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THE SEX OFFENDER REGISTRY: IS IT ATTACKING PEOPLE THAT WERE NOT MEANT TO BE A PART OF THE LAW?

I. INTRODUCTION

The recent holding in *Doe v. Attorney General* (“*Doe(1)*”),¹ has left the fate of the Sex Offender Registry Act unknown. In a unanimous decision, the Supreme Judicial Court of Massachusetts held that the law dealing with low-risk offenders was unconstitutional.² This comment will discuss the development of the law and its applicability to low-risk offenders. The recent argument that the sex offender registry act is overinclusive, and therefore unconstitutional to low-risk offenders, has left many wondering about the status of the current law.³

This comment will focus on the Massachusetts Sex Offender Registry Act and how it applies to sex offenders. Section IIA of this comment discusses how Megan’s law, which requires the registration of sex offenders with local authorities, came into existence.⁴ Section IIB of this comment explains the implementation of Megan’s law in Massachusetts and its application to sex offenders.⁵ Section IIC explains how sex offenders’ due process rights are affected by Megan’s law.⁶ Section IID sets forth the relevant Massachusetts case law and statutes that have further defined the sex offender registry.⁷ Section

¹ No. 07481, 1997 WL 70985 (Mass. Nov. 17, 1997).

² *See id.* (holding all low-risk offenders must be granted hearing to argue against inclusion into registry).

³ *See infra* note 106 and accompanying text (indicating recent holding has weakened sex offender registry).

⁴ *See infra* notes 11- 15 and accompanying text (explaining why Megan’s law was initiated).

⁵ *See infra* notes 16- 22 and accompanying text (introducing how Megan’s law applies to sex offenders in Massachusetts).

⁶ *See infra* notes 23- 36 and accompanying text (discussing violation of sex offenders’ constitutional rights).

⁷ *See infra* notes 37- 104 and accompanying text (illustrating shift in existing sex offender registry).

III provides an analysis of current case law.⁸ Finally, in section IV, this comment concludes that recent case law has left the sex offender registry in an unworkable state.⁹ The holding that the sex offender registry was unconstitutional as applied to the lowest level offenders has opened the floodgates for more than thirteen thousand new hearings for level one offenders.¹⁰

II. HISTORY

A. Introduction to Megan's Law

On July 29, 1994, Megan Kanka, a seven year old New Jersey girl, was sexually assaulted and then strangled to death.¹¹ This tragedy received national attention when the public learned the offender, Jesse Timmendequas, was a convicted pedophile.¹² This convicted sex offender had moved directly across the street from the Kanka family without any warning.¹³ The public's fury over this avoidable tragedy led to the implementation of a community notification plan on both a state and federal level.¹⁴ As a result of the federal govern-

⁸ See *infra* notes 105-119 and accompanying text (discussing how current case law affects sex offender registry).

⁹ See *infra* note 106 and accompanying text (concluding sex offender registry needs to be revamped).

¹⁰ See *infra* note 107 and accompanying text (acknowledging loophole in sex offender registry).

¹¹ See James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994 (addressing public's anger over known sex offenders within their communities).

¹² See *id.*, (acknowledging public's outrage when Jesse Timmendequas and two other known sex offenders moved into Hamilton township).

¹³ See *id.* (highlighting facts of the Kanka's tragedy).

¹⁴ See Ivette Mendez, *Sex Offender Bills Enacted by Whitman*, STAR LEDGER, Nov. 1, 1994 (announcing community notification provisions Governor Whitman signed); see also Jacob Wetterling, *Crimes Against Children and Sexually Violent Offender Registration Program Act*, 42 U.S.C. § 14071 (West 1997) (establishing guidelines for persons convicted of sexual offenses).

ment's adoption of a community notification plan, every state has adopted some form of "Megan's Law."¹⁵

