Pennsylvania's "Registration of Sexual Offenders" Statute: Can It Survive a Constitutional Challenge?

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Pennsylvania's "Registration of Sexual Offenders" Statute: Can It Survive a Constitutional Challenge?

I. INTRODUCTION

On July 29, 1994, Jesse Timmendequas lured his seven-year-old neighbor, Megan Kanka, into his house by offering to show her his new puppy. Megan never returned home. When police questioned Timmendequas about Megan's disappearance, he confessed to raping and strangling Megan. It was not until after police arrested Timmendequas for Megan's murder that Megan's parents and their neighbors learned that Timmendequas and his two roommates were convicted sex offenders.

Megan's murder caused the community of Hamilton Township, New Jersey, to cry out: "People should be told if there's a sexual offender on the block." Within a week, 100,000 people signed petitions supporting a community notification law in New Jersey. New Jersey's governor and legislature responded quickly. By August 15, 1994, legislation mandating registration and community notification was introduced in the General Assembly of New Jersey. The General Assembly declared a "legislative emergency" and rushed the bills through the system, bypassing committees and hearings.

On October 31, 1994, the governor signed New Jersey's Registration and Community Notification Laws. This legislation, referred to as "Megan's Law", requires those who have committed certain designated crimes involving sexual assault to register with

1. Rick Hampson, What's Gone Wrong With Megan's Law, USA TODAY, May 14, 1997, at 1A.
2. Id.
3. E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997). Timmendequas had two prior convictions of sex offenses involving young girls. Id. at 1081.
4. Rick Hampson, supra note 1, at 1A.
5. Id.
6. E.B., 119 F.3d at 1081.
7. Id.
8. Id.
local law enforcement upon release from prison.\textsuperscript{10} In addition, Megan's Law provides for the distribution of information to the community about those required to register.\textsuperscript{11}

\textsuperscript{10} The United States Court of Appeals for the Third Circuit summarized the operation of the registration provision of New Jersey's Megan's Law as follows:

The registration provision requires all persons who complete a sentence for certain designated crimes involving sexual assault after Megan's Law was enacted to register with local law enforcement. N.J.S.A. 2C:7-2b(1). Those committing these offenses and completing all incarceration, probation, and parole before the Law's enactment must register only if, at the time of sentencing, their conduct was found to be 'characterized by a pattern of repetitive and compulsive behavior.'\textit{Id.}

The registrant must provide the following information to the chief law enforcement officer of the municipality in which he resides: name, social security number, age, race, sex, date of birth, height, weight, hair, and eye color, address of legal residence, address of any current temporary legal residence and date and place of employment. N.J.S.A. 2C:7-4b(1). He must confirm his address every ninety days, notify the municipal law enforcement agency if he moves, and reregister with the law enforcement agency of any new municipality. N.J.S.A. 2C:7-2d to e.

The registration agency then forwards the registrant's information, as well as any additional information it may have, to the prosecutor of the county that prosecuted the registrant. N.J.S.A. 2C:7-4c to d. The prosecutor, in turn, forwards the information to the Division of State Police, which incorporates it into a central registry and notifies the prosecutor of the county in which the registrant plans to reside.\textit{Id.} This information is available to law enforcement agencies of New Jersey, other states, and the United States. N.J.S.A. 2C:7-5. The registration information is not open to public inspection. Law enforcement agencies are authorized to release "relevant and necessary information concerning registrants when . . . necessary for public protection," but only in accordance with the notification procedures we describe below. Failure of the sex offender to comply with registration is a fourth-degree crime.\textit{Id.}

\textsuperscript{11} Artway v. New Jersey, 81 F.3d 1235, 1243 (3d Cir. 1996).

The United States Court of Appeals for the Third Circuit summarized the notification provisions of New Jersey's Megan's Law as follows:

The prosecutor of the county in which the registrant plans to live must consider the information provided through registration and, in consultation with the prosecutor of the convicting county, determine whether the registrant poses a low, moderate or high risk of re-offense. N.J.S.A. 2C:7-8d(1). In making that determination, the prosecutor must consider guidelines the Attorney General has promulgated pursuant to the Act. N.J.S.A. 2C:7-8a to b.

The determination of risk as low, moderate, or high places the registrant in corresponding notification categories: Tier 1, Tier 2, or Tier 3. Under Tier 1 (low risk), the prosecutor must notify law enforcement agencies likely to encounter the registrant. N.J.S.A. 2C:7-8c(1). Under Tier 2 (moderate risk), the prosecutor, working with local law enforcement agencies, must notify schools, licensed day care centers, summer camps, and designated community organizations involved in the care of children or the support of battered women or rape victims. N.J.S.A. 2C:7-8c(2). Under Tier 3 (high risk), law enforcement agencies are required to notify members of the public likely to encounter the registrant. N.J.S.A. 2C:7-8c(3).

The prosecutor makes this future risk determination using the "Registrant Risk Assessment Scale," promulgated by the Attorney General. See Registration and Community Notification Bench Manual 26. The Scale is a matrix of thirteen categories organized into four larger headings: (1) Seriousness of Offense; (2) Offense History;
Other states quickly followed New Jersey's lead, enacting their own versions of Megan's Law. In 1996, Congress implemented a federal version of Megan's Law by amending the 1995 version of the Jacob-Wetterling Crimes Against Children and Sexually Violent Offender Registration Program. The Megan's Law amendment made the following changes to the Jacob-Wetterling Act: (1) it eliminated the general requirement that information collected under state registration programs be treated as private data; and (2) it substituted mandatory language for permissive language concerning the release of information that is necessary to protect the public from registered sexual offenders. The amended Jacob-Wetterling Act requires states to implement registration and notification programs as a condition of receiving certain federal funds. By May 1996, forty-nine states had enacted registration laws for convicted sex offenders; thirty-two states had implemented community notification laws.

(3) Characteristics of the Offender, and (4) Community Support. Id. (footnote omitted). The prosecutor scores each of these categories for different levels of risk — low, moderate, or high. Id. In doing so, he or she is guided by commentary that includes factual examples. Id. at 17-25. This initial risk score is multiplied by coefficients that differ by category, and the data is tabulated for a final risk assessment score. Id. at 26. Finally, the prosecutor must consider whether two exceptions apply. "If an offender has indicated that he will reoffend if released into the community and the available record reveals credible evidence to support this finding, then the offender will be deemed a high risk. . . ." Id. at 16. Conversely, "if the offender demonstrates a physical condition that minimizes the risk of reoffense, then the offender will be deemed to be a low risk." Id.

The form of notification under Tiers 2 and 3 includes the registrant's name, a recent photograph, his physical description, offense, address, place of employment or schooling, and a description and license plate number of the registrant's vehicle. Id. at 39. Those notified under Tier 2 are informed that the information is not to be shared with the general public, and every notification must contain a warning about the criminal consequences of vandalism, threats and assaults against the registrant or any of his associates. Id. at 40.

Artway, 81 F.3d at 1243-44.


13. 42 U.S.C. § 14071. Prior to the Megan's Law amendments, the Jacob-Wetterling Crimes Against Children and Sexually Violent Offender Registration Program permitted states to release information regarding sexual offenders to the public. The amendments made this release of information mandatory. See APPENDIX A to this article for the full text of the Jacob-Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, as amended by Megan's Law.


15. E.B., 119 F.3d at 1081.
II. PENNSYLVANIA'S LAW

The Pennsylvania legislature enacted its version of Megan's Law on October 24, 1995.16 Under Pennsylvania's Registration of Sexual Offenders statute ("Act"),17 any individual convicted of one or more specified crimes after April 21, 1996, is presumed (by the State Board to Assess Sexually Violent Predators ("the Board") and by the court) to be a "sexually violent predator."18 The crimes falling within the scope of the Act are: rape,19 involuntary deviate sexual intercourse,20 aggravated indecent assault,21 spousal sexual assault,22

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17. Id.
A sexually violent predator is defined as: "A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 PA. CONS. STAT. § 9792. The State Board to Assess Sexually Violent Predators is comprised of "psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and offenders." 42 PA. CONS. STAT. § 9799.3(a).
19. "Rape" is defined by the Crimes Code of Pennsylvania as:
A person commits a felony of the first degree when he or she engages in sexual intercourse with a complainant:
(1) By forcible compulsion.
(2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.
(3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.
(4) Where the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purposes of preventing resistance.
(5) Who suffers from a mental disability which renders the complainant incapable of consent.
(6) Who is less than 13 years of age.
20. "Involuntary deviate sexual intercourse" is defined by the Crimes Code of Pennsylvania as:
A person commits a felony of the first degree when he or she engages in deviate sexual intercourse with a complainant:
(1) by forcible compulsion;
(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
(3) who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;
(4) where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without
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kidnapping (if the victim is a minor and the actor is not a parent of

the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
(5) who suffers from a mental disability which renders him or her incapable of consent;
(6) who is less than 13 years of age; or
(7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.


