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Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in Doe v. Poritz

Kirsten R. Bredlie

Comment

Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in *Doe v. Poritz*

*Kirsten R. Bredlie**

On July 29, 1994, convicted pedophile Jesse Timmendequas lured seven-year-old Megan Kanka into his house, where he sexually assaulted her and strangled her to death with a belt.[1] At the time of the murder, Timmendequas lived with two other convicted sex offenders across the street from Megan.[2] Outraged by Megan's death, New Jersey residents demanded that the state reevaluate its policies toward sex offenders.[3] The residents argued that they had a right to know when a convicted sex offender moves into their neighborhood.[4]

The New Jersey legislature passed Megan's Law[5] in response to public pressure[6] and reports indicating that repeat offenders pose a danger to public safety.[7] Modeled in part after

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1. Ralph Siegel, *Suspect Admits Killing Girl*, RECORD (New Jersey), Aug. 2, 1994, at A1.

2. James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 64, 66.

3. *See* Siegel *supra* note 1, at A1.

4. Jan Hoffman, *New Law Is Urged on Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1.

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

6. Joyce Price, *States Find New Ways to Stop Sex Offenders*, WASH. TIMES, Oct. 1, 1995, at A1 (discussing public pressure to pass Megan's Law).

7. N.J. STAT. ANN. § 2C:7-1 (West 1995) embodies the New Jersey legislature's statement of purpose:

> The danger of recidivism posed by sex offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.

Id.

the Washington State Community Protection Act of 1990,[8] Megan's Law requires convicted sex offenders to register with local police.[9] It also authorizes local law enforcement to notify communities that a sex offender is present in their neighborhood[10] based on determinations of the dangerousness of the offender, including the likelihood of recidivism.[11]

In *Doe v. Poritz*,[12] a convicted sex offender challenged Megan's Law, alleging that it imposed punishment in violation of the ex post facto,[13] double jeopardy,[14] and cruel and unusual punishment protections.[15] Applying a test for determining

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The New Jersey legislature relied on studies that "[a]s a group, sex offenders are more likely than other repeat offenders to re-offend with sex crimes or other violent crimes." Doe v. Poritz, 662 A.2d 367, 375 (N.J. 1995) (citing Response Brief for Attorney General at 8-10). The statistics the Attorney General cited include:

> A major Justice Department study of state prisoners released in one year showed that 7.7% of released rapists were 10.5 times more likely to be rearrested for rape than were other released prisoners. . . . [L]ikewise, prisoners who had served time for other sexual assaults were 7.5 times more likely than other released prisoners to be rearrested for sexual assault.

Id.

8. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996) (codifying Washington's "Community Notification Act" that authorizes police to release necessary information regarding sex offenders to protect the public).

9. N.J. STAT. ANN. § 2C:7-2 to -5 (West 1995) (codifying registration provisions).

10. N.J. STAT. ANN. § 2C:7-6 to -11 (West 1995) (codifying notification provisions).

11. N.J. STAT. ANN. § 2C:7-8 (West 1995). The statute sets up three levels of notification based on the risk of re-offense, *id.*, and the statute includes a list of factors to be considered in making a determination as to the risk of re-offense. *See infra* note 57 (listing the factors considered). The statute also delegates the authority to "promulgate guidelines and procedures for notification" to the Attorney General. § 2C:7-8.

12. 662 A.2d 367 (N.J. 1995). Plaintiff further sought an injunction barring the application of Megan's Law to him. *Id.* at 380. John S. Furlong, the attorney for the plaintiff, applied for United States Supreme Court review on October 24, 1995. Michelle Ruess, *Megan's Law Goes to Top Court*, RECORD (New Jersey) Oct. 25, 1995, at A01.

13. U.S. CONST. art. I, § 10, cl. 3. The Ex Post Facto Clause, Section 10 of Article I, forbids any state from making laws that punish individuals "after the fact" for acts previously committed. The plaintiff in *Doe v. Poritz* contended that the 1994 Act's Community Notification and Registration Provisions were impermissible ex post facto violations because they imposed additional "punishment" subsequent to his convictions. *Poritz*, 662 A.2d at 380-81.

14. U.S. CONST. amend. V & XIV. The plaintiff argued such a punishment would cause sex offenders to be effectively retried for the same crime in contravention of the Double Jeopardy Clause which prohibits the government from punishing an individual twice for the same crime.

15. U.S. CONST. amend VIII. The plaintiff claimed that Megan's Law

whether a law is punitive, based on its own interpretation of precedent, the New Jersey Supreme Court held that Megan's Law was not punitive and therefore did not violate the Constitution.[16]

Poritz charts a new course in determining the constitutionality of sex offender registration and notification laws.[17] No definitive test currently exists for assessing whether a law is punitive. Courts considering challenges to registration and notification provisions in other jurisdictions have relied on a variety of tests and arrived at opposing results.[18] The *Poritz* court's decision to uphold Megan's Law casts a new light on the question of whether registration and notification laws actually constitute punishment.

This Comment critically examines the *Doe v. Poritz* decision and its effects on the standard of review applied to sex offender registration and notification laws. Part I provides an overview of other states' registration and notification laws, addresses the development of Megan's Law, and discusses constitutional challenges to these provisions. Part II outlines the holding and reasoning of *Doe v. Poritz*. Part III compares the *Poritz* court's reasoning to that of other courts considering challenges to registration and notification laws and argues that the United States Supreme Court should affirm the *Poritz* decision and uphold Megan's Law as remedial, not punitive. This Comment concludes that the Court should adopt the *Poritz* test when determining the constitutionality of all state sex offender registration and notification laws.

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constitutes cruel and unusual punishment because it subjects sex offenders to harassment, ostracism and vigilantism. 662 A.2d at 380.

16. 662 A.2d at 372. The court also held that "the prosecutor's decision to provide community notification, including the manner of notification is subject to judicial review before such notification is given, and that such notification is constitutionally required." *Id.* The court reasoned that notice to the offender, and the opportunity for judicial review prior to notification was required to satisfy procedural due process. *Id.* at 382.

17. In the conclusion to its opinion, the *Poritz* majority acknowledged that its decision sailed into "truly uncharted waters, for no other state has adopted such a far reaching statute." *Id.* at 422.

18. *See infra* note 104 and accompanying text (detailing the divisions among the different courts).

I. MEGAN'S LAW, CONSTITUTIONAL CHALLENGES, AND THE PUNISHMENT DETERMINATION

A. OVERVIEW OF REGISTRATION AND NOTIFICATION PROVISIONS AND MEGAN'S LAW

Washington state passed the nation's first notification law, the 1990 Community Protection Act,[19] in response to public outrage over the brutal attack on a seven-year-old boy by Earl Shriner, a convicted child molester.[20] Evidence discovered after the attack revealed that the state released Shriner "knowing he might still be dangerous."[21] The Washington state legislature believed that by requiring sex offenders to register with local police and authorizing police to notify the community of the presence of sex offenders, it could reduce the likelihood of such repeat attacks.[22] Media attention to brutal attacks on children by repeat offenders in other states, including New Jersey, prompted other legislatures to enact registration and notification laws.[23]

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19. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996).

20. Erin Gunn, *Washington's Sexually Violent Predator Law: The "Predatory" Requirement,* 5 UCLA WOMEN'S L.J. 277, 277 (1994). Shriner raped him, stabbed him, and cut off his penis, but the boy survived the attack and identified Shriner. Popkin, *supra* note 2, at 66.

21. Popkin, *supra* note 2, at 66. Shriner had apparently "confided to a cellmate his continuing fantasies of molesting and murdering children." *Id.*

22. *See* WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996) (Historical and Statutory Notes) (quoting Washington legislature's findings and declaration of policy).

23. *See* Patricia Lopez Baden, *Proposal Would Require That Sex Offenders Be Identified to Neighbors*, STAR-TRIB. (Minnesota) Feb. 13, 1995, at A1 ("In Minnesota, much of the push for notification can be traced to the state's most notorious sex offender. Dennis Linehan raped and murdered a 14-year-old Shoreview girl in 1965, escaped from prison in 1975 and tried to rape a 12-year-old Michigan girl."); Peter Baker & Marylou Tousignant, *An Early Eye on the Spoils of Fall Vote*, WASH. POST, Sept. 28, 1995, at V1 (discussing publicity surrounding convicted child molester Timothy K. Walsh as a motivation for the passage of a notification law in Virginia); Lourdes Medrano Leslie, *Sex-Offender Notification Debated*, ARIZ. REPUBLIC, Aug. 29, 1995, at A1 (explaining how the publicity surrounding release of pedophile James R. Singleton prompted Arizona legislators to pass notification laws).

Not surprisingly, some of the most effective lobbyists have been parents of victims. *See* John Affleck, *New York Senate Passes Its Own "Megan's Law,"* ASSOCIATED PRESS POL. SERVICE, May 24, 1995 (noting that Megan's mother, Maureen Kanka, campaigned for the passage of the New York law); Michael Gillis, *Spare No Cost to Protect Kids, Victims' Moms Say*, CHI. SUN-TIMES, Sept. 19, 1995, at 6 (noting that six Illinois mothers of murder victims are "pushing for uniform standards for treating juvenile sex offenders, mandatory

Registration provisions require released offenders to register themselves with local police.[24] In contrast, notification provisions authorize the police to notify the public of an offender's presence in the community.[25] Several states have enacted registration laws that do not provide for notification.[26] Others, like New Jersey, include both registration and notification provisions.[27]

1. Registration Laws

Forty-seven states have now enacted some form of registration law.[28] Although registration laws vary, most fit into one of the following categories:[29] laws that release registration information[30] to law enforcement personnel,[31] laws that inform selected government agencies,[32] or laws that make information

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notification of victims' families when offenders are put on probation and more money for the state program for searching for missing children"); Jefferson Robbins, *Kramers Back Notification Bill: Neighbors Would Know Pedophiles*, STATE JOURNAL-REGISTER (Illinois), Oct. 6, 1995, at 13 (discussing pleas by Brad and Sally Kramer, whose three-year-old daughter Sara was found murdered in the Sangamon River, to the Illinois state legislature to pass an amendment to the state's Child Sex Offender Registration Act to provide for notification).

24. *See, e.g.*, N.J. STAT. ANN. § 2C:7-2 to -5 (West 1995) (codifying registration provisions).

25. *See, e.g.*, N.J. STAT. ANN. § 2C:7-6 to -11 (West 1995) (codifying notification provisions).

26. Twenty-nine of the forty-seven states that have enacted registration laws include notification provisions. *See infra* notes 28-52 and accompanying text (discussing registration and notification provisions).

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

28. Bill Alden, *Rochester Judge Rejects Challenge to Megan's Law*, N.Y. L.J., Aug. 20, 1996, at 1.

29. *See* Matthew J. Herman, Note, *Are the Children of Illinois Protected from Sex Offenders?*, 28 J. MARSHALL L. REV. 883, 893-98 (1995) (discussing the three types of registration laws).

30. Typically the sex offender must release his or her name, age, race, physical description, current and permanent addresses, and employment information to the local police. *See, e.g.*, N.J. STAT. ANN. § 2C:7-4 (West Supp. 1996) (specifying registration requirements).

31. The majority of states fall into this category. *See, e.g.*, ARK. CODE ANN. § 12-12-909 (Michie 1995) (providing that "[t]he statements or any other information required by this subchapter shall not be open to inspection by the public").

32. *See, e.g.*, IND. CODE ANN. § 5-2-12-11 (Michie Supp. 1996) (providing for release of registration information to law enforcement agencies, schools, state agencies which license individuals to work with children, licensed child care facilities, and any other organization that works with children and requests the registry).

available to the public.[33] Most states require sex offenders to register for ten years.[34] The penalty for failure to register ranges from an additional year of probation to an additional year of incarceration.[35]

In 1994, Congress enacted a federal registration law modeled after Washington's Community Protection Act.[36] The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (SVORA) provides for nationwide registration.[37] It requires sex offenders who committed crimes against children[38] or sexually violent offenses[39] to register with a designated state law enforcement agency for ten years after they are released from prison or placed on probation.[40] Those sex offenders found to be "sexually violent predators" are re-

33. *See, e.g.*, WASH. REV. CODE ANN. § 4.24.550 & Historical and Statutory Notes (West Supp. 1996) (providing for release of information to the public because "[r]estrictive confidentiality and liability laws governing the release of information about sexual offenders have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety").

New York's registration law uses a unique system which enables residents to access the state registry by dialing a 900 number. Sex Offender Registration Act, ch. 192, § 168-p, 1995 N.Y. LAWS 933-34. A task force in Arizona has suggested a similar system. Associated Press, *Task Force Suggests Methods of Registering Sex Offenders*, ARIZ. REPUBLIC, Oct. 4, 1995, at A1. The Oregon State Police maintain a toll-free number for victims to obtain information from the registry. OR. REV. STAT. § 181.601 (Supp. 1996).

34. Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 235 (1995)

35. *Id.*

36. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (1994) [hereinafter SVORA].

