public humiliation” and “shaming”. Plaintiffs argued that being punished for their crime after release from prison was unnecessary and in violation of the Ex Post Facto Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment. "Ex post facto" is a term of art applicable only to "punishment" legislative action that retroactively "punishes as a crime an act previously committed, which was innocent when done," "makes more burdensome the punishment for a crime, after its commission," or "deprives one charged with crime of any defense available according to law at the time when the act was committed."<sup>4</sup> The court held *registration on the sex offender registrations and notification law in compliance with Megan’s Law did not violate Ex Post Facto Clause. “The Act is nonpunitive and its retroactive application does not violate the Ex Post Facto Clause”.* (Smith v. Doe, 538 US

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<sup>3</sup> Doe v. Poritz, 662 A. 2d 367 - NJ: Supreme Court 1995

<sup>4</sup> Beazell v. Ohio, 269 U.S. 167,169-70,46 S.Ct. 68, 68-69, 70 L.Ed. 216 (1925)

84 - Supreme Court 2003)<sup>5</sup>. The law was recent at the time of the initial lawsuit and inclusion to the list was determined to have a beneficial effect to the community and not meant to have a punitive effect on the offender. It was a measure to notify the community as the new requirement of the law stated and not one to further shame the plaintiff and others similarly situated. Being added to the registry was a benefit to the community as a past crime is still a risk for a future crime.

Soon after another case, *Doe v. Pataki*<sup>6</sup> also discussed whether retroactive application of sex offender registration or notification laws would violate the Ex post facto laws and the Supreme Court decisions discussing whether a sanction or proceeding was sufficiently “punitive” or “criminal” to invoke the protections of the Ex post Facto clause violations, the Double Jeopardy Clause, the Excessive Fines Clause, the Cruel and Unusual Punishments Clause, or the procedural safeguards of the Fifth and Sixth Amendments. After applying a four factor test to the Ex Post Facto provision it was determined that notification was not “punishment” in fact. The notification portion of the requirements is not there to offer a “punitive” measure but rather it is there as a complying reality of the law. Requiring an offender to report their address and whereabouts once a year was not deemed to be a punishment and an action that one should be able to handle without an infringement on their rights. *The court held “we conclude that the plaintiffs have not provided “the clearest proof” that the burdens attendant to these provisions are “so punitive in form and effect,”<sup>7</sup> as to transform them into punitive sanctions. Because we have previously concluded that the legislature’s intent in enacting these provisions*

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<sup>5</sup> Smith v. Doe, 538 US 84 - Supreme Court 2003

<sup>6</sup> Doe v. Pataki, 120 F. 3d 1263 – Court of Appeals, 2<sup>nd</sup> Circuit 1997

<sup>7</sup> *Ursery*, U.S at, 116 S.Ct. at 2148

*was nonpunitive and that the text and structure of the Act bear out its prospective, regulatory goals, we hold that the notification requirements of the SORA do not constitute punishment for purposes of the Ex Post Facto Clause.”*

Megan’s Law accomplished the *release of information* to the public but a new addition of the Federal version of Megan’s Law entitled “The Jacob Wetterling Act”<sup>8</sup> “focused on requiring states to implement a registry of sex offenders and those who commit crimes against children”. In addition the “Adam Walsh Act” or AWA was enacted to *expand the notification requirements* of Megan’s Law notification system. The law reclassified offenders into categories based on the level of violence and type of abuse. The levels were considered under Tier I, Tier II, and Tier III as reviewed and determined by the Executive Judicial officers. The review was based on reopening final judgments rather than granting an offender a new hearing or trial. Plaintiffs argued that in doing so the law was violating the separation-of-powers doctrine.<sup>9</sup> If the powers are not separated then there is no true liberty. If the judicial branch has all the power then there is no way to offer true checks and balance system. After careful consideration, the court held that *the separation-of-powers doctrine was violated when it required the attorney general to reclassify sex offenders who have already been classified by court order under former law. Reclassification provisions in the AWA were deemed to be unconstitutional and severance was the remedy.* (State v. Bodyke, 126 Ohio St. 3d 266 - Ohio: Supreme Court 2010.)<sup>10</sup>

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<sup>8</sup> <http://www.parentsformeganslaw.org/public/meganFederal.html>

<sup>9</sup> [https://www.law.cornell.edu/anncon/html/art1frag1\\_user.html](https://www.law.cornell.edu/anncon/html/art1frag1_user.html)