21. Section 3125 of the Crimes Code of Pennsylvania provides:

[A] person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault, a felony of the second degree, if:
(1) the person does so without the complainant's consent;
(2) the person does so by forcible compulsion;
(3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
(4) the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring;
(5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
(6) the complainant suffers from a mental disability which renders him or her incapable of consent;
(7) the complainant is less than 13 years of age; or
(8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.


22. The statutory provision defining the crime of "sexual assault" was repealed in 1995.

Before the statute was repealed, it provided:
(a) Sexual assault.
A person commits a felony of the second degree when that person engages in sexual intercourse with that person's spouse:
(1) by forcible compulsion;
(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
(3) who is unconscious.

(b) Involuntary spousal deviate sexual intercourse.
A person commits a felony of the second degree when that person engages in deviate sexual intercourse with that person's spouse:
(1) by forcible compulsion;
(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
(3) who is unconscious.

18 PA. CONS. STAT. § 3128 (1984). The crime is still relevant to Pennsylvania's Megan's Law since individuals who were convicted of spousal sexual assault before it was repealed are subject to the registration provisions of the statute.
the victim), promoting prostitution (if the victim is a minor), or distributing obscene or other sexual materials and performances (if the victim is a minor). After conviction, but before sentencing, the

23. Section 2901 of the Crimes Code of Pennsylvania provides:
   A person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions:
   (1) To hold for ransom or reward, or as a shield or hostage.
   (2) To facilitate commission of any felony or flight thereafter.
   (3) To inflict bodily injury on or to terrorize the victim or another.
   (4) To interfere with the performance by public officials of any governmental or political function.
18 PA. CONS. STAT. § 2901(a) (1983).
24. Section 5902(b) of the Crimes Code of Pennsylvania provides:
   A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in subsection (c) of this section [relating to grading of offenses]. The following acts shall, without limitation of the foregoing, constitute promoting prostitution:
   (1) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business;
   (2) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate;
   (3) encouraging, inducing, or otherwise intentionally causing another to become or remain a prostitute;
   (4) soliciting a person to patronize a prostitute;
   (5) procuring a prostitute for a patron;
   (6) transporting a person into or within this Commonwealth with intent to promote the engaging in prostitution by that person, or procuring or paying for transportation with that intent;
   (7) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or
   (8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.
25. Subsections 5903(a)(3)-(6) of the Crimes Code of Pennsylvania provide:
   (a) Offenses defined.
   No person, knowing the obscene character of materials or performances involved, shall:
   (3) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials;
   (4) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom, or by what means any obscene materials can be purchased, obtained or had;
   (5) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity; or
   (6) hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in this subsection.
Board must conduct an assessment of the individual to determine if he or she is a sexually violent predator. When the assessment is completed, the court reviews the Board's findings in a hearing and determines whether it agrees with the Board's finding that the defendant is a "sexually violent predator." During the hearing, the defendant may rebut the presumption that he or she is a sexually violent predator by clear and convincing evidence.

If the court finds that the defendant is not a sexually violent predator, but merely an "offender," the defendant must register his or her address with the Pennsylvania State Police for ten years. This ten-year period begins when the offender is released from incarceration, placed on parole, or commences a sentence of intermediate punishment or probation. Offenders must also verify their residences with the State Police annually and notify that

26. 42 PA. CONS. STAT. § 9794. Pursuant to a court order requesting an assessment of the defendant, two members of the board conduct an assessment to determine if the defendant is a sexually violent predator. 42 PA. CONS. STAT. § 9794(a). Factors considered during the assessment include, but are not limited to: the age of the defendant; the age of the victim; the number of victims; the prior criminal record of the defendant; drug use by the defendant; mental illness or disability of the defendant; nature of the sexual contact with the victim; whether there was a display of unusual cruelty toward the victim; behavioral characteristics of the defendant; and prior participation in programs for sexual offenders and prior sentences. 42 PA. CONS. STAT. § 9794(c).
27. 42 PA. CONS. STAT. § 9794(e). Section 9794(e) provides:

(e) Court review of findings.
Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

Id.

28. 42 PA. CONS. STAT. § 9794(b). "Clear and convincing proof" is defined as "proof which results in reasonable certainty of the truth of the ultimate fact in controversy." BLACK'S LAW DICTIONARY 251 (6th ed. 1990).
29. An "offender," as referred to in this comment, is an individual who has been convicted of one of the predicate offenses and required to register, but has not been determined to be a sexually violent offender.
30. 42 PA. CONS. STAT. § 9793(a) (West Supp. 1997).
31. 42 PA. CONS. STAT. § 9793(a).
authority within ten days of the change of address.32

An individual who is determined to be a sexually violent predator must register with the Pennsylvania State Police for the rest of his or her life or until the designation of sexually violent predator is terminated.33 A sexually violent predator must also verify his or her address with the State Police every ninety days,34 inform the State Police of a new address within ten days of a change of address,35 and attend monthly counseling sessions.36 In addition, the sexually violent predator is subject to the public notification process.37

32. 42 PA. CONS. STAT. § 9793(a).
33. 42 PA. CONS. STAT. § 9795. An offender who has been designated as a sexually violent predator is entitled to petition a court with original jurisdiction to reconsider the designation one year prior to release from prison and at five year intervals thereafter. 42 PA. CONS. STAT. § 9794(f). When such a petition is made, the court may review the original determination and request a new report from the Board. 42 PA. CONS. STAT. § 9794(f). If, upon reconsideration, the court disagrees with the prior designation, the court may terminate the original designation by issuing a court order and notifying the Pennsylvania State Police. 42 PA. CONS. STAT. § 9794(f).
34. 42 PA. CONS. STAT. § 9796(a). Subsection 9796(a) of the Registration of Sexual Offenders provides:
The Pennsylvania State Police shall verify the residence of sexually violent predators every 90 days through the use of a nonforwardable verification form to the last reported address. The form shall be returned within ten days.
42 PA. CONS. STAT. § 9796(a).
35. 42 PA. CONS. STAT. § 9796(c). Subsection 9796(c) provides:
A change of address of an offender required to register under this subchapter reported to the Pennsylvania State Police shall be immediately reported by the Pennsylvania State Police to the appropriate law enforcement agency having jurisdiction of the offender's new place of residence. The Pennsylvania State Police shall, if the offender changes residence to another state, notify the law enforcement agency with which the offender must register in the new state.
42 PA. CONS. STAT. § 9796(c).
36. 42 PA. CONS. STAT. § 9799.4(b) (West Supp. 1997). Section 9799.4(b) provides:
The sexually violent predator shall be required to attend at least monthly counseling sessions in a program approved by the board and be financially responsible for all fees assessed from such counseling sessions. If the sexually violent predator can prove to the satisfaction of the court that the person cannot afford to pay for the counseling sessions, that person shall still attend the counseling sessions and the parole office shall pay the requisite fees.
42 PA. CONS. STAT. § 9799.4(b).
37. 42 PA. CONS. STAT. § 9798. Specifically, the public notice provision provides:
§ 9798 Other notification
(a) By municipality's chief law enforcement officer.
Notwithstanding any of the provisions of 18 PA.C.S. Ch. 91 (relating to criminal history record information), the chief law enforcement officer of the police department of the municipality where a sexually violent predator lives shall be responsible for providing written notice as required under this section.
(1) The notice shall contain:
(i) The name of the convicted sexually violent predator.
(ii) The address or addresses at which he resides.
Finally, a sexually violent predator must be sentenced upon a first conviction to lifelong parole; subsequent convictions mandate life imprisonment.\(^{38}\)

(iii) The offense for which he was convicted.

(iv) A statement that he has been designated by court order as a sexually violent predator, which designation has or has not been terminated as of a date certain.

(v) A photograph of the sexually violent predator, if available.

(2) The notice shall not include any information that might reveal the victim's name, identity and residence.

(b) To whom written notice is provided.

The chief law enforcement officer shall provide written notice, under subsection (a), to the following persons:

(1) Neighbors of the sexually violent predator.

(2) The director of the county children and youth service agency of the county where the sexually violent predator resides.

(3) The superintendent of each school district and the equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality.

(4) The director of each licensed day care center and licensed preschool program in the municipality.

(5) The president of each college, university and community college located within 1,000 feet of a sexually violent predator's address.