37. *Id.* States have a three-year window within which they must pass a registration law or else they lose ten percent of their funding under the crime bill. *Id.* § 14071(f)(1)-(2).

38. Under subparagraph (A) of subsection (a)(3), crimes against children include kidnapping, false imprisonment, criminal sexual conduct, solicitation of a minor to engage in sexual conduct, use of a minor in sexual performance, solicitation of a minor to practice prostitution, any conduct that is by its nature a sexual offense, or the attempt of any of the above offenses. *Id.* § 14071(a)(3)(A).

39. Subparagraph (B) of subsection (a)(3) defines the term "sexually violent offense" as "any criminal offense that consists of aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18 or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of Title 18 or as described in the state criminal code)." *Id.* § 14071(a)(3)(B).

40. *Id.* § 14071(b)(6)(A).

quired to register indefinitely.[41] The registration requirement ceases if the court determines that "the person no longer suffers from a mental abnormality or personality disorder that would make the person likely to engage in a predatory sexually violent offense."[42]

2. Notification Laws

The SVORA also provides for notification.[43] Twenty-nine states have passed laws that include notification.[44] Notification provisions vary in the amount of discretion local police can exercise. Washington's 1990 Community Protection Act,[45] the first notification law, served as the model for notification laws in many states.[46] It provides broad discretion to local police[47] in establishing notification procedures.[48]

41. *Id.* § 14071(b)(6)(B).

42. 42 U.S.C. § 14071(b)(6)(B) (1994).

43. Pub. L. No. 104-145, 1996 U.S.C.C.A.N. (110 Stat.) 1345 (to be codified at 42 U.S.C. § 14071(d)). The 1996 Amendments to the Act replaced the permissive language in the original provision, making notification mandatory when it is "necessary to protect the public." *Id.* The federal act also provides immunity for law enforcement agencies and employees who release the information in good faith. 42 U.S.C. § 14071(e) (1994).

44. Henry J. Reske, *Lawyers Balk at Imposed Pro Bono Sex Cases*, A.B.A. J., Jan. 1996, at 36.

45. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996).

46. *See, e.g.*, FLA. STAT. ANN. § 775.21(7)(a) (West Supp. 1996) (requiring authorities to give notice to the community where the sexual predator resides).

47. WASH. REV. CODE ANN. § 4.24.550(1) (West Supp. 1996) (authorizing public agencies "to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection").

48. Baden, *supra* note 23. Under Washington's Act, police have generally followed a three-tier framework of notification. Tier One involves mostly incest cases and requires only notification of local police. *Id.* At Tier Two, which includes moderate risk offenders, information is released to schools and neighborhood groups. *Id.* Tier Three includes offenders considered the most dangerous and provides for the broadest notification, allowing police to release photos, addresses, and criminal history of offenders to newspapers, or to distribute handbills. *Id.* Section 4.24.550(2) of the Washington Revised Annotated Code authorizes local law enforcement agencies to decide whether to release information to the community. Although the statute leaves discretion to local law enforcement agencies to develop their own standards for release of information, most agencies follow the three-tier guidelines developed by the Washington Association of Sheriffs and Police Chiefs. Jolayne Houtz, *When Do You Unmask a Sexual Predator?* SEATTLE TIMES, Aug. 30, 1990, at B2.

Only a few states place the burden of notifying the community on the sex offenders themselves.[49] In Louisiana, sex offenders whose victims were under eighteen years old must send postcards to their neighbors within a one-mile radius in a rural community or within a three-square-block area in an urban or suburban community.[50] The parole board also has considerable discretion to require other forms of notification.[51] The board may require offenders to put "Sex Offender On Board" bumper stickers on their cars or wear specially labeled clothing.[52]

3. Megan's Law and Public Protection

Megan's Law includes both registration[53] and notification components.[54] Although modeled after the Washington Act, New Jersey's Megan's Law is more highly structured, giving law enforcement less discretion in making notification decisions.[55] Indeed, several of the most recently passed notification laws follow the detailed guidelines of Megan's Law.[56] Megan's

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49. In Oregon, sex offenders can be forced to place signs stating "Sex Offender Residence" in the windows of their homes. Baden, *supra* note 23, at 1A. Under Oregon's laws, some low-risk offenders can "avoid notification by participating in treatment and rehabilitation programs." *Id.; see, e.g.*, LA. REV. STAT. ANN. § 15:574.4 (H)(2)(b) (West 1992 & Supp. 1996).

50. LA. REV. STAT. ANN. § 15:574.4(H)(2)(a)(i) (West 1992 & Supp. 1996). Offenders must also publish a notice in the local newspaper on two different days that includes their names, their addresses, and the crimes for which they were convicted. § 15:574(H)(2)(b).

51. § 15:574.4(H)(2)(b) ("[T]he board may order any other form of notice which it deems appropriate, including but not limited to signs, handbills, bumper stickers, or clothing labeled to that effect.").

52. *Id.* The special clothing requirement has prompted critics to describe Louisiana's law as a "Scarlet Letter" law. Critics compare this law to the letter *A* that Hester Prynne was required to wear in Nathanial Hawthorne's classic, *The Scarlet Letter*. *See infra* note 79; *see also* Jerusalem, *supra* note 34, at 241 ("[N]early 350 years after Hester Prynne, Louisiana allows sex offenders to be branded with a 'scarlet letter.'"); *cf.* Elizabeth Kelley Cierzniak, *There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester Is Released into the Community*, 28 IND. L. REV. 715, 743-44 (1995) (explaining that "Scarlet Letter" conditions segregate offenders from society and interfere with their ability to reintegrate into the community).

53. N.J. STAT. ANN. § 2C:7-2 to -5 (West 1995 & Supp. 1996) (codifying registration provisions).

54. § 2C:7-6 to -11 (codifying notification provisions).

55. § 2C:7-8.

56. *See, e.g.*, 730 ILL. COMP. STAT. ANN. 150/1-10 (West 1992 & Supp. 1996) (outlining detailed requirements of the regulation); Sex Offender Regis-

Law provides a list of factors relevant to determining the risk of re-offense, including criminal and psychological history of the sex offender.[57] The Attorney General's Guidelines, promulgated in conjunction with the passage of Megan's Law,[58] follow a three-tier framework that is similar to Washington's Community Protection Act.[59] The first tier, for low risk of re-offense, limits notification to law enforcement agencies that are "likely to encounter"[60] the offender.[61] The second tier, for mod-

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tration Act, ch. 192, 1995 N.Y. Laws 168 (echoing the language of Megan's Law).

57. § 2C:7-8(b). The factors include, but are not limited to, the following:

(1) Conditions of release that minimize risk of re-offense, including but not limited to whether the offender is under supervision of probation or parole; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision;

(2) Physical conditions that minimize the risk of re-offense, including but not limited to advanced age or debilitating illness;

(3) Criminal history factors indicative of high risk of re-offense, including:

(a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior;

(b) Whether the offender served the maximum term;

(c) Whether the offender committed the sex offense against a child.

(4) Other criminal history factors to be considered in determining the risk, including:

(a) The relationship between the offender and the victim;

(b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury;

(c) The number, date and nature of prior offenses;

(5) Whether the psychological or psychiatric profiles indicate a risk of recidivism;

(6) The offender's response to treatment;

(7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence; and

(8) Recent threats against persons or expressions of intent to commit additional crimes.

Id.

58. NEW JERSEY ATTORNEY GENERAL, GUIDELINES FOR LAW ENFORCEMENT FOR NOTIFICATION TO LOCAL OFFICIALS AND/OR THE COMMUNITY OF THE ENTRY OF A SEX OFFENDER INTO THE COMMUNITY (Sept. 14, 1995).

59. *Id.* at 8-10.

60. The Attorney General's guidelines provide:

The term "likely to encounter" shall mean for purposes of these guidelines that the law enforcement agency, community organization or members of the community are in a location or in close geographic proximity to a location which the offender visits or can be presumed to visit on a regular basis.

Id. at 6.

61. *Id.* at 8-9.

erate risk of re-offense, requires notification of law enforcement and community organizations in charge of or caring for women and children who are "likely to encounter" the offender.[62] The third tier, for high risk of re-offense, limits notification to tier-two groups and members of the community who are "likely to encounter" the offender.[63]

Legislatures enacting registration and notification laws like Megan's Law, intend to protect the public, particularly children, from the special harms of sex crimes.[64] Commentators have noted that the brutal nature of sex crimes often cause public outrage,[65] which "may have an enormous symbolic impact on a community."[66] These attacks "are almost terroristic, in that they strike people unawares [sic] in their own neighborhoods and provoke distrust, fear, and frustration."[67] Thus,

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62. *Id.* at 9-10.

63. *Id.* at 10.

64. *See, e.g.*, N.J. STAT. ANN. § 2C:7-1 (West 1995) (indicating the legislature's intent to protect the public from sex offenders); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996) (quoting Historical and Statutory Notes) ("[P]rotection of the public from sex offenders is a paramount governmental interest.").

In enacting such laws, legislatures found that sex crimes cause special harms to their victims such as personal trauma, including "chronic depression and anxiety, isolation and poor social adjustment, substance abuse, [and] suicidal behavior" Doe v. Poritz, 662 A.2d 367, 375 (N.J. 1995) (quoting Brief for the United States). In addition, victims often become perpetrators of sex crimes later in life:

> An especially disturbing finding about child sexual abuse is its strong intergenerational pattern; in particular, due to the psychological impact of their own abuse, sexually abused boys have been found to be more likely than non-abused boys to turn into offenders against the next generation of children, and sexually abused girls are more likely to become mothers of children who are abused.

Id.

65. Suzanne Fields, *The Rights and Wrongs of Megan's Law*, WASH. TIMES, Mar. 6, 1995, at A19.

66. *Criminal Law—Sex Offender Notification Statute—Washington State Community Protection Act Serves as Model for Other Initiatives by Lawmakers and Communities—1990 Wash. Laws. Ch. 3, §§ 101-1406 (codified as amended in scattered sections of Wash. Rev. Code)*, 108 HARV. L. REV. 787, 790-791 (1995) (discussing the special harms of sex crimes) [hereinafter *Criminal Law*].

67. *Id.* at 791. The commentator further explained, "To confront these harms, community notification is particularly appropriate given the growing consensus among psychiatrists that repeat offenders are rarely treatable and more likely than other convicts to strike again once released from prison." *Id.*

members of the public feel they have a right to know if a sex offender is living in their neighborhood.[68]

Based on the high recidivism rates attributed to sex offenders, legislatures enacting registration and notification laws conclude that release of offenders from incarceration poses a unique threat of harm to the public.[69] According to the United States Department of Justice, the recidivism rate of untreated sex offenders is about sixty percent.[70] Attorney General Janet Reno reports that "convicted child molesters have a recidivism rate as high as 40 to 75 percent."[71] Noting the high recidivism rate, the Washington legislature found that "protection of the public from sex offenders [was] a paramount governmental interest."[72] Moreover, the Washington legislature concluded that

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68. *Cf.* Robert L. Jackson, *Sex-Offender Notification Laws Facing Legal Hurdles*, L.A. TIMES, Aug. 8, 1995, at A5. Bonnie Campbell, director of the Justice Department's newly created Office of Violence Against Women, explains, "People need to have the assurance that local police know when child molesters and sex offenders are released." *Id.*

69. The Washington state legislature found that "sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is a paramount governmental interest." WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996) (quoting Historical and Statutory Notes); *see supra* note 7 (detailing New Jersey's legislative findings regarding recidivism).

During congressional debates urging the enactment of the 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Program, several members of Congress argued that "allowing community notification was crucial to preventing future crimes." Doe v. Poritz, 662 A.2d 367, 376 (N.J. 1995); *see, e.g.*, 140 CONG. REC. S12,544-45 (daily ed. Aug. 25, 1994) (remarks of Sen. Lautenberg) (arguing that community notification is necessary to protect the public); 140 CONG. REC. H8,981-82 (daily ed. Aug. 21, 1994) (remarks of Rep. Ridge) (suggesting that notification provisions could have saved Megan Kanka's life); 140 CONG. REC. S11,889-90 (daily ed. Aug. 16, 1994) (remarks of Senators Gorton and Lautenberg) (arguing community notification is necessary to prevent repeat offenses); 140 CONG. REC. S10,710 (daily ed. Aug. 5, 1994) (remarks of Sen. Gorton) (arguing that citizens have a right to know of a sex offender's presence to prevent further victimization); 140 CONG. REC. H5612-17 (daily ed. July 13, 1994) (remarks of Representatives Dunn and Ramstad) (arguing that notification is needed to protect the public).

70. John Sanko, *Bill Aims to Unmask Sex Offenders*, ROCKY MTN. NEWS, Mar. 15, 1995, at 4A.

71. Jerry Seper, *Reno Backs Notification Law*, WASH. TIMES, Feb. 10, 1995, at A4; *see supra* note 7 and accompanying text (detailing recidivism statistics used by the New Jersey legislature).

72. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996) (quoting Historical and Statutory Notes). Louisiana and New Jersey legislatures made almost identical assertions. *See* LA. REV. STAT. ANN. § 15:540 (West Supp.

the state's interest in protecting the public outweighed the privacy interests of sex offenders.[73]

Proponents of registration and notification laws argue that increased public awareness and education of children should lead to "more reporting of sex crimes and also help to detect and deter repeat offenders."[74] A study of Washington's Community Protection Act[75] concluded that although the law has not reduced repeat offenses, "offenders who were subject to community notification were arrested for new crimes much more quickly than comparable offenders who were released without notification."[76]

B. CRIME AND PUNISHMENT

Historically, public humiliation often accompanied physically painful punishments, thereby making them uniquely harsh.[77] Occasionally, punishments were rooted in shame alone.[78] The scarlet letter *A* Hester Prynne wore in Nathaniel

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1996) (repeating the Washington legislature's statement); *supra* note 7 (detailing the New Jersey legislature's findings).

73. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996) (quoting Historical and Statutory Notes). This Comment does not analyze the privacy challenges to Megan's Law. For a discussion of the privacy rights of sex offenders, see Catherine A. Trinkle, *Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy*, 37 WM. & MARY L. REV. 299, 314-19 (1995) (arguing that registration and notification laws must be "narrowly tailored" to accomplish their remedial purpose to survive constitutional challenges); Patricia L. Petrucelli, Comment, *Megan's Law: Branding the Sex Offender or Benefiting the Community?*, 5 SETON HALL CONST. L.J. 1127, 1158-69 (1995) (arguing that the community's right to be informed outweighs a sex offender's privacy interests). *But cf.* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 91 (1996) (arguing that an offender's privacy interest outweighs the community's right to know).

74. *Criminal Law*, *supra* note 66, at 787.

75. The Washington State Institute for Public Policy completed this study. Eric Houston, *Law Is Helping Police Track Sex Offenders*, SEATTLE POST-INTELLIGENCER, Oct. 5, 1995, at B2.

76. *Id.*

77. CHRISTOPHER HIBBERT, THE ROOTS OF EVIL 27-28 (1963). Punishing offenders in the public eye through hanging, flogging, and branding was common in early societies, including colonial America. HARRY ELMER BARNES, THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN 62 (1972). Colonial New Jersey practiced branding. *Id.* The hands of convicted thieves, for example, were branded with the letter *T*. *Id.*

78. *See* Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1900-03, 1911-15 (1991) (describing the use and effects of shame as punishment).

Hawthorne's novel exemplifies the use of shame as punishment.[79] This use of shame was based on the belief that the criminal committed wrongs against society, and society should participate in punishing the offender.[80]

America's criminal justice system has not completely eliminated "Scarlet Letter" style punishments,[81] despite changes in the form of physical punishment.[82] Creative judges

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79. NATHANIEL HAWTHORNE, THE SCARLET LETTER 63-64 (1850).

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

Id.

80. BARNES, *supra* note 77, at 40. The belief that crimes are public offenses and should be punished by all of society also underlies modern criminal law. *Id.*

81. *See* Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions,* 1989 DUKE L.J. 1357, 1360-66 (arguing modern "Scarlet Letter" probation conditions constitute punishment by humiliation).

82. As society evolved, the forms of punishment changed. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9-16 (1968) (describing the theories justifying punishment). Courts declared the pillories and stocks "cruel and unusual punishment" and therefore unconstitutional. *See, e.g.,* Hobbs v. State, 32 N.E. 1019, 1021 (Ind. 1893). Retribution, rehabilitation, deterrence, denunciation, and incapacitation became widely accepted justifications for punishment, and the American criminal justice system developed elaborate rules and procedures for convicting and punishing wrongdoers. PACKER, *supra,* at 37-58, 149-74.

The retribution theory of punishment holds that "it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts." *Id.* at 37. Retributivist theorists believe that the criminal pays society back and society obtains revenge against the criminal through punishment. *Id.* at 38. Retributive theory also embraces the idea that individuals can expiate their sins through suffering punishment and making amends to society. *Id.* Packer compares revenge and expiation theories:

> The revenge theory treats all crimes as if they were certain crimes of physical violence: you hurt X; we will hurt you. The expiation theory treats all crimes as if they were financial transactions: you got something from X; you must give the equivalent value.

Id.

The rehabilitation theory is based on the belief that punishment will reform the individual so that he or she will not re-offend. *Id.* at 53. Packer notes, however, that the effectiveness of rehabilitation is dubious because "we do not know how to rehabilitate offenders, at least within the limit of the resources that are now or might reasonably be expected to be devoted to the task." *Id.* at 55.

Proponents of deterrence theory contend that punishment, either actual

continue to impose "Scarlet Letter" penalties in a variety of situations. Examples include requiring a convicted drunk driver to place a "Convicted D.U.I. Restricted License" bumper sticker on his car[83] and ordering a purse snatcher to wear tap shoes.[84] In each of these cases, the punisher's explicit, intended purpose is to publicly humiliate the offender.[85]

C. CONSTITUTIONAL CHALLENGES TO REGISTRATION AND NOTIFICATION LAWS

Challengers to registration and notification laws claim that these laws impose additional punishment,[86] thus violating the Ex Post Facto Clause,[87] the Eighth Amendment's Cruel and

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or threatened, will inhibit those who are otherwise disposed to commit crimes. *Id.* at 39. Alternatively, Jeremy Bentham's model of deterrence argues that the purpose of punishment is to make the consequences of getting caught severe enough, to outweigh any possible pleasure of successfully carrying out the crime. *Id.* at 40-41.

The denunciation theory is premised on the belief that through punishing law-breakers, the government sends the message to society that crime is wrong and will not be tolerated. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 13 (1995).

The incapacitation theory is based on the premise that once someone has committed a crime, they will likely re-offend. PACKER, *supra,* at 48-53. Thus, incapacitation is necessary to protect the public and reduce crime. *Id.* Packer notes, however, that predicting who will be a repeat offender is a difficult and problematic task. *Id.* at 49-51.

83. *See* Goldschmitt v. Florida, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986) (per curiam). The defendant challenged the order on "cruel and unusual punishment" grounds to no avail. *Id.* at 125-26. The court reasoned that "[t]he mere requirement that a defendant display a 'scarlet letter' as part of his punishment is not necessarily offensive to the Constitution." *Id.* at 125. *But cf.* Donna DiGiovanni, Comment, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV. 643, 658-70 (1988) (analyzing *Goldschmitt* and arguing that the bumper sticker is unconstitutional because it is excessive and does not conform to the purposes of punishment).

84. *See* People v. McDowell, 59 Cal. App. 3d 807, 812-14 (1976), *overruled by* People v. Welch, 851 P.2d 802 (Cal. 1993) (requiring a purse snatcher to wear tap shoes); *see also* Brilliant, *supra* note 81 at 1362-66 (describing modern day "Scarlet Letter" conditions).

85. Brilliant, *supra* note 81, at 1362-66.

86. *See, e.g.*, State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992) (en banc) (holding that a registration requirement did not violate the Ex Post Facto Clause); People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991) (upholding registration of a sex offender against a claim that it imposed a disproportionate penalty); State v. Manning, 532 N.W.2d 244, 249 (Minn. Ct. App. 1995) (holding that a registration requirement is not punitive); State v. Ward, 869 P.2d 1062, 1068-69 (Wash. 1994) (en banc) (holding that a registration requirement is not an unconstitutional ex post facto law).

87. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

Unusual Punishment Clause,[88] and the Fifth Amendment's Double Jeopardy Clause.[89] Because these clauses only apply in the criminal context,[90] the application of each clause hinges on whether the challenged provision constitutes punishment.[91]

The Ex Post Facto Clause operates to invalidate a law that "inflicts a greater punishment, than the law annexed to the crime, when committed."[92] A law violates the Ex Post Facto Clause if it is applied retrospectively[93] and is punitive, rather than regulatory.[94] Most states apply registration and notification laws retrospectively for offenses committed before the laws came into effect.[95] Thus, the critical inquiry in ex post facto

88. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

89. U.S. CONST. amend. V. ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.").

90. United States v. Ward, 448 U.S. 242, 248 (1980) (noting that some of these constitutional protections only apply to criminal cases); *see also* Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (holding that the Double Jeopardy Clause protects a criminal defendant from receiving two criminal punishments).

91. *See Ward*, 448 U.S. at 248-49 (noting that validity of a challenged provision depends on whether the penalty is civil or criminal); *see* Doe v. Poritz, 662 A.2d 367, 390 (N.J. 1995) (noting that "[t]he parties and all *amici* are in general agreement that the laws' validity, measured against the various constitutional attacks, depends on whether they inflict punishment").

92. Calder v. Bull, 3 U.S. (3 Dall.) 386, 389-95 (1798) (holding retrospective application of Connecticut probate law did not violate the Ex Post Facto Clause). The Supreme Court also stated that the purpose of the Ex Post Facto Clause was "to protect . . . person[s] from *punishment by legislative acts*, having a retrospective operation." *Id.*

93. Collins v. Youngblood, 497 U.S. 37, 42-43 (1990). A retrospective law is one which "looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force." BLACK'S LAW DICTIONARY 1317 (6th ed. 1990).

94. *Collins*, 497 U.S. at 42-43. Prior to the *Collins* decision, the Supreme Court broadened the definition of ex post facto laws to include a law that "alters the situation of a party to his disadvantage." Kring v. Missouri, 107 U.S. 221, 235 (1882), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990). *Collins* overruled *Kring*'s expansive definition of ex post facto laws and reestablished that the primary focus of an ex post facto inquiry is whether the law constituted punishment. State v. Ward, 869 P.2d 1062, 1067 (Wash. 1994) (en banc).

95. *See* State v. Costello, 643 A.2d 531, 532 (N.H. 1994) ("The State does not dispute that the law is retrospective as applied to the defendant."); *Ward*, 869 P.2d at 1068 (holding that Washington's sex offender registration statute was retrospective in application). Arkansas, Colorado, Florida, Illinois and Kansas do not apply their laws retrospectively. Doe v. Poritz, 662 A.2d 367, 428 (N.J. 1995).

challenges to registration and notification laws is whether the law is punitive or regulatory.[96]

The Eighth Amendment prohibits "cruel and unusual punishment."[97] A court hearing an Eighth Amendment challenge must first decide whether the law constitutes punishment.[98] A law will violate the Eighth Amendment if it imposes punishment that is disproportionate to the crime. To make this determination, the court will consider: "(i) the gravity of the offense and the harshness of the penalty, (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for the commission of the same crime in other jurisdictions."[99]

Evaluation of double jeopardy challenges also depends on an initial determination of whether enforcement of the statute constitutes punishment.[100] The Double Jeopardy Clause prohibits the government from punishing an individual twice for the same crime.[101] In cases where registration and notification laws are challenged on all three grounds—ex post facto, cruel and unusual punishment, and double jeopardy—courts often decide the issue under the Ex Post Facto Clause rather than evaluate the law under the Double Jeopardy Clause.[102] The

96. *Ward*, 869 P.2d at 1068.

97. U.S. CONST. amend. VIII. In *Weems v. United States*, 217 U.S. 349, 373 (1910), the Supreme Court observed that cruel and unusual punishment is a fluid concept that changes in accordance with societal values and norms. The Court in *Weems* further reasoned that the determination of whether a law is cruel and unusual should be based on the proportionality of the punishment to the crime. *Id.* at 367.

98. *See supra* note 90 and accompanying text (asserting that Eighth Amendment challenges must involve a criminal sanction).

99. Solem v. Helm, 463 U.S. 277, 292 (1983). Although the Supreme Court did not reject the *Solem* test outright, in *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991), a plurality of the Court stated, "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Thus, the future use of the proportionality test is unclear. In *Artway v. Attorney General*, 876 F. Supp. 666, 678 (D.N.J. 1995), *rev'd*, 81 F.3d 1235 (3rd Cir. 1996), the court noted that after *Harmelin*, "clarity is now lacking as to the proper application of Eighth Amendment scrutiny to legislation . . . ."

100. *Artway*, 876 F. Supp. at 684 (noting that double jeopardy analysis hinges on whether the statute and the burdens it creates effectively constitute punishment).

101. United States v. Halper, 490 U.S. 435, 442 (1989) (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

102. *Id.; see, e.g.*, Doe v. Poritz, 662 A.2d 367, 405 (N.J. 1995) ("[B]ecause the challenged provisions do not constitute punishment, they do not violate any constitutional prohibition against punishment.").

primary inquiry, then, is whether the challenged provision has a punitive effect.

D. TESTS TO DETERMINE WHETHER A LAW IS PUNITIVE

Courts do not agree on the legal standard for evaluating whether state registration and notification laws have a punitive effect;[103] nor do they agree on whether laws determined to be punitive nonetheless meet accepted constitutional mandates.[104] The Supreme Court has not announced a definitive test, applicable in all contexts, for determining whether a law is punitive.[105] Rather, the Court has developed a variety of tests, the application of which depends on the nature of the provision in question.[106] These tests differ in some respects, but most involve inquiries into both the legislative purpose and the ultimate effect of the statutory provision.