¹⁵ See Jacob Wetterling, *Crimes Against Children and Sexually Violent Offender Registration Program Act*, 42 U.S.C. § 14071 (encouraging states to enact sex offender registration and community notification laws in order to maintain the level of federal funding for crime control). Presently, all states have passed some form of child sex offender registration laws: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, West Virginia and Wyoming. ALA. CODE § 13A-11-200 (1996); ALASKA STAT. §§ 11.56.840, 12.63.010 (Michie 1997); ARIZ. REV. STAT. § 13-3821 (1997); ARK. CODE ANN. § 12-12-902 to -906 (1997); CAL. PENAL CODE § 290-290.4 (West 1998); COLO. REV. STAT. ANN. § 18-3-412.5 (WEST 1997); CONN. GEN. STAT. ANN. 54-102a to -102b (West 1996); DEL. CODE ANN. Tit. 11, §4120 (1997); FLA. STAT. ANN. § 775.13- .21 (West 1997); GA. CODE ANN. § 42-1-12 (1998); 1995 Haw. Sess. Laws 160; IDAHO CODE § 18- 8301 to -8311 (1997); 730 ILL. COMP. STAT. ANN. 150/1- 10 (West 1997); IND. CODE ANN. § 5-2-12-4 to -13 (West 1997); 1995 Iowa Legis. Serv. 146 (West); KAN. STAT. ANN. §22-4901 to -4910 (1997); KY. REV. STAT. ANN. § 17.500- .540 (Banks- Baldwin 1997); LA. REV. STAT. ANN. § 540- 549 (West 1997); ME. REV. STAT. ANN. Tit. 34-A, § 11001- 11005 (West 1997); 1995 Md. Laws 142; MASS. GEN. LAWS ch. 6, §§ 178C- 178O (1997); 1994 Mich. Pub. Acts 295; MINN. STAT. ANN. § 243.166 (West 1997); MISS. CODE ANN. § 45-33-1 to -19 (1997); MO. ANN. STAT. § 589.400 (West 1997); MONT. CODE ANN. § 46-23-501 to -507; NEB. REV. STAT. § 29-4001 to -4013; 1997 Nev. Stat. 377; N.H. REV. STAT. ANN. § 651-B; N.J. STAT. ANN. § 2C:7-1 to -11 (West 1997); N.M. STAT. ANN. § 29-11A-1 to -8 (Michie 1997); N.Y. CORRECT. LAW §§ 168-a to 168- t (McKinney 1997); N.C. GEN. STAT. § 14-208.5 to .10 (1997); N.D. CENT. CODE § 12.1-32-15; OHIO REV. CODE ANN. § 2950.01 to -.10 (Baldwin 1997); OKLA. STAT. ANN. tit. 57 §§ 581-587; 1997 Or. Laws 538; 1995 Pa. Laws 24; R.I. GEN. LAWS § 11-37.1-1 to §11-37.1-16; 1998 S.C. Acts 384; S.D. CODIFIED LAWS ANN. § 22-22-30 to -41 (1997); TENN. CODE ANN. § 40-39-101 to -108 (1997); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1

B. Megan's Law in Massachusetts

On July 31, 1996, Massachusetts enacted legislation (the "Act"), a form of "Megan's Law," addressing repeat sex offenders.¹⁶ The sex offender registry board, a subdivision of the criminal history systems board (the "Board"), established and maintained a computerized registry of all sex offenders.¹⁷ The Board adopted both registration and community notification schemes to allow a person to request sex offender information about a particular person or geographic area.¹⁸ The Act requires that a sex offender must register, in

redesignated as art. 62.01; UTAH CODE ANN. § 77-27-21.5, 53-5-212.1 (1997); VT. STAT. ANN. tit. 13 (1997); VA. CODE ANN. §19.2-298.1 to -302 (Michie 1997); WASH. REV. CODE ANN. §§ 4.24.550, 9A.44.130 to .140, 10.01.200 to .210, 70.48.470, 72.09.330 to .345 (West 1997); W. VA. CODE § 61-8F-1 to -10; 1996 Wis. Legis. Serv. 440 (West); WYO. STAT. § 7-19-301 to -306 (1997).

¹⁶ MASS. GEN. LAWS ch. 6, §§ 178C-1780 (1997) (enacting sex offender registry).

¹⁷ MASS. GEN. LAWS ch. 6, § 178D(a-e) (1997). Section 178D(a-e) provides that the file on each sex offender should include the following information:

- (a) the sex offender's name, aliases used, date and place of birth, sex, race, height, weight, eye and hair color, social security number, home address and work address; (b) a photograph and set of fingerprints; (c) a description of the offense for which the sex offender was convicted or adjudicated, the city or town where the offense occurred, the date of conviction or adjudication and the sentence imposed; (d) any other information which may be useful in assessing the risk of the sex offender to re offend; and (e) any other information which may be useful in identifying the sex offender.

Id.

¹⁸ MASS. GEN. LAWS ch. 6, § 178J (1997) provides:

- A person who requests sex offender registry information shall: (i) be eighteen years of age or older; (ii) appear in person at a city or town police station and present proper identification; (iii) state that he requests sex offender registry information for his own protection or for the protection of a child under the age of eighteen or another person for whom said inquirer has responsibility, care, or custody; and (iv)

person, at the local police department in the city or town where he resides.¹⁹ This information is then transmitted to the Federal Bureau of Investigation.²⁰ A sex offender's obligation to maintain accurate registration information lasts for twenty years from the date of conviction or release, whichever is later.²¹ If the offender has committed more than one sexual offense, the offender is obligated to register for the rest of his life.²²

*C. How Sex Offenders' Due Process Rights are
Affected by Megan's Law*

The Fourteenth Amendment of the United States Constitution provides that "[n]o state [shall] deprive any person of life, liberty, or property, without due process of law."²³ The Supreme Judicial Court of Massachusetts, in *Doe v. Sex Offender Registry Bd.*,²⁴ held that in order to satisfy due process requirements, the appropriateness of an offender's risk classification must be proven.²⁵ The *Sex Offender Registry Bd.* court reaffirmed that "sex offenders have a constitutionally protected liberty and privacy interest in avoiding registration and public dissemination of registration information."²⁶ In

complete and sign a record of inquiry, designed by the board, which includes the following information: the name and address of the person making the inquiry; the person or geographic area or street which is the subject of the inquiry; the reason for the inquiry; and the date and time of the inquiry.