(c) Urgency of notification.

The municipal police department's chief law enforcement officer shall provide notice within the following time frames:

(1) To neighbors, notice shall be provided within 72 hours after information of the sexually violent predator's release date and address has been received by the chief law enforcement officer. Notwithstanding the provisions of subsections (a) and (b), verbal notification may be used if written notification would delay meeting this time requirement.

(2) To the persons specified in subsection (b)(2), (3), (4) and (5), notice shall be provided within seven days after the chief law enforcement officer receives information regarding the sexually violent predator's release date and address.

(d) Public notice.

All information provided in accordance with subsection (a) shall be available, upon request, to the general public.

42 PA. CONS. STAT. § 9798.

38. 42 PA. CONS. STAT. § 9799.4. Subsections 9799.4(a),(c) and (d) outline the mandatory sentencing provisions:

(a) Increased mandatory maximum sentence.

Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9738(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

(c) Mandatory sentence.

Notwithstanding any other provision of law to the contrary, when a person who has been designated as a sexually violent predator is convicted of a subsequent sexually violent offense, the mandatory sentence shall be life imprisonment. Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the offender shall have the right to petition.
Numerous defendants who have been subjected to the Pennsylvania Registration of Sexual Offenders statute are challenging the Act's constitutionality by asserting that it violates several provisions of the United States Constitution and the Pennsylvania Constitution. The following Constitutional arguments have been raised: the Act violates the Double Jeopardy, Bill of Attainder, Cruel and Unusual Punishment, Ex Post Facto, Due

the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

(d) Authority of court in sentencing.

There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (c), to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

42 PA. CONS. STAT. § 9799.4(a),(c),(d).

39. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In explaining the guarantees and protections provided under the Double Jeopardy Clause of the United States Constitution, the Supreme Court of the United States stated, "The guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. Also, it protects against multiple punishments for the same offense." United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

40. Section 9 of Article I of the United States Constitution provides, "No Bill of Attainder . . . shall be passed." U.S. CONST. art. I, § 9. "Bills of Attainder" are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." United States v. Brown, 381 U.S. 437, 448-49 (1965).

41. The Eighth Amendment of the United States Constitution provides, "nor [shall] cruel and unusual punishments [be] inflicted." U.S. CONST. amend. VIII. As explained by the Supreme Court of the United States, "[T]he Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under Gregg, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977) (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

42. Section 9 of Article I of the United States Constitution provides, "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9. An "ex post facto" law has been defined by the Supreme Court of the United States as:

[A]n ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is
Process and Right to Privacy guaranteed by the United States Constitution; and the Act is void for vagueness.

After the Supreme Court of the United States' decision in *Kansas v. Hendricks* and the subsequent decision of the United States Court of Appeals for the Third Circuit in *E.B. v. Verniero*, Pennsylvania's version of Megan's Law will likely survive a majority of the challenges raised under the United States Constitution. The statute may, however, fail constitutional scrutiny on procedural due process grounds.

In *Kansas v. Hendricks*, Hendricks, an inmate with a long history of convictions for sexually molesting children, challenged the constitutionality of Kansas' Sexually Violent Predator Act ("the

sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage; but the prescribing of different modes or procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition.


43. The Fifth Amendment of the United States Constitution provides, "No person shall be... deprived of life, liberty, or property, without due process of Law..." U.S. CONST. amend. V. In addition, the Fourteenth Amendment of the United States Constitution provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of Law..." U.S. CONST. amend. XIV, § 1. "There are two aspects [of due process]: procedural, in which a person is guaranteed fair procedures and substantive which protects a person's property from unfair governmental interference or taking." BLACK'S LAW DICTIONARY 500 (6th ed. 1990).

44. The Supreme Court of the United States explained:
The Constitution does not explicitly mention any right of privacy. In a line of decisions..., the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment,... in the Fourth and Fifth Amendments,... in the penumbras of the Bill of Rights,... in the Ninth Amendment,... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.... These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'... are included in this guarantee of personal privacy.


45. The "void for vagueness" doctrine is defined as "[a] law which is so obscure in its promulgation that a reasonable person could not determine from a reading what the law purports to command or prohibit is void as violative of due process. The doctrine means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." BLACK'S LAW DICTIONARY 1574 (6th ed. 1990) (citing United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963)).


47. 119 F.3d 1077 (1997).
In 1994, shortly before his scheduled release from prison, proceedings to commit Hendricks under the VPA were instituted. After subjecting Hendricks to the procedure provided for by the VPA, a jury unanimously determined, beyond a reasonable doubt, that Hendricks was a "sexually violent predator." The trial court subsequently committed Hendricks to the Secretary of Social and Rehabilitation Services. Hendricks appealed, asserting that the application of the Act was a violation of the due process, double jeopardy and ex post facto provisions of the United States Constitution. The Supreme Court of Kansas did not address Hendrick's double jeopardy and ex post facto claims, but held that the VPA violated "substantive due process" because it required a mental abnormality or personality disorder, rather than a mental disease. On certiorari, the Supreme Court of the United States

48. *Hendricks*, 117 S. Ct. at 2076 (1997). Kansas' Commitment of Sexually Violent Predators Act, KAN. STAT. ANN. § 59-29a01 was enacted as a response to the high recidivism rates of sex offenders. *Hendricks*, 117 S. Ct. at 2077. The VPA establishes a civil commitment proceeding which provides for long-term care and treatment of sexually violent predators. *Id.* Specifically, the VPA provides:

1. The local prosecutor is notified 60 days before the anticipated release of an inmate fitting the Act's criteria;
2. the prosecutor decides within 45 days whether to file a petition seeking the involuntary commitment of that inmate;
3. if such a petition is filed, the court must then determine whether probable cause exists to support the finding that the inmate is a 'sexually violent predator';
4. upon such a determination, the inmate is sent to a facility for evaluation;
5. following this evaluation, a jury trial is held to determine whether the inmate is a sexually violent predator beyond all reasonable doubt;
6. if the inmate is found to be such a predator, he or she is placed in the custody of the Secretary of Social and Rehabilitation Services for treatment until his or her mental abnormality or personality changes.

KAN. STAT. ANN. § 59-29a17. A "sexually violent predator" is defined by the VPA as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." KAN. STAT. ANN. § 59-29a02(a) (1994). A "mental abnormality" is defined by the VPA as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." KAN. STAT. ANN. § 59-29a02(b).

50. *Id.* During the jury trial, Hendricks admitted to sexually molesting children for approximately twenty years and "stated that the only sure way he could keep from sexually abusing children in the future was 'to die.'" *Id.*
51. *Id.*
52. *Id.* at 2079.
disagreed, finding that the VPA definition of "mental abnormality" violated the requirements of substantive due process.\textsuperscript{54} The Court also rejected Hendricks’ contention that the VPA provided for criminal punishment.\textsuperscript{55} Concluding that the VPA nature was nonpunitive, the Court found that the Act did not violate the United States Constitution's prohibition on double jeopardy and ex post facto laws.\textsuperscript{56}

\textsuperscript{54} Hendricks, 117 S. Ct. at 2079. The Court recognized that liberty interest is not absolute and an individual's interest in avoiding physical restraint may be overridden explaining:

"[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." 

\textit{Id.} (quoting Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)). The Court then determined that the VPA prerequisites of future dangerousness and a mental abnormality were consistent with the Court's prior understanding of ordered liberty. \textit{Id.} at 2080 (citing Heller v. Doe, 509 U.S. 312 (1993) (upholding a Kentucky statute permitting the commitment of dangerous and "mentally retarded" or "mentally ill" individuals); Allen v. Illinois, 478 U.S. 364 (1986) (upholding an Illinois statute providing for the commitment of dangerous and "mentally ill" individuals).

\textsuperscript{55} Hendricks, 117 S. Ct. at 2081. The Court first noted that the VPA was placed within the Kansas probate code, not the criminal code, and created a "civil commitment procedure," not a criminal procedure. \textit{Id.} at 2082. It also determined that the VPA did not implicate retribution or deterrence, the two primary objectives of criminal punishment. \textit{Id.} Furthermore, the Court recognized that the VPA uses prior crimes solely as evidence of mental abnormality or future dangerousness and "does not affix culpability for prior criminal conduct." \textit{Id.} Other factors that the Court also considered in determining that the VPA had a nonpunitive purpose: (1) the VPA lack of a scienter requirement; (2) its focus on persons who are unlikely to be deterred by the threat of confinement; (3) its provision for immediate release if the person is adjudged to be safe at large; and (4) the fact that the confinement conditions for persons covered by the VPA are essentially the same as those of other civilly committed individuals. \textit{Id.} at 2082-83.