1. *Trop v. Dulles* and the "Legislative Purpose" Approach

In determining whether a law constitutes punishment, a court must inquire into the law's underlying legislative in-

103. *See* discussion *infra* notes 142-155 (addressing various challenges to registration and notification laws adopted throughout the United States).

104. Most courts addressing the issue have held that registration laws are remedial and thus do not invoke ex post facto, double jeopardy and cruel and unusual punishment protections. *See* State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992); People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991); State v. Manning, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995); State v. Ward, 869 P.2d 1062, 1069 (Wash. 1994). State courts in California and Louisiana, however, deemed their state registration provisions punitive. *See* In re Reed, 663 P.2d 216, 220 (Cal. 1983) (en banc) (holding that requiring sex offenders convicted of misdemeanor disorderly conduct to register constituted cruel and unusual punishment); State v. Payne, 633 So. 2d 701, 703 (La. Ct. App. 1993) (holding that registration violated the Ex Post Facto Clause). The Federal District Court for the Southern District of New York, in *Doe v. Pataki*, 919 F. Supp. 691, 701 (S.D.N.Y. 1996), held that the notification provisions of Megan's Law violated the Ex Post Facto Clause. Recently, the United States District Court for New Jersey upheld both the registration and notification provisions of Megan's Law. W.P. v. Poritz, 931 F. Supp. 1199, 1223 (D.N.J. 1996).

105. *See* California Dep't of Corrections v. Morales, 115 S. Ct. 1597, 1603 (1995) ("We have previously declined to articulate a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition . . . and we have no occasion to do so here.").

106. *See* United States v. Ursery, 116 S. Ct. 2135, 2144 (1996) (noting that the test for determining whether a forfeiture is punitive differs from the test applied in determining whether a penalty is punitive).

tent.[107] Where regulatory laws have punitive effects, the "evident purpose of the legislature" will prevail.[108] According to the Supreme Court in *Trop v. Dulles*,[109] a punitive statute "imposes a disability for the purposes of punishment."[110] Remedial statutes, on the other hand, must serve a non-penal, "legitimate governmental purpose."[111]

The party claiming that a statute is punitive has the burden of providing the clearest proof of the legislature's punitive intent.[112] The Supreme Court defines "clearest proof" as "unmistakable evidence of punitive intent."[113] According to the Supreme Court, this strict quantum of proof will prevent lower courts from guessing at the legislature's motives.[114] Consequently, when the legislature's stated purpose is remedial, "only the clearest proof" that the purpose is in fact punitive can negate that intent.[115]

2. The Development of the *Halper* Test

Expanding on its "legislative purpose" approach, the Supreme Court in *United States v. Salerno*[116] formulated a test to

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107. Trop v. Dulles, 356 U.S. 86, 95 (1958) (finding that revocation of citizenship for military desertion constituted cruel and unusual punishment).

108. *Id.* at 96 ("The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature."); *see also* De Veau v. Braisted, 363 U.S. 144, 160 (1960). The Court in *De Veau* found:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation.

Id.

109. 356 U.S. 86, 95 (1958).

110. *Id.* at 96.

111. *Id.*

112. *Cf.* United States v. Ward, 448 U.S. 242, 249 (1980) (quoting Fleming v. Nestor, 363 U.S. 603, 617-21 (1960)).

113. Fleming v. Nestor, 363 U.S. 603, 619 (1960); *see also* Bae v. Shalala, 44 F.3d at 494 (7th Cir. 1995) ("The Supreme Court has consistently required 'unmistakable evidence of punitive intent' to characterize a sanction as punishment . . . .").

114. *See Fleming*, 363 U.S. at 617 ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed . . . .").

115. *Ward*, 448 U.S. at 248-49.

116. 481 U.S. 739, 747 (1987).

determine whether a law or proceeding is punitive.[117] The Court held that when the legislative purpose is unclear, a court should consider whether an alternative non-penal purpose rationally related to the disputed provision exists, and whether the law "appears excessive in relation to the alternative purpose assigned [to it]."[118]

Following *Salerno*, the Court in *United States v. Halper*,[119] addressed the issue of whether the Civil False Claims Act, which imposed monetary sanctions in addition to a criminal conviction for the same false claims, violated the Double Jeopardy Clause.[120] The *Halper* Court reasoned that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."[121] Consequently, the Court found the monetary fine "overwhelmingly disproportionate" to the non-penal legislative purpose of compensating the government for its losses and concluded that the fine could "only be explained as serving either retributive or deterrent purposes."[122] Accordingly, the Court held that the civil penalties imposed under the Civil Claims Act were punitive in nature.[123]

In *United States v. Ursery*,[124] the Supreme Court declined to apply the *Halper* test in deciding whether a civil forfeiture was punitive.[125] The Court reasoned that the "excessiveness"

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117. *Id.*

118. *Id.* The *Salerno* majority held that pre-trial detention was not punitive because its purpose, to protect society from potentially dangerous individuals, was regulatory. *Id.* at 748. Furthermore, the Court concluded that "the incidents of pre-trial detention [are not] excessive in relation to the regulatory goal." *Id.* at 747.

119. 490 U.S. 435 (1989).

120. *Id.* at 448-49.

121. *Id.* at 449.

122. *Id.*

123. *Id.*

124. 116 S. Ct. 2135 (1996).

125. *Id.* at 2144. The plaintiffs in *Ursery* argued that confiscating property which was used to facilitate illegal drug transactions under 21 U.S.C. § 881(a)(6)-(7), in addition to their drug convictions, violated the Double Jeopardy Clause. *Id.* at 2137. The lower courts had interpreted *Halper* as holding that civil forfeitures always constitute punishment for the purpose of the Double Jeopardy Clause. *Id.* The Supreme Court disagreed, reasoning the *Halper* excessiveness determination relied on by the lower courts did not apply to civil forfeitures. *Id.* at 2144. The Court explained "for Double Jeopardy

prong of the *Halper* test was difficult to apply and consequently inappropriate when evaluating a civil forfeiture proceeding.[126] The Court instead used a two-part test derived from a line of cases involving civil forfeiture proceedings.[127]

In upholding the civil forfeiture claim as non-punitive,[128] *Ursery* does not render the *Halper* test useless outside the context of civil penalties.[129] The *Ursery* Court acknowledges that its decision does not mean that "there is no occasion for [the *Halper*] analysis of the Government's harm . . . . The point is simply that *Halper's* case-specific approach is inapplicable to

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purposes we have never balanced the value of property forfeited in a particular case against the harm suffered by the Government in that case, we have balanced the size of a particular civil penalty against the Government's harm." *Id.* at 2145.

126. *Id.* The Court observed that civil penalties generally serve the purpose of compensating the government for damages caused by the defendant's conduct. *Id.* Thus, in evaluating the excessiveness of a penalty a court can readily compare the penalty imposed to the amount of damages suffered by the government. *Id.* Conversely, while the amount of a civil forfeiture can be measured, the damages suffered by the government as a result of the illegal use of the confiscated property are "virtually impossible to quantify." *Id.*

127. *Id.* at 2147. The Court followed *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (per curiam); and *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931).

The Court first looked at whether the forfeiture proceeding was punitive or remedial. *Ursery*, 116 S. Ct. at 2147. The Court noted that Congress intended the civil forfeiture to be civil, rather than criminal. *Id.* Moreover, the proceedings set up were civil and involved an action against property rather than an individual person. *Id.* Second, the Court asked whether "clearest proof" showed that the proceedings were "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id.* at 2148. The Court concluded that the forfeiture served the nonpunitive goal of encouraging property owners to be responsible and not allow their property to be used for illegal purposes. *Id.*

128. Reversing the lower court decision, the *Ursery* Court held that the forfeiture was not punitive and did not violate the Double Jeopardy Clause. *Id.* at 2149.

129. *Id.* at 2146. The court in *W.P. v. Poritz*, 931 F. Supp. 1199, 1209 (D.N.J. 1996) observed that *Ursery* does not "require this court to relegate [*Halper, Austin, Kurth Ranch,* (by implication) *Morales*] to a narrow context and thereafter decline to consult them for guidance in deciding the case at bar." *Id. Ursery* does mean, however, that the tests "cannot be employed to establish a 'synthesis' that generates a universal analytical framework for defining punishment in all cases." *Id.* Consequently, the punishment test will vary from case to case depending on the type of provision challenged.

civil forfeitures."[130] Hence, under *Ursery* courts should remain flexible when making the punishment determination.[131]

3. The *Mendoza-Martinez* Factors

In *Kennedy v. Mendoza-Martinez*,[132] the Supreme Court set forth another approach for determining whether a law is punitive in the absence of conclusive evidence of the legislative purpose.[133] The Court listed seven factors for courts to consider in deciding whether a proceeding is civil or criminal.[134] These factors include:

> [1] [W]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose for which it may rationally be connected is assignable for it, [7] and whether it appears excessive in relation to the alternative purposes assigned.[135]

The Court, however, did not apply any of these seven factors when deciding the case.[136]

Despite the Supreme Court's rejection of the use of the factors outside of the civil proceeding context,[137] and despite con-

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130. *Ursery*, 116 S. Ct. at 2146 (emphasis added).

131. *See Poritz*, 931 F. Supp. at 1209 (D.N.J. 1996) (noting that *Ursery* teaches that the punishment determination may not be "transformed into a rigid series of hurdles which must be surmounted, one after the other, before the legislation can survive an ex post facto or double jeopardy challenge").

132. 372 U.S. 144 (1963).

133. *Id.* at 168-69. In *Mendoza-Martinez*, the Court held that provisions in the Nationality Act of 1940 and the Immigration and Nationality Act of 1952, which divest Americans of their citizenship for evading the draft, are unconstitutional because they are punitive and fail to provide the procedural safeguards required by the Fifth and Sixth Amendments. *Id.* at 186.

134. *Id.*

135. *Id.* at 168-69 (footnotes omitted).

136. *Id.* at 169.

> Although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive.

Id.

137. *See* Austin v. United States, 113 U.S. 2801, 2806 n.6 (1993) (rejecting the use of the *Mendoza-Martinez* factors in determining whether punishment was imposed for the purpose of applying the Eighth Amendment Excessive Fines Clause); United States v. Halper, 490 U.S. 435, 447-48 (1989) (rejecting

fusion over the appropriate weight to be given to the seven factors,[138] several courts have applied these factors when determining whether a particular registration or notification law is punitive.[139] The Federal District Court for the Southern District of New York applied five of the seven *Mendoza-Martinez* factors in overturning as punitive that state's version of Megan's Law.[140] Similarly, the Supreme Court of California balanced all seven of the *Mendoza-Martinez* factors to reach the conclusion that the California registration law constituted punishment when applied to misdemeanor sex offenses.[141]

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the use of the *Mendoza-Martinez* factors in determining whether a civil penalty constitutes punishment for Double Jeopardy Clause purposes); *see also* Artway v. New Jersey, 81 F.3d 1235, 1262 (3rd Cir. 1996) (rejecting the application of the *Mendoza-Martinez* factors to Megan's Law and noting that "[the] Supreme Court has made clear that the *Mendoza-Martinez* test is not controlling for the issues in this case").

Furthermore, in *United States v. Ursery*, the Court observed that the fourth and fifth factors were not dispositive in determining whether a civil forfeiture was punitive. 116 S. Ct. 2135, 2149 (D.N.J. 1996).

138. *See* discussion *infra* at notes 142-151 and accompanying text (addressing various challenges to the registration and notification laws that have been adopted throughout the United States); *see also* Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty, Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 819-26 (1996) (applying the *Mendoza-Martinez* factors and concluding that Megan's Law is cruel and unusual punishment); Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 924-27 (1995) (same); Michael L. Bell, Comment, *Pennsylvania's Sex Offender Community Notification Law: Will It Protect Communities from Repeat Sex Offenders?*, 34 DUQ. L. REV. 635, 659 (1996) (following the reasoning of district court's decision in Artway v. Attorney General of New Jersey, 876 F. Supp. 666 (D.N.J. 1995), *rev'd*, 81 F.3d 1235 (3rd Cir. 1996), which concludes that Pennsylvania's Megan's Law is punishment based on application of the *Mendoza-Martinez* factors).

139. *See infra* notes 142-151 and accompanying text (addressing the ongoing dialogue among courts and academics regarding the constitutionality of Megan's Law).

140. Doe v. Pataki, 919 F. Supp. 691, 701-02 (S.D.N.Y. 1996). In deeming Megan's Law punitive, the *Pataki* court reasoned that "public notification of one's crime has traditionally been viewed as punishment" (factor two); notification serves a deterrent purpose, one of the traditional goals of punishment (factor four); the stigma of notification results in an affirmative disability or restraint on the offender (factor one); the provisions are "triggered by behavior that is 'already a crime'" (factor five); and the provisions accomplish their remedial purpose so well that they become punitive (factor seven) in their overall effect. *Id.; cf.* State v. Afrika, Nos. 81/0787, 91/0293, 1996 WL 496672, at *5-6 (N.Y. Sup. Ct. Aug. 15, 1996) (upholding New York's Megan's Law and finding the *Pataki* decision unpersuasive).

