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Spring 2006

## Making Meaning of Megan's Law

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*This study of Megan's Law contrasts scholarly narratives that describe and analyze sexual predator laws with a case study of implementation in New Jersey. A critical feminist perspective shows that Megan's Law employs a radically underinclusive notion of sexual violence that conflicts sharply with feminist arguments about the cultural and institutional roots of sexual violence. The law excludes many of the most common offenders from reach of the law, thus deflecting attention away from assaults committed by family and friends in favor of reviving stereotypes about deviant strangers. The most significant effect of Megan's Law is not to expand the power of the punitive state but to advance a political and legal interpretation of rape that undermines the basis for and gains made by feminist rape law reforms of the 1970s.*

### I. INTRODUCTION

On July 29, 1994, in Hamilton Township, New Jersey, Jesse Timmendquas invited seven-year-old neighbor Megan Kanka to his house to see his new puppy. Unbeknownst to Kanka or the community, Timmendquas was a convicted sex offender with a history of increasingly violent assaults against children. Once inside the house, Timmendquas strangled Kanka with a belt, raped her at least twice, and finally suffocated her to death by placing a plastic bag over her head. He was arrested shortly after the murder and confessed to the crime. Kanka's parents were outraged that they did not know a convicted sex offender lived in the neighborhood and helped organize a statewide movement to reform laws regarding sex offenders. Elected officials

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responded to the public outcry by enacting Megan's Law, legislation aimed at controlling "sexually violent predators" through a system of registration and community notification. Legislators and law enforcement officials "hoped that, armed with knowledge of the descriptions and whereabouts of sex offenders and pedophiles, community members [would] be in the best possible position to protect their children and themselves" (New Jersey 2000, 1). Megan's Law renewed public attention to the problem of sexual assault and mapped out the most significant changes to the state's sex crimes laws in over a decade.

Megan's Law is described by supporters and critics alike as a bold, new form of legal intervention that warrants close scrutiny. Megan's Law combines some of the oldest forms of punishment—shaming, marking, and exclusion—with some of the newest—risk prediction, psychological assessment, and information management. Measured by public and governmental support, expenditure of funds, media coverage, and impact on legal institutions, Megan's Law is arguably the most important development in rape law reform since the 1970s, when feminist antirape reformers associated with the women's liberation movement campaigned for revised rape laws across the country.

This article examines scholarly theories and legal practices that have emerged so far around sexual predator laws—the very different attempts to "make meaning" of Megan's Law. I contrast implementation of Megan's Law with some of the most cogent critiques from what I call a "left-progressive" view: a perspective that prioritizes civil liberties, advocates compassionate, expert treatment for sex offenders, and questions the coercive power of the state. Despite their criticisms of Megan's Law, these legal scholars take at face value much of the rhetoric put forth by proponents of the law. Scholarly discussions of the laws have not addressed how Megan's Law uses the trope of rape to reshape cultural and legal discussions about gender, sexuality, violence, and social control. As a result, theoretical interpretations continue to mask the ways in which Megan's Law actually functions. That these effects are invisible to scholars shows how thoroughly even critics have unquestioningly accepted the state's formulation of the problem and its rhetoric about the solution offered by Megan's Law.

I suggest that a critical feminist perspective significantly deepens scholarly inquiries about the meaning, implications, and influence of Megan's Law. Joseph Gusfield (1981) says that the public character of law illuminates a society's understanding of the world and of the construction of the "facts" upon which law is based. "In stating a general set of principles as publicly held norms, laws grant an orderliness to the diversity of behaviors that enable us to 'see' a society" (142).

Rape laws have long been a vehicle for reformers of all political stripes to "see" and make arguments about risk, harm, fear, community, sexuality, and responsibility. Feminists used rape law reform to legitimize diverse experiences of sexual violence as unjust and illegal, increase women's freedom by decreasing the fear and stigma associated with rape, and promote social transformation to end rape. The society feminists saw was deeply marked by injustice, but

capable of change. The view of rape that emerges from registration and notification laws is diametrically opposed to the principles and goals of feminist-inspired reform. Taken at face value, Megan's Law sees a society in which sexual violence is rare, recognizable by its physical brutality, and perpetrated by mentally disturbed monsters who strike without warning or reason. This society needs no change, just better tools to control these individuals.

Incorporating a critical feminist perspective on Megan's Law shows that it is deeply problematic, but not for the reasons articulated by left-progressive scholars. The law is detrimental to feminist approaches to rape because it is both too broad (legally), and too narrow (conceptually). With its overbroad application to all sex offenders the law may inadvertently *decrease* investigations, prosecutions, and convictions of sex crimes; with its narrow focus on the stranger who commits a violent physical assault on a child, the law diminishes the perceived seriousness of other forms of rape and abuse. I argue that Megan's Law does not expose sexual violence as much as it effaces its prevalence and most typical perpetrators. Its supporters co-opt the form but undermine the substance of feminist arguments about rape that could help explain and prevent sexual assaults.

My critique of left-progressive scholarship should therefore by no means be read as supporting an extension or strengthening of Megan's Law, but as pointing to crucial problems and assumptions about the laws that have been unexamined so far by advocates or skeptics. The point of the article is not to illustrate gaps in Megan's Law that should be closed through tighter regulation or more stringent enforcement. Rather, it is to show how the law presents a picture of sexual violence that justifies apolitical, individualized, state-centered explanations for and responses to gendered violence. The registration and community notification provisions attempt to evoke feminist reforms, but the laws are used here to consolidate state power rather than create social change. Feminist reforms that critique gender, culture, or the family are dismissed.

This article offers a feminist analysis to argue that more empirical and theoretical work must be done to grasp the importance and effects of sexual predator laws. Despite the extensive literature on sexual predator laws, there are almost no studies of the statutes from an explicitly feminist perspective. This article draws on state documents, court decisions, and interviews with local rape care advocates<sup>1</sup> to argue that Megan's Law *should be* of interest to scholars who study gender and sexuality, sexual violence, the politics of

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1. Interviews with legal actors responsible for implementation were not part of this initial study, which focused primarily on nonstate responses to Megan's Law and drew on interviews with rape care advocates in New Jersey to develop a feminist analysis of the laws. Though contributions from these law enforcement representatives would no doubt provide additional useful information concerning the perceptions and implementation of Megan's Law, such interviews were outside the scope of the research on which this article is based. Additional research with law enforcement officials and psychologists who implement tiering and registration with sex offenders in New Jersey is currently under way.

crime and social control, and criminal justice systems. There is a potentially enormous amount of work to be done in these areas—I do not purport to do all such work in this article.<sup>2</sup> Rather my purpose is to construct an analytic framework that justifies more and different investigations of the laws and provides some thoughts about where such energies might be most usefully directed.

My discussion focuses on two key elements of Megan's Law: the classification of sex offenders into tiers (and hence, designating some of them as "sexual predators") and the procedures around community notification. These practices illuminate the complex relationship between law, legal processes, and the cultural production of sexual violence. I conclude with a discussion of how the images and solutions presented in Megan's Law reshape the legal response to sex crimes in ways that are not anticipated or explained by these critics.

### A. A Feminist Theory of Rape

I discuss my analysis of Megan's Law as arising from a feminist interpretation of rape. My particular conception of rape is deeply influenced by the early, radical antirape movement that developed out of the second-wave women's liberation movement. Though not the only feminist framework for thinking about rape, I believe it provides a useful contrast with sex offender registration and notification laws.

Antirape activism was a rich and complex site of feminist politics in the 1970s. The movement is viewed today as one of the earliest and most effective translations of feminist theory into transformative political organizing. A brief overview of feminist thinking about rape illustrates how rape served as a vehicle to express deep criticisms of legal, cultural, and economic institutions that structure gender and sexuality.

One of the earliest, most thorough, and still most widely cited works in the antirape literature is Susan Brownmiller's (1975) book *Against Our Will*. Brownmiller's oft-quoted thesis was that rape "is nothing more or less than a conscious process of intimidation by which *all* men keep *all* women in a state of fear" (15, italics in original). Central to this analysis was sexual anatomy, which made "the human male . . . a natural predator and the human female . . . his natural prey" (16).

While Brownmiller's book was probably the most widely read feminist analysis of rape, it was not the first and far from the only one. Though the understandings of the causes of rape varied, activists were united in linking women's private experiences of sexual violence to broader forms of public, political oppression. In a widely disseminated essay first published in 1971,

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2. I am, however, currently pursuing some of the research I suggest in the conclusion of this article. Under way now is a comparative, quantitative study of several states to assess whether different kinds of sexual predator laws produce changes in key case outcomes for rape cases.

Susan Griffin (1977) argued that, far from being a natural or innate phenomenon, rape was a learned behavior that reinforced mechanisms of social control. In their influential article "Rape: An Act of Terror," Barbara Mehrhof and Pamela Kearon (1971) describe rape as "an effective political device. It is not an arbitrary act of violence by one individual on another; it is a political act of oppression . . . exercised by members of a powerful class on members of the powerless class" (233). Diana Russell (1974) used similar language when she described rape as "the supreme political act of men against women" (231).

To counter pervasive assumptions that rape was the product of a diseased mind (and consequently rare and not preventable), activists argued that rape was a conscious choice springing from and reinforcing male supremacist ideology, not the result of mental illness or frustrated sexual desire. Feminists were particularly angered by the ways that psychological language was used to blame women for making false accusations of rape, and to exonerate men from responsibility for the crime. Activists challenged the link between rape and mental illness by describing the crime as one "motivated by hostility rather than passion, . . . generally a premeditated crime of violence rather than a crime provoked by the victim's behavior" (Cobb and Schauer 1977, 170). Lorene Clark and Debra Lewis (1977) pointed out that while "virtually all [psychological] studies . . . found the rapist to manifest great hostility towards women . . . no one had been prepared to classify misogyny as mental illness" (135). Antirape advocates argued that rapists were not significantly different from other types of criminals (or men in general), even though they and their victims were treated differently by the legal system.

Early feminist understandings of rape were based on scathing critiques of male sexual violence and its relationship to public, gendered forms of inequality. Antirape advocates argued that rape was a normal, expected, and socially accepted outcome of oppressive practices toward women, poor people, and racial minorities, not an individual or isolated problem that could be resolved by locking up more criminals.

The rhetoric of equality—equal treatment for victims, for the crime, and even for offenders—adopted by most activists was important and effective because perceptions of the seriousness of sexual violence are so closely tied to perceptions of responsibility. One research study conducted around the time of the first rape law reforms "found that college students were . . . more likely to attribute responsibility to the assailant who raped a virgin than to one who raped a divorcee. The subjects also attributed more responsibility to the assailant of a female physician than of a cocktail waitress" (Klemmack and Klemmack 1976, 136). These beliefs and their codification in law set up hierarchies, so that a victim with higher perceived social status (a chaste woman, a physician) was seen as experiencing a greater harm from the assault than a less worthy woman (a black woman, a prostitute). Similarly, assaults by certain men (black men, poor men, lower class men) were perceived as more serious when committed against higher status women.

Antirape activists, many of them coming out of the New Left, had a deep cynicism about the state's interest in prosecuting sexual violence. Nevertheless, theorists saw law as having important, real and symbolic value that could matter, such as by expanding the legal definition of rape to include separated and divorced women,<sup>3</sup> as well as men and boys. Finally, activists in several states considered (though ultimately rejected) subsuming rape entirely under the law of assault.

The prospect of eliminating rape altogether arose from early feminist claims that rape was no different than other crimes and that treating rape as a special type of crime merely reinforced the stigmatization of victims and its marginalization by legal institutions. Based in a fascinating and sophisticated analysis of rape's relationship to female sexual and legal identity, this theory represented a significant development for the movement (Connell and Wilson 1974; Haag 1996). It also represented the beginning of a move to turn attention from critiques of sexuality and/as male power to a depoliticized, state-centered focus on controlling violence.

This focus on violence grew out of a selective, distorted interpretation of feminist arguments. As indicated above, feminist rhetoric sometimes dovetailed with more conservative arguments about, and proposed responses to, sexuality and social control. Emphasis on the essentially problematic nature of male sexuality resonated with conservative rhetoric about the need for social control of men, especially as crime, increased sexual activity, and social acceptance of alternative family and sexual lifestyles were seen as out of control (Eisenstein 1984; Gilder 1973). This behavior was proof that the domesticating influence of women and the family were being eroded, resulting in men who were freer than ever to indulge their base and degraded natures. Feminist researcher Diana Russell (1974), for example, emphasized the dangers of sexual liberation of men who, "freed from internal constraints . . . are likely to become active rapists" (209). George Gilder's (1973) self-proclaimed conservative polemic *Sexual Suicide* decries women's liberation and its results, which will "liberate the man to celebrate . . . a violent, misogynistic, and narcissistic eroticism" (258).