\textsuperscript{56} Hendricks, 117 S. Ct. at 2085. Recognizing that the Double Jeopardy Clause prevents States from "punishing twice, or attempting a second time to punish criminally for the same offense," the Court disagreed with Hendricks' argument that the VPA fails both the "multiple punishments" test and the "same elements" test. \textit{Id.} at 2085-86. The Court determined that confinement after imprisonment was not a multiple punishment stating:

"[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." If an individual otherwise meets the requirements for involuntary civil commitment, the State is under no obligation to release that individual simply because the detention would follow a period of incarceration." \textit{Id.} at 2086 (quoting Baxstrom v. Herold, 383 U.S. 107 (1966)).

The Court also rejected Hendricks' contention that the VPA failed the "same elements" test of \textit{Blockburger v. United States}, 284 U.S. 299 (1932), explaining that "the \textit{Blockburger} test . . . simply does not apply outside of the successive prosecution context." Hendricks, 117 S. Ct. at 2086. The \textit{Blockburger} test provides, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether
Following the Supreme Court's decision in *Kansas v. Hendricks*, the United States Court of Appeals for the Third Circuit addressed the constitutionality of the community notification provisions of New Jersey's Megan's Law in *E.B. v. Verniero*.\(^{57}\) *E.B. v. Verniero* consolidated two separate actions: *E.B. v. Verniero*\(^{58}\) and *W.P v. Verniero*.\(^{59}\) In both actions, sex offenders who were subjected to the consequences of New Jersey's Megan's Law challenged the notification requirements of the law by asserting that they violated the ex post facto, double jeopardy, and procedural due process grounds.\(^{60}\) On appeal, the Third Circuit held that the public

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\(^{57}\) E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1996), cert. denied sub nom., W.P. v. Verniero, 118 S. Ct. 1039 (1998). The Third Circuit had previously rejected challenges to the registration requirement of New Jersey's Megan's Law under the Ex Post Facto and Double Jeopardy Clauses. *Artway v. New Jersey*, 81 F.3d 1235 (3d Cir. 1996). In *Artway*, a sexual offender who was released from prison in 1992, asserted that enforcement of Megan's Law would violate his equal protection and due process rights as well as his rights not to be punished in violation of the ex post facto, bill of attainder and double jeopardy clauses. *Id.* at 1245. The court held that Artway's claim against the notification provisions of New Jersey's Megan's Law was not ripe since Artway was not subject to the notification provisions under the law. *Id.* at 1252-53. The court did, however, address Artway's claim with regard to the registration provisions. Determining that the registration requirements did not constitute punishment, the court held that they did not violate the Ex Post Facto, Bill of Attainder, and Double Jeopardy Clauses of the United States Constitution. *Id.* at 1253-67. In addition, the court rejected Artway's contentions that the registration provisions of the law violated the Equal Protection and Due Process Clauses. *Id.* at 1267-70.

\(^{58}\) *E.B.*, 119 F.3d at 1087. In 1974, E.B. pled guilty to three offenses of sexual abuse in the Superior Court of New Jersey. *Id.* After serving his sentence in New Jersey, followed by a sentence for murder charges in Virginia, E.B. was released from prison, subject to supervision by the New Jersey Bureau of Parole. *Id.* As required by New Jersey's Megan's Law, E.B. registered with authorities. *Id.* Classifying E.B. as a Tier 3 sexual offender, the local prosecutor proposed to issue notification in the neighborhood of E.B.'s residence. *Id.* at 1087-88. E.B. objected to the classification and notification, but the Superior Court of New Jersey agreed with the classification and permitted the notification. *Id.* at 1088. Following his unsuccessful appeals to the New Jersey appellate division and supreme court, E.B. filed a federal action against the New Jersey Attorney General, the local county prosecutor, and the police chief. *Id.* The United States District Court for the District of New Jersey entered a preliminary injunction enjoining the community notification. *Id.* See *E.B. v. Poritz*, 914 F. Supp. 85 (D. N.J. 1996). The defendants appealed from the district court's order. *E.B.*, 119 F.3d at 1088.

\(^{59}\) *E.B.*, 119 F.3d at 1087. *W.P v. Verniero* was a class action representing twenty-two plaintiffs who had been classified as Tier 2 or Tier 3 sexual offenders. *Id.* at 1088. The United States District Court for the District of New Jersey initially entered a preliminary injunction precluding notification for any of the members of the class; however, the court later entered summary judgment in favor of the defendants, the New Jersey Attorney General, and various local prosecutors. *Id.* See *W.P. v. Poritz*, 931 F. Supp. 1187 (D. N.J. 1996), *rehearing denied*, 931 F. Supp. 1199 (D. N.J. 1996). The plaintiffs appealed from the entry of summary judgment. *E.B.*, 119 F.3d at 1088.

\(^{60}\) *E.B.*, 119 F.3d at 1087.
notification provisions do not constitute "punishment" and, therefore, do not violate the Double Jeopardy or Ex Post Facto Clauses of the United States Constitution. The court did, however, determine that the Due Process Clause forbids placing the burden of persuasion on the registrant and requires the State of New Jersey to carry the burden of justifying the classification and notification plan by clear and convincing evidence. Without comment or dissent, the Supreme Court of the United States denied certiorari on E.B. v. Veniero. The denial of certiorari has been interpreted as eliminating most doubts about the constitutionality of the various states' community notification laws.

At this time, the Supreme Court of Pennsylvania has not granted certiorari on the constitutionality of Pennsylvania's Megan's Law. Only the Commonwealth Court of Pennsylvania and the Superior Court of Pennsylvania have addressed the issue. In Van Doren v. Mazurkiewicz, 695 A.2d 967 (Pa. Commw. 1997), and the Superior Court of Pennsylvania in Commonwealth v. Stovall, 83 Appeal Docket 1997;
Mazurkiewicz, an inmate at the State Correctional Institute-Rockview filed an action against the Superintendent of the prison following the circulation of a memorandum informing inmates of the effects of Pennsylvania's Megan's Law. Challenging the registration provisions of the statute, Van Doren asserted that the statute violated the Ex Post Facto and Double Jeopardy provisions of the United States Constitution. Applying the test set forth by the Third Circuit in Artway, the commonwealth court concluded that the actual purpose, objective purpose, and effect of the registration provisions of Pennsylvania's Megan's Law were nonpunitive. Therefore, the court rejected Van Doren's argument and held that the registration provisions of Pennsylvania's Megan's Law did not violate the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.

The Superior Court of Pennsylvania agreed with the commonwealth court's rationale. In Commonwealth v. Gaffney, the superior court held that the registration provisions of Pennsylvania's Megan's Law do not violate the Ex Post Facto Clause of the United States Constitution. The court concluded

Commonwealth v. Williams, 84 Appeal Docket 1997. The Supreme Court of Pennsylvania may review direct appeals from courts of common pleas under 42 PA. CONS. STAT. § 722(7) which provides:

The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases: . . .

(7) Matters where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter.

42 PA. CONS. STAT. § 722(7).

67. Van Doren, 695 A.2d at 968. Van Doren, who was serving a ten-year prison sentence for statutory rape (18 PA. CONS. STAT. § 3122), involuntary deviate sexual intercourse with someone under 16 years of age (18 PA. CONS. STAT. § 3123(a)(5)), indecent assault (18 PA. CONS. STAT. § 3126) and incest (18 PA. CONS. STAT. § 4302). Van Doren challenged the constitutionality of the registration provisions and requested injunctive and declaratory relief by filing a Petition for Review. Id. at 969. Superintendent Mazurkiewicz and the Attorney General filed preliminary objections in response to Van Doren's petition. Id. The Commonwealth Court of Pennsylvania decided to review Van Doren's Petition for Review as a request for declaratory judgment, noting that the memorandum circulated by the Superintendent was not a final appealable order invoking the original jurisdiction of the commonwealth court. Id. at 970-71.

68. Id. at 971.
69. Id. at 976.
70. Id.
71. Commonwealth v. Gaffney, 702 A.2d 565, 566-70. In Gaffney, Dennis Gaffney, who pled guilty to involuntary deviate sexual intercourse, aggravated indecent assault, and corruption of minors, and was subject to the registration provisions of Megan's Law, claimed
that Gaffney failed to provide any evidence that the effects of the Pennsylvania statute differ from those of the New Jersey statute and, therefore, rejected Gaffney's contention that the registration provisions of Pennsylvania's Megan's Law violate the Ex Post Facto Clause of the United States Constitution. Similarly, the court also determined in Gaffney that the registration provisions of Pennsylvania's Megan's Law did not violate the Ex Post Facto Clause of the Pennsylvania Constitution.