141. *In re* Reed, 663 P.2d 216, 220 (Cal. 1983) (en banc). In *Reed*, the defendant was convicted of "soliciting and dissolute conduct" from an undercover vice officer in a public restroom. *Id.* at 216. The *Reed* court found that requir-

State courts applying the *Mendoza-Martinez* factors in Arizona,[142] Washington,[143] and Minnesota[144] reached the opposite result.[145] The Arizona Supreme Court found Arizona's registration law non-punitive.[146] The court explained that limited access to and dissemination of information "significantly dampen[ed] its stigmatic effect,"[147] distinguishing the law from "Scarlet Letter" shame punishments.[148] The court also found that the law served a legitimate regulatory purpose and had no

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ing the defendant to register with local police would be disproportionate punishment in relation to his crime. *Id.* at 222. The court further noted that the defendant "is not the prototype of one who poses a grave threat to society" and that his "relatively simple indiscretion" does not "place him in the ranks of those who commit more heinous registrable sex offenses." The court concluded that requiring the defendant and similarly situated sex offenders convicted of misdemeanor disorderly conduct to register violated the cruel and unusual punishment provision of the California constitution. *Id.* at 221-22.

142. *See* State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992) (upholding Arizona's registration law).

143. *See* State v. Ward, 869 P.2d 1062, 1077 (Wash. 1994) (en banc). In *Ward*, a convicted felony sex offender challenged the Washington Community Protection Act on ex post facto grounds. *Id.* The Washington Supreme Court began its analysis by observing that the Act was retrospectively applied to the defendant. *Id.* at 1066. The court then applied the *Mendoza-Martinez* factors to determine whether the act was punitive. The court concluded:

> The Legislature's purpose was regulatory, not punitive; registration does not affirmatively inhibit or restrain an offender's movements or activities; registration per se is not traditionally deemed punishment; nor does registration of sex offenders necessarily promote the traditional deterrent function of punishment. Although a registrant may be burdened by registration, such burdens are an incident of the underlying conviction and are not punitive for purposes of ex post facto analysis.

Id. at 1074.

144. *See* State v. Manning, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995) (applying and holding that registration is remedial, and therefore constitutional). *Manning* involved an ex post facto challenge to Minnesota's registration law, Minn. Stat. § 243.166 (Supp. 1993).

145. *Noble*, 829 P.2d 1217, 1224 (Ariz. 1992) (holding Arizona's registration law is regulatory and does not violate the Ex Post Facto Clause); *Manning*, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995) (holding Minnesota's registration law is not punitive and does not violate the Ex Post Facto Clause); *Ward*, 869 P.2d at 1077 (holding that Washington's registration law is not punitive and does not violate the Ex Post Facto Clause).

146. *Noble*, 829 P.2d at 1223-24. The *Noble* court did find, however, that "registration has traditionally been viewed as punitive." *Id.* at 1222.

147. *Id.* at 1223. The *Noble* court further explained: "Registrants are not forced to display a scarlet letter to the world; outside of a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statute is kept confidential." *Id.* at 1223-24.

148. *See supra* notes 77-85 and accompanying text (discussing the use of humiliation to punish criminals).

excessive punitive effect when considered in relation to that purpose.[149] The Arizona Supreme Court's decision influenced subsequent decisions by the Washington[150] and Minnesota courts.[151]

Other state courts have ignored the *Mendoza-Martinez* factors altogether in deciding challenges to registration and notification laws.[152] Noting that the *Mendoza-Martinez* factors apply only where the legislative purpose is ambiguous, the Illinois Supreme Court found the application of the factors to Illinois registration law unnecessary where the legislative purpose is "clearly nonpenal in nature."[153] Instead, the court followed the Supreme Court's "legislative purpose" approach from *Trop v. Dulles*.[154] The Supreme Court of New Hampshire up-

149. *Noble*, 829 P.2d at 1223-24 (noting the purpose of registration is to facilitate the police in locating child sex offenders, a purpose unrelated to punishing offenders for past offenses).

150. *See* State v. Ward, 869 P.2d 1062, 1071 (Wash. 1994) (en banc) (rejecting Noble's conclusion that, traditionally, registration has been viewed as punitive and stating, "[e]ven if a secondary effect of registration is to deter future crimes in our communities, we decline to hold that such positive effects are punitive in nature").

151. The Court of Appeals of Minnesota in *State v. Manning*, 532 N.W.2d 244 (Minn. Ct. App. 1995) stated:

> Consideration of the *Mendoza-Martinez* factors leads us to conclude that the registration statute does not impose an affirmative disability, has not historically been viewed as punishment, and does not advance the traditional aims of punishment. Although former offenders may be slightly burdened by the fact that they could be scrutinized when local sex crimes occur, we find that this additional burden is not excessive in relation to the important regulatory purpose served.

Manning, 532 N.W.2d at 248-49.

152. *See Adams*, 581 N.E.2d at 641-42 (concluding that the application of *Mendoza-Martinez* is unnecessary where the legislative purpose is regulatory rather than punitive); State v. Costello, 643 A.2d 531, 533-34 (N.H. 1994) (holding the registration requirement "inflicts no greater punishment," and does not violate ex post facto laws); State v. Taylor 835 P.2d 245, 246-49 (Wash. Ct. App. 1992) (holding that the legislative purpose was regulatory and the punitive aspects were not so burdensome as to constitute an ex post facto violation), *review denied*, 877 P.2d 695 (Wash. 1994).

153. *Adams*, 581 N.E.2d at 641. The defendant in *Adams* argued that the Illinois Habitual Sex Offender Registration Act constituted cruel and unusual punishment. *Id.* at 640. The *Adams* majority in dicta concluded that even if registration was punitive, it would not qualify as "cruel and unusual." *Id.* at 641. The court, however, noted in dicta, that it might be inclined to strike down a notification law under the Eighth Amendment because such laws may impose a stigma on the offender. *Id.*

154. *Id.* at 640. *See supra* notes 107-111 and accompanying text (discussing the "legislative purpose" test in Trop v. Dulles, 356 U.S. 86 (1958)).

held its registration provisions by applying the *Trop v. Dulles* test and finding "any punitive effect . . . to be de minumus."[155]

4. The *Artway* Test

Acknowledging the absence of a definitive test for making the punishment determination, the Third Circuit in *Artway v. New Jersey*[156] formulated its own three-prong test based on a synthesis of prior court decisions.[157] The elements of the three-prong test are: actual purpose, objective purpose, and effects.[158] Under the first prong, the court must determine whether the legislature's actual purpose was punishment.[159] The second prong poses three questions: (1) whether the law can be explained solely by a remedial purpose; (2) whether a historical analysis showed that the measure had traditionally been regarded as punishment; and (3) whether any deterrent purpose was a necessary complement to and did not overwhelm its salutary remedial operation.[160] Finally, the third prong questions whether the effects of the law are so harsh "as a matter of

155. State v. Costello, 643 A.2d 531, 533-34 (N.H. 1994). In *Costello*, the defendant was charged with failing to register and challenged New Hampshire's registration act on ex post facto grounds. *Id.* at 532. The *Costello* court concluded that the registration requirement "inflict[ed] no greater punishment" than the original sentence and thus did not violate the Ex Post Facto Clause. *Id.* at 534.

156. 81 F.3d 1235, 1263 (3rd Cir. 1996).

157. *Id.*

158. The court took concepts from *California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 1601-05 (1995); *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1945-46 (1994) (objective purpose and deterrence); *Austin v. United States*, 509 U.S. 602, 617-23 (1993) (objective purpose through history); *United States v. Halper*, 490 U.S. 435, 448 (1989) (objective purpose through proportionality); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (the inquiry for the nature of proceedings); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (subjective purpose). 81 F.3d at 1254-63.

The *Artway* court acknowledged that its test was "by no means perfect" and that "[o]nly the Supreme Court knows where all the pieces belong." 81 F.3d at 1263.

159. 81 F.3d at 1264.

160. *Id.* at 1263; *cf.* Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1726 (1996) (proposing its own effects test: "[I]f the sex offender statute deprives an offender of an otherwise-established legal right and primarily operates to affect retribution or general deterrence, it should be deemed 'punitive' for constitutional purposes"). *But see* United States v. Ursery, 116 S. Ct. 2135, 2146 (1996) (noting that a remedial law may also have deterrent objectives without becoming punitive).

degree" as to become punishment.[161] Applying this synthesized test, the Third Circuit upheld the registration provisions of Megan's Law.[162]

Using the *Artway* test, the New Jersey Federal District Court recently upheld the registration and notification provisions of Megan's Law.[163] Although the court found that the *Artway* test was inconsistent with *Ursery*, which rejected the formulation of a "universal" test[164] and was not binding,[165] the

161. *Artway*, 81 F.3d at 1266; *cf.* Artway v. New Jersey, 83 F.3d 594, 596-98 (3rd Cir. 1996) (denial of rehearing) (Alito, J. dissenting) (arguing that *Artway*'s effects test is not supported by Supreme Court precedent). Alito explained that *Artway* misinterpreted *California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 1602 (1995), a case which never addressed the issue of whether a provision was punishment. *Artway*, 83 F.3d at 597. Alito also observed that certain governmental actions such as pretrial detention, professional license revocation and deportation, which have harsh effects, have been upheld as nonpunitive. *Id.* at 596.

162. *Artway*, 81 F.3d at 1267. Applying its test, the *Artway* court concluded that the actual and objective purpose of registration was remedial. *Id.* at 1264-65. The court further reasoned that the effects of registration were not harsh enough to constitute punishment. *Id.* at 1267.

The court found that Artway's challenge to notification was not ripe for review because the plaintiff's tier determination had not been made. *Id.* at 1248. Thus, the court did not determine whether notification was punitive. *Id.* In dicta, however, the court indicated that it might find notification punitive because of the harshness of ostracism and vigilante reprisals and its resemblance to shaming punishment. *Id.* at 1265-66.

163. W.P. v. Poritz, 931 F. Supp. 1199, 1223 (D.N.J. 1996).

164. *Id.* at 1208; *see* Artway v. New Jersey, 83 F.3d 594, 598 (3rd Cir. 1996) (denial of rehearing) (Alito, J. dissenting) (arguing that *Morales* is a "narrow decision" and should not be read "as adopting a universally applicable effects test").

The district court in *Poritz* observed that "*Ursery* casts considerable doubt upon whether a separate effects hurdle must be scaled in order for Megan's Law to withstand the present constitutional attack, *Ursery* itself suggests that both purpose and effect are considerations in an *ex post facto* or double jeopardy analysis." 931 F. Supp. at 1218. The court further observed that *Artway* misinterpreted *Morales* for the effects portion of its test. *Id. Morales*, the court explained, did not even involve the issue of whether a provision constituted punishment. *Id.* The question in *Morales* was whether a provision which decreased a prisoner's entitlement to parole eligibility hearings impermissibly increased the punishment attached to criminal conduct. 115 S. Ct. 1597, 1599 (1995).

The *Morales* Court held that a law that changed the procedure for determining a parole release date did not violate the Ex Post Facto Clause because it created only a "speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause." *Id.* at 1603. The *Morales* Court reasoned that in an ex post facto challenge the focus should not be on

court proceeded to apply the *Artway* test to uphold Megan's Law.[166]

II. *DOE V. PORITZ*

In *Doe v. Poritz*,[167] the New Jersey Supreme Court formulated a two-step test for determining whether a registration or notification law is regulatory or punitive.[168] In arriving at this test, the court followed the Supreme Court's "legislative purpose" approach as established in *Trop v. Dulles*[169] and expanded by *United States v. Salerno*[170] and *United States v. Halper*.[171] Under the *Poritz* test, a court must first determine if

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whether the law "produces some ambiguous sort of 'disadvantage.'" *Id.* at 1602 n.3.

165. The court concluded that "the particular, compartmentalized approach of *Artway* need not and should not be followed, because it is not binding precedent for the issues and claims presented in the cross motions for summary judgment." 931 F. Supp. at 1208.

166. *Id.* at 1213-19. The court began its analysis by concluding that the actual intent of Megan's Law was remedial. *Id.* at 1213. Next, the court reasoned that the objective purpose was remedial. *Id.* at 1214. The court explained that "the deterrent purpose of . . . the law is a necessary complement to its salutory [remedial] operation." *Id.* (quoting Artway v. Attorney General of New Jersey, 81 F.3d at 1263). Moreover, the court stated, "[T]he means employed (Tier II and III notifications) are directly proportional to the ends which Megan's Law is designed to serve." *Id.*

The court then proceeded to distinguish Megan's Law from "Scarlet Letter" style punishment. *Id.* at 1215-16. The court reasoned that unlike "Scarlet Letter" punishments which were intended to publicly humiliate criminals, Megan's Law is designed to protect children, and the resulting impact is merely a consequence of accomplishing the remedial purpose. *Id.* at 1217. The court further compared Megan's Law to the FBI's most wanted lists, explaining that law enforcement officials have used wanted posters since the beginning of the republic and they have never been considered "punitive." *Id.* Thus, the court reasoned that a historical analysis reveals that Megan's Law is remedial. *Id.* at 1218.