Both feminists and conservatives saw male sexuality as premised on aggression, and both proposed that state power be used to curb this tendency. The difference was that feminists linked this aggression to sex and gender roles, while conservatives pointed to men as "essentially" sexually dangerous. Discussions of the widespread nature of rape and the constant reminders that it could happen to any woman could be read as providing evidence of the fragility and vulnerability of women to male attack, thus reinforcing the perceived need to "protect" women from sexual violence rather than to change the conditions which make that violence possible (Brownmiller 1975). Conservatives picked

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3. The campaign against the marital rape exception started and stalled in Michigan in 1974; it would be over a decade before all fifty states criminalized rape in marriage.

up feminist concerns about the prevalence of rape and leniency toward offenders to argue for tougher laws, but dismissed their related arguments about how rape laws were deeply related to racism, classism, sexism, and social control.

Taken out of context, these distortions of feminist rhetoric provided support for the goals of groups with markedly different interests than the women's liberation movement. Many of these distortions make their presence felt again in Megan's Law.

## B. Conventional Interpretations of Megan's Law

Megan's Law has spawned a cottage industry of law review articles on state and federal laws.<sup>4</sup> Most of these articles, too numerous to cite comprehensively here, take a "balancing" perspective that weighs the rights of children versus those of convicted sex offenders (Martin 1996; Rudin 1996; Schopf 1995). Others provide detailed descriptions of state laws and assess potential legal challenges to the statutes (Fernsler 1998; Fischer 1997; Gfellers and Lewis 1998; Greissman 1996; Schramkowski 1999). These articles, while helpful in illuminating the specifics of various states' legislation, do not shed much light on the questions about the relationship of the law to social meaning. When authors do invoke the symbolic content of the laws, it is most often in a disparaging context, accusing the laws of "empty symbolism" and using metaphors such as "the scarlet letter" (Earl-Hubbard 1996; Kabat 1998), "pariahs" (Farber and Sherry 1996), and "the mark of Cain" (Kuperman 1996) to describe the law's symbolic functions. Such interpretations portray law as an entirely repressive force, using its power to subdue and suppress sex offenders—whether authors believe that is good or bad.

These articles present common and genuinely important concerns about protecting the civil liberties of alleged and convicted offenders, a concern that is deepened and broadened in what I call left-progressive interpretations of Megan's Law. This left-progressive literature begins with a similar respect for civil liberties, but goes on to question the larger role played by Megan's Law as a tool of the state that redefines relationships and forms of knowledge and power between groups of citizens. Beyond assessing the efficacy or impact of Megan's Law, left-progressive critics ask why *this* law at *this* time? Instead of focusing exclusively on the erosion of *offenders'* civil liberties, left-progressive critics investigate how Megan's Law illustrates the omnipresence of the criminal justice system and the narrowing of civil liberties and social tolerance in the lives of *all* citizens. Instead of criticizing the law for the lifetime penalties imposed, left-progressive thinkers analyze how punishing sex offenders provides an opportunity to imagine, extend, and consolidate

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4. A January 2005 Lexis search for law review articles including the terms "Megan's Law" or "sexual predator law" appearing at least three times in the text produced over 300 references.



power among groups such as law enforcement actors, mental health professionals, and elected officials. The left-progressive critiques present basic and trenchant criticisms of sexual predator laws. But in the end they are, I argue, insufficient to fully grasp the implications and importance of Megan's Law because they neglect the political history and uses of rape law reform.

Many left-progressive theories share some common premises. The first, perhaps most commonly invoked explanation, is that Megan's Law is a classic example of social "panic"—the hysterical overreaction to an isolated event. Drawing on Edwin Sutherland's (1950) work about sexual psychopath laws of the 1950s, Philip Jenkins (1998) characterizes contemporary registration and notification laws as another example of a sex crimes "panic." Panics are identified by official responses that are disproportionate to the number and types of crimes, consensus among experts on the scope of and appropriate response to the threat, and media dramatization of "sudden" changes in numbers or events (6). The social panic model suggests that Megan's Law is a hysterical overreaction to a hugely exaggerated problem—that there is no real problem warranting dramatic legal or cultural attention and energy.

Another frequently invoked idea is that the law expresses deep-seated prejudice against criminals, especially sex offenders, by imposing disproportionately harsh penalties on them. Joseph Kennedy (2000) investigates the symbolic and political utility of targeting "monstrous" criminals such as sex offenders. Kennedy argues that the desire to imagine and punish such offenders is the result of "changes, divisions, and tremors in our social and economic structure over the last several decades" that have eroded "social solidarity," resulting in "the hyper-punitiveness of our criminal justice practices" (830). Jonathan Simon (1998) contends that sex offenders "have become a lesson in the intransigence of evil" (451). Mona Lynch (2002) and Daniel Filler (2001) provide empirical evidence for some of these claims by looking at the deep repugnance of sex offenders evidenced in lawmakers' debates over federal and state sexual predator laws. These analyses see the demonization of sex offenders as intrinsic to other psychological and political needs that are only tangentially related to the crime itself.

A third response to the laws indicts them for their insensitivity to changing cultural norms around sexuality, and argues that the laws unfairly stigmatize individuals whose sexual acts are seen as perverted and dangerous because they exist outside of socially approved relationships or expressions. Estelle Freedman's (1987) analysis, published before the recent wave of sex offender laws, placed the 1950s statutes in the context of a society-wide anxiety about gender roles in the post-World War II era, and specifically linked these anxieties to the medicalization of "deviant" sexual behavior. Deborah Denno (1998) cautions against the "unintentional" and unfair results of earlier registration and notification statutes that arose from the "increasing importance placed on children and the family during the twentieth century; and . . . the criminal justice system's promotion of the medical model . . . of

deviance" (1318–19). These authors point out the troubling uses of law as a tool of social and sexual control, reminding readers that legal responses to sexual behavior are not neutral or objective expressions of fixed principles.

Finally, several commentators link these new forms of punishment to other social and political structures. John Pratt (2000) and Jonathan Simon (1998, 2000) argue that sexual predator laws generate new kinds of knowledge and reflect important trends in the uses of law as social control. These authors look at crime control as a way to extend and generate political power, and often employ a postmodern lens that is skeptical about the capacity and motivations of the modern, liberal state.

These provocative perspectives provide more interesting and persuasive explanations for the emergence and swift adoption of sexual predator laws across the United States. In looking at both the symbolic and practical effects of Megan's Law, these studies argue that Megan's Law offers important lessons about relationships between crime control and the power of law—lessons that I think were similarly at stake during the earlier wave of rape law reform initiated by feminists.

I agree with many of the interpretations and share many of the concerns advanced by these authors, and I share with several of them a Foucaultian-inspired skepticism about the uses of sexuality and of legal systems to deepen and extend state power. At the same time I challenge the conceptual narrowness of these left-progressive narratives by presenting a critical feminist analysis grounded in a case study of Megan's Law in New Jersey. Existing research fails to grasp that Megan's Law is not solely an illustration of "governing through crime" (Simon 1997) interchangeable with other new punitive measures. Crucial to the success of Megan's Law is its rejection of feminist challenges to social, cultural, economic, and legal institutions that structure gender, sexuality, violence, and the family. Megan's Law is a viable project precisely because it so successfully distorts progressive, feminist rhetoric and tactics for ends that further the coercive and discriminatory uses of state power.

Where feminist activists sought to de-stigmatize rape, Megan's Law marks the crime as so horrific and different that it requires special penalties for (some) perpetrators. Where rape law reform attempted to limit differential treatment among victims, Megan's Law reintroduces the idea that some victims—children—deserve special protection. Antirape activists argued that rape was the product of social conditions that normalized sexual violence; Megan's Law depicts sexually violent behavior as the product of individual mental defects and pathology. Megan's Law employs the (literally) visible apparatus of community notification to efface the kinds of rape feminists argued (and government statistics have shown) are much more common—assaults by family members and acquaintances. Feminists crafted reforms that attempted to eliminate race and class bias in the criminal justice system; Megan's Law employs procedures that potentially discriminate against politically marginalized groups. The most threatening aspects of feminist rape law

reform—its criticisms of violence, sexuality, family, and repressive institutions—are those that supporters of Megan's Law erase in rhetoric and practice.

Discussing changing perceptions of child molesters, Philip Jenkins (1998) reminds us that “[w]hen a group succeeds in convincing a broad section of society about the gravity of that problem, it is also disseminating a portion of its distinctive worldview” (8). Supporters of Megan's Law use the rhetoric and political capital of feminist rape law reform—“getting tough” on sex offenders, attention to child sexual abuse, concern for victims—to mask what is really a challenge to feminist arguments about rape. The “distinctive worldview” that emerges from Megan's Law is deeply antithetical to feminist arguments about the origins, effects, and consequences of sexual violence.

This critical feminist perspective raises issues that are invisible to the social control or civil libertarian narratives that currently dominate progressive critiques of Megan's Law, and contests the assumptions that underlie the most typical arguments for and against the laws.

Legal theorists have largely accepted that descriptions of Megan's Law put forth by legislators and criminal justice personnel are accurate and honest. This lack of skepticism about law enforcement claims is striking. Both critics and proponents share a set of working assumptions about that law that I contest. These areas of agreement are: that Megan's Law applies equally to all sex offenders—it does not differentiate between types of offenders; that the criminal justice system is capable of identifying, prosecuting, and convicting large numbers of sex offenders; and that sexual predator laws provide greater state control over sex offenders. These unexamined beliefs about the nature and efficacy of existing legal responses to sexual assault deeply influence critical approaches to the laws. This alternative feminist perspective highlights the gaps between the stated intentions of Megan's Law and how it works in practice. While the state's rhetoric about registration and notification has some real effects, in practice the rules produce quite a different—and conflicting—set of conclusions about the legal response to rape.

In this article I follow the lead of Stuart Scheingold (1998), who in a survey of the “new political criminology” cautioned that “the political construction of crime and crime control is more subtle, fluid, and unpredictable than the theorists . . . seem to believe. The . . . politics of crime and crime control can be constructed in a variety of ways and may, thus, vary substantially from time to time and place to place” (888). I present a critical feminist reading of legal practices that have emerged in New Jersey that challenges the dominant scholarly depictions of Megan's Law and offers a framework to investigate some of the possible effects of the law not envisioned by left-progressive narratives.

Though focused on New Jersey, the implications of this study are not limited to that state alone. New Jersey serves as an important and useful model for several reasons: first, because its highly publicized law served as a template for many other states; second, because its laws have had time to mature through statutory amendment and regulatory and judicial interpretation; and

third, because New Jersey is recognized as an innovative and liberal leader in criminal matters. Close attention to what government, law enforcement, and criminal justice personnel are actually doing to make Megan's Law meaningful in New Jersey provides a sharp contrast to the existing scholarly literature on sexual predator laws, which generally draws on scattered, decontextualized examples from different jurisdictions. These studies fail to account for the ways that different legal practices—case processing, constitutional challenges to the laws, ground-level enforcement—are nested together in sometimes surprising relationships that advance some of the stated purposes of Megan's Law while neutralizing or even hindering others.

### C. Setting the Stage: Rape Law Reform and Social Change

Before addressing the implementation of Megan's Law, I want to briefly discuss the criminal justice response to rape as a vehicle to contest meanings about sexuality, power, and social control. Doing so illuminates how Megan's Law changes the way contemporary U.S. law and culture "see" sexual violence.

Decades of sociolegal research have demonstrated that laws are far more than simply administrative pronouncements with clear meanings and direct, linear effects. Law is a normative force that melds symbols, stories, and visions into public statements about social ideals that are backed by the physically coercive power of the state. This ability to see a society through its laws makes law a useful lens through which to examine the articulation and transformation of beliefs, concepts, and institutions. Laws have the capacity to shape cultural understandings of particular problems at the same time that their effects can change the nature of those problems. Feminist attempts to change the legal response to rape in the 1970s illustrate this relationship between the symbolic and direct effects of law reform.

The antirape movement is generally acknowledged to have grown out of second-wave feminism, and was viewed as a distinct submovement by the early 1970s.<sup>5</sup> The emergence and growth of local groups that provided

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5. There are several introductions to the emergence of feminist theorizing about rape. For a historical overview of rape in the political and intellectual context of second-wave feminism, see Echols (1989). Several popular books and collections that came out of the women's liberation movement in the 1970s illustrate the widespread consensus that rape was a tool of male power and control, with cultural beliefs about gender and sexuality providing "cover" to justify this behavior and mask its oppressive functions (Clark and Lewis 1977; Connell and Wilson 1974; Delacoste and Newman 1981; Griffin 1977; Mehrhof and Kearon 1971; Russell 1974). Catharine MacKinnon's (1989) analysis of rape, emphasizing the use of rape as a tool of male power and oppression, still stands as one of the most influential statements about the origins and effects of rape. In the last decades, some theorists have begun to trace the intellectual history of the movement as it struggled with issues of embodiment and violence in its early stages (Haag 1996), and more recently with discursive developments including victim rhetoric and postmodernism (Lamb 1999; Mardorossian 2002).

community-based services such as crisis intervention, self-defense training, and education have been ably documented (Bevacqua 2000; Gornick, Burt and Pittman 1985; Largen 1985; Matthews 1994).