In Commonwealth v. Davis, the superior court addressed a Double Jeopardy challenge to Pennsylvania's Megan's Law. The court rejected the argument that the hearing provided to sexually violent predators pursuant to Title 42 was a "second trial," stating, "[A]ppellant [Davis] has not been 'charged' with being a sexually violent predator." The court also rejected Davis' contention that

that Megan's Law was an Ex Post Facto law. Id. at 566. Like the commonwealth court, the Superior Court of Pennsylvania determined that the Third Circuit's test for punishment, which was outlined in Artway, 81 F.3d at 1263, should be applied to the Pennsylvania statute. Gaffney, 702 A.2d at 567-68.

72. Id. at 568.

73. Id. at 569. The Ex Post Facto provision of the Pennsylvania Constitution states "no ex post facto law . . . shall be passed." PA. CONST. art. 1, § 17. Explaining that the standards applied to determining an ex post facto violation under the Pennsylvania Constitution are comparable to those used under the United States Constitution, the court referred to the decision of the Supreme Court of Pennsylvania in Commonwealth v. Young, 637 A.2d 1313 (Pa. 1993). In Young, the Supreme Court of Pennsylvania stated, "[a]s our interpretation of the state constitutional prohibition against ex post facto laws has been consistent with that of the Supreme Court of the United States' interpretation of the federal prohibition, the analysis of appellant's federal ex post facto claim disposes his state claim as well." Young, 637 A.2d at 1317, n.7. The superior court recognized that this statement indicates both, that the state and federal provisions are identical, and that prior to Young, the federal ex post facto standards were applicable to state ex post facto claims. Gaffney, 702 A.2d at 569. The superior court concluded that the lack of punishment in the registration provisions of Pennsylvania's Megan's Law prevents a violation of Pennsylvania's ex post fact prohibition. Id. at 569-70.

74. Commonwealth v. Davis, 708 A.2d 116, 119 (Pa. Super Ct. 1998). The appellant in Davis asserted that the trial court was required to conduct a hearing on his Motion for Extraordinary Relief which challenged the constitutionality of Megan's Law on Double Jeopardy Grounds. Davis, 708 A.2d at 119.

75. Id. The court explained:

Megan's Law recognizes that the societal interest of protecting our youngsters from molesters is paramount to the privacy rights of the molester and permits the court to presume that an individual convicted of molesting young children is a sexually violent predator. . . . [T]he hearing merely provides a convict with a pre-sentence opportunity to rebut the statutory presumption. Obviously, the phrase 'sexually violent predator' denotes designation; nowhere . . . is there support for appellant's characterization of the phrase as a 'charge' or an 'offense.' Moreover, the hearing itself does not impose a greater punishment upon appellant. Rather, if at the hearing appellant cannot rebut the presumption that he is a sexually violent predator, then he will be subject to the maximum sentencing provisions provided for at 42 Pa. C.S. § 9799.4.
the presumption of being a “sexually violent predator” was a greater included offense of involuntary deviate sexual intercourse, the crime for which he was convicted.\textsuperscript{76}

Although the commonwealth court’s decision in Van Doren and the superior court’s decisions in Gaffney and Davis were limited to specific constitutional issues, trial courts throughout Pennsylvania have considered the constitutionality of the entire statute.\textsuperscript{77}

Pennsylvania courts of common pleas that have analyzed the constitutional challenges of the statute seem to agree that the statute does not violate the right to privacy,\textsuperscript{78} is not void for vagueness,\textsuperscript{79} and does not violate the bill of attainder\textsuperscript{80} guarantees

\textsuperscript{76} Id. at 120.


\textsuperscript{78} Judge Temin of Philadelphia County, Judge DiSantis of Erie County, and Judge Uhler of York County agreed in their respective memoranda that the registration and notification provisions of the statute fails to violate protections of the right to privacy under the United States Constitution. See Morris, No. 0597 of 1997 (C.P Philadelphia County, Oct. 29, 1997); Williams, No. 922 of 1997 (C.P. Erie County, Sept. 23, 1997); Ames, No. 471 C.A. 1997 (C.P. York County, Aug. 28, 1997). Judge Temin and Judge DiSantis relied on the Supreme Court of the United States decision in Paul v. Davis, 424 U.S. 693 (1976) and the decision of the United States Court of Appeals for the Third Circuit in E.B. v. Verniero, 119 F3d 1077 (3d Cir. 1997) to support their positions. In Paul, the Supreme Court of the United States rejected the contention that the distribution of fliers to merchants by law enforcement officials which described possible shoplifters violated the constitutional right to privacy. 424 U.S. at 693. The Supreme Court emphasized the difference between reputational interests in that particular situation from those relating to marriage, procreation, and child rearing. Paul, 424 U.S. at 713.

\textsuperscript{79} Judge Callen of Lancaster County, Judge Temin of Philadelphia County, Judge DiSantis of Erie County, and Judge Freedberg of Northampton County all cited the Supreme Court of the United States’ decision in Kansas v. Hendricks, 117 S. Ct. 2072 (1997) as support for their conclusions that Pennsylvania’s statute is not void for vagueness. Alejandrez, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 25-26, Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997) at 8-10, Williams, No. 922 of 1997 (C.P. Erie County, Sept. 23, 1997) at 5-6, Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 26, 1998) at 22-23. In Hendricks, the Supreme Court held that the definition imposed by the state of Kansas for “mental abnormality” satisfied substantive due process. Hendricks, 117 S. Ct. at 2079. Judge Lewis of Dauphin County and Judge Uhler of York County relied on the Supreme Court of Pennsylvania’s decision in Commonwealth v. Parker White Metal Co., 515
of the United States Constitution; however, the courts have conflicting views on whether the statute violates the double jeopardy, cruel and unusual punishment, and procedural due process protections of the United States Constitution. The trial court decisions that have addressed the double jeopardy and cruel and unusual punishment challenges may be separated into two groups: those that have examined the statute's notification provisions and those that have analyzed the statute's sentencing provisions. The courts of common pleas concede that although the notification provisions do not constitute punishment, the

A.2d 1358 (Pa. 1986) to support their conclusions that Pennsylvania's statute is not void for vagueness. Beam, No. 96 3328 C.D. 1996 (C.P. Dauphin County, Jul. 30, 1997) at 19-20; Ames, No. 471 C.A. 1997 (C.P. York County, Aug. 28, 1997) at 24-26. In Parker White Metal, the Supreme Court of Pennsylvania rejected a vagueness challenge to a Pennsylvania drunk driving law stating, "[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Park White Metal, 515 A.2d at 1367 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

Finding that Pennsylvania's Megan's Law is not a penal statute, Judge Lewis and Judge Uhler recognized that the "concept of 'vagueness' has limited application"; therefore, they determined that the statute, particularly the notification provisions, is not vague. Beam, No. 96 3328 C.D. 1996 (C.P. Dauphin County, Jul. 30, 1997) at 19; Ames, No. 471 C.A. 1997 (C.P. York County, Aug. 28, 1997) at 23. Judge Freedberg of Northampton County, Judge Cullan of Lancaster County, and Judge Temin of Philadelphia County cited United States v. Brown, 381 U.S. 437 (1965), when discussing the Bill of Attainder issue. Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 26, 1998) at 27; Alejandro, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 37; Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997) at 5-6. In Brown, the Supreme Court of the United States explained that a Bill of Attainder is one that labels "named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." Brown, 381 U.S. at 448-49. Recognizing that the sentencing provisions of Pennsylvania's Megan's Law are punishment, Judge Cullen, Judge Freedberg, and Judge Temin concluded that the statute is not a Bill of Attainder since the designation of being a sexually violent predator is made by the court, after a judicial proceeding, rather than the legislature. Alejandro, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 37; Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 26, 1998) at 23; Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997) at 6.

80. Concluding that the community notification provisions of Pennsylvania's statute do not constitute punishment, Judge Lewis of Dauphin County and Judge Uhler of York County determined that the statute is not a Bill of Attainder. Beam, No. 96 3328 C.D. 1996 (C.P. Dauphin County, Jul. 30, 1997) at 14; Ames, No. 471 C.A. 1997 (C.P. York County, Aug. 28, 1997) at 23. Judge Freedberg of Northampton County, Judge Cullan of Lancaster County, and Judge Temin of Philadelphia County cited United States v. Brown, 381 U.S. 437 (1965), when discussing the Bill of Attainder issue. Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 26, 1998) at 27; Alejandro, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 37; Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997) at 5-6. In Brown, the Supreme Court of the United States explained that a Bill of Attainder is one that labels "named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." Brown, 381 U.S. at 448-49. Recognizing that the sentencing provisions of Pennsylvania's Megan's Law are punishment, Judge Cullen, Judge Freedberg, and Judge Temin concluded that the statute is not a Bill of Attainder since the designation of being a sexually violent predator is made by the court, after a judicial proceeding, rather than the legislature. Alejandro, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 37; Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 26, 1998) at 23; Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997) at 6.


sentencing provisions do. The courts, however, have not uniformly decided whether the sentencing provisions, as punishment, violate the Double Jeopardy and Cruel and Unusual Clauses.