Although the court had reservations about the validity of the effects test, the court did not hesitate to apply it because it demonstrated that Megan's Law was not punitive. *Id.* at 1219. The court explained that notification was no more severe than other remedial measures such as deportation or pretrial detention. *Id.*

167. 662 A.2d 367 (N.J. 1995).

168. *Id.* at 390, 404-05.

169. 356 U.S. 86 (1958); *see supra* notes 107-111 and accompanying text (discussing the *Trop v. Dulles* "legislative purpose" test).

170. 481 U.S. 739 (1987); *see supra* notes 116-118 and accompanying text (discussing *Salerno's* expansion of the legislative purpose test).

171. 490 U.S. 435 (1989). In *Halper*, the Supreme Court stated that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* at 448. The *Poritz* majority concluded that the

the legislative intent is regulatory or punitive.[172] If the legislative intent is punitive, the inquiry ends, because punishment results.[173] If the legislative intent is regulatory, a court must assess whether the implementing provisions are "excessive" in that they are not necessary to accomplish the regulatory purpose.[174] Under the second step, any punitive impact which is not an "inevitable consequence" of the regulatory provision will render a provision punitive.[175]

Concluding that other courts have mistakenly applied the *Mendoza-Martinez* factors to registration and notification provisions,[176] the *Poritz* court refused to use the *Mendoza-*

Halper language was not intended to apply to provisions which serve solely remedial purposes, only to provisions that do not advance a remedial purpose and therefore only serve punitive purposes. 662 A.2d at 394. The *Poritz* majority further reasoned that the term "serve" refers to the "purpose" of the provision and not the "impact" because "the use of the word "explained" clearly suggests an examination of something more than the impact; it suggests the question of whether the impact is simply an inevitable consequence of the remedial provision, or whether it is such that the only explanation is another purpose to the sanction, a punitive purpose." *Id.* Thus, the majority concluded, "[w]hat counts . . . is the purpose and design of the statutory provision, its remedial goal and purposes, and not the resulting consequential impact, the 'sting of punishment' that may inevitably, but incidentally flow from it." *Id.* at 396.

172. *Poritz*, 662 A.2d at 390.

173. *Id.*

174. *Id.* The *Poritz* court explained:

> The law is characterized as punitive only if the punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes—that is, if the law is "excessive," the excess consisting of provisions that cannot be justified as regulatory, that result in a punitive impact, and that, therefore, can only be explained as evidencing a punitive intent.

Id. at 390-91. The court further observed that this inquiry reflects "the underlying constitutional goal of preventing government from using its power to punish either in an excessive or unjust manner." *Id.* at 398.

175. *Id.* at 390. The court explained:

> [T]he ultimate question is whether this statute . . . is an impermissible use of government's power to punish, or whether it is an honest, rational exercise of the government's power, aimed solely at effecting a remedy, its provisions explainable as addressed to that which is being remedied, its deterrent or punitive impact, if any, a necessary consequence of its remedial provisions.

Id. at 398.

176. *Id.* at 400-01. The *Poritz* majority noted:

> One might wonder of the importance of *Mendoza-Martinez* as a "test" when the two most important cases to which it has been applied, *Mendoza-Martinez* and *Ward*, have treated it so cavelierly, *Mendoza-Martinez*, the originator, not using it at all, and *Ward* considering but one factor and dismissing it as unpersuasive.

Id.

Martinez factors in its analysis.[177] The court observed that the Supreme Court explicitly rejected the use of the *Mendoza-Martinez* factors outside of the context of determining whether a proceeding is civil or criminal in *Halper*[178] and *United States v. Austin*.[179] Moreover, the *Mendoza-Martinez* decision itself indicated that the Court only intended the factors to be used as a guide in cases where conclusive evidence of the legislative purpose was unavailable.[180] The *Poritz* court reasoned that use of the factors as determinative indicators distracted the reviewing court from thoroughly analyzing the issues of the case.[181] The court also noted that several cases following *Mendoza-Martinez* applied only the last two factors which constitute the *Halper* test.[182] The majority thus concluded that the factors should not be used to determine whether a particular law imposes punishment.[183]

Applying its own test to Megan's Law, the *Poritz* majority found that the legislative intent, to protect the public from repeat offenders, was regulatory[184] and that the implementing

177. *Id.*

178. 490 U.S. 435, 447 (1989).

179. 662 A.2d at 402-03; *see supra* note 137 and accompanying text (discussing the rejection of the *Mendoza-Martinez* factors in Austin v. United States, 113 S. Ct. 2801, 2806 (1993) and United States v. Halper, 490 U.S. 435, 447 (1989)).

Based on these precedents, the *Poritz* majority argued that courts should not apply the *Mendoza-Martinez* factors in ex post facto and cruel and unusual punishment cases because punishment in those contexts is "substantially indistinguishable from punishment in the double jeopardy and excessive fines context." 662 A.2d at 402.

180. *Poritz*, 662 A.2d at 401 ("The description of *Mendoza-Martinez* as providing factors that are 'useful guideposts' is a far cry from the status they are given in recent cases as the determinative test.").

181. *Id.* at 403. The court concluded that determinative use of the factors could have the "practical effect of distracting a court from a significant analysis of the issues." *Id.*

182. *Id.* at 401 (citing United States v. Salerno, 481 U.S. 739, 746-51 (1987); Schall v. Martin, 467 U.S. 253, 269-72 (1984); Bell v. Wolfish, 441 U.S. 520, 537-39 (1979).

183. *Id.* at 402.

184. *Id.* at 404 (stating that the legislative purpose was "to enable the public to protect itself from the danger posed by sex offenders . . . widely regarded as having the highest risk of recidivism"). As evidence of remedial intent the court noted that the law applies only to those offenders who are most likely to re-offend. *Id.* Further, the law applies to individuals regardless of culpability, including those found not guilty by reason of insanity, indicating that the purpose is remedial, not punitive. *Id.* The court further concluded:

provisions were "not excessive, but . . . aimed solely at achieving, and, in fact . . . [were] likely to achieve, that regulatory purpose."[185] In so holding, the court observed that the legislature relied on recidivism statistics,[186] evidence showing that successful treatment is rare,[187] and studies revealing the harmful effects on victims, especially children.[188] The court concluded that Megan's Law reflected a legislative choice[189] as to how to remedy these problems,[190] not an attempt to punish sex offenders further.[191]

> The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further.

Id. at 372.

185. *Id.* at 405. The *Poritz* majority found that the means chosen, the Tiers, were "strongly related to the risk of re-offense and the consequent need for greater or lesser notification." *Id.* The *Poritz* majority further reasoned that removing the "shield of anonymity" from sex offenders is an unavoidable consequence of a registration and notification law, because informing the public "goes to the very heart of the remedy: that which is allegedly punitive, the knowledge of the offender's record and identity, is precisely that which is needed for the protection of the public." *Id.*

186. *Id.* at 374-75; *see supra* note 7 (discussing the recidivism statistics cited by the *Poritz* court).

187. *Id.* at 374.

188. 662 A.2d at 374-75; *see supra* note 64 (discussing the harmful effects of sex crimes on children).

189. *Poritz,* 662 A.2d at 373. The court explained:

> The choice the Legislature made was difficult, for at stake was the continued apparently normal lifestyle of previously-convicted sex offenders, some of whom were doing no harm and very well might never do any harm, as weighed against the potential molestation, rape, or murder by others of women and children because they simply did not know of the presence of such a person and therefore did not take the common-sense steps that might prevent such an occurrence. The Legislature chose to risk unfairness to the previously-convicted offenders rather than unfairness to children and women who might suffer because of their ignorance, but attempted to restrict the damage that notification of the public might do to the lives of rehabilitated offenders by trying to identify those most likely to re-offend and limiting the extent of notification based on that conclusion.

Id.

190. *Id.* at 376. The court observed:

> The remedy goes directly to the question of what a community can do to protect itself against the potential of re-offense by a group the Legislature could find had a relatively high risk of recidivism involving those crimes to which the most vulnerable and defenseless were exposed—the children of society.

Id.

191. *Id.* at 373.

The *Poritz* majority emphasized that legislative intent is not the sole determinant of punishment.[192] The court reasoned that its analysis considered the functional effect of the law.[193] The court explained that the punitive effects of Megan's Law do not transform it into punishment because those effects are "an inevitable consequence of the regulatory provision,"[194] rather than "excessive" provisions, that do not advance the regulatory purpose.[195] Accordingly, the court found that Megan's Law was not punitive.[196]

Having determined that Megan's Law was not punitive, the *Poritz* court held that Megan's Law did not violate the Ex

192. 662 A.2d at 404. Justice Stein, the sole dissenter in *Poritz,* criticized the majority for relying solely on legislative intent. *Id.* at 432. Stein reasoned that *Halper* required the court to look not only at legislative intent, but also at the effects of the law, including whether the actual function of the law imposes punishment. *Id.* at 435-36. Stein concluded that, functionally, the law imposed punishment because its effects were consistent with historical forms of punishment such as stigma and public humiliation. *Id.* at 437-38. Stein noted that Megan's Law led to two incidents of vigilantism. *Id.* at 430. The first incident involved notification following the release of a convicted rapist in Phillipsburg, New Jersey in which local police provided the residents of the community with the sex offender's address and a photograph of him. *Id.* A father and son went to the offender's address and assaulted the man they believed to be the released sex offender. *Id.* They attacked the wrong man. *Id.* The second incident involved a sex offender who got a preliminary injunction to delay notification. *Id.* Upon discovery of the injunction, the Guardian Angels organized a demonstration outside the house of the released offender's mother. *Id.* The demonstrators carried signs with photos of the released offender and a number to call if the offender was seen. *Id.* Based on these incidents, Stein found that Megan's Law adversely affected the quality of sex offenders' lives, thus imposing additional punishment in violation of ex post facto laws. *Id.* at 441; *see also* Lori N. Sabin, Note, Doe v. Poritz*: A Constitutional Yield to an Angry Society*, 32 CAL. W. L. REV. 331, 354 (1996) (arguing that Megan's Law "should be declared an increase in punishment because Doe will likely be subject to constant community harassment, endangered with the possibility of vigilante attacks, and burdened with the probability of losing his current job and remaining unemployable").

193. 662 A.2d at 404-05. The *Poritz* majority observed that some harassment and vigilantism may result. *Id.* at 376-77. Yet, the court refused to assume that such harassment and vigilantism would convert Megan's Law into punishment. *Id.* The court assumed that the public and media would act responsibly. *Id.* Moreover, the court noted that the Attorney General had "strongly warned that vigilantism and harassment will not be tolerated." *Id.* at 376.

194. *Id.* at 405. The court found that "[t]he notification provisions are as carefully tailored as one could expect in order to perform their remedial function without excessively intruding on the anonymity of the offender." *Id.* at 404.

195. *Id.* at 405.

196. *Id.* at 367.

Post Facto Clause, Cruel and Unusual Punishment Clause or the Double Jeopardy Clause.[197] The court also revised portions of the Attorney General's Guidelines that set forth the terms of tier classifications to conform them to its interpretation of the statute.[198] The court further established procedural safeguards, in compliance with the procedural Due Process Clause,[199] restricting the discretion of law enforcement in making notification decisions.[200]

III. CHARTING A NEW COURSE: *PORITZ*'S TEST OUTPERFORMS THE REST

Doe v. Poritz sets forth the most appropriate test for determining whether registration and notification laws are punitive. Tests followed by other courts are not supported by precedent, improperly balance purpose and effects and lead to circuitous reasoning and inconsistent results. In contrast, the *Poritz* test conforms to the major trends in caselaw regarding punishment determinations and properly balances purpose and effects. The test also encourages legislatures to draft narrowly tailored provisions that minimize the negative impact on sex offenders. Finally, the *Poritz* test appropriately considers policy justifications behind registration and notification laws by weighing the need to protect the public against the adverse effects on a sex offender.

A. *PORITZ* PROVIDES A BETTER ANALYTICAL FRAMEWORK THAN OTHER EXISTING TESTS

1. Rejecting the *Mendoza-Martinez* Factors

The major distinction between the various court decisions considering challenges to registration and notification laws is

197. *Id.* at 405.