Id.

¹⁹ See MASS. GEN. LAWS ch. 6, § 178E (1997) (requiring sex offenders to register).

²⁰ See MASS. GEN. LAWS ch. 6, § 178E (1997) (requiring transmitting of information to appropriate offices).

²¹ See MASS. GEN. LAWS ch. 6, § 178G (1997) (setting forth requirements of registering).

²² See MASS. GEN. LAWS ch. 6, § 178G (1997) (requiring registration for life if offender has committed more than one offense).

²³ U.S. CONST. amend. XIV, § 1.

²⁴ 428 Mass. 90, 697 N.E.2d 512 (1998).

²⁵ See *id.* at 91, 697 N.E.2d at 513 (requiring hearing showing by preponderance of evidence classification is correct).

²⁶ *Id.* at 100, 697 N.E.2d at 515; see also *Doe(1)*, 1997 WL 70985, at *6 (announcing level one offenders have constitutionally protected interests).

this case, the two sex offenders were classified as level three offenders, the highest risk classification for offenders.²⁷ The offenders claimed that because the legislature did not provide for any evidentiary hearings in the statute to assess risk classification, the statute was constitutionally defective.²⁸ The Supreme Judicial Court of Massachusetts held that inherent safeguards exist to show the appropriateness of the risk classification, and therefore the Act satisfies the due process requirements under both the state and federal constitutions.²⁹

In *Roe v. Farwell*,³⁰ the United States District Court was required to determine whether the application of the registration and community notification requirements were overinclusive as applied to the plaintiff.³¹ The sex offender there was a convicted rapist.³² The sex offender claimed the registration and public disclosure violated a number of his constitutional rights.³³ The sex offender argued that he should not have to register because he was not classified as a sexually dangerous person and did not pose a threat to children.³⁴ The *Farwell* court held “imperfections in the classification will not constitute a violation of the equal protection clauses unless based on

²⁷ *Sex Offender Registry Bd.*, 428 Mass. at 96, 697 N.E.2d at 516.

²⁸ *See id.* at 98, 697 N.E.2d at 516-17 (arguing absence of constitutionally sufficient procedures makes statute defective).

²⁹ *See id.* at 103, 697 N.E.2d at 520 (recognizing dual requirement of detailed finding to demonstrate close attention has been given to classification and preponderance of evidence standard satisfies due process).

³⁰ 999 F. Supp. 174 (D. Mass. 1998).

³¹ *Id.* at 194.

³² *Id.* at 178. The sex offender’s victim was a thirty-three year old female employee of his company. *Id.* He subjected her to vaginal penetration with his fingers and penis and performed cunnilingus on her. *Id.*

³³ *Farwell*, 999 F. Supp. at 174. The sex offender claimed that the registration and disclosure requirements violated ex post facto, double jeopardy, equal protection, and due process clauses of the constitution. *Id.* The court, however, could not address the due process claim. *Id.*

³⁴ *See id.* at 194 (arguing inclusion into registry should only be for sexually dangerous persons).

invidious discrimination.”³⁵ The court reasoned the mere fact that a sex offender may not pose a threat to minors does not invalidate the classification.³⁶

D. Massachusetts Statutory and Case Law

Prior to the enactment of the community notification provisions of the sex offender registry, the Supreme Judicial Court of Massachusetts, in the *Opinion of the Justices to the Senate*,³⁷ assessed the constitutionality of the Act.³⁸ In this opinion, the Justices discussed the purpose of the proposed legislation.³⁹ The stated purpose of the proposed legislation was to “protect the public from the danger of recidivism posed by sex offenders.”⁴⁰ In evaluating the purpose, the Justices’ found that community notification schemes, along with information passed to law enforcement agencies, would further the governments interest in protecting children and other vulnerable people from harm.⁴¹ In addition, the legislation defined what would

³⁵ *Farwell*, 999 F. Supp. at 194.

³⁶ *See id.* (recognizing classification rationally related to legitimate governmental interest); *but see Doe(1)*, 1997 WL 70985 (acknowledging right to hearing to determine risk of reoffense).

³⁷ 423 Mass. 1201, 668 N.E.2d 738 (1996).

³⁸ *See id.* (holding community notification provisions in proposed legislation constitutional).

³⁹ *Id.* at 1204, 668 N.E.2d at 739.