In Commonwealth v. Alejandrez, Judge Cullan of Lancaster County determined that the proceeding in which an offender's status as a sexually violent predator is examined constitutes a second prosecution for the same offense for which the offender had already been convicted. Therefore, the court concluded that the statute violates the Double Jeopardy Clause. In addition, Judge Cullan concluded that the imposition of a maximum life sentence is cruel and unusual punishment since it is based on mental status and potential dangerousness, rather than prior


84. Judge Mott of Bradford County, Judge Temin of Philadelphia County, Judge Freedberg of Northampton County, and Judge Cullen of Lancaster County each found that Pennsylvania's Megan's Law provides for punishment since it imposes a mandatory maximum sentence of life imprisonment if a defendant is determined to be a sexually violent predator. Koller, No. 96 CR 000474 (C.P. Bradford County, May 19, 1997) at 3; Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997) at 6; Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 26, 1998) at 7; Alejandrez, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 15.

85. Applying the test set forth by the Supreme Court of the United States in Blockburger v. United States, 284 U.S. 299 (1932), Judge Cullen concluded that the predicate offense for which a defendant has been convicted and the designation as a sexually violent predator are the "same offense" within the meaning of the Double Jeopardy Clause. Alejandrez, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 29. In Blockburger, the Supreme Court explained that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . ." Blockburger, 284 U.S. at 304. Judge Cullen also determined that the hearing provided for by Pennsylvania's Megan's Law is a separate criminal proceeding and, therefore, constitutes a second prosecution. Alejandrez, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 32. In making this determination, Judge Cullen compared Megan's Law to Pennsylvania's Barr-Walker Act and the Colorado Sex Offenders Act, which were both found unconstitutional on due process grounds. See United States ex. rel Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966); Specht v. Patterson, 386 U.S. 605 (1967). Judge Cullen acknowledged that both the Barr-Walker Act and the Colorado Sex Offenders Act were ruled unconstitutional on due process rather than double jeopardy grounds; however, Judge Cullen relied on the Supreme Court and Third Circuit descriptions of the proceedings provided for in the acts. Alejandrez, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 30.

In Gerchman and Specht, the acts were determined to be criminal proceedings, rather than sentencing proceedings. Gerchman, 355 F.2d at 309; Specht v. Patterson, 386 U.S. 605, 608-09 (1967).
In contrast, Judge Freedberg of Northampton County, Judge Temin of Philadelphia County, and Judge Mott of Bradford County rejected arguments that Megan's Law violated the Double Jeopardy Clause of the United States Constitution. In *Commonwealth v. Morris* and *Commonwealth v. Sanchez*, Judges Temin and Freedberg concluded in their respective opinions that Pennsylvania's Megan's Law does not subject a defendant to a second prosecution for the same offense; it merely provides for a sentencing hearing to determine the appropriate sentence allowed by law. They both explained that a separate proceeding may be held to decide a distinct issue that addresses punishment alone. They also found that the mandatory maximum sentence of life, imposed by the statute, is not cruel and unusual punishment. Judge Mott of Bradford County explained that the sentencing provisions of Pennsylvania's Megan's Law are only enhancements of the maximum sentence, not a separate punishment.

The issue of whether Pennsylvania's Megan's Law violates the procedural due process protections of the United States Constitution is even more controversial than the double jeopardy and cruel and unusual punishment challenges. Trial courts are split

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86. *Alejandrez*, No. 3494 of 1995 (C.P. Lancaster County, Nov. 20, 1997) at 33-34 Judge Cullen found that Megan's Law imposes punishment for a status, instead of an act. *Id.* (citing *Robinson v. California*, 370 U.S. 660 (1962)). In *Robinson*, the Supreme Court held that the imposition of a punishment is cruel and unusual if it inflicts punishment for a status offense. *Robinson*, 370 U.S. at 667.


on this issue. In addressing procedural due process, some trial courts compared Pennsylvania's Megan's Law with Pennsylvania's "Barr-Walker Act."92 In United States ex. rel. Gerchman v. Maroney,93 the United States Court of Appeals for the Third Circuit held that the Barr-Walker Act violated procedural due process.94 In Commonwealth v. Dooley, the Superior Court of Pennsylvania held the Barr-Walker Act unconstitutional.95 Although Judge Temin of Philadelphia County noted the differences between the Barr-Walker


§ 1166. Indeterminate sentence for certain sex offenses.

For the better administration of justice and the more efficient punishment, treatment, and rehabilitation of persons convicted of the crime of indecent assault, incest, assault with intent to commit sodomy, solicitation to commit sodomy, sodomy, assault with intent to ravish or rape, if the court is of the opinion that any such person, if at large, constitutes a threat of bodily harm to members of the public, or is a habitual offender and mentally ill, the court, in lieu of the sentence now provided by law, for each such crime, may sentence such person to a State institution for an indeterminate term having a minimum of one day and a maximum of his natural life.

18 PA. CONS. STAT. § 1167 (1952).

§ 1167. Psychiatric examination of person convicted.

No person, convicted of a crime punishable in the discretion of the court, under the provisions of this act, with imprisonment in a State institution for an indeterminate term having a minimum of one day and a maximum of his natural life, shall be so sentenced until (1) a complete psychiatric examination shall have been made of him through the facilities of the Department of Welfare, as hereinafter provided, or by a psychiatrist designated by the court, the results of whose examination shall be transmitted to, and accepted by, the Department of Welfare in lieu of an examination made through its own facilities, and (2) a complete written report thereof shall have been submitted to the court. Such report shall include all facts and findings necessary to assist the court in determining whether it shall impose sentence under the provisions of this act upon the person convicted in lieu of the sentence otherwise provided by law.

19 P.S. § 1166-1179 (1952).

93. 355 F.2d 302 (3d Cir. 1966). In Gerchman, the court determined that the proceeding under the Barr-Walker Act was a criminal hearing, not a sentencing or civil hearing. Gerchman, 355 F.2d at 309. The Third Circuit, therefore, concluded that the Barr-Walker Act violated the guarantee of procedural due process since it did not offer the safeguards fundamental to a fair trial, particularly, the right to confront and cross-examine witnesses.

Id.

94. Id.

95. 232 A.2d 45 (Pa. Super. 1967). The superior court concluded that the Barr-Walker Act was unconstitutional based on the United State Supreme Court's consideration of the Colorado Sexual Offender Act in Specht v. Patterson, 386 U.S. 605 (1967). In Specht, the Supreme Court ruled that the Colorado Act was deficient in due process because due process requires "a right to counsel, an opportunity to be heard, be confronted with witnesses . . . , have the right to cross-examine, and to offer evidence. . . ." Specht, 386 U.S. at 610.
Act and Pennsylvania's Megan's Law, he nevertheless concluded that the two statutes were more alike than different. He, therefore, determined that Megan's Law, like the Barr-Walker Act, creates a separate criminal proceeding that requires "the full panoply of due process protections." However, Judge Temin held that Pennsylvania's statute fails to offer such protection by infringing on the right to avoid self-incrimination, and the right to a jury trial by shifting the burden of proof. Similarly, Judge Callan of Blair County held that the statute violates due process by shifting the burden of proof to the defendant.