198. *Id.* at 381-86; *see supra* notes 60-63 and accompanying text (discussing the three tiers of notification). The *Poritz* court revised and limited the second tier to include only those women's and children's organizations "likely to encounter" the offender, not all such organizations. 662 A.2d at 381. Similarly, the court limited the third tier to notification of those "likely to encounter" the offender, not the entire community. *Id.*

In response to *Poritz*, New Jersey's Attorney General established a "Sex Offender Risk Assessment Scale" used by county prosecutors in assigning tier levels to individual offenders. *Id.*

199. U.S. CONST. amend. XIV.

200. 662 A.2d at 417.

the court's willingness to apply the *Mendoza-Martinez* factors to determine whether a law is punitive.[201] Criticizing courts for using the *Mendoza-Martinez* factors,[202] the *Poritz* court points out that even the *Mendoza-Martinez* court did not apply the factors in deciding the case.[203] The *Poritz* court correctly concluded that using the factors as a determinative test, rather than as a helpful guideline, is inconsistent with the language of *Mendoza-Martinez*.[204]

Using the factors as a balancing test is unworkable because the factors "may often point in differing directions."[205] For instance, a law may have a deterrent effect, thereby satisfying the fourth factor [206] and suggesting that the law is punitive. The same law, however, may not be excessive in relation to accomplishing its regulatory purpose, failing to meet the seventh factor and suggesting that the law is *not* punitive.[207] Similarly, in a different case, application of four of the factors may suggest a law is punitive whereas the other three factors suggest the opposite conclusion.[208] In both cases, a court must decide which factors should be given the most weight, while ignoring the other factors.[209] The court deciding the case is distracted from engaging in good legal reasoning by trying to reconcile the inconsistencies of applying the test.[210] Hence, as

201. *See supra* notes 139-155 and accompanying text (detailing constitutional challenges to registration and notification laws).

202. *See supra* notes 176-183 and accompanying text (discussing *Poritz*'s criticism of the *Mendoza-Martinez* factors).

203. *See supra* note 136 and accompanying text (explaining that the *Mendoza-Martinez* Court did not rely on the *Mendoza-Martinez* factors in its decision).

204. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-70 (1963).

205. *Id.* at 169.

206. *See supra* note 135 and accompanying text (listing the *Mendoza-Martinez* factors).

207. *See supra* note 135 and accompanying text (listing the *Mendoza-Martinez* factors).

208. A court may then ask whether four factors are enough to make it punitive or whether five, six or all seven factors are necessary to deem a law punitive. Alternatively, a court could decide that the three factors suggesting the law is regulatory should be controlling because they are more important. Thus, applying the factors does not really help a court reach the best decision, because the court must use its own judgment to determine which of the factors should get the most weight, if any at all.

209. *See supra* notes 176-183 and accompanying text (detailing *Poritz*'s criticism of the use of the *Mendoza-Martinez* factors).

210. *See supra* notes 176-183 and accompanying text (detailing *Poritz*'s criticism of the use of the *Mendoza-Martinez* factors).

Poritz suggested, attempting to weigh and balance the different factors leads courts to circuitous reasoning and inconsistent results.[211]

Poritz's rejection of the *Mendoza-Martinez* factors follows the reasoning of other courts. Both *Halper* and *Austin* rejected the use of the factors for determining whether a law is punitive and limited the application of the factors to the context of determining whether a proceeding is civil or criminal.[212] The Supreme Court in *Ursery* further indicated that two of the *Mendoza-Martinez* factors should not be determinative of whether a law is punitive.[213] The Court reasoned that all laws that serve deterrent purposes, the second *Mendoza-Martinez* factor, are not necessarily punitive:[214] "We long have held that this purpose may serve civil as well as criminal goals."[215] Similarly, the Court rejected the third *Mendoza-Martinez* factor, noting that the fact that a law is tied to criminal activity "is far from the 'clearest proof' necessary to show that a proceeding is criminal."[216] Consequently, application of the *Mendoza-Martinez* factors to determine whether Megan's Law is punitive conflicts with *Ursery*.

2. *Artway*: Overemphasizing Effects

Artway's three-prong test has similar shortcomings. The test is difficult to apply because it contains several hoops that laws must jump through.[217] Like the *Mendoza-Martinez* fac-

211. Using the factors as a test in practice actually gives courts considerable freedom in deciding the case because they can pick and choose which factors they think are most compelling and ignore the rest. *See supra* notes 176-183 and accompanying text (detailing *Poritz*'s criticism of the use of the *Mendoza-Martinez* factors).

212. *See supra* note 137 and accompanying text (discussing the rejection of *Mendoza-Martinez* in *Halper* and *Austin*).

213. *See supra* note 137 and accompanying text (discussing *Ursery's* rejection of the fourth and fifth factor).

214. *See supra* note 137 and accompanying text (discussing *Ursery*'s rejection of the fourth and fifth factors).

215. United States v. Ursery, 116 S. Ct. 2135, 2149 (1996); *see supra* note 137 and accompanying text (discussing *Ursery*'s rejection of the fourth factor).

216. *Ursery,* 116 S. Ct. at 2149; *see supra* note 137 and accompanying text (discussing *Ursery*'s rejection of the fifth factor).

217. *See supra* note 131 (noting that tests should not create a series of hurdles). Moreover, some of the hoops are substantively improper. The part of the second prong which focuses on deterrence, like the second *Mendoza-Martinez* factor, is inconsistent with *Ursery*. *See supra* note 137 and accom-

tors, the three prongs of the *Artway* test may suggest opposite conclusions.[218] For example, the actual and objective purpose of a law may be remedial, but the effects may be severe enough to suggest the law is punitive.[219] Thus, a court following *Artway* must decide which prongs should control and which prongs should be disregarded.[220]

The third prong, which focuses on the effects of a provision, is the most problematic.[221] The *Artway* court concluded that if the effects of a remedial provision are severe enough, that provision is punitive.[222] Yet, the Supreme Court has never held that severe effects alone transform an otherwise remedial provision into punishment.[223] Indeed, the Court has upheld harsh effects such as pretrial detention and deportation as remedial actions.[224] Furthermore, *Artway* mistakenly relied on a case that did not even involve the issue of whether a law was punitive to reach this conclusion.[225] The case *Artway* relied on involved the issue of whether a law increased the punishment attached to a crime in violation of the Ex Post Facto Clause.[226] The "effects" analysis in this context thus examines whether the effects of the new provision increased the punishment, not whether the provision was punitive.[227]

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panying text (explaining that the Supreme Court in *Ursery* found the deterrence factor nondispositive).

218. The second prong of the test actually consists of three of the *Mendoza-Martinez* factors, thus raising the same concerns presented by those factors. *See supra* notes 205-211 and accompanying text (discussing problems with the *Mendoza-Martinez* factors).

219. *See supra* notes 158-161 and accompanying text (describing the *Artway* test).

220. *Cf. supra* notes 205-211 and accompanying text (discussing similar problems with the *Mendoza-Martinez* factors).

221. *See supra* note 161 and accompanying text (noting problems with the validity of the effects prong).

222. *See supra* note 161 and accompanying text (discussing *Artway*'s misinterpretation of *Morales* in concluding that effects alone can make a law punitive).

223. *See supra* note 161 and accompanying text (criticizing the effects prong).

224. *See supra* note 161 and accompanying text (explaining that pretrial detention and deportation have been upheld as remedial actions despite their severe effects).

225. *See supra* notes 164-165 and accompanying text (detailing the holding in *Morales*).

226. *See supra* notes 164-165 and accompanying text (detailing the issue in *Morales*).

227. *See supra* notes 164-165 and accompanying text (explaining the reference to effects in *Morales*).

In addition, *Artway's* synthesis of the "punitive determination" tests conflicts with *Ursery's* case-specific approach.[228] The *Ursery* Court reasoned that courts should follow different punishment tests depending on the type of provision challenged.[229] The *Ursery* Court properly observed that the test used for assessing a civil penalty is not appropriate for determining whether a civil forfeiture is punitive.[230] Thus, *Artway's* attempt to lump all the different tests used in various contexts together into one definitive test is improper and should not be followed.[231]

3. *Trop v. Dulles's* "Legislative Purpose" Test: Improperly Allowing Remedial Purpose to Trump Punitive Effects

The *Trop v. Dulles* test applied by the supreme courts of Illinois[232] and New Hampshire[233] in upholding their respective registration laws is also problematic.[234] It places too much emphasis on legislative purpose. If the statute has punitive effects, but the legitimate government purpose is remedial, that remedial purpose governs.[235] Although the test requires the court to evaluate the legitimacy of the legislative purpose by evaluating the effects of the statute, it nonetheless suggests that a court may ignore punitive effects if the purpose is deemed remedial.[236] Hence, application of the *Trop v. Dulles* test leads to misguided conclusions because it allows a remedial legislative purpose to trump any punitive effects.

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228. *See supra* note 129 and accompanying text (explaining that "the tests cannot be employed to establish a 'synthesis'" and courts should consider the context of each case in deciding which test to follow).

229. *See supra* note 129 and accompanying text (explaining that the punishment test followed will vary from case to case).

230. *See supra* note 126 and accompanying text (explaining that the differences between civil penalties and civil forfeitures warrant the use of different tests when determining whether a penalty or forfeiture is punitive).

231. *See supra* note 129 and accompanying text (explaining that courts should consider the context of each case in deciding which test to follow).

232. *See supra* notes 152-153 and accompanying text (discussing People v. Adams, 581 N.E.2d 637, 640-41 (Ill. 1991)).

233. *See supra* note 155 and accompanying text (discussing State v. Costello, 643 A.2d 531 (N.H. 1994)).

234. *See supra* notes 107-111 and accompanying text (detailing the "legislative purpose" test).

235. *See supra* notes 107-111 and accompanying text (discussing Trop v. Dulles, 356 U.S. 86, 96 (1958)).

236. *See supra* notes 107-111 and accompanying text (discussing *Trop*, 356 U.S. at 96).

B. THE *PORITZ* TEST APPROPRIATELY BALANCES PURPOSE AND EFFECTS

Of the different tests used by courts, the *Poritz* test provides the most straightforward standard for determining whether a law is punitive.[237] Unlike the *Mendoza-Martinez* factors and the *Artway* test, the *Poritz* test does not require courts to pick and choose among conflicting factors or prongs.[238] Courts applying *Poritz* must simply inquire into the legislative purpose of the provision and then determine whether the implementing provisions are excessive in accomplishing that purpose.[239]

1. Substantive Support for the *Poritz* Test

The *Poritz* test is consistent with the major trends in caselaw regarding punishment determinations. *Poritz* correctly observed that courts applying the *Mendoza-Martinez* factors to cases outside the context of challenges to registration and notification laws use only the last two factors,[240] which mirror the language of the *Halper* test.[241] The majority opinion and dissenting opinion in *Poritz* disagreed about the outcome of applying *Halper*, but their assessments of the test's elements were consistent.[242] Both the majority and dissent reasoned that *Halper* required courts to ask two questions: (1) what is the legislative purpose, and (2) are the effects of the law excessive in relation to accomplishing that purpose?[243]

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237. *See supra* notes 173-175 and accompanying text (discussing the requirements of the *Halper* test as set forth in *Poritz*).

238. *See supra* notes 205-211 and accompanying text (analyzing consistency problems with applying the *Mendoza-Martinez* factors) and notes 217-220 and accompanying text (analyzing consistency problems with the *Artway* test).

239. *See supra* notes 173-175 and accompanying text (detailing the two prongs of the *Halper* test as set forth in *Poritz*).

240. *See supra* note 135 and accompanying text (listing the *Mendoza-Martinez* factors).

241. *See supra* notes 173-175 and accompanying text (detailing the two prongs of the *Halper* test as set forth in *Poritz*).

242. *See supra* notes 171-174, 192 and accompanying text (describing the majority opinion and dissenting opinion's interpretations of *Halper* and the majority's conclusion that Megan's Law is remedial and the dissent's conclusion that Megan's Law is punitive).

243. *See supra* notes 171-174, 192 and accompanying text.

Applying *Poritz*'s interpretation of the *Halper* test to Megan's Law does not conflict with *Ursery*.[244] The *Ursery* Court declined to apply *Halper* because it distinguished between the purposes of civil penalties and civil forfeitures.[245] The *Ursery* court concluded that *Halper's* "excessiveness determination" was not workable within the context of civil forfeitures.[246] On the contrary, courts can apply the "excessiveness determination" to registration and notification laws. Furthermore, most notification statutes,[247] including Megan's Law[248] and the Federal Act,[249] contain language permitting or mandating disclosure as "necessary to protect the public."[250] Similar to the "excessiveness determination" in *Halper*, in which the Court concluded that the penalty imposed grossly exceeded the harm to the government,[251] notification laws may be evaluated to determine whether the scope of notification exceeds what is "necessary to protect the public."[252]

The *Poritz* test also follows the "clearest proof" requirement.[253] The "clearest proof" requirement prevents a court from deferring entirely to either the statute's purpose or effects in its analysis. It ensures that courts will require "unmistakable evidence of punitive intent" before rejecting the remedial purpose offered by the legislature.[254] Similarly, under

244. *See supra* note 129 and accompanying text (explaining *Ursery* does not mean that *Halper* cannot be applied outside the context of civil penalties, only that courts should engage in case-specific analysis).

245. *See supra* note 125 and accompanying text (discussing the reasons *Ursery* did not apply the *Halper* test).

246. *See supra* note 126 and accompanying text (explaining why *Ursery* held that *Halper*'s excessiveness determination did not apply to civil forfeitures).

247. *See supra* note 8 (explaining that Washington's Community Protection Act authorizes release when necessary to protect public safety).