Even though local groups usually prioritized these community services, law reform was an important strategy of antirape organizing. Though many early feminist discussions of rape eschewed law as a solution to the problem, almost all identified law as contributing to the prevalence and stigma of rape. The problem with rape law, authors and activists argued, was that it reflected a cultural attitude toward rape that was premised on women's inequality before the law, and that legal systems perpetuated that inequality through the systematic refusal to acknowledge or prosecute sexual crimes against women.<sup>6</sup> The seriousness of crimes often depended more on the characteristics and relationships of the parties involved than the actual acts committed. Deference to the patriarchal family, for example, led to legal immunity from acts of sexual violence committed against spouses and children (Finkelhor and Jones 2004; Rush 1974).

Advocates saw law functioning on two levels: as an expression of ideology about what rape was and as a mechanism of social control. These functions were mutually reinforcing: stereotypes about rapists and their victims (that assaults were primarily committed by black men, or men with mental problems, or lower class men, against virgins, or only against women) were reinforced by a criminal justice system, which selectively prosecuted rapes that fit those stereotypes. Eliminating from the criminal justice system cases that involved forced sex but that were outside of legal definitions of rape helped to reinforce cultural beliefs about rape. Assumptions that rape was rare, involved physical brutality, and was perpetrated largely by deviant individuals made sense when those were the only cases acknowledged by legal actors and codes as rape.

It was these dual functions of law—ideological and instrumental—that feminist advocates hoped to use to their own ends. By reforming rape laws, activists reasoned, they could simultaneously challenge beliefs about what

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6. Connell and Wilson (1974), who edited the book resulting from the New York Radical Feminists speak out and conference on rape, introduce a section on "Legal aspects of rape" by emphasizing that "it is our institutions of law which reflect society's *intent* to pursue justice. . . . The laws as they stand now reflect only suspicion and mistrust of the victim" (125). Largen (1985) describes rape laws as a concern for feminists because legal institutions and practices "reflect the attitudes and biases of the society they serve. . . . Feminists . . . felt that reforms would be best achieved in conjunction with a positive change in social attitudes toward the crime and its victims" (3). BenDor (1976) stressed that a "major function of law reform is confirming and protecting democratic rights" which for rape victims in Michigan were impinged by the state's "old statute, . . . [that] exhibited all the inequities of the sexist and hypocritically moralistic social order which shaped it" (154). Drawing on letters and articles from the *Feminist Alliance Against Rape Newsletter*, Bevacqua (2000) points out that "Whether or not individual crisis center workers agreed with a strategy of law reform, they understood that many of their clients would pursue their cases through police and prosecutors. . . . Reformed laws . . . helped them to present victims with an even greater number of choices" (107).

rape was, and by loosening restrictions on prosecution, they could change which individuals were charged, prosecuted, and sentenced for sex crimes. This two-pronged approach formed the justification for the rape law reform strategies that swept the country in the 1970s.

For feminists, this dual pursuit of legal and cultural change was an ideal place to use the symbolic power of law. As Marsh, Geist, and Caplan (1982) put it,

The traditional view of the crime of rape has expressed the degrading notion that women would consent to a brutal, violent assault, or that their essentially vindictive nature would lead them to fantasize about and fabricate the occurrence of the crimes. . . . Because old laws were predicated on this degrading and confining view of women, efforts to reform them represent more than a redefinition of the crimes. Such efforts are part of a larger statement that, as women move into more autonomous roles in society, their activities deserve to be acknowledged and respected. Reformed rape laws, then, reflect and legitimate the increasingly varied and independent roles and styles of behavior for women in society. They define the crimes in terms consistent with emerging concerns of women. (3)

Activists were thus keenly aware of the role that law plays in shaping cultural perceptions that are then validated or justified by reference to law and legal evidence. Feminists sought to change the very definitions of rape to include groups that were denied access to the criminal justice system (such as males and married women), encompass crimes that were not considered rape (previously defined solely as penile penetration of the vagina), and eliminate the most obvious barriers to prosecution (corroboration and "utmost resistance" requirements). In doing so, activists knew they were embarked on "an experiment in which we can hope to learn how a major revision in the criminal code can deter, control, publicize, and equalize the treatment of a very destructive set of acts against human beings" (Marsh, Geist, and Caplan 1982, 5).

These reformers helped launch a powerful and largely successful campaign to reshape U.S. cultural beliefs about what rape was, and how the state should respond to sexual violence. The reforms changed cultural attitudes toward sexual violence, and by changing the criminal justice response to rape reformers also significantly shifted the demographics of what individuals were recognized and prosecuted as sex offenders. Newly legitimized convictions for an expanded roster of crimes, of incest offenders, acquaintance and marital assaults, and of assailants who were increasingly white, middle-class, and well-educated changed the composition of the sex offender population. These new categories of offenses and offenders then bolstered feminist arguments that sex offenders were "normal" individuals who came from all racial, socioeconomic, and social groups, and often bore few external "markers" of social deviance.

Early antirape advocates believed that the extremely harsh penalties imposed for rape in many states discouraged prosecution and conviction. Revised sentencing was understood as key to more vigorous and effective prosecution and conviction of alleged rapists. Somewhat counterintuitively, advocates sought *lighter*, graduated sentences and the abolition of the death penalty for rape in order to encourage prosecutions and convictions for sex offenses. Feminist advocates believed that if penalties were seen as more proportionate and appropriate, cases against nonstereotypical offenders (those who were white, professionals, first-time offenders, or assaulted individuals known to them) would be taken more seriously by law enforcement, judges, and juries.

These strategies worked. Recent studies of sex offender characteristics demonstrate that, in contrast to the rest of the prison population, sex offenders as a whole are more representative of the U.S. population: they are *more* likely than other felony offenders to be white, middle-class, and married; they are also *less* likely to have a history of prior convictions than other class of serious offenders (Greenfeld 1997). Such findings support feminists' contentions that serious sex crimes were prevalent in all parts of society and perpetrated by men who did not look like "monsters." These changes arose out of feminist efforts that were constituted simultaneously through law reform and cultural change—new attitudes about sexual violence both resulted from and reflected a broadened legal understanding of and response to rape.

The antirape movement continued to drive rape policy for a decade, winning additional important reforms such as the elimination of the spousal rape exemption. At the same time, however, criminal justice institutions and officials often resisted and resented feminist rape reforms. Though many jurisdictions have experienced significant improvements in services to and attitudes toward victims, studies of rape case processing still document discrimination against victims that is manifested both through the lack of attention to procedural guarantees for victims and in attitudes that dismiss nonstereotypical assaults or unsympathetic victims (Estrich 1987; Frohmann 1991; Spohn and Horney 1992). Megan's Law codifies this resistance to sustained, thorough feminist reforms, providing law enforcement with tools for extending state control over some offenders while exculpating many nonstereotypical offenders from the law's penalties.

## II. MEGAN'S LAW IN NEW JERSEY

"Sexual predator" laws like Megan's Law are generally assumed to narrowly target repeat, violent, pedophilic offenders. This widely shared public perception is, however, largely inaccurate. But its persistence, even throughout scholarly literature on Megan's Law, reflects a troubling lack of

attention to the interpretation and implementation in specific legal contexts. As I show in my discussion of the New Jersey law, each of the components of the law—addressing sex offender recidivism, distinguishing violent offenses from less serious ones, and protecting children—works at cross-purposes in practice. Some background on the specifics of the law will help make this clearer.

## A. Policy History and Current Status

The New Jersey Legislature passed ten separate bills during its special session on Megan's Law, though only three have come under close scrutiny from media, citizens, courts, and scholars.<sup>7</sup> Provisions creating registration, community notification, and civil commitment procedures for sex offenders are by far the most visible and controversial components of the legislation. Civil commitment of sexually dangerous persons has been used on and off for much of the twentieth century and has been twice found constitutional

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7. There were five pieces of legislation aimed at sentencing and other conviction-related reforms. These were generally straightforward attempts to close what were perceived as "loopholes" in the state's treatment of sex offenders. Sentences were extended for certain types of sexual assaults, especially in the case of repeat offenders, and could be imposed for crimes that involve violence or the threat of violence against children sixteen years and under (NJSA 2C:43-7). The youth of the victim (less than fourteen years of age) can be considered an aggravating factor in death penalty sentencing (NJSA 2C:11-3). The state is required to provide notice of events in the criminal justice process (including plea bargains, parole hearings, and custody release dates) to crime victims, and allows for victim input through consent to plea bargains and impact statements at sentencing (NJSA 2C:12-14). Inmates at the Adult Diagnostic and Treatment Center (ADTC) will not get "good behavior" credit toward reducing their sentences if they do not "fully cooperate" with treatment options (NJSA 2C:47-8). Finally, DNA samples will be collected from individuals convicted of certain sex offenses (NJSA 53:1-20.17). The "Violent Predator Incapacitation Act" provides for community supervision of individuals convicted of a number of offenses, including sexual assaults and offenses against children. Individuals serving community supervision sentences are treated "as if on parole" for a period of not less than fifteen years. Individuals whose behavior is "characterized by a pattern of repetitive, compulsive behavior" may be sentenced to the ADTC or be required to receive psychological treatment as a condition of probation (NJSA 2C:43-6.4). County prosecutors are notified when individuals convicted of certain offenses (such as murder, manslaughter, aggravated sexual assault, kidnapping, offenses against children) are scheduled to be released, and, upon notice of the impending release of an inmate, prosecutors may request an examination to determine if the offender "is in need of involuntary commitment" (NJSA 30:4-123.53a). The civil commitment act provides for the involuntary, indefinite civil commitment of sexual offenders whose behavior is "characterized by a pattern of repetitive, compulsive behavior." "Mental illness" is expanded to cover "disturbances" that do not necessarily constitute psychosis. Such offenders may be sentenced to the ADTC or to private mental health treatment as a condition of probation (NJSA 30:4-82.4). The New Jersey Legislature has defined "sexually violent predator" to mean "a person who has been convicted, adjudicated delinquent, or found not guilty by reason of insanity for commission of a sexually violent offense, or has been charged with a sexually violent offense but found to be incompetent to stand trial, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment" (NJSA 30:4-27.26).



by the U.S. Supreme Court (*Allen v. Illinois* 1986; *Kansas v. Hendricks* 1997).<sup>8</sup> Registration and notification represented the real innovations of Megan's Law, and inspired similar state and federal laws. At this time, every state and the federal government has a sex offender registration statute; most also require community notification, though notification has been subject to ongoing challenges in almost every state. In March 2003 the U.S. Supreme Court upheld registration and notification statutes from Connecticut (*Connecticut Department of Public Safety v. Doe* 2003) and Alaska (*Smith v. Doe* 2003), ruling that the registration and notification requirements did not constitute an impermissible invasion of the privacy of sex offenders.

Once passed by the Legislature, Megan's Law became the province of New Jersey Attorney General Deborah Poritz. The Legislature had voted on only the most general outlines of the laws; the actual substance of the law was left to Attorney General Poritz, who convened a committee to draft detailed guidelines that were completed in December 1994 and scheduled to go into effect on January 1, 1995.

Release of the Attorney General's guidelines for implementation (hereinafter "Guidelines") renewed public attention to the issue and spurred supporters and critics to action. In January 1995 a federal district judge issued the first injunction to prevent a local police department from enforcing the community notification provisions against a sex offender about to be released. The judge upheld the registration requirement but ruled that community notification constituted additional punishment and therefore violated constitutional prohibitions against *ex post facto* penalties (Hanley 1995a). Though the injunction applied only to the specific offender in the case, the ruling gave clout to concerns expressed by civil libertarians and advocates for the rights of offenders.<sup>9</sup>

Two additional rulings the next month dealt further blows to the Guidelines. A state judge agreed that the Guidelines gave prosecutors too much leeway in categorizing sex offenders and ordered that offenders were entitled to hearings before being classified (Hanley 1995b). Problems with

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8. Laws targeting repeat sex offenders extend back to the 1920s, when almost every state had laws that targeted suspected "predatory" sex offenders (Lieb 1996). Most states repealed or effectively abandoned the sexual psychopath laws in the 1960s as they came under attack from mental health professionals who refuted many of the assumptions on which the laws were based and challenged the vagueness of the diagnosis, as well as from legal critics who applied increased due process guarantees outlined by the Warren Court to the civil and criminal proceedings regarding sex offenders (Denno 1998, Freedman 1987). Since the late 1980s, some states have resurrected their sexual psychopath laws (such as Minnesota [which supplemented the 1939 Psychopathic Personality act with the 1994 Sexually Dangerous Persons law] and Illinois [a 1938 law pertaining to "sexually dangerous persons"] while others, like Washington and New Jersey, have adopted similar language but created what are essentially entirely new statutes.