Using a different analysis, Judge DiSantis of Erie County also found that due process requires that the Commonwealth bear the burden of proving that a defendant is a sexually violent predator. He followed the analysis employed by the Third Circuit in E.B. v. Verniero. Finding a potential deprivation of a liberty interest under the sentencing provisions of Megan's Law, Judge DiSantis balanced the private interests of defendants against Pennsylvania's interests and concluded that the Commonwealth must bear the burden of proof to minimize the risk of error. Following a similar analysis, Judge Vardaro of Crawford County also ruled that due process requires that the Commonwealth bear the burden of proof. Judge Vardaro, however, based his holding on a recognition of a liberty interest in the right to reputation under the

97. Id. at 18.
98. Id. at 21. Citing Estelle v. Smith, 451 U.S. 454 (1981), Judge Temin determined that a defendant is "entitled to be warned that his statements may be used against him, that he has the right to remain silent, and has the right to have counsel present during any interview conducted pursuant to the purposes of the Act." Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997) at 18. In Estelle, the Supreme Court explained that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." Estelle, 451 U.S. at 462 (citation omitted).
100. Id. at 22. Judge Temin concluded that the Commonwealth should bear the burden of proving "beyond a reasonable doubt" that a defendant is a sexually violent predator since the statute is punitive in nature and a risk of error is involved. Id.
101. Rickabaugh, No. 97 CR 272, 273 (C.P. Blair County, Jan. 26, 1998) at 11. Judge Callan found that the "full panoply of due process protections" requires the Commonwealth to bear the burden of proving that a defendant is a sexually violent predator. Id.
Pennsylvania Constitution.\textsuperscript{106} In contrast, Judge Anthony of Erie County rejected the contention that Pennsylvania's statute violates procedural due process.\textsuperscript{107} Viewing the sentencing provisions of the statute as a change of the maximum sentence for the predicate offenses, instead of an enhancement, Judge Anthony upheld the constitutionality of placing the burden of proof on the defendant by considering it a mitigating factor.\textsuperscript{108} Moreover, Judge Anthony also upheld the constitutionality of the presumption that persons convicted of the predicate offenses are sexually violent predators since the fact proven, that the defendant committed a predicate sexual offense, has a rational relation to the fact presumed, that the defendant has a mental abnormality, which increases the chances that he will engage in the criminal activity again.\textsuperscript{109} Likewise, Judge Freedberg of Northampton County ruled that the Pennsylvania statute provides the necessary protections required by procedural due process.\textsuperscript{110}

As exhibited above, these challenges impose serious constitutional obstacles for Pennsylvania's Megan's Law. After the Third Circuit's decision in \textit{E.B.}, it is improbable that the statute will pass constitutional scrutiny with respect to the procedural due

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106. \textit{Id.} at 5-6. Article I, section 8 of the Pennsylvania Constitution provides, in pertinent part: "All men . . . have certain inherent and indefeasible rights, among them are . . . possessing and protecting . . . reputation . . . ." PA. CONST. art. I, § 8.


108. \textit{Id.} at 7-9. Judge Anthony explained that "it is constitutional for [a defendant] to bear the burden of proving a mitigating factor, [i.e.] that he is not a sexually violent predator," when the defendant is requesting to be excused from imprisonment after he/she has been convicted. \textit{Larson}, No. 2095 of 1996 (C.P. Erie County, Oct. 28, 1997) at 8 (citing \textit{Leland} v. Oregon, 343 U.S. 790 (1952)). In \textit{Leland}, the Supreme Court permitted the state of Oregon to place the burden of proving insanity beyond a reasonable doubt on the defendant. \textit{Leland}, 343 U.S. at 799.


110. Commonwealth v. Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 16, 1998). In \textit{Sanchez}, Judge Freedberg rejected the assertion that the Pennsylvania statute does not comply with procedural due process as set forth in \textit{Gerchman}, \textit{Specht}, and \textit{Dooley} because these cases did not decide the issues of the right to a jury trial or the allocation of the burden of proof. \textit{Sanchez}, No. 1456-1997 (C.P. Northampton County, Jan. 16, 1998) at 9-13. Concluding that the sexually violent predator provisions of the statute provide for a sentencing hearing, Judge Freedberg stated that a defendant is not entitled to a jury trial. \textit{Id.} at 12. Furthermore, Judge Freedberg held that the burden of proof is not unconstitutionally shifted to the defendant; it is an opportunity for the defendant to request leniency in sentencing after the Commonwealth has proven that he committed a sexually violent offense beyond a reasonable doubt. \textit{Id.} at 18.
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process guarantees of the United States Constitution. Furthermore, the likelihood of Pennsylvania's Megan’s Law surviving constitutional challenges under the Pennsylvania Constitution is equally dubious.

For the most part, the following constitutional challenges raised pursuant to the Pennsylvania Constitution are identical to those raised under the United States Constitution: the statute violates the Double Jeopardy,\(^{111}\) Bill of Attainder,\(^{112}\) Cruel and Unusual Punishment,\(^{113}\) Ex Post Facto\(^{114}\) and Due Process\(^{115}\) Clauses as well as the Right to Privacy.\(^{116}\) Thus, the courts that have addressed Pennsylvania’s Megan’s Law intertwined their analyses of these issues with those raised under the parallel provisions of the United States Constitution.\(^{117}\)

Surprisingly, none of the trial courts expounded on the broader

\(^{111}\) Article I, section 10 of the Pennsylvania Constitution provides, in pertinent part: “No person shall, for the same offense, be twice put in jeopardy of life or limb. . . .” Pa. Const. art. I, § 10.

\(^{112}\) Article I, section 18 of the Pennsylvania Constitution provides: “No person shall be attained of treason or felony by the Legislature.” Pa. Const. art. I, § 18.


\(^{114}\) Article I, section 17 of the Pennsylvania Constitution provides, in pertinent part: “No ex post facto law . . . shall be passed.” Pa. Const. art. I, § 17.

\(^{115}\) Article I, section 9 provides, in pertinent part: “In all criminal prosecutions the accused . . . [cannot] be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.” Pa Const. art. I, § 9.

\(^{116}\) The Supreme Court of Pennsylvania has recognized a right to privacy guarantee under Article I, section 1 of the Pennsylvania Constitution, which provides: “All men are created equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, or acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Denoncourt v. State Ethics Comm’n, 470 A.2d 945, 947-48 (Pa. 1983) (quoting Pa. Const. art. I, § 1). In Denoncourt, the Supreme Court of Pennsylvania explained the right to privacy under Article I section 1 as: “(1) a freedom from disclosure of personal matters and (2) the freedom to make certain important decisions.” Denoncourt, 470 A.2d at 948 (citation omitted). In addition, the Supreme Court of Pennsylvania has recognized a right to privacy in Article I, section 8 of the Pennsylvania Constitution. Denoncourt, 470 A.2d at 948. Article I, section 8 provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant. Pa. Const. art. I, § 8.

\(^{117}\) The trial courts commonly referred to the guarantees provided by these provisions of the Pennsylvania Constitution as “parallel” or “co-extensive” to those provided under the United States Constitution; therefore, the courts did not offer separate discussions under the Pennsylvania Constitution. See Commonwealth v. Sanchez, No. 1456-1997 (C.P. Northampton County, Jan. 16, 1998); Commonwealth v. Morris, No. 0597 of 1997 (C.P. Philadelphia County, Oct. 29, 1997); Commonwealth v. Williams, No. 922 of 1997 (C.P. Erie County, Sept. 23, 1997).
protection of the right to privacy recognized by the Pennsylvania appellate courts under the Pennsylvania Constitution.\textsuperscript{118} For example, the Supreme Court of Pennsylvania extended greater privacy protection to bank records under Article I § 8 of the Pennsylvania Constitution than the Supreme Court of the United States has recognized under the Fourth Amendment of the United States Constitution.\textsuperscript{119} Following the lead of the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania found an expectation of privacy under the Pennsylvania Constitution in telephone numbers dialed by an individual, even though the Supreme Court of the United States refused to recognize a privacy interest under the United States Constitution.\textsuperscript{120} Although the trial

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\item \textsuperscript{118} As explained by the Supreme Court of Pennsylvania: "[T]his court, when considering the relative importance of privacy as against securing criminal convictions, has struck a different balance than has the Supreme Court of the United States, and under the Pennsylvania balance, an individual's privacy interests are given greater deference than under federal law." Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1995). Judge DiSantis from Erie County did address the right to privacy guaranteed by the Pennsylvania Constitution in Commonwealth v. Williams; however, he did not comment on the decisions in which the Pennsylvania Supreme Court has recognized broader privacy interests under the Pennsylvania Constitution. Williams, No. 922 of 1997 (C.P. Erie County, Sept. 23, 1997). Quoting the Supreme Court of Pennsylvania's decision in John M. v. Paula T., 571 A.2d 1380, 1385 (Pa. 1990), Judge DiSantis stated:
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The right of privacy is protected by the Constitutions of the United States and by this Commonwealth. (citations omitted). Of course, an individual's right to privacy is not obsolete; however, where a person asserts a legitimate expectation of privacy, that expectation cannot be violated without a judicial balancing of respective interests in a judicial determination that the government or other private party has compelling needs and interests which justify invasion of privacy.
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\item \textsuperscript{119} Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979). In \textit{United States v. Miller}, 425 U.S. 435, 443 (1976), the Supreme Court concluded that a bank depositor does not have an expectation of privacy in bank records under the Fourth Amendment to the United States Constitution. Pennsylvania's supreme court declined to follow the Court's decision in \textit{Miller} and analyzed the issue under the Pennsylvania Constitution. \textit{DeJohn}, 403 A.2d at 1289. The court explained: "For a state court interpreting a state constitution, opinions of the United States Supreme Court are like opinions of sister state courts or lower federal courts. While neither binding in a constitutional sense nor precedential in a jurisprudential one, they are entitled to whatever weight their reasoning and intellectual persuasiveness warrant. . . ." \textit{Id.} (citation omitted). Under the Pennsylvania Constitution, the Supreme Court of Pennsylvania concluded that bank customers have an expectation of privacy in their bank records. \textit{Id.} at 1289.