248. *See supra* note 7 and accompanying text (explaining that New Jersey's Megan's Law mandates disclosure as "necessary for the public safety").

249. *See supra* note 43 and accompanying text (stating that SVORA mandates notification where "necessary to protect the public").

250. *See supra* note 7 and accompanying text (explaining that New Jersey's Megan's Law mandates disclosure as "necessary for the public safety").

251. *See supra* notes 119-123 and accompanying text (describing the Court's reasoning in *Halper*).

252. *See infra* text accompanying notes 259-264 (describing how the excessiveness determination can be used to evaluate registration and notification laws).

253. *See supra* notes 112-115 and accompanying text (discussing the "clearest proof" test).

254. *See supra* notes 112-115 and accompanying text.

the second step of the *Poritz* test a challenger must prove that a law exceeds its remedial purpose in order for the law to be deemed punitive. Thus, the *Poritz* test properly incorporates the "clearest proof" requirement.

2. The *Poritz* Test Outperforms the Rest

The Supreme Court has not spoken on the issue of the constitutionality of registration and notification laws. Courts must look to other areas of law in which courts have determined if a provision was punitive. The *Poritz* test is based on tests developed in response to challenges to laws other than registration and notification provisions. Unlike the other proposed tests, the *Poritz* test ensures a proper balance between purpose and effects. Likewise, courts using the *Poritz* test will strike down provisions whose punitive effects exceed what is necessary to accomplish the remedial purpose.[255] For these policy reasons, the Supreme Court should follow *Poritz*'s lead and apply the *Poritz* test to Megan's Law.

By requiring courts to examine not only the legislative purpose underlying a statute, but also whether the effects of the provision go beyond its purported purpose, *Poritz* encourages courts to engage in well-reasoned analysis.[256] If properly applied, *Poritz* discourages courts from relying entirely on either the legislative purpose[257] or effects.[258] Rather, *Poritz* requires courts to look beyond the legislative purpose and determine whether the statute as implemented is excessive in relation to accomplishing its purpose.[259]

The *Poritz* test also encourages state legislatures to draft their registration and notification laws in ways that minimize

255. *See infra* notes 259-264 and accompanying text (describing how the excessiveness determination can be used to evaluate registration and notification laws).

256. *See supra* notes 167-200 and accompanying text (discussing the *Poritz* test analysis).

257. *See supra* text accompanying notes 232-236 (discussing the problems with the "legislative purpose" test in *Trop v. Dulles*). The second prong of the *Poritz* test, requiring courts to determine if the provisions as implemented go beyond the regulatory purpose, avoids the *Dulles* court's problem of deferring to legislative purpose. *See supra* notes 172-175 and accompanying text (detailing the *Poritz* test).

258. *See supra* note 192 (discussing the *Poritz* dissent's reliance on punitive effects such as stigma and humiliation).

259. *See supra* notes 172-175 and accompanying text (discussing the *Poritz* test as requiring analysis of both the purpose of the provision and the effects of implementation).

the punitive effects. Courts could use the second prong of *Poritz*, which examines whether the implementing provisions are excessive in relation to the regulatory purpose, to strike down provisions that are not narrowly drawn.[260] For instance, a provision that enables law enforcement to notify the entire community when any sex offender is released without any assessment of the risk imposed by that particular offender would fail the second prong of *Poritz*, because the provision goes beyond what is necessary to achieve its remedial purpose.[261] Similarly, broadly drawn statutes like Washington's Community Protection Act,[262] that do not contain specific risk assessment guidelines, would fail the *Poritz* test.[263] Furthermore, a statute requiring sex offenders to wear specially labeled clothing would be struck down as excessive in achieving its regulatory purpose.[264]

Ultimately, the question of whether Megan's Law should be upheld rests on these policy considerations. With the introduction of registration and notification laws, society must balance the rights of sex offenders against the rights of potential victims. The community's right to know must be balanced against a sex offender's right to be free from unconstitutional stigmatization. The need to protect children from the threat posed by sex offenders must be balanced against the intrusion in offenders' lives.

Notification will undoubtedly adversely affect the lives of sex offenders. Offenders will not be able to reintegrate into a community without others knowing of their criminal history. If they could, the purpose of Megan's Law would be defeated. The heart of Megan's Law is that it provides parents with the opportunity to protect their children from a known sex offender and teach them how to respond to invitations from strangers.[265] The recidivism statistics reveal that sex offenders pose a real threat to society;[266] sex offenders commit repeat offenses more

260. *See supra* notes 174-175 and accompanying text (discussing the second prong of the *Poritz* test).

261. *See supra* notes 174-175 and accompanying text.

262. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1996).

263. *See supra* notes 47-48 and accompanying text (discussing the broad discretion given to police officers in implementing Washington's Act).

264. *See supra* note 52 and accompanying text (describing Louisiana's special clothing provision).

265. *See supra* note 7 (detailing the purpose of Megan's Law).

266. *See supra* notes 7, 69-72 and accompanying text (discussing the high recidivism statistics for sex offenders).

often than any other type of criminal.[267] Psychiatric research further indicates that many sex offenders are virtually incurable and that treatment is rarely successful.[268]

The *Poritz* test provides courts with the opportunity to consider these policy issues. Under the second prong of *Poritz*, a court could strike down a provision which may cause unnecessary adverse effects.[269] A provision, for instance, that required sex offenders to put bumper stickers on their cars stating "Convicted Sex Offender On Board" would fail the second prong.[270] The bumper sticker is excessive in accomplishing the purpose of protecting the public because it would indiscriminately inform people without consideration of those individuals who are likely to encounter the offender outside of the car, where the potential threat lies. Thus, the *Poritz* test ensures that courts will properly take policy considerations into account by weighing the need to protect the public against the adverse effects on an offender.

Finally, courts following *Poritz* will not have to evaluate a series of indefinite factors. Nor will they have to reconcile considerations that point in opposite directions. Rather, those courts may engage in well-reasoned analysis of the purpose and effects of the challenged provisions. Courts applying the *Poritz* test will properly strike down provisions producing excessive punitive effects and uphold narrowly drawn provisions.

C. MEGAN'S LAW UNDER THE *PORITZ* TEST

In analyzing Megan's Law under the *Poritz* test, the Court should first determine whether the legislative purpose is regulatory or punitive.[271] According to the statute,[272] the New Jersey legislature intended to protect the public from dangers

267. *See supra* notes 7, 69-72 and accompanying text (noting that sex offenders are "more likely than other convicts to strike again once released from prison").

268. *See supra* note 67 (observing the growing consensus among psychiatrists that sex offenders are "rarely treatable").

269. *See supra* notes 174-175 and accompanying text (discussing the second prong of the *Poritz* test).

270. *See supra* note 83 and accompanying text (discussing a Florida court order that required a drunk driver to place a bumper sticker stating "Convicted D.U.I. Restricted License" on his car).

271. *See supra* notes 171-175 and accompanying text (describing *Poritz*'s interpretation of *Halper*).

272. N.J. STAT. ANN. § 2C:7 (West Supp. 1996).

posed by the risks of recidivism.[273] Protecting the public is an unambiguous regulatory purpose.

Next, the Court should determine whether the law as implemented exceeds the purported purpose so as to become punitive.[274] The plaintiff in *Poritz* based its claim that Megan's Law constituted punishment on two grounds.[275] First, the challenger argued that Megan's Law served one of the traditional purposes of punishment: deterrence.[276] The challenger did not offer proof that Megan's Law deterred individuals from committing sex offenses because they would in turn be subject to Megan's Law.[277] A five-year study of Washington's statute revealed that its notification laws had not had a deterrent effect.[278] Rather, Washington's laws put the public on notice and, in turn, aided police departments in apprehending repeat offenders.[279] Even if the challengers could prove that Megan's Law had a deterrent effect, that effect would merely be an inevitable consequence of accomplishing the remedial purpose of the law, not a purpose intended by the enacting legislature.[280]

Secondly, the challengers claimed that Megan's Law was punitive because notification could potentially lead to harassment, ostracism, and vigilantism.[281] The *Poritz* dissent noted two incidents in which Megan's Law led to vigilantism.[282] The merit of the challengers' claim, however, does not depend on whether they can prove that harassment, ostracism, and vigi-

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273. *See supra* note 7 and accompanying text (detailing New Jersey's legislative findings regarding recidivism).

274. *See supra* notes 171-175 and accompanying text (describing *Poritz*'s interpretation of *Halper*).

275. Doe v. Poritz, 662 A.2d 367, 389 (N.J. 1995).

276. *Id.*

277. *Id.*

278. *See supra* notes 75-76 and accompanying text (discussing the Washington state study).

279. *See supra* notes 75-76 and accompanying text.

280. *See* Doe v. Poritz, 662 A.2d 367, 396 (N.J. 1995) ("What counts . . . is the purpose and design of the statutory provision, its remedial goal and purposes, and not the resulting consequential impact, the 'sting of punishment' that may inevitably, but incidentally flow from it.").

281. *Id.* at 389. The challengers argued that the "government is responsible for the potential impacts that may result from notification, whether they were intended or not, and that they may be so severe as to constitute punishment." *Id.*

282. *See supra* note 192 (describing the two incidents of vigilantism).

lantism may result. The challengers must show that the legislature intended those results when it created the statute.[283]

In enacting Megan's Law, the New Jersey legislature determined that the risks posed by sex offenders were great enough to override the potential negative impact on sex offenders.[284] Megan's Law reflects the legislature's conclusion that a community has a right to know when a sex offender moves into its neighborhood in order to protect itself.[285] Revealing the names, addresses, and offenses committed by convicted sex offenders is the essence and, consequently, inevitable consequence of, Megan's Law.[286] Accordingly, the mere possibility of hostile public reaction to sex offenders does not convert Megan's Law into punishment.[287]

The *Poritz* dissenter's argument that Megan's Law is tantamount to "Scarlet Letter" punishment by humiliation is similarly without merit.[288] The crucial distinction between "Scarlet Letter" laws and Megan's Law is that the sole purpose of "Scarlet Letter" laws is to punish the offender,[289] whereas the purpose of Megan's Law is to protect the public.[290] Under Megan's Law, an offender's humiliation is an unintended consequence of carrying out the regulatory purpose. Informing residents of the presence of a sex offender could save lives. Megan's parents did not know that a sex offender lived across the street until it was too late. Thus, the mere fact that some sex offenders may feel humiliated as a result of notification should not transform a regulatory law into punishment.[291] Under the *Poritz* test, proof of a punitive impact does not convert a regulatory provision into punishment unless the provi-

283. *See supra* note 171 (explaining that the intent of the legislature is what matters, not the consequential impact).

284. *See supra* note 7 and accompanying text (detailing the New Jersey legislative findings).

285. *Poritz*, 662 A.2d at 372.

286. *Id.* at 376.

287. *Id.*

288. *See supra* note 192 (discussing the dissent's argument regarding punishment by humiliation).

289. *See supra* notes 77-85 and accompanying text (discussing the use of humiliation as punishment).

290. *See supra* note 7 and accompanying text (detailing New Jersey's legislative findings and statement of purpose of Megan's Law).

291. *See supra* note 171 and accompanying text (explaining that the intent of the legislature is what matters, not the consequential impact).

sions exceed what is necessary to carry out the regulatory purpose.[292]

Megan's Law does not go beyond its purported purpose.[293] Megan's Law sets up different tiers of notification based on determinations of the risks imposed by each individual sex offender.[294] The tiers restrict notification only to situations where it is necessary to achieve the purpose of the statute: public safety.[295] For example, at tier three, the broadest level of notification, only those "likely to encounter" the offender may be notified.[296] Thus, Megan's Law does not go beyond necessity to effectuate the purpose of the statute. Furthermore, application of the *Poritz* test supports the conclusion that Megan's Law is regulatory and, therefore, does not violate ex post facto, cruel and unusual punishment, or double jeopardy protections.

CONCLUSION

The dangers posed by sex offenders prompted the vast majority of states and the federal government to enact registration and notification provisions. The courts are divided on the question of whether registration and notification laws are punitive and, thus, in violation of ex post facto, cruel and unusual punishment, and double jeopardy protections. Courts are also divided regarding what test should be used to make the punishment determination.

The test advanced by *Doe v. Poritz* provides the most appropriate and workable standard for determining whether a law constitutes punishment. The *Poritz* test correctly follows precedent, appropriately balances the purposes and effects of provisions, and encourages state legislatures to draft narrowly tailored provisions. The *Poritz* decision also takes the policy considerations behind registration and notification laws into account by weighing the need to protect the public against the laws' adverse effects on sex offenders. Recognizing that the

292. *See supra* notes 174-175 (describing the second prong of the *Poritz* test).

293. *See supra* notes 171-175 and accompanying text (describing *Poritz*'s interpretation of *Halper*).

294. *See supra* note 184 (discussing the legislative purpose of Megan's Law).

295. *See supra* note 198 (describing the three tiers of notification as modified by *Poritz*).

296. *See supra* note 198.

Poritz test outperforms the other tests, the Supreme Court should uphold Megan's Law and apply the *Poritz* test in future registration and notification law cases.