<sup>10</sup> State v. Bodyke, 126 Ohio St. 3d 266 - Ohio: Supreme Court 2010

The plaintiff's right to privacy was questioned again as the plaintiff asserts the home address shall remain private. It was argued (and ultimately rejected) that a regular citizen can opt to have their home address left incomplete in informational registries and so it was deemed to be important information that could and should be left out of the notification process as a constitutional right. The court disagreed. The case clarified the Rules of Conduct,<sup>11</sup> established the Redacted and Unredacted notices, and the requirements of each. With the clarification in the Rules of Conduct, it allows the offenders reassurance that the information is only being physically distributed to the immediate community that is on a need to know basis even though they still wanted to have the information protected and they are not allowed to redistribute the information unless it meets the very specific criteria or face fines for violation. The benefit to the community outweighed the desire of the offenders to keep their information private. *The court held the New Guidelines adequately safeguard appellants interest in assuring that information is disclosed only to those individuals who have a particular need for the information. In addition they found that including in the redacted notices information concerning appellant's areas of residence does not unjustly infringe upon appellants privacy interest.* (Paul P. v. Farmer, 227 F. 3d 98 - Court of Appeals, 3rd Circuit 2000).<sup>12</sup>

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<sup>11</sup> Megan's Law Rules of Conduct. States in part, "Once the receipt form is signed, the individual receives the Unredacted Notice along with a copy of the court order and the "Rules of Conduct," which also vary somewhat depending on the recipient. With respect to school personnel, the Rules of Conduct state that the recipient cannot "share the information in this notification flier, or the flier itself, with anyone." The Rules of Conduct for community organization recipients state that they are not allowed to share the information in the "flier, or the flier itself, with anyone outside of the community organization." Finally, parents and legal guardians are told that they can share the information "with those residing in [their] household, such as family members," and "with anyone caring for [their] children at [their] residence in [their] absence." They are not allowed, however, to share the information with anyone outside of the household or not in their care and, specifically, not "with the media." All of the Rules expressly warn that inappropriate conduct vis-a-vis the notices "may result in court action or prosecution being taken against you."

<sup>12</sup> Paul P. v. Farmer, 227 F. 3d 98 - Court of Appeals, 3rd Circuit 2000

Megan's law does very well to notify the community about convicted offenders. It does not account for those that have gone unreported. There should be more information to advise the community to step forward even if the offender is a family member, friend, or acquaintance. A first time offender may not be offending for the first time but rather only have been caught the first time after so many times unreported and should not be treated with too much leniency.

The laws in place have the best intentions and are enforced however they are not sufficient to stop all abuse. As a collective they are a tool to help identify those offenders within a community of the crimes they have been convicted of. This assists a community in determining how they can conduct themselves whether to avoid a convicted offender or whether to adjust somehow to the news. It can also bring about necessary conversations with the family to help them address the information. While it is understandable that an offender would want to move on with their life and may have participated in counseling as part of their treatment they still pose a risk to re-offend. The risk is one that the public would rather not take for the sake of their families. The risk is high as an offender can re-offend at the sight of temptation.

Unfortunately, due to the nature of the laws and the continued shame on a family, not all offenders are reported and will still continue to live amongst the general population going unreported and unnoticed. There needs to be more awareness for unreported crimes. Megan's Law is a start and effective at providing, releasing information, and notifying the community of serious offenders however, it is ineffective at preventing abuse altogether. Offenders have

challenged the constitutionality of Megan's Law affecting their Right to Privacy, Ex post facto violations, and notification procedures to no avail. It has been shown that the community awareness outweighs the offender's desire for privacy. It is alarming the amount of offenders that are in the databases. It does little to ease the mind and rest assured. Ultimately, it is up to parents to educate themselves and their children as well as to watch out for warning signs<sup>13</sup> and to take actions to prevent themselves from becoming victims. First, discussing the dangers of talking with strangers and second, establishing a relationship in which children will be comfortable talking about any issues that could warranted reporting. Twenty-two years ago there was no real need to advise children of the dangers of talking or going with a stranger. Now, it is obvious with the amount of laws implemented after the fact of children blinding trusting adults that children need to be responsible and aware at such a young age. There is no room to take chances and Megan's Law has been essential making parents aware and in helping parents take proper precautions involving their children in and around their community. There are a vast amount of resources available as a result of the tragedies surrounding the implementation of Megan's Law. With parental support and community notification we can hope to have a safer community.

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<sup>13</sup> <http://www.stopitnow.org>