⁴⁰ *Id.* The legislative purpose goes on to state that sex offender registry is also to “aid law enforcement officials in the apprehension of sex offenders by providing the police with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation.” *Id.*

⁴¹ *See id.* (acknowledging purpose of bill would also bring Massachusetts in compliance with Federal Crime Control Act); *see also Opinion of the Justices*, 423 Mass. at 1243, 668 N.E.2d at 761(Liacos, Paul J.) (emphasizing court has commented only on certain portions of Bill); *see also* Jacob Wetterling, *Crimes Against Children and Sexually Violent Offender Registration Program Act*, 42 U.S.C. § 14071 (West 1997) (announcing failure to implement certain provisions of Act will result in failure to receive ten percent of funds otherwise granted).

constitute a “sex offense.”⁴² To keep the community abreast of sexual offenders, the proposed legislation developed a three-tier community notification scheme.⁴³ The three levels used for assessing risk of recidivism, low, moderate, and high, would be determined by considering certain information.⁴⁴ Some of the factors used to determine the risk of reoffense include:

⁴² MASS. GEN. LAWS ch. 6, § 178C (1997). The definition of a “sex offense” reads, in pertinent part:

[a]n indecent assault and battery on a child under fourteen under the provisions of section thirteen B of chapter two hundred and sixty-five; indecent assault and battery on a mentally retarded person under the provisions of section thirteen F of said chapter two hundred and sixty-five; rape of a child under sixteen with force under the provisions of section twenty-two A of chapter two hundred and sixty-five; rape and abuse of a child under the provisions of section twenty-three of said chapter two hundred and sixty-five; . . . assault of a child under sixteen with intent to commit rape under the provisions of section twenty four B of chapter two hundred and sixty-five and sixty-five; . . . unnatural and lascivious acts with a child under sixteen under the provisions of section thirty-five A of chapter two hundred and seventy-two; or (B) rape under the provisions of section twenty-two of chapter two hundred and sixty-five; assault with intent to commit rape under the provisions of section twenty-four of said chapter two hundred and sixty-five; indecent assault and battery on a person who has obtained the age of fourteen under the provisions of section thirteen H of said chapter two hundred and sixty-five; or (C) kidnapping under the provisions of section twenty-six of said chapter two hundred and sixty-five; including an attempt to commit a violation of any of the aforementioned sections.

Id.; see also *Opinion of the Justices*, 423 Mass. at 1204, 668 N.E.2d at 740 (1996) (articulating what constitutes sex offense).

⁴³ See *Opinion of the Justices*, 423 Mass. at 1228, 668 N.E.2d at 753 (announcing three level notification scheme is to protect and guard against repeat offenders); see also *supra* note 40 and accompanying text (reiterating sex offender registry purpose is to protect public).

⁴⁴ See MASS. GEN. LAWS ch. 6, § 178K(1) (1997). Section 178K(1) provides, in pertinent part, “[t]he sex offender registry board shall promulgate

whether the sex offender has a mental abnormality; whether the sex offender's conduct is characterized by repetitive and compulsive behavior; whether the offender committed a sex offense on a child; the age of the sex offender at the time of the commission of the first sex offense; and whether the sex offender served the maximum term of incarceration.⁴⁵

The Board would be responsible for determining the risk of recidivism of each sex offender.⁴⁶ The Board developed three levels of notification depending on the degree of risk of re-offense.⁴⁷ The first level, level one, is given to a sex offender whose risk of re-offense is low.⁴⁸ A level one classification only requires that the appropriate information be passed on to the police departments and the Federal

guidelines for determining the level of risk of reoffense of sex offenders, apply the guidelines to assess the risk level of particular offenders, develop guidelines for use by city and town police departments in disseminating sex offender registry information." *Id.*

⁴⁵ MASS. GEN. LAWS ch. 6, § 178K (1) (a) (i-v) (1997).

⁴⁶ See MASS. GEN. LAWS ch. 6, § 178K(1) (1997) (detailing who board will consist of and length of term for each member).

⁴⁷ See MASS. GEN. LAWS ch. 6, § 178K (1997) (listing guidelines used to assess risk of re-offense); see also *supra* note 45 and accompanying text (reiterating factors relevant to determine risk of reoffense).

⁴⁸ MASS. GEN. LAWS ch. 6, § 178K(2)(a) (1997). Section 178K(2)(a) provides, in relevant part:

If the risk of re-offense is low, a level one designation shall be given to the sex offender. In such case, the board shall transmit the registration data to the police departments where the sex offender intends to live and work and where the offense was committed and to the Federal Bureau of Investigation. The public shall have access to information regarding level one offenders in accordance with the provisions of sections 178I and 178J.

Id.; see *supra* note 18 and accompanying text (listing requirements of person requesting sex offender information); see also *infra* note 75 and accompanying text (announcing proper procedure to find out whether particular person is sex offender).