9. On another front, concerns that the law would be a spur to vigilantism were founded just days after the notification guidelines had gone into effect. On January 10, 1995, a father and son broke into a private home and attacked a man they thought was a sex offender whose name and address had been publicized in accordance with the regulations (Nordheimer 1995).

the notification procedures were further compounded when another federal district court judge ruled that community notification for offenders convicted before Megan's Law was enacted was unconstitutional, though he too found nothing to prevent registration of such sex offenders with law enforcement agencies. The decision was sharply criticized by supporters of the law, including Megan Kanka's mother Maureen (Hanley 1995b). Faced with mounting opposition in the courts, Attorney General Poritz suspended notification procedures until the New Jersey Supreme Court could rule on Megan's Law. That case was not long in coming.

Anonymous plaintiff "Doe" brought suit against the state in early 1995; the Court heard arguments in May.<sup>10</sup> The New Jersey State Supreme Court's two-hundred-page majority opinion in *Doe v. Poritz* was delivered on July 25, 1995, and upheld Megan's Law as constitutionally sound by a vote of six to one. The breadth and firmness of the decision was a surprise to many observers, most of whom expected that the State Supreme Court, with its record of "judicial pioneering" and sensitivity in the areas of civil liberties and defendants' rights, would overwhelmingly reject the new statutes.

In *Doe*, the Court largely deferred to legislative determinations about the nature and extent of the problem of sexual assault, and accepted the justification for the laws. The measures were challenged on several substantive grounds, most seriously that they violated *ex post facto*, double jeopardy, cruel and unusual punishment, equal protection, and procedural due process guarantees.<sup>11</sup> On the *ex post facto*, double jeopardy, and cruel and unusual punishment challenges, the Court upheld the laws based on a critical distinction: that the registration and community notification laws were remedial rather than punitive measures.<sup>12</sup> The Court disposed of the equal protection question by deferring to the legislative finding that sex offenders posed a substantially higher risk of recidivism, and of a particularly heinous and disturbing crime, than other criminal groups. The Court anticipated other

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10. Though Doe sought to limit the decision to his particular case, the Court ruled otherwise. "Although plaintiff is seeking relief only for himself, our decision will affect all sex offenders covered by the laws. Plaintiff's claims are the same [sic] as any offender could assert, whether convicted before or after the enactment of these laws, although his *ex post facto* and bill of attainder claims apply only to previously-convicted offenders. The claims that can be made by offenders convicted after the enactment of the laws, double jeopardy, cruel and unusual punishment, invasion of privacy, equal protection, and procedural due process, can also be made by plaintiff" (*Doe v. Poritz* 1995, 41).

11. The Court also considered the plaintiff's argument that the laws constitute an unreasonable search and seizure; that claim was dismissed as without merit (*Doe v. Poritz* 1995, 44).

12. This has obviously remained very much in the minds of judges in New Jersey. In granting an appeal to limit community notification of a Tier Two sex offender, one judge prefaced his ruling with the statement that, the "[r]egistrant's squalid life style and failure to conform to societal norms naturally excite one's punitive instincts. But the judicial process has already administered appropriate punishment to the registrant in a separate proceeding, and the constitutional justification for Megan's Law rests on the belief that it is intended as non-punitive, remedial legislation" (*In re R.F.* (1998), 5-6 [internal citations omitted]).

possible challenges to the laws and found that the laws survived those as well.<sup>13</sup> The Court did find that aspects of the Guidelines violated the due process rights of offenders, and rewrote the offending sections to remedy these deficiencies. The decision in *Doe* has since been corrected twice, both times to “refine the hearing process” in response to decisions from the U.S. Third Circuit Court of Appeals (New Jersey 2000, 2). Those corrections have provided some additional protection of offender due process and privacy interests, though they upheld the substance of the state Supreme Court ruling. Since *Doe*, New Jersey lawmakers have moved ahead to implement Megan’s Law.

As the laws in New Jersey currently stand, thousands of sex offenders are required to register with local law enforcement officials. The first group of offenders required to register are those who committed or attempted to commit more serious sex crimes<sup>14</sup> and who were found by a court to exhibit “a pattern of repetitive, compulsive behavior” (New Jersey 2000, 6). These repetitive, compulsive offenders must register regardless of when the offense was committed or the offender was released from state custody.<sup>15</sup> The second group of offenders required to register are those who were convicted or in state control<sup>16</sup> on or after the effective date of Megan’s Law, and who were convicted of a broad range of sex crimes.<sup>17</sup> These offenders are not required to exhibit a pattern of repetitive, compulsive behavior; conviction for one of the enumerated offenses is sufficient to trigger the registration requirement.

Sex offenders are notified of their “duty to register” either through the mail (in the case of previously convicted sex offenders not in state custody

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13. The court found that the law survived the most significant of these potential challenges—the fundamental fairness doctrine as developed and applied in New Jersey state law.

14. Offenses requiring retroactive registration are aggravated sexual assault, sexual assault, aggravated criminal sexual contact, or kidnapping.

15. The Court justified this on the grounds that: The law does not apply to all offenders but only to sex offenders, and as for those who may have committed their offenses many years ago, it applies only to those who were found to be repetitive and compulsive offenders, i.e., those most likely, even many years later, to reoffend, providing a justification that strongly supports the remedial intent and nature of the law. It applies to those with no culpability, not guilty by reason of insanity, those who would clearly be excluded if punishment were the goal but included for remedial purposes. And it applies to juveniles, similarly an unlikely target for double punishment but included for remedial protective purposes (*Doe* 1995, 129–30).

16. Offenders under state control include those who are incarcerated, on probation or parole, or confined in another state institution.

17. Offenders are required to register if they are convicted, adjudicated delinquent, or found not guilty by reason of insanity for completed or attempted acts of: aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping; endangering the welfare of a child by engaging in sexual conduct that would impair or debauch the morals of the child; endangering the welfare of a child; luring or enticing; criminal sexual contact if the victim is a minor; kidnapping, criminal restraint, or false imprisonment if the victim was a minor under the age of eighteen and the offender is not a parent/guardian of the victim.

on October 30, 1994) or before they are released from state custody.<sup>18</sup> Offenders complete a "Sex Offender Registration" form at the local police station or prior to their release from custody. Eligible offenders are required to provide their name, a recent photograph, a physical description, specifics of the convicted sex offense, home and employment or school addresses, vehicle description, and license plates (New Jersey 2000, 24). After the initial registration, repetitive and compulsive offenders are required to reregister every 90 days; all other offenders must reregister annually or if they change their address. Failure to register is a crime of the fourth degree.

When notified (by state personnel or the offender him or herself) that an eligible sex offender resides in the district, the county prosecutor uses the Registrant Risk Assessment Scale (hereinafter "Scale"; reproduced as Figure 1) to determine the risk of reoffense and corresponding level of community notification. The Scale is an actuarial risk assessment instrument developed by a committee of experts convened by the State Attorney General to predict the likelihood of reoffense and the likely harm to the community should reoffense occur (New Jersey 2000). The prosecutor completes the Scale and computes a score for the offender. The score classifies the sex offender into one of the three tiers designated by the Legislature: low; moderate; or high risk to reoffend. Tier assignment is linked to community notification—the higher the assessed risk of the offender, the more far-ranging and public the form of notification. Eligible offenders are then served with notice of their Tier assignment and proposed level of community notification. Offenders may appeal Tier assignment and the concomitant scope of notification at a hearing before a special judge.

Appeals of Tier assignments and the concomitant scope of notification can come on several grounds: that their score on the Scale is factually inaccurate (usually disputing the inclusion or scoring of particular offenses); that the score does not accurately reflect the offender's risk to the community; or that community notification should be limited or tailored for the offender's circumstances.<sup>19</sup> Notification is put on hold until any appeals are complete.

Once the registrant's Tier assignment and scope of notification is finalized, the community notification process begins. Notification is typically based on Tier assignment and disseminated to the following groups:

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18. Additionally, "[o]ffenders moving to this State must notify the chief law enforcement officer of the municipality or the State Police within 70 days of their arrival in New Jersey" (New Jersey 2000, 8).

19. In decisions since *Doe*, the New Jersey Supreme Court has directed trial courts to tailor community notification in situations where the facts of the case suggest either broader or more narrow notification than that required in the Guidelines.

*Tier One* (low risk to reoffend): law enforcement likely to encounter the offender;<sup>20</sup>

*Tier Two* (moderate risk to reoffend): law enforcement, and schools and community organizations likely to encounter the offender;

*Tier Three* (high risk to reoffend): law enforcement, schools and community organizations, and members of the public likely to encounter the offender.

Anyone convicted of a sex offense in New Jersey is currently subject to the registration, assessment, and “tiering” process required by Megan’s Law. Though the scope of notification varies according to circumstances, the laws do affect all individuals convicted of or pleading guilty to a sex offense. As I will discuss later, the laws thus have broad consequences that are likely to affect the disposition of all sex offenses in the state.

### III. LEGAL PRACTICES AND SEX OFFENDER IDENTITIES

The implementation of Megan’s Law reinforces many of the left-progressive criticisms discussed earlier, especially concerns about the encroachment on civil liberties of offenders, the extension of state control through new technologies, the expanded observational machinery of the state, and the use of fear to control communities and potential victims. While the laws obviously do not replace existing sex crimes statutes, they are the first significant additions to the sex crimes codes in many years. As such, the laws and formal guidelines for implementation are an opportunity to see how the state defines its current priorities around sexual assault.

Obviously the rules in action may be very different than the rules in theory. Because of problems obtaining confidential data about offenders subject to Megan’s Law, this study focuses on the formal rules developed by the state of New Jersey as a place to begin thinking about the laws’ effects. Though limited in scope, these observations point out some surprising, unexpected, and counter-intuitive results of this innovative approach that merit additional research.<sup>21</sup>

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20. Based on guidance from the New Jersey Supreme Court, the Guidelines define the term “likely to encounter” to mean that the law enforcement agency, community organization or members of the community are in a location or in close geographic proximity to a location which the offender visits or can be presumed to visit on a regular basis. . . . In addition to geographic proximity, there must also be a “fair chance to encounter” the offender. “Fair chance to encounter” shall mean for purposes of these guidelines that the types of interaction which ordinarily occur at that location and other attendant circumstances demonstrate that contact with the offender is reasonably certain. For example, barring other attendant circumstances, it is not reasonably certain that there is a “fair chance to encounter” an offender at a gas station where the offender stops merely to buy gas and has no more extensive contact or interaction (New Jersey 2000, 13–4).

21. I wish to emphasize that this research is the beginning, not the end, of my investigations on this subject. I am in the process of conducting several additional analyses of the laws, including interviews and the collection of quantitative data on the outcomes of sexual predator laws in different states.

Criteria	Low Risk	0	Moderate Risk	1	High Risk	3	Comments	Total
<b>Seriousness of Offense x5</b>								
1. Degree of Force	no physical force; no threats		threats; minor physical force		violent; use of weapon; significant victim harm			
2. Degree of Contact	no contact; fondling over clothing		fondling under clothing		penetration			
3. Age of Victim	18 or over		13-17		under 13			
Subtotal:								
<b>Offense History x3</b>								
4. Victim Selection	household/family member		acquaintance		stranger			
5. Number of Offenses/Victims	first known offense/victim		two known offenses/victims		three or more offenses/victims			
6. Duration of Offensive Behavior	less than 1 year		1 to 2 years		over 2 years			
7. Length of Time Since Last Offense	5 or more years		more than 1 but less than 5 years		1 year or less			
8. History of Anti-Social Acts	no history		limited history		extensive history			
Subtotal:								
<b>Characteristics of Offender x2</b>								
9. Response to Treatment	good progress		limited progress		prior unsuccessful treatment or no progress in current treatment			
10. Substance Abuse	no history of abuse		in remission		not in remission			
Subtotal:								
<b>Community Support x1</b>								
11. Therapeutic Support	current/continued involvement in therapy		intermittent		no involvement			
12. Residential Support	supportive/supervised setting; appropriate location		stable and appropriate location but no external support system		problematic location and/or unstable; isolated			
13. Employment/Educational stability	stable and appropriate		intermittent but appropriate		inappropriate or none			
Subtotal:								
Total:								

Scoring: Highest possible total score = 111  
 Low range: 0-36 Moderate range: 37-73 High range: 74-111  
 From the Attorney General Guidelines for the Implementation of Sex Offender Registration and Community Notification Laws (Guidelines 2000).

Figure 1. Registrant Risk Assessment Scale.