\item \textsuperscript{120} Commonwealth v. Beauford, 475 A.2d 783 (Pa. Super. 1984). In \textit{Smith v. Maryland}, 442 U.S. 735 (1979), the Supreme Court of the United States declined to find an expectation of privacy in telephone numbers dialed by an individual and, therefore, ruled that the use of a pen register is not a search under the Fourth Amendment of the United States Constitution. The Superior Court of Pennsylvania rejected the reasoning of \textit{Smith} and found a right to privacy in telephone communications under the Pennsylvania Constitution. \textit{Beauford}, 475 A.2d at 789-92. The superior court explained: "[I]t cannot be doubted that this
court opinions discussed in this comment failed to address the broad privacy protections of the Pennsylvania Constitution, they should be considered by the appellate courts.  

IV. CONCLUSION

It is virtually impossible to predict whether Pennsylvania's Megan's Law will survive constitutional scrutiny since the courts have not uniformly interpreted the numerous constitutional challenges raised under the United States and Pennsylvania Constitutions. The Third Circuit's decision in *E.B.* will undoubtedly influence the decision of the Supreme Court of Pennsylvania on the procedural due process issue, since Pennsylvania's Megan's Law follows New Jersey's version by placing the burden of proof on the defendant. In addition, the statute is subject to the broad protection accorded the right to privacy under the Pennsylvania Constitution. The legislature enacted Pennsylvania's Megan's Law to protect the safety and welfare of the citizens of Pennsylvania, specifically the children. Despite the numerous constitutional obstacles, the statute has generated tremendous public support that will ultimately prevent its abolishment. Consequently, the Pennsylvania legislature will probably amend, rather than repeal, the statute to balance the constitutional rights of sex offenders with the protection of society.

*Stephie-Anna Kapourales Fernsler*

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state has the constitutional power to guard individual rights, including the right to be free from unreasonable searches and seizures, more zealously than the federal government does under the United States Constitution." *Id.* at 788 (citations omitted).

121. The Supreme Court of Pennsylvania has stated: "Here in Pennsylvania, we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated. . . ." Commonwealth v. Edmunds, 586 A.2d 887, 894-95 (Pa. 1991). In *Edmunds*, the court refused to adopt a "good faith" exception to the exclusionary rule under the Pennsylvania Constitution. *Edmunds*, 586 A.2d at 894-95.
Following the inclusion of the Megan’s Law amendment, the Jacob-Wetterling Crimes Against Children and Sexually Violent Offender Registration Program provides:

(a) In general

(1) State guidelines
The Attorney General shall establish guidelines for State programs that require —
(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency for the time period specified in subparagraph (A) of subsection (b)(6) of this section; and
(B) a person who is a sexually violent predator to register a current address with a designated State law enforcement agency unless such requirement is terminated under subparagraph (B) of subsection (b)(6) of this section.

(2) Court determination
A determination that a person is a sexually violent predator and a determination that a person is no longer a sexually violent predator shall be made by the sentencing court after receiving a report by a State board composed of experts in the field of the behavior and treatment of sexual offenders, victim rights advocates, and representatives from law enforcement agencies.

(3) Definitions
For purposes of this section:
(A) The term “criminal offense against a victim who is a minor” means any criminal offense that consists of —
   (i) kidnaping of a minor, except by a parent;
   (ii) false imprisonment of a minor, except by a parent;
   (iii) criminal sexual conduct toward a minor;
   (iv) solicitation of a minor to engage in sexual
Registration of Sexual Offenders

conduct;
(v) use of a minor in sexual performance;
(vi) solicitation of a minor to practice prostitution;
(vii) any conduct that by its nature is a sexual offense against a minor; or
(viii) an attempt to commit an offense described in any of clauses (i) through (vii), if the State—
   (I) makes such an attempt a criminal offense; and
   (II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

For purposes of this subparagraph conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

(B) The term “sexually violent offense” means 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).

(C) The term “sexually violent predator” means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

(D) The term “mental abnormality” means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(E) The term “predatory” means an act directed at a
stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(b) Registration requirement upon release, parole, supervised release, or probation

An approved State registration program established under this section shall contain the following elements:

(1) Duty of State prison official or court

(A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, or in the case of probation, the court, shall—

(i) inform the person of the duty to register and obtain the information required for such registration;

(ii) inform the person that if the person changes residence address, the person shall give the new address to a designated State law enforcement agency in writing within 10 days;

(iii) inform the person that if the person changes residence to another State, the person shall register the new address with the law enforcement agency with whom the person last registered, and the person is also required to register with a designated law enforcement agency in the new State not later than 10 days after establishing residence in the new State, if the new State has a registration requirement;

(iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to register under subparagraph (B) of subsection (a)(1) of this section, the State prison officer or the court, as the case may
be, shall obtain the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and the FBI

The officer, or in the case of a person placed on probation, the court, shall, within 3 days after receipt of information described in paragraph (1), forward it to a designated State law enforcement agency. The State law enforcement agency shall immediately enter the information into the appropriate State law enforcement record system and notify the appropriate law enforcement agency having jurisdiction where the person expects to reside. The State law enforcement agency shall also immediately transmit all information described in paragraph (1) to the Federal Bureau of Investigation for inclusion in the FBI database described in section 14072 of this title.

(3) Verification

(A) For a person required to register under subparagraph (A) of subsection (a)(1) of this section, on each anniversary of the person’s initial registration date during the period in which the person is required to register under this section the following applies:

(i) The designated State law enforcement agency shall mail a nonforwardable verification form to the last reported address of the person.

(ii) The person shall mail the verification form to the designated State law enforcement agency within 10 days after receipt of the form.

(iii) The verification form shall be signed by the person, and state that the person still resides at the address last reported to the designated State law enforcement agency. The person shall include with the verification form, fingerprints and a photograph of that person.
(iv) If the person fails to mail the verification form to the designated State law enforcement agency within 10 days after receipt of the form, the person shall be in violation of this section unless the person proves that the person has not changed the residence address.

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1) of this section, except that such person must verify the registration every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address.

A change of address by a person required to register under this section reported to the designated State law enforcement agency shall be immediately reported to the appropriate law enforcement agency having jurisdiction where the person is residing. The designated law enforcement agency shall, if the person changes residence to another State, notify the agency shall, if the person changes residence to another State, notify the law enforcement agency with which the person must register in the new State, if the new State has a registration requirement.

(5) Registration for change of address to another State

A person who has been convicted of an offense which requires registration under this section shall register the new address with a designated law enforcement agency in another State to which the person moves not later than 10 days after such person establishes residence in the new State, if the new State has a registration requirement.

(6) Length of registration
A person required to register under subsection (a)(1) of this section shall continue to comply with this section, except during ensuing periods of incarceration, until-

(A) 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation; or
(B) for the life of that person if that person-
   (i) has 1 or more prior convictions for an offense described in subsection (a)(1)(A) of this section; or
   (ii) has been convicted of an aggravated offense described in subsection (a)(1)(A) of this section; or
   (iii) has been determined to be a sexually violent predator pursuant to subsection (a)(2) of this section.

(c) Penalty

A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed.

(d) Release of information

(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The designated State law enforcement agency and any local law enforcement agency authorized by the State agency shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

(e) Immunity for good faith conduct

Law enforcement agencies, employees of law enforcement
agencies, and State officials shall be immune from liability for good faith.

(f) Compliance

(1) Compliance date

Each State shall have not more than 3 years from September 13, 1994, in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section.

(2) Ineligibility for funds

(A) A State that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 3756 of this title.

(B) Reallocation of funds

Any funds that are not allocated for failure to comply with this section shall be reallocated to States that comply with this section.

(g) Fingerprints

Each requirement to register under this section shall be deemed to also require the submission of a set of fingerprints of the person required to register, obtained in accordance with regulations prescribed by the Attorney General under section 14072(h) of this title.