Bureau of Investigation.⁴⁹ A level two classification is designated when the risk of re-offense is moderate.⁵⁰ A level two designation requires that the police departments notify all youth groups in the community, and any other group that may encounter the sex offender.⁵¹ Level two's more stringent standards of community notification are due to the greater risk of re-offense. A level three classification is given when the sex offender's risk of re-offense is high.⁵² Level three offenders, similar to level two offenders, require a strict community notification plan.⁵³ Although the Board determines the sex offender's level of risk, information such as victim impact statements, statements made by the offender himself, and a number of other factors are considered when designating a classification.⁵⁴

⁴⁹ See MASS. GEN. LAWS ch. 6, § 178K(2)(a) (1997) (requiring less stringent standards for level one designation). The file contains the sex offenders home address, work address, physical characteristics, a photograph, fingerprints, and a description of the sex offenses. *Id.*

⁵⁰ MASS. GEN. LAWS ch. 6, § 178K(2)(b)(1997). Section 178K(2)(a) provides:

If the risk of offense is moderate, a level two designation shall be given to the sex offender. In such case, the board shall transmit the registration data to the police departments where the sex offender intends to live and work and where the offense was committed and to the Federal Bureau of Investigation. A level two community notification plan shall require the police department to notify organizations in the community which are likely to encounter the offender including, but not limited to, schools, day care centers, religious and youth organizations, and sports leagues.

Id.

⁵¹ See MASS. GEN. LAWS ch. 6, § 178K(2)(a)(1997) (requiring notification to community organizations "likely to encounter" sex offender).

⁵² See MASS. GEN. LAWS ch. 6, § 178K(2)(c)(1997) (setting forth required community notification scheme).

⁵³ See MASS. GEN. LAWS ch. 6, § 178K(2)(b)(1997) (requiring level three sex offenders not only to notify organizations in community which are "likely to encounter" sex offender, but also notify individual members of public).

⁵⁴ See MASS. GEN. LAWS ch. 6, § 178K (1) (a) (1997) (articulating factors used to determine risk).

Although somewhat conclusive, a level two or a level three offender has the right to challenge their risk designation.⁵⁵ Level one offenders, however, do not have the right to challenge their risk designation.⁵⁶ Proponents of the statute have argued that level one offenders, because of the relaxed community notification schemes, do not enjoy a statutory right to judicial review.⁵⁷ Since the enactment of the sex offender registry legislation, much controversy has surrounded a level one offender's due process right to introduce evidence to show that the offender is not a threat to minors or other vulnerable people.⁵⁸ Moreover, because the sex offender registry's purpose is to protect minors or other vulnerable people from falling prey and becoming sex victims, some level one offenders have claimed that the registration notification plan is overinclusive when the crime committed does not involve children.⁵⁹

In *Doe v. Criminal History Sys. Bd.*,⁶⁰ the Superior Court of Massachusetts was required to determine whether a plaintiff was entitled to injunctive relief from the Act.⁶¹ The sixteen year old plain-

⁵⁵ MASS. GEN. LAWS ch. 6, § 178M (1997) provides in pertinent part, [a]n offender who has been given a level two or three designation may petition the superior court where the offender resides or intends to reside to challenge his risk designation. Such offender may request an opportunity to appear and be heard. At such hearing, the rules of evidence shall not apply and the court may review any materials described in the guidelines.

Id. This section allows the sex registry board to modify the designation given to a particular offender if it was determined that such classification was an abuse of discretion. *Id.* The chance to challenge the risk classification, however, is not given to level one offenders. *Id.*

⁵⁶ *See id.* (acknowledging no review for offenders classified as level one).

⁵⁷ *See* MASS. GEN. LAWS ch. 6, § 178K(3) (1997) (announcing level one classifications are final).

⁵⁸ *See Doe v. Attorney General* (No.2), 425 Mass. 217, 680 N.E.2d 97 (1997) (finding some sections of sex offender registry overinclusive).

⁵⁹ *See id.* (acknowledging person convicted of crime of open and gross lewdness may not be threat to public).

⁶⁰ No. 96- 6046, 1997 WL 100878 (Mass. Super. Ct. Feb. 25, 1997).

⁶¹ *Id.* at *1.

tiff was convicted of raping a child under sixteen.⁶² The plaintiff served nine months probation for his conviction.⁶³ The plaintiff could have been classified as a level one offender because he had not received a risk classification due to his lack of a criminal record since the delinquency.⁶⁴ The plaintiff contended the application of the sex offender registry unconstitutionally restricted his right to due process.⁶⁵ The court, while examining the Act, reiterated the legislative intent of the Act is to protect the public from repeat sex offenders, and to provide law enforcement agencies with the necessary information to prevent sexual victimization.⁶⁶ The court announced that the procedural due process available to level two and level three offenders is to challenge their risk classification.⁶⁷ Level one offenders, however, may not challenge their classification because they are already at the lowest level.⁶⁸ The court further found there is no provision in the Act that allows a level one offender to challenge whether he must register at all.⁶⁹ The Act's juvenile registration re-

⁶² *Id.* The plaintiff admitted to sufficient facts for the court to warrant a charge of one count of being a delinquent child by reason of raping of a child younger than sixteen under section two hundred and sixty-five section twenty-two A in 1986. *Id.*

⁶³ *Id.*

⁶⁴ *See Criminal History Sys. Bd.*, 1997 WL 100878, at *3 (assuming lack of criminal record since delinquency will require level one classification).