## A. Identifying Sexual Predators: Sex Offender Registration

The Scale is a logical place to start talking about the legal practices surrounding Megan's Law, since it is the primary instrument through which registration and community notification are effected. The accompanying

Registrant Risk Assessment Scale Manual (hereinafter "Manual") describes the vital role of the Scale in registration and notification:

The purpose of the scale and this accompanying manual is to provide Prosecutors with an objective standard on which to base the community notification decision . . . and to insure that the notification law is applied in a uniform manner throughout the State. The Risk Assessment Scale was rationally derived by a panel of mental health and legal experts by the following processes: 1) the selection of risk assessment criteria that have empirical support; 2) the weighting of these pertinent risk assessment criteria and 3) the use of sample cases to assist in the setting of numerical cut-off points for low, moderate and high risk scores. (New Jersey 1998, 1)

It is common for left-progressive observers to criticize Megan's Law for its irrational, hysterical reaction to sex crimes. The Scale and Manual, however, are presented as anything but emotional. New Jersey's Guidelines explicitly prioritize the expertise and scientific neutrality that observers like Jenkins (1998) and Simon (1998, 2000) regard as the hallmark of a civilized and rational approach to sex crimes.

This same framing, however, explicitly displaces feminist arguments that rape is an expression of gendered inequality by depoliticizing and individualizing experiences of sexual violence. Feminist arguments about sexual assault were unabashedly political—the legal reforms advocates espoused were clearly driven by an understanding of rape as based on male privilege, control, and oppression. Advocates did not claim that rape law reform was value-free or objective; revised rape laws were explicitly described and justified as a way to change cultural perceptions of and responses to rape. Megan's Law, on the other hand, is couched in the language of psychological expertise that claims to be neutral even as it makes value judgments about risk and harm. The Manual regularly refers to feminist understandings or language about rape, but without addressing any of the associated critiques of violence, gender, or inequality that were central to the feminist antirape movement. The experts on rape are no longer feminists, victim advocates, or even victims themselves, but instead "mental health and legal experts" whose institutional and disciplinary frameworks explicitly preclude viewing rape as a product of systemic or class-based violence.

The Scale measures risk of reoffense through several sections ("Seriousness of the offense," "Offense history," "Characteristics of offender," and "Community support"), each of which is broken down into several individual items for even more precise scoring.<sup>22</sup>

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22. The sections are weighted differently to reflect the Legislature's guiding concern about specific kind of criminals—repeat sex offenders who commit physically violent assaults against minor children.

In the "Seriousness of the offense" section, offenders are scored first on the degree of force, based on the presence and type of physical violence used during the commission of the offense. This item measures "the seriousness of the potential harm to the community if reoffense occurs" (New Jersey 1998, 6). The *low risk* examples of the degree of force item—for which an offender scores zero out of a possible three points—are "intra- or extrafamilial child sexual abuse in which the offender obtains or attempts to obtain sexual gratification through use of candy, pets, or other nonviolent methods; offender exposes self to child; offender fondles adult victim without use of force." A *high risk* offender "causes lasting or substantial physical damage to victim, or . . . uses or is armed with a weapon" (New Jersey 1998, 6).<sup>23</sup>

The careful grading of these items would likely comfort those critics who allege that Megan's Law aggrandizes and conflates all acts of sexual misconduct, no matter how minimal. Jenkins (1998), for example, claims that while the "discovery" of child sexual abuse in the 1970s "cannot be described as a groundless panic," "these claims were embellished . . . [by] assimilating all minor forms of deviancy with the most threatening acts of sexual predation" (119). These assumptions, Jenkins continues, create an overly broad definition that includes nonviolent, even harmless, sexual misfits. "In recent years, American policymakers and media have seen such crimes as developing inexorably from lesser sexual offenses, and association with so menacing a figure gives rhetorical urgency to the demand that these activities be curbed" (9). Legal attention to these nonviolent offenders increases reports of sex crimes, fueling the perception that ever-stronger laws are required.

The Scale's attention to force and contact seems to reflect a serious commitment to separate dangerous offenders and serious offenses from the "lesser" ones Jenkins mentions. Emphasizing the physical violence of assaults also seems to reflect feminist arguments that "rape is violence, not sex." If rape is primarily about violence, then measuring violence is a good way to measure the harm of rape.

But the Scale defines many forms of sexually violent behavior as resulting in little harm to the individual or community should they reoccur. Without evidence of externally visible physical force, it is apparently difficult for the designers of the Scale to perceive sexually violent behavior, no matter what the degree of contact. The problem with rape is presumed to be with the force used, not with the victim's loss of autonomy or lack of consent.

Thus "seducing" a child, fondling an adult, and exhibitionism are *all* scored as zero on the degree of force, because the law sees none of them as employing externally visible levels of coercion or violence. The Scale only

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23. The Manual also provides examples of moderate and high-risk examples. *Moderate risk* examples are, "offender threatens physical harm or offender applies physical force that coerces but does no physical harm, for example, by holding the victim down; the offender uses verbal coercion against a child victim, for example, by telling a child victim that he will get 'in trouble' or 'won't be loved' if he tells anyone of the abuse" (New Jersey 1998, 6).



sees serious harm in rape when it looks like physically violent intercourse. Indeed, the Scale does not define unwanted sexual contact as necessarily involving any force—the paradoxical idea of a “non-violent rape” becomes not only plausible, but commonplace.

The degree of contact item describes the amount of sexual contact; the item is scored based on the extent to which the assault looks like intercourse. Thus “fondling over clothes” or “exhibitionism” is scored as zero, while the highest score of three is reserved for “penetrat[ion] [of an] orifice with object, tongue, finger, or penis” (New Jersey 1998, 6).<sup>24</sup>

The scoring of the degree of contact item apparently mirrors feminist reforms that created a “step” approach to sexual assault that broke sexual assault into crimes of varying degrees (Marsh, et al. 1982; Spohn and Horney 1992). In contrast, Megan’s Law rhetorically separates out some crimes as creating “no risk” to the community. The score of zero given to low-risk behaviors is different in form and substance from feminist reforms that actually attempted to *increase* prosecution of these crimes by bringing them within the scope of the criminal law, and by creating reasonable definitions and penalties that law enforcement personnel could accept. Megan’s Law, to the contrary, minimizes assaults that do not look like intercourse and ignores violence that does not leave bruises.

The third item in the “Seriousness of the offense” section is the age of the victim; it too presents a conflict for the “rationally derived” Scale. The Scale was designed to reflect the legislative concern about sexual offenses committed against children, reflecting Jenkins’ (1998) assertion that in the 1970s, a consensus emerged that child molesters were “extremely persistent in their deviant careers, . . . [and] were virtually unstoppable, either by repeated incarceration or by prolonged programs of treatment or therapy, because their acts arose not from any temporary or reversible weakness of character but from a deep-rooted sickness or moral taint” (189).

The legislative determination included the finding that sex offenses against children are quantitatively and qualitatively different than those committed against adults.<sup>25</sup> However, there is deep and genuine disagreement

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24. According to the Manual, “[i]f one is dealing with a compulsive exhibitionist, although there may be a high likelihood of recidivism, the offense itself is considered a nuisance offense. Hence, the offender’s risk to the community would be judged low, consistent with the low legal penalties associated with such offenses. Conversely, with a violent offender who has a history of substantial victim harm, even a relatively low likelihood of recidivism may result in a moderate or high potential risk to the community given the seriousness of a reoffense” (New Jersey 1998, 2).

25. The Legislature also went on to find that there were even differences between (assumed male) heterosexual and (assumed male) homosexual pedophiles.

Studies describing recidivism by sex offenders indicate the severity of the problem the Legislature addressed in Megan’s Law. Studies report that rapists recidivate at a rate of 7 to 35 percent; offenders who molest young girls, at a rate of 10 to 29 percent, and offenders who molest young boys, at a rate of 13 to 40 percent (Doe 1995, 20).

in the sex offender research community about the causes of sexually abusive behavior toward children and the prospects for rehabilitation of adults who sexually abuse children. Despite this lack of consensus, the Guidelines committee dutifully fulfilled its assigned task and asserted that individuals who act out sexually with children present the greatest risk to the community.

Just as physical violence is required to make sexual contact into a serious harm, so too must offenders fit the image of a sexual predator to be seen as posing risk. Offenders whose victims are household or family members are deemed low risk, scoring a zero on the "Victim selection" criteria, while strangers are found to present the greatest threat. According to the Manual, "[v]ictim selection is related to likelihood of reoffense (with intrafamilial offenders having the lowest baserate of reoffense) as well as risk to the community at large" (New Jersey 1998, 6). The Manual does not cite its sources for conclusions about reoffense rates, much less qualify its statements by acknowledging that the low reoffense rate among incest offenders might be due to other factors, such as pressure on victims not to report, and the unwillingness of law enforcement to pursue familial abuse charges aggressively. Studies have shown that the closer the relationship between victim and offender, the less likely the act will be reported to police (Rennison 2002, 3), and the less likely it is to be successfully prosecuted through the criminal justice system (Clay-Warner and Burt 2005; Simon 1996).

Rather than targeting pedophiles the Scale appears to minimize the harm of a significant form of child sexual abuse. This approach fundamentally misunderstands the character of incest as a less serious, even benign form of assault that is fundamentally different than all other forms of child molestation. The Guidelines dwell at length on the harms done by strangers, though they rarely acknowledge that the types of assaults most feared by the public—the physically violent penetrative rape of a child by a stranger—are a tiny fraction of assaults. Incest offenses, in comparison, constitute approximately 46 percent of *convictions* for sexual assaults committed against children (Langan and Harlow 1994),<sup>26</sup> often occur over several years, and are committed against a victim who is usually dependent on the abuser for the most basic life necessities. Preventative policies that truly sought to protect the greatest number of children from the greatest source of harm would instead prioritize intrafamilial abuse, not predation by strangers. But the initial assumption that risk and harm flow from strangers, and violence minimizes attention to abuses committed by friends and family, which are often carried out with bribes, threats, or verbal coercion that the Scale defines as low risk and low harm.

Because Megan's Law places such importance on the relationship between victim and offender, the assessment process winnows out not only

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26. According to the same report, another 50 percent of convictions were obtained for offenses against children under twelve committed by friends and acquaintances; only 4 percent of convictions were against stranger assailants (Langan and Harlow 1994).

offenses that lack actual physical contact, but also those that involve acts of penetrative sexual intercourse. This casts doubt on Jenkins' premise that the laws target ever less-dangerous offenders and treat all cases of child sexual abuse with the utmost seriousness. Indeed, the Guidelines suggest quite the opposite—that the Scale deliberately minimizes the risk and harm of sexual acts that, if they were committed by a stranger instead of a family member, would likely be viewed much more seriously. This suggests that rather than developing a model that accurately reflected research on the prevalence and forms of sexual assault, the committee developed a way to identify sexual predators to fit the predetermined, highly contested notion that stranger offenders pose the most serious risk to the community.

Perhaps the Scale was intended to do this. Maybe, observers could argue, stranger offenders commit more violent acts and against more children. This conclusion is not supported by empirical research on sex offenders. Incest may well include physical violence; about 25 percent of parent-child sexual assault resulted in what the government defines as a “major injury”—“severe lacerations, fractures, internal injuries, or unconsciousness” (Greenfeld 1997, 12). Sexual murders are also more than three times as likely to be committed by someone known to the victim (a family member, intimate, or acquaintance) than by a stranger (38). The stated rationale of Megan's Law is to provide “the descriptions and whereabouts of sex offenders and pedophiles” (New Jersey 2000, 1), not to provide information about only those sex offenders or pedophiles who use a gun instead of a puppy to coerce a child to perform sexual acts. Exempting nonstranger assailants would eliminate over 85 percent of all convicted sex offenders from Megan's Law. The point is not therefore to expand Megan's Law to cover more cases of abuse, but that manipulating perceptions of serious sex offenses revives stereotypes about sexual violence that feminists tried to challenge in earlier reforms.

The “Offense history” and “Characteristics of offender” sections of the Scale draw on decades of psychological research on rapists to present a picture of sexual violence as motivated by or at least closely associated with mental health problems or social abnormalities. The Manual states that an offender's

[h]istory of antisocial acts is a good predictor of future antisocial acts, sexual and otherwise. The more extensive the antisocial history, the worse the prognosis for the offender. Antisocial acts include crimes against persons, crimes against property, and status offenses (for juveniles). . . . Available documentation which can be considered may include evidence of truancy, behavioral problems in school or in a work situation, school suspensions, work suspensions, prior diagnoses of conduct disorder or oppositional defiant. (New Jersey 1998, 8)

Documentation of these behaviors and characteristics—nonconviction offenses, history of antisocial acts, residential support, and employment or educational stability (items in the “Offense history” and “Community support”

sections of the Scale)—are used to determine an offender's likelihood of successful reintegration into the community.

This approach is a troubling return to the idea of the "crazed rapist" (Wells and Motley 2001) that dominated the criminal response to rape until feminist reforms. Feminist theorists pointed out that assuming that rapists are mentally defective or deficient obscures the high number of sexual assaults and absolves rapists of political and legal responsibility for their actions (Brownmiller 1975; Griffin 1977; Largen 1976). In their thorough review of the literature, Allison and Wrightsman (1993) found few studies that demonstrated significant differences between most sex offenders and "normal" male control groups.