⁶⁵ *See id.* at *7 (arguing level one offenders are not given opportunity to challenge whether offender should be required to register at all). The Court, however, holds that the right to appeal is available only to challenge one's classification within the sex offender registry, and not, as the plaintiff argues, to challenge whether one must register at all. *Id.* Therefore, if one is given a level one classification, no appellate review is possible. *Id.*

⁶⁶ *See id.* (reciting purpose of sex offender registry act); *see also Opinion of the Justices*, 423 Mass. 1201, 668 N.E.2d 738 (1996) (examining purpose and intent of proposed sex offender registry act).

⁶⁷ *See Criminal History Sys. Bd.*, 1997 WL 100878, at *7 (acknowledging that right to judicial review is limited to review of risk designation).

⁶⁸ *See id.* (acknowledging appellate review granted only to challenge one's level determination).

⁶⁹ *See id.* (reasoning sex offender already classified at lowest level- level one).

quirement illustrates the legislature's intent to "create broad coverage."⁷⁰ The Supreme Judicial Court of Massachusetts denied the plaintiffs motion for preliminary injunction.⁷¹

In *Doe v. Attorney General (No.2)*,⁷² the Supreme Judicial Court of Massachusetts granted a preliminary injunction enjoining the plaintiff's sex offender registry information from being made public.⁷³ In *Doe (No. 2)*, the adult plaintiff was twice convicted of the crime of open and gross lewdness.⁷⁴ The plaintiff contested § 178I of the Act claiming that the purpose of the registry is to protect vulnerable people from becoming sex victims and therefore the registry, as applied to him, would serve no legitimate purpose.⁷⁵ The plaintiff further contended the furnishing of this material to the public for the crime of open and gross lewdness would be punitive.⁷⁶ The trial judge granted the preliminary injunction, and the court had to determine whether the judge used the "proper legal standards."⁷⁷ The court held the "weakness of section 178I as a remedial measure is revealed by comparing it to the provisions of section 178J."⁷⁸ The

⁷⁰ *Id.* at *4; *but see Doe v. Weld*, 954 F. Supp 425, 433 (D. Mass. 1996) (citing Rep. Paulsen expressing concern there is no language concerning juveniles).

⁷¹ *Criminal History Sys. Bd.*, 1997 WL 100878, at *8.

⁷² 425 Mass. 217, 680 N.E.2d 97 (1997).

⁷³ *Id.*; 680 N.E.2d at 97.

⁷⁴ *Id.* at 218, 680 N.E.2d at 98. In 1989, the plaintiff was convicted of masturbating in a public department store. *Id.* The 1995 conviction occurred as a result of the plaintiff being caught masturbating while driving on a public highway. *Id.*

⁷⁵ *See Doe (No. 2)*, 425 Mass. at 218, 680 N.E.2d at 98; *see also* MASS. GEN. LAWS ch. 6, § 178I which states, in relevant part: "Any person who is eighteen years of age or older, upon the verification of his age and identity, shall receive at no cost from the board a report which indicates whether an individual identified by name, date of birth or sufficient personal identifying characteristics is a sex offender. . ." *Id.*

⁷⁶ *Doe (No. 2)*, 425 Mass. at 219, 680 N.E.2d at 98.

⁷⁷ *Id.* at 219, 680 N.E.2d at 98.

⁷⁸ *Id.* at 220, 680 N.E.2d at 99. Section 178J explicitly requires that a person requesting the information need it for "his own protection or for the

Court found that section 178I, as applied to the plaintiff, was over inclusive and provided no remedial purpose.⁷⁹

In the prior case of *Doe v. Weld*,⁸⁰ a juvenile sex offender brought an action challenging the registration and disclosure requirements of Massachusetts sex offender registry.⁸¹ The sex offender argued the registration scheme strips juveniles of their anonymity and is too extensive as applied to juveniles.⁸² In addition, the plaintiff argued the retroactive application violated his constitutional rights.⁸³ The plaintiff, nearly two years before the sex offender registry was enacted, plead guilty as a minor to four counts of indecent assault and battery on a child under fourteen years old.⁸⁴ The plaintiff served four months probation and was not subsequently convicted of any crime since his probation has ended.⁸⁵ After the enactment of the Act, the plaintiff was informed of his obligation to register.⁸⁶ The plaintiff filed a temporary restraining order for a preliminary injunction arguing that at the time he was sentenced, Massachusetts law expressly prohibited public inspection of juveniles

protection of a child under the age of eighteen or another person for whom said inquirer has responsibility, care or custody." MASS. GEN. LAWS ch. 6, § 178J (1997). Section 178I, however, makes no such reference. MASS. GEN. LAWS ch. 6, § 178I (1997).

⁷⁹ *Doe(No.2)*, 425 Mass. at 221, 680 N.E.2d at 99; *see also supra* note 75 and accompanying text (announcing proper procedure to find out whether particular person is sex offender).

⁸⁰ 954 F. Supp. 425 (D. Mass. 1996).

⁸¹ *See id.* (arguing Act too broad as applied to juveniles).

⁸² *See id.* at 435 (reiterating argument Act is too broad).

⁸³ *See id.* at 426 (arguing Act violates ex post facto, bill of attainder, double jeopardy and due process clauses).

⁸⁴ *See Weld*, 954 F. Supp. at 429 (describing plaintiff's criminal history).

⁸⁵ *See id.* at 428 (noting minor did not commit any subsequent crime).

⁸⁶ *Id.* at 429.

records.⁸⁷ The Court, however, denied the plaintiff's motion on several grounds.⁸⁸

The United States District Court in *Doe v. Weld* concluded that the level one notification plan as set forth in the sex offender registry act has a number of procedural safeguards.⁸⁹ The *Doe* court also found a rational connection between requiring juvenile sex offenders to register under the level one scheme and the purpose of the sex offender registry.⁹⁰ This court held that the effect of the public interest in having the juvenile register greatly outweighed the risk that the juvenile may suffer irreparable injury.⁹¹ The intent of the sex offender registry prevailed over the juvenile's potential for injury.⁹² The court in *Weld* further held the inclusion of juveniles in the Act illustrates the desire of the legislature to protect people that are vulnerable from becoming a sex crime victim.⁹³ This decision sent a

⁸⁷ *Id.*; see MASS. GEN. LAWS ch. 119, § 60A (defining when juveniles records are open for public inspection).

⁸⁸ See *Weld*, 954 F. Supp. at 425. The court denied the preliminary injunction because the "juvenile did not show the likelihood of success on claim that requirements [of registering] amounted to punishment for purposes of ex post facto, bill of attainder, and double jeopardy clauses." *Id.*

⁸⁹ See MASS. GEN. LAWS ch. 6, § 178J (1997) (listing requirements for person requesting sex offender information).

⁹⁰ See *Weld*, 954 F. Supp. at 436 (holding treatment of juvenile sex offenders had rational basis).

⁹¹ See *id.* at 432 (acknowledging inclusion of juveniles in Act illustrates broad desire to protect vulnerable people).

⁹² See *id.* at 433 (reiterating legislature's intent was to protect vulnerable people from becoming sex crime victim). The Massachusetts legislature "desired to assist law enforcement officials in the prevention and investigation of sex crimes and, when necessary, to 'allow particular members of the public who are in an especially vulnerable situation . . . to take measures lawfully available to them to protect themselves against danger.'" *Id.* (quoting *Opinion of the Justices*, 423 Mass. at 1227, 668 N.E.2d at 752 (1996)).

⁹³ See *Weld*, 954 F. Supp. at 433 (balancing juveniles right for potential injury against the public's).

message to the public that Massachusetts is serious about protecting potential victims.⁹⁴

In the subsequent case of *Poe v. Attorney General*,⁹⁵ the Massachusetts Superior Court held that the Board may not distribute information about sex offenders prior to a judicial review.⁹⁶ The court acknowledged that the Act does not explicitly provide for a “dissemination stay pending judicial review.”⁹⁷ The court interpreted the Act’s legislative intent to mean that all information must be kept confidential prior to a judicial review.⁹⁸ The court, in looking to the other sections of the statute and the devastating consequences that public disclosure could have, granted the plaintiffs’ request for a preliminary injunction.⁹⁹

⁹⁴ See *id.* (holding registration information of juveniles subject to public disclosure).

⁹⁵ No. 96-6237-B, 1996 WL 754895 (Mass. Super. Dec. 19, 1996).

⁹⁶ *Id.* at *1. In *Poe*, the two plaintiffs argued the Act should require that no information may be given to the public for level two or level three offenders prior to a judicial review of the classification. *Id.* at *2. The registration and notice procedures that the Board will follow are:

1. Persons who have been registered as sexual offenders will be mailed a letter notifying them of the pending classification by the Board;
2. [t]he individual may submit materials to the Board within twenty days of the date of the letter;
3. [a]fter the Board makes its classification decision, the individual will be notified by certified mail of the decision;
4. [d]issemination will not commence until fourteen days after the registrant receives the letter or until the Postal Service has returned the letter to the Board as undelivered;
5. [n]o stay will be given to any person who seeks judicial review, as the Board’s decision is ‘presumptively valid.’