The return of the crazed rapist—illustrated in the Scale—demonstrates the powerful pull of individualized, psychological explanations against feminist arguments about rape as a tool of social control. The focus on mental pathology also reinforces the political and legal resistance to feminist interpretations of sexual violence by family and friends that threaten to destabilize the public/private dichotomy.

Though many left-progressive authors argue that Megan's Law displaces psychological expertise (Cole 2000; Jenkins 1998; Pratt 2000; Simon 1998, 2000), this is clearly not the case. Somewhat surprisingly, both Simon (1998, 458) and Pratt (2000, 143) advocate responses to sex offenders that are dependent on clinical evaluations and definitions of mental illness. None of these left-progressive scholars confronts the idea that therapeutic intervention in a prison setting relies on a set of uniquely coercive conditions. This point, seemingly too obvious to state, is nevertheless completely ignored by scholars who enthusiastically advocate prison-based therapeutic intervention with sex offenders, and indeed, indict the laws for their supposed "neglect" of offenders' psychological health. The reliance on the liberal, rehabilitative ideal of therapy for rapists erases and disguises the continuing role that mental health professionals have played in helping to create and sustain sexual predator laws, though this is discussed extensively in Jenkins (1998) and elsewhere (Denno 1998; Freedman 1984).

The Scale demonstrates conflicts about the role of psychology. The legislature defines sexual violence as the product of mental abnormality resistant to treatment.<sup>27</sup> This approach is not supported by the findings of mental

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27. In 1998 the Legislature revised its findings and determinations regarding sexually violent predators to define more clearly the relationship between mental illness and sex offenses:

Certain individuals who commit sex offenses suffer from mental abnormalities or personality disorders which make them likely to engage in repeat acts of predatory sexual violence if not treated for their mental conditions. . . . "Mental illness" is a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, capacity to control behavior or capacity to recognize reality, which causes the person to be dangerous to self, others or property. The nature of the mental condition from which a sexually violent predator may suffer may not always lend itself to characterization under the existing statutory standard, although civil commitment may nonetheless be warranted due to the danger the person may pose to others as a result of the mental condition (NJSA 30:4–27.25).

health research, and in fact could threaten the legitimacy of the psychological profession to diagnose, assess, and treat sex offenders. The Scale thus has to balance two competing interests: the legislative finding that sex offenders are unresponsive to treatment, and its preexisting commitments<sup>28</sup> to the legitimacy of the psychological response to rape. If sex offenders really were the untreatable, uncontrollable monsters Megan's Law proposes, then the law is completely inadequate and mass, lifetime imprisonment is the only solution. The law and its supporters obviously do not take that approach. Psychological intervention justifies the lines drawn between types of offenders, even though the results are incoherent or inconsistent if the priority is protecting the greatest number of potential victims from the most likely sources of harm.

Megan's Law tightly integrates the psychological approach to rape with law enforcement norms and practices, legitimating therapeutic intervention by incorporating it into the coercive apparatus of the state. Psychologists use information gained in treatment of sex offenders to justify and extend the mechanisms of social control created by Megan's Law.

Offenders are scored on several key items relating to their mental health. At the same time, studies conducted on the tiny fraction of incarcerated sex offenders reinforce the supposed link between antisocial traits and sexual violence. In each case, the state extends its power over convicted sex offenders: it requires them to engage in therapy and then punishes them for being honest.

Some convicted sex offenders are genuinely interested in changing their behavior; if they are lucky, they are sent to the Adult Diagnostic and Treatment Center (known as Avenel) in Woodbridge, New Jersey. If they engage in an honest and open assessment of their behavior, they may well disclose behaviors, assaults, and victims in addition to those for which they were convicted. Under the Scale, however, these disclosures will increase the offender's score on at least four important items, which could result in a higher Tier assignment and wider range of community notification.<sup>29</sup> The Scale relies on, and the courts have consistently upheld, the use of non-conviction offenses in computing the registrant's score (*In re C.A.* 1995; *In re G.B.* 1996). Offenders thus have a profound disincentive to openly discuss any history of offenses other than their conviction. The failure of psychological treatment of rapists is almost assured by the additional scoring penalties Megan's Law imposes for taking it seriously.

The Manual does not acknowledge this poses a catch-22 for offenders. Officials value treatment and therefore reward offenders who comply with

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28. I would include among these financial (the investment in an extensive range of research, diagnosis, and treatment services for offenders), liberal (the almost-moribund belief in individual rehabilitation), and patriarchal (to a depoliticized, individualized understanding of sexual violence) commitments.

29. The items that would likely change after additional disclosures include victim selection, number of offenses or victims, duration of offensive behavior, and length of time since last offense.

designated protocols by assigning fewer points on the Scale for the "response to treatment" item, but this does not make up for the increased score that would accompany additional disclosures of suspect acts. Here the legislative interest in identifying and incapacitating sexual predators conflicts with the psychological response to rape premised on the medical model of individual rehabilitation.

Therapy is not the only source of information about offenders. The Scale incorporates reports from the criminal justice system and other human services agencies in its assessment of perpetrator risk. This is in stark contrast with the aims of feminist law reformers, who recognized and tried to mitigate systemic race and class bias in the criminal justice system (Bevacqua 2000; Matthews 1994). The risk assessment required by Megan's Law prescribes and scientifically validates close legal scrutiny to the entire lifespan of sex offenders. In doing so, advocates of the law tie the sexual predator label to race- and class-inflected mechanisms of social control. The Scale uncritically relies on this information but does not acknowledge the socioeconomic differences that will likely emerge.

The courts have refused to address this potentially discriminatory impact. In one challenge to the validity of the Scale, the New Jersey Supreme Court wrote that "[r]isk assessment experts generally agree that the best predictor of a registrant's future criminal sexual behavior is his or her prior criminal record. We emphasize that the focus on prior offenses is not due to any attempt at punishment but is rather a scientific attempt to better protect the public safety from registrants likely to re-offend" (*In re C.A.* 1995, 1169–70).

The emphasis placed on documentation of nonconviction offenses, history of antisocial acts, residential support, and employment or educational stability (items in the "Offense history" and "Community support" sections of the Scale) means that offenders who have less social or economic privilege to insulate themselves from contact with the police or other social services will almost certainly be rated a more serious threat than offenders without such a background. Offenders from vulnerable or marginalized groups are more likely to have trivial acts recorded and examined by the observational machinery of the state. The scoring system also penalizes those who may simply be poor—lack of stable employment and housing also counts against an offender.<sup>30</sup>

## B. Controlling Sexual Predators: Community Notification

This case study does not bear out the oft-repeated charge that Megan's Law is "hyper-punitive," constituting a new form and scope of punishment

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30. This is a particularly cruel irony for offenders subject to Tier Two and Three community notification, as the publicity that attends notification makes the process of finding stable employment and housing even more difficult for released offenders (Zevitz and Farkas 2000).

(Kennedy 2000, 830; Pratt 2000, 136). There are three ways that the rhetoric of community notification diverges sharply from legal practices: limits on the number of offenders eligible for notification, the development of standard notification exemptions, and procedures that limit even Tier Two and Three community notifications.

Civil libertarians allege that the dissemination of information about sex offenders will encourage vigilante violence and reprisals against identified offenders. In fact, there have been documented cases of threats and violence against sex offenders in several states including New Jersey, where the first round of community notification in 1995 led to the assault of two men, one of whom was mistakenly thought to be a sex offender (Nordheimer 1995). Based on the information available, these types of violence appear to be relatively infrequent (Matson and Lieb 1996) but serious and worth further study (Freeman-Longo 2002). The rarity of vigilantism may be due to the fact that notification does not work at all like critics or proponents claim. In New Jersey, the Guidelines limit community notification in ways that largely neutralize the stated goals of Megan's Law.

According to the last official numbers released by the State of New Jersey there are 8,780 convicted sex offenders eligible for registration under Megan's Law (New Jersey 2002). Many of these offenders are not subject to community notification because they are designated as Tier One offenders (2,829 individuals; 32 percent). There are an additional 2,075 offenders (24 percent) whose Tier classification has not yet been finalized. That means 46 percent—less than half of all offenders—were *potentially* eligible for community notification at the time the report was published in 2002. Tier Three status, which results in the notification is most commonly understood as Megan's Law, has been assigned to only 362 individuals in the state of New Jersey.<sup>31</sup> Only 6 percent of *eligible* sex offenders are subject to the highest form of community notification; this is 2 percent of *all* registered sex offenders.<sup>32</sup>

As far as the public is concerned, offenders who are not subject to community notification might as well not exist. Indeed, law enforcement officials in New Jersey have been notified of the presence of released sex

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31. I think that drawing conclusions about the demographic and offense characteristics of this initial group of offenders may be premature. The first offenders tiered under law, whose convictions and/or determinations as "repetitive and compulsive" predated Megan's Law, may provide an interesting comparison to offenders whose convictions took place *after* Megan's Law went into effect. My impression is that this initial group of offenders assigned to Tier Three status looks more like a typical pool of serious sex offenders—including a mix of assaults against acquaintances, family members committed by nonstereotypical offenders—that may change after Megan's Law went into effect in the mid-1990s. I suspect that Tier Three offenders will increasingly fit the "model" sexual predator assumed by Megan's Law: a mentally ill and/or previously convicted stranger who commits a violent assault against a child unrelated to him. This is an area of future research.

32. Special thanks to David DiSabatino, who provided assistance in wading through the state data to extract and make sense of these numbers.

offenders since about the 1940s; local police in Hamilton Township knew of Jesse Timmendequas's history, and it was precisely because of this information that they identified him so quickly as a suspect. But without wider community notification, the neighbors apparently had no information about his offenses.<sup>33</sup> Despite sweeping claims by supporters and opponents that Megan's Law exposes all sex offenders as predators, a Tier One designation or a Tier Two or Three exemption means that offenders continue to be invisible in their communities.

The significant limitations on notification call into question Simon's (1998) sweeping indictment of "the new penology," with its incitement of "populist punitiveness" which draws the community into the "surveillance and treatment of the offender" (460–62). With the vast majority of offenders invisible to the general public, there are few opportunities for communities to participate in surveillance, scrutiny, or punishment. This is not to deny that it ever happens, but rather that those opportunities are much more tightly circumscribed than legal theorists imagine.

Instead, what emerges as the priority of community notification is the production of new bureaucratic and administrative controls over sex offender information. This contradicts arguments that the law "eliminates the role of the state agent, and with it, the implication of state responsibility coupled with expertise" (Simon 1998, 460–62), or that notification constitutes "a new involvement by the public in the process of punishment," where "bureaucrats and penal professionals have been shifted to more of a fringe role in penal administration" (Pratt 2000, 143). Implementation demonstrates that criminal justice personnel have not lowered or eliminated the separation between the state and the community, but rather that they have erected an entirely new set of administrative structures to manage, manipulate, and control images and perceptions of sexual violence in the guise of community protection.

The "incest exemption," which has been articulated in several court decisions, demonstrates that notification is designed to exclude large numbers of offenders, even those who commit rapes involving significant sexual contact. In the case *In re G.B.* (1996), the New Jersey Supreme Court ruled that a convicted sex offender whose Scale score placed him in Tier Two, and thus subject to limited community notification, could introduce expert testimony that might lower his Scale score.<sup>34</sup> The justices also held that the trial judge making the final Tier classification could reduce the offender's

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33. Interestingly, Timmendequas shared a house with two other men who were also convicted sex offenders. One of those men was known to many neighbors in the community as having committed a sexual assault against a young child; when Kanka disappeared suspicious neighbors apparently confirmed police suspicions that one of the men was involved (O'Brien 1996).

34. G.B. was indicted for aggravated sexual assault, sexual assault, endangering the welfare of a child, and child abuse for a variety of acts, including oral sex and intercourse, against a female cousin beginning when she was five and lasting for seven years. The charges were reduced to one count of second-degree sexual assault in exchange for a guilty plea, and he was sentenced to five years at Avenel (of which he appears to have served about three years), (*In re G.B.* 1996).



score and/or tailor community notification in cases that fell outside of the "heartland" of community notification. In this case, the trial judge was instructed to consider expert testimony that because his offenses were against a child in his family, the Scale score for G.B. was inappropriately high:

We believe that few cases will involve facts that render the Scale score suspect. . . . Only in the unusual case where relevant, material, and reliable facts exist for which the Scale does not account, or does not adequately account, should the Scale score be questioned. Those facts must be sufficiently unusual to establish that a particular registrant's case falls outside the "heartland" of cases. We cannot define what those facts might be, but we can provide some examples. Here, G.B.'s offense occurred in the family home. The Scale calculations did not take this circumstance into account when computing his risk of reoffense. Registrant contends, with some support, that sexual offenders who commit their offenses within the family home pose less risk to the community than do other sexual offenders. . . . Of course, we express no opinion here about the validity of that proposition. Rather, we note that arguments based on such evidence, if found persuasive by a court, may support a claim that the Scale calculations, although accurately performed, do not accurately establish the risk of reoffense for a particular registrant. In such circumstances, a Scale score may be 'overridden.' (*In re G.B.* 1996, 30–31, citations omitted)

The decision in *G.B.* was followed by another that extended the incest exemption. The Superior Court of New Jersey applied the standard articulated in *G.B.* to *In re R.F.* (1998), a Tier Two notification appeal.<sup>35</sup> In excluding schools from receiving notification of R.F.'s presence in the community, the appellate court found

nothing in the registrant's history and personal circumstances that rises to the level of clear and convincing evidence that he threatens the children attending the listed schools. His two previous sex offenses . . . while abhorrent, were committed upon two helpless children who in one way or another were placed in his care, were members of the same household as he and to whom he had easy and convenient access. His acts arose from a trusting relationship between him and his victims. They were not "predatory" in the sense of the Guidelines that he placed himself in a household which included these children in order to offend against them.

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35. R.F. is described in the decision as a neurologically impaired adult man with a history of sexual behavior toward minors. At fourteen he was found fondling the genitals of his three-year-old female cousin. In 1992 he was convicted for an assault on the ten-year-old son of his girlfriend that included "acts of fellatio and sodomy." (Interestingly, the court cites the completed Registrant Risk Assessment Scale, rather than original court documents, to find that the attack was carried out by "threats and minor physical force.") He was sentenced to eight years' imprisonment and appears to have served about five years (*In re R.F.* 1998, 3).

Nothing in the evidence suggests that he is given to prowling schoolyards or other areas serving children. (*In re R.F.* 1998, 15–16)

In both cases, the New Jersey courts assume that familial assaults are rare, “unusual,” and pose less harm to victims and lower risk to the community. On the basis of the victim-offender relationship judges may shield offenders by reducing their Tier classification or limiting community notification of their offenses. Under New Jersey law, the most typical kinds of sex offenders—those who abuse children in their care—will not typically be subjected to the kinds of community notification feared by critics. Separating incest offenses from other sex crimes is premised on the unproven assumption that sex offenders who abuse children in their nuclear family *only ever* abuse children in their nuclear family, and that other children and adults in the family are always aware of an individual's history. The view of incest as a crime rarely committed and seldom repeated means that in many jurisdictions, acquaintances and intimates are, by definition, incapable of being “predators” for the purposes of registration and notification.<sup>36</sup> Offenders exempted from Megan's Law, such as G.B. or R.F., above, therefore may continue to have access to children precisely because they are part of the community as scout leaders, softball coaches, choir directors, babysitters, teachers, and new household members. The false sense of security—that all the “dangerous offenders” are known to the community—whence the laws engender, may well be one of their most pernicious effects.

Notification does not work as expected in even those cases theoretically subject to public exposure. As practiced in New Jersey, notification is a Byzantine process that rarely provides specific information about offenders to the public. As described above, Tier One offenders are not subject to any public identification as sex offenders. In typical Tier Two notifications, identifying information is provided to school principals, community groups serving women and children, and law enforcement. School principals and community group staff are required to go through an elaborately detailed process for receiving notices and are strictly warned not to distribute the information to inappropriate groups, such as parents or parent-teacher organizations, groups using school facilities, students, or program participants (New Jersey 2000, 31–37). Community members may receive a notice that often simply states that a convicted sex offender lives in the neighborhood but provides no specific information. For higher risk Tier Two offenders, information may include a photograph and description, but does not include a home address.

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36. Many state registration and notification laws, including New Jersey, contain language that explicitly exclude family members and friends from being legally designated as sexual predators. The federal statute mandating registration of sexually violent predators defines “the term ‘predatory’” as “an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization” (The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071(a)(3)(E) (2001)).

Classification as a Tier Three offender results in greater exposure. In addition to police, school, and community groups, individual citizens living in the specified area receive a hand-delivered notice with a photograph, description, and vehicle information. These notices may include the offender's home address and place of employment.

Limitations on community notification might well seem obsolete in light of the state's Internet registry.<sup>37</sup> The New Jersey Sex Offender Database, which went live in March 2002, provides a searchable database of offenders by county, township, zip code, name, or vehicle ([www.nj.gov/njsp/info/reg\\_sexoffend.html](http://www.nj.gov/njsp/info/reg_sexoffend.html)). Internet sex offender databases present the closest approximation to the type of community notification strongly criticized by opponents of the law.<sup>38</sup> Under the referendum approved by New Jersey voters, all Tier Two and Three offenders are eligible for inclusion in the database.<sup>39</sup> Information about sex offenders available on the New Jersey Web site includes a photograph, physical description, Tier assignment, aliases, a brief summary of offense and conviction information, "modus operandi/significant event details" (including the victim's age and sex),<sup>40</sup> and vehicle information.<sup>41</sup>

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37. Court rulings limiting the scope of community notification were partially overridden by a constitutional amendment passed by voters in the state in 2000. That amendment permitted implementation of an Internet Web site to disseminate information about offenders designated as Tier Two or Three (NJSA 2C:7-12).

38. Online databases listing sex offenders are clearly an important and growing component of the state procedures for managing sex offenders. By 2001, twenty-nine states and Washington, D.C. had publicly accessible sex offender databases; six more states were developing or planning to develop an Internet database for community use (Adams 2002).

39. According to the Web site, the online registry "includes information pertaining to sex offenders determined to pose a relatively high risk of re-offense (Tier 3 offenders) and, with certain exceptions, information about sex offenders found to pose a moderate risk of re-offense (Tier 2 offenders). The Internet registry excludes any information about offenders determined to present a low risk of re-offense (Tier 1 offenders)" (New Jersey Sex Offender Internet Registry). The Web site does not specify which offenders are covered by this blanket exemption; they include juvenile offenders, incest offenders, and some cases of "consensual sex," such as statutory rape (NJSA 2C:7-12).

40. The offense and conviction history indicates the age category (e.g., "under 13," "adult") and sex of the victim. The *modus operandi* gives additional information about the crimes. Sample descriptions from the New Jersey database for Bergen County include the following offenses: "unlawfully entered victims [sic] home and assaulted her"; "subject assaulted female stranger"; "gains access to juvenile victims through family members"; "offender picked up a hitchhiker, took her into a wooded area and assaulted her"; "forcibly assaulted a female at gunpoint"; "offender broke into to home and assaulted victim. Victim was an acquaintance of offender"; and "gains access to juvenile victims while visiting a park."

41. The Web site also provides links to information on topics such as sexual assault education and prevention, "how can citizens help support the management of sex offenders in communities?", personal safety tips for children, and myths and facts about sexual assault. Not surprisingly, most of the information reinforces the "stranger danger" approach to sexual violence. It overwhelmingly presents child sexual abuse as a problem committed by strangers, does not address sexual abuse of adults at all (though offenses against adults are part of the database), and presents state-approved treatment and rehabilitation as a viable option for reducing sexually violent behavior. Though the information is distinctly one-sided, the Internet site has more educational potential than notification conducted by the police or mailed to citizens' homes.

In the New Jersey experience the Web site provides another opportunity to limit the number and types of sex offenders exposed. Individuals convicted of incest are excluded from the state's online sex offender database. This exemption was supported by and indeed sought by members of the New Jersey Coalition Against Sexual Assault, who were concerned about protecting confidentiality of victims. Here the state's interest in masking the prevalence of incest coincided with rape care advocates' interests in victim confidentiality. Where earlier rape reform activists saw the prosecution of incest as contributing to social change by making visible its prevalence, contemporary state law enforcement officials used the trope of visibility as a threat against victims, thus persuading advocates that masking incest was a better strategy than publicizing it.

As a result of offender appeals and exemptions, by January 2004 only 18 percent of *eligible* Tier Two and Three offenders were included in the database—just 6 percent of *all* registered sex offenders. This is a far cry from the assumption that all offenders are subject to notification, or from Simon's (1998) assertion that sexual predator laws employs a "waste management" approach that demonizes sex offenders and treats them as an undifferentiated group of monsters (456). Again, supporters of Megan's Law consolidate support for the laws through the illusion of providing complete, transparent information to the community; again, left-progressive scholars appear to uncritically accept the criminal justice system's description of Megan's Law.

### C. Contrasting Narratives and Practices

If laws are a reflection of what society sees and fears, Megan's Law presents a particularly narrow vision of the risks and harms presented by sexual violence. If Megan's Law is supposed to protect society from "the worst of the worst" sex offenders, the worst is clearly a violent assault committed by a stranger. Though the randomness and suddenness of stranger assaults have their own devastating impact, supporters of the law fail to recognize that these are precisely the incidents where the legal system is already most likely to investigate, prosecute, and sentence offenders. The repeated emphasis on protecting society from "violent pedophiles" diminishes the perceived seriousness of other types of sexual abuse and reinforces beliefs that strangers inherently always pose the greatest threat to communities. Left-progressive assessments of the law point to some of these problems, but a critical feminist perspective expands the scope of inquiry to issues that have been unexamined so far.

Both legal scholars and policymakers start from the premise that since the passage of feminist rape law reforms, the criminal justice system treats all cases of sexual violence equally and fairly. Central to Jenkins' (1998) argument is the argument that "[b]ecause child murder and forcible rape are

already treated with the utmost gravity, claims-makers . . . turn their attention to behaviors that, while not obviously harmful in themselves, are cited as precursors of violence" (9). A critical feminist perspective, in contrast, starts with the well-documented finding that most police and prosecutors never fully implemented feminist-inspired reforms and continue to resist them even to this day (Clay-Warner and Burt 2005; Frohmann 1991; Spohn and Horney 1992). Interviews with New Jersey advocates indicate ongoing problems with police and prosecutorial treatment of rape victims; investigations of police practices in cities like Philadelphia illustrate that systemic problems persist in the law enforcement response to rape.<sup>42</sup>

The quick-fix approach of Megan's Law relieves lawmakers from having to look closely at the continuing failure of the criminal justice system to handle sexual assault complaints. Registration and notification statutes permit legislators to claim they are tough on crime without remedying systemic problems of inadequate training for police and judges (especially in cases involving children), law enforcement insensitivity to victims, abysmal levels of support for victim advocacy groups, and lack of treatment options for offenders who seek to change their behavior.<sup>43</sup>

Nevertheless, the perceived success of feminist rape law reform provides the justifications for both critics and proponents of Megan's Law. The left-progressive critics I have discussed here see the success of feminist reforms as evidence that Megan's Law is *not* needed—that sufficient measures are in place to handle complaints of sexual violence, and that Megan's Law unfairly targets marginal and despised individuals whose acts are deviant rather than dangerous. Supporters of Megan's Law assume that even despite reforms, dangerous predators walk the streets. In this case, the perceived success of the laws indicate that they do not go far enough, thus *necessitating* extraordinary measures like registration and notification. Neither group reflects on the possibility that the continued high rates of sexual violence and the presence of repeat, dangerous offenders might have to do with systemic resistance to feminist law reforms.

The substance of feminist antirape reforms and principles is clearly under attack in Megan's Law. I think that one measure of these feminist successes, limited as they may have been in changing law enforcement behavior, is

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42. From 1981 to 2000, the Philadelphia Police Department Sex Crimes Unit dismissed one-third of victim complaints without investigation, mislabeled one-fourth of victim complaints to lower crime statistics, and solved fewer sex crimes cases than almost any major police department in the country. Criticism of these failures led to significant changes at the unit and reopening of almost 2,000 rape cases it had previously ignored (McCoy 2003b). One long-time Sex Crimes Unit investigator jokingly referred to his assignment as the "Lying Bitches Unit" (McCoy 2003a).

43. My earlier criticisms of offender treatment options do not mean that I always reject therapeutic intervention for all offenders, but that I am very cautious about treatment being linked to punishments or rewards as it is in Megan's Law.

the thoroughness and specificity of the attacks on the feminist concept of rape by supporters of registration and notification laws. The image of sexual predators derived from examination of legal practices is considerably more complex than that depicted by scholars. Megan's Law turns out not to be the all-encompassing, over-broad category critics allege, but rather reflects a particular set of political beliefs about rape that does draw distinctions among sex offenders.

Definitions of sexual predators and sexual violence are manipulated, but rarely in ways predicted by progressives. Rather than expanding the legal definitions to catch more offenders, Megan's Law dismisses as unimportant issues feminists fought to bring to public and legal attention, especially assaults committed by family members and acquaintances. Manipulation of these definitions is often in the interests of protecting privileged defendants rather than exposing more sex offenders to public scrutiny.

In contrast to earlier sexual psychopath laws, which cast a very broad but shallow net that primarily targeted non-violent offenders (such as consenting adult homosexuals), Megan's Law is structured and administered to exclude a vast number of assaults and offenders, even when they involve serious crimes. Against Jenkins' assertion that sexual predator laws create hysteria and panic over ever-less serious offenses, Megan's Law in New Jersey provides formal and informal ways to minimize feminist claims about the seriousness of the most common and pervasive forms of sexual violence. The legislative rhetoric of universal notification, reinforced by left-progressives who decry that idea, masks the ways the state manipulates information to present an image of sexual violence that is not supported by research or experience. The elaborate provisions, to protect some very serious offenders from the reach of the law, directly contradict Jenkins' assertion that criminal justice institutions take all reports of sexual abuse seriously.

Exceptions for the "harmless" sex offender are an integral part of Megan's Law. These exceptions are not *ad hoc* or arbitrary. The Guidelines are quite specific about who is, and more importantly is *not*, a viable candidate for community notification. These definitions clearly reflect preferences and politics around the definition of sexual violence that feminists should interrogate and contest. The crime control and moral panic perspectives presented by progressives fail to account for the systematic downgrading of familial and acquaintance assaults offenders in Megan's Law. The incest exemption shows that, far from opening up categories and making overly vague generalizations, Megan's Law has a radically *underinclusive* definition of sexual violence when compared to feminist law reforms. In contrast to Jenkins' assertion that ever-less serious crimes are being met with the full punitive power of the state, sexual predator laws set up clear hierarchies of crimes and offenders who pose risk to communities. The state's reliance on psychological expertise begins to explain why only some individuals convicted of sex offenses are sexual predators.

From a critical feminist perspective, the problem with Megan's Law seems not to be treating all sex offenders as a group, but rather the fragmentation, individualization, and depoliticization of sex offenses. Each sex offender is treated as an aberrant individual whose behavior springs from an individual context too complex and multifaceted to support broad generalizations, such as the indictments of race, class, and economic inequalities feminist argued perpetuated subordination and condoned sexual violence as a tool of repression. The predictive model used in Megan's Law suggests that there is a different dynamic than the "group" approach to punishment identified by left-progressive critics. Rather, risk assessment for the purposes of Megan's Law seems to prescribe exhaustive attention to the psychological condition of sex offenders, encompassing not only time spent in correctional facilities but an offender's entire lifespan. This presents a very different challenge than that delineated by Pratt and Simon: the concern is not that psychology has abandoned sex offenders, but rather that it is being deployed in ways that are now justified in going beyond the conviction that brings the offender to attention of the legal system. Left-progressive critics and feminist theorists might find fertile ground here to reflect on how the production of expert knowledge about sex offenders resists and co-opts large-scale, potentially transformative claims about political, social, and economic institutions.

Megan's Law challenges feminist efforts to treat sex offenders equally by reviving tawdry, tired, empirically invalidated stereotypes of marginal "outsiders" preying on "good" communities. The definition of social disorder and the disposition for sex crimes is now extended to a whole range of characteristics and circumstances—not only "oppositional-defiant disorder" but also lack of employment, lateness for school, or homelessness. Omitted from any discussions are feminist arguments linking sexual violence to structural asymmetries in economic, racial, and cultural power. Closer attention to the construction of the totalizing identity of the sexual predator, which is produced through the meticulous surveillance and examination of individual behavior, seems a natural point of connection between feminist and left-progressive studies of sex offenders.

Simon (1998) alleges that the "old penology" was "a vehicle for relatively unbridled visions of state competence," whereas "new penology . . . is shaped by a pervasive skepticism about the power of the state to fundamentally change offenders" (461).

I disagree with Simon: I think that even more than earlier rape reforms, Megan's Law presupposes absolute faith in the capacity of the legal system to accurately recognize, properly prosecute, and correctly calculate punishments and Scale scores for offenders. The assumption underlying rhetoric about the failure of the criminal justice system to deal with sex offenders is the certainty that the state can identify them. And, when sex offenders are defined strictly along lines that the state is willing

to accept, it can in fact do a reasonable job of recognizing what it already knows.<sup>44</sup>

Against the notion of the ever-expanding punitive state, eagerly implementing Megan's Law and voraciously seeking new objects for its punitive schemes, I argue that there are bounds to the kinds of changes legal systems will tolerate and predictable patterns that will emerge from legal institutions. In this final section, I explore how Megan's Law has the potential to shift policy and political discussions of sexual violence.

#### D. The Future of Sex Crimes?

Drawing on the theoretical critiques offered here and anecdotal reports from victim advocates in New Jersey, I suggest some ways that Megan's Law may change the behavior of all the important participants in sex crimes cases: police, prosecutors, juries, defendants, and victims. I have argued that there is a substantial gap between public rhetoric about Megan's Law and the rules that shape its implementation. The law has some very real and serious effects that appear to have already changed the adjudication process for sex offenders. Perceptions that the laws apply to and involve significant public exposure of most sex offenders, though incorrect or incomplete, may also matter greatly if they determine whether cases get into the legal system at all and how they are handled once there.

Unlike many other critics of Megan's Law, I do not assume that the behavior of criminal justice personnel will remain static in the wake of implementation. Inspired by feminist skepticism about the state's interests and willingness to prosecute sexual violence, I think that the adjudication of sex offenses is an important area to watch for unintended consequences of Megan's Law. Though Megan's Law is not punishment *per se*, it is a widely known, highly publicized, substantial collateral penalty of conviction for any sex offense in the state of New Jersey. I think it likely that knowledge and perceptions of Megan's Law will change the behavior of individuals involved with sex crimes cases. Research on law reform demonstrates that legislative change is often opposed by administrators and front-line personnel in the criminal justice system. The wide-ranging discretion of police and prosecutors offers several opportunities to evaluate the impact of the law on case adjudication.

Police in New Jersey apparently resent the extra burdens state-managed notification imposes on them. One rape crisis center director reported on a

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44. I am reminded here of Thomas Kuhn's (1970) discussion of "normal science," and its legitimacy, accuracy, and usefulness in studying problems that fall within the boundaries of accepted knowledge. By excluding from its definition of sexual predators offenders who do not fit its predetermined profile, Megan's Law ignores "anomalies" (e.g., the violent incest offender or repeat acquaintance rapist) that could raise questions about the definition of the sexual predator or the processes of identification.



training conducted by a police officer who criticized Megan's Law for diverting police attention to "unimportant" crimes. In another county where law enforcement had conducted informal notifications about sex offenders long before Megan's Law, the director reported that police disapproved of the rigid guidelines imposed by the Guidelines and preferred to make *ad hoc* judgments based on their own analysis of the danger posed by the offender. Given indications of resentment and disagreement with the laws, it remains to be shown whether police carry out their role in registration and notification laws with both the vigor and the restraint proposed in the law.

The literature on mandatory sentencing programs offers a framework to think about possible effects of Megan's Law on the case adjudication process. Though registration and notification are not part of an offender's sentence, and proponents deny they are punishment in the literal sense, registration and notification requirements share some similarities with mandatory sentencing schemes: they apply to a wide range of offenders; attempt to limit prosecutorial and judicial discretion; and impose penalties that some law enforcement personnel may feel are disproportionate or inappropriate to the crime committed. Studies of mandatory sentencing reforms show that prosecutors and judges routinely evade or circumvent procedures designed to limit discretion and impose legislatively mandated punishments (Nagel and Schulhofer 1992; Parent, Dunworth, and McDonald 1997; Tonry 1996; Zimring, Hawkins, and Kamin 2001). When mandatory sentences are required, studies have found that "[a]rrest rates, indictments, plea bargains, and convictions decline . . . while early dismissals, early diversions, trial rates, and sentencing delays increase" (Parent et al. 1997).

By changing the legal consequences of sex crimes, proponents of Megan's Law have a subtle but powerful opportunity to shape who is prosecuted and imprisoned for these crimes. I suspect that the effects of Megan's Law will mirror those of mandatory sentencing: the unwillingness of police, prosecutors, judges, and juries to expose nonstereotypical sex offenders<sup>45</sup> to registration and notification laws will significantly decrease rates of arrest, prosecution, plea bargaining, and sentencing, especially in cases of incest, spousal assault, and acquaintance rape. These "borderline" cases may be shifted to nonsex crimes charges to avoid the reach of the law. If my suspicions are correct, Megan's Law may become a tautology: all sex offenders will come to be seen as sexual predators, but only those defendants who fit the preconceived profile of a sexual predator will be recognized as sex offenders. This could actually *decrease* the number of individuals convicted of sex crimes.

New Jersey's reliance on local prosecutors to implement Megan's Law may have other important symbolic effects. The Guidelines send the

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45. Including those who are white, middle-class, educated, employed, or have no previous criminal record.

unmistakable message that abuse by family and friends is less harmful and less likely to be repeated than acts by strangers. A prosecutor pressed for time and resources might therefore justify dismissing or pleading down these cases to pursue "real" sexual predators. If fewer of these "unusual" cases are processed, the belief that strangers are the most significant source of risk and harm will be legitimized, and the perception of familial and acquaintance assaults as rare will be validated.

Whether or not prosecutors change their own behavior, it seems apparent that defendants will, thus creating changes in the legal system. Many defendants and law enforcement personnel in New Jersey believe that Megan's Law covers all sex offenders without exception. Victim advocates, who provide court accompaniment for rape victims, talked about how the community and supervision requirements adversely influence prosecutors' ability to negotiate with defendants, and some are deeply concerned about how Megan's Law will affect the ability of the criminal justice system to prosecute sex offenders.

Several rape crisis staff members noted that defendants are unwilling to accept a plea bargain that subjects them to Megan's Law, and thus more rape cases are going to trial. One rape care advocate noted that, "A lot of people don't want to plead charges now, when they find out about Megan's Law. . . . So I think we're gonna see more things going to trial because people don't want to be under Megan's Law." Another director said that such changes were already under way. Megan's Law, she reported, "has forced trials. [Sexual assault cases] take a lot longer. There are more trials because [defendants are] less likely to accept pleas because of the stigma." These observations are supported by reports that lawyers defending individuals charged with sex offenses are encouraging their clients to go to trial instead of plea bargaining in order to avoid postrelease consequences of the law (Kensik 1998).

Victims may also fear the perceived breadth of Megan's Law. Victims do not uniformly support the harshest penalties for offenders; one study has reported that individuals who experienced crime themselves or in their immediate family were actually *less* supportive of punishment and extended sentences than the public as a whole (Peter D. Hart Research Associates 2002, 19–20). Rape care advocates in New Jersey expressed concern that victims who know their offenders may be less likely to report assaults or press charges if they believe that all offenders are subject to lifetime registration and community notification. As one advocate noted, "the majority of the women and men and children who we treat in our program are victims of . . . somebody in the family or someone close to the family. I think there are a million reasons why people don't report anyway and this is one more to add to it." Pressures not to report for fear of triggering notification may be especially intense in cases of incest within intact families, or if there is a repeat incident for a previously convicted individual close to the victim. The impact of sexual predator laws on the attitudes and beliefs of community

members may be an interesting avenue to pursue for researchers seeking to explain a 40-percent drop in cases of child sexual abuse from 1992 to 2000 (Finkelhor and Jones 2004).<sup>46</sup>

These changes suggest that the influence of feminist rape law reforms may well be nullified by the increasing emphasis on crimes, victims, and offenders who fit more easily with stereotypes about rape held by criminal justice gatekeepers. If, and as, anomalous offenders are no longer visible to the public, erased as sexual predators, hard-fought feminist reforms that reflect the complexity of sexual violence may also be smoothed away in favor of easy stereotypes and bright-line distinctions between sex crimes. Feminist thinkers themselves bear some considerable responsibility—not currently a high priority—for assessing whether and how rape law reforms fit with goals of social transformation. The invisibility of feminist advocates during the emergency legislative session after the murder of Megan Kanka points to a need for legal theorists and victim advocates to work together to craft solutions that are sensitive to the needs of victims and the rights of offenders *and* that further feminist goals of ending gendered violence and systemic discrimination.

The left-progressive narratives discussed here are vital and provocative critiques that ask searching questions about the direction of punishment and of social control. Missing from these analyses are the ways in which Megan's Law also functions as a political intervention into, and argument about, how sexual violence is defined and treated within the criminal system. Closer attention to the evolving politics of rape by left-progressives shows that these emerging forms of punishment cannot be separated from other uses of sexual assault as a form of gender-, race-, and class-based social control.

If, as feminists argued, rape is about social control, and that the fear of sexual violence inhibits women's autonomy and equality, then Megan's Law is not only dangerous for the rights of sex offenders. It is also an attack on a broader understanding of how sexual violence limits women's freedom and autonomy. Prioritizing social and legal attention on a small fraction of offenses incites fear and paralysis; encourages community members to ignore other, more pervasive forms of violence; and denies the need for social transformation to end rape and create justice. Megan's Law may well be the harbinger of shifts in sociopolitical arrangements predicted by left-progressive critics, but it is one whose power arises from distinctly gendered and antifeminist roots that should not be ignored by those who care about civil liberties, justice, state power, and social change.

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46. And, interestingly, Finkelhor and Jones (2004) note that the data from at least one state show the largest decline in child sexual abuse cases (a 39 percent drop) comes from families with two parents in the home (4).

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