Id.

⁹⁷ See *Poe* at *4 (noting although statute does not explicitly provide for dissemination, it is reasonable to infer based upon likelihood of harm).

⁹⁸ See *id.* (observing requirements of other sections of legislation as requiring confidentiality).

⁹⁹ See *id.* (stressing 178M of the act); see also MASS. GEN. LAWS ch. 6, § 178M (1997) providing, in relevant part:

In the recent case *Doe(1)*, the level one offender claimed the Act failed to provide him with a hearing and therefore failed to find he presented a risk to children or other vulnerable persons for whose protection the legislation was adopted.¹⁰⁰ In *Doe(1)*, the offender plead guilty to one count of indecent assault and battery on an undercover police officer and was placed on probation for two years.¹⁰¹ The offender asserted his "sexual interests are exclusively oriented to other consenting adults."¹⁰² The offender claimed he should only be made to register after he had a hearing and it was determined that he was a threat.¹⁰³ The Supreme Judicial Court concluded the requirement and notification provisions were unconstitutional as applied to the offender at a level one classification when no determina-

An offender who has been given a level two or level three designation may petition the superior court where the offender resides or intends to reside to challenge his risk designation. . . The court may modify the risk designation given by the sex offender registry board only if such designation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The court shall reach its final decision within sixty days of the offender's petition for review. The court shall keep proceedings conducted pursuant to this paragraph and records from such proceedings *confidential*.

Id. (emphasis added).

¹⁰⁰ *Poe*, 1996 WL 754895, at *4.

¹⁰¹ *Id.* The offender was found in a wooded lot bordering a highway rest area which was known for consensual homosexual activity. *Id.* The offender had approached an undercover police officer and placed his hand inside the police officer's front pocket and squeezed. *Id.* The offender then was placed under arrest. *Id.*

¹⁰² *Doe*, 1997 WL 709859, at *1. The offender had been convicted in 1989 for a similar act. *Id.* The offender claimed his sexual activity with a consenting adult is distinguishable from what the sex offender act proscribes. *Id.* at 2. The offender asserted that he was a self employed carpenter and if he was made to register he would lose most, if not all, of his customers and friends. *Id.*

¹⁰³ *Id.* "Plaintiff argues that neither the manner in which he committed the crime of indecent assault and battery, nor any other circumstance, justifies the conclusion that he is a threat to anyone, and particularly to children or to any other non consenting potential victim of a sex crime." *Id.*

tion had been made concerning the offenders threat, if any, to minors and other vulnerable people for whom the act was passed.¹⁰⁴

III. ANALYSIS

The Supreme Judicial Court of Massachusetts in *Doe (No.2)* acknowledges the loopholes of the Act, and the possibility of sex offender registry information being used for purposes other than protection.¹⁰⁵ *Doe (No.2)* provided that not all offenses defined as a "sex offense" should require registration.¹⁰⁶ The subsequent decision in *Doe (1)* has left proponents of the two year old Act thinking it is time to go back to the drawing board.¹⁰⁷ The overbroad risk classifications have included people that pose no risk to minor children or other vulnerable people, but are still considered sex offenders within the meaning of the statute.¹⁰⁸ Crimes which by their nature pose no threat to minor children or other vulnerable people may not warrant registration.¹⁰⁹

¹⁰⁴ See *id.* at *6 (maintaining there must be hearing to assess whether offender poses risk).

¹⁰⁵ See *Doe (No.2)*, 425 Mass. 217, 680 N.E.2d 97 (realizing registration of certain sex offenses may not serve any remedial purpose to public).

¹⁰⁶ See *id.*, *supra* note 58 (acknowledging not all sex offenses may create threat to vulnerable people).

¹⁰⁷ See *e.g.*, John Ellement et. al., *Sex Case Registry Weakened by SJC*, Boston Globe, Nov. 18, 1997, at A1 (observing Supreme Judicial Court has left current law unworkable); Matt Kelly, *Sex Offender Ruling Weakens Registry Law*, Patriot Ledger, Nov. 18, 1997, at A1. (noting decision dealt "strong blow" to new law); John H. Boit, *Sex Registry Ruling Bolsters Hopes for Lifetime Parole Bill*, Patriot Ledger, Nov. 19, 1997, at A1 (advocating proposal of lifetime parole for sex offenders may gain more support since SJC weakened registry law).

¹⁰⁸ See *Doe*, 1997 WL 709859, at *1 (recognizing some crimes characterized as sex offenses do not pose threat to vulnerable people).

¹⁰⁹ 425 Mass. at 221, 680 N.E.2d at 99 (recognizing certain crimes more serious than others).

These holdings illustrate an emerging shift in the existing sex offender registry law.¹¹⁰ The holding in *Doe(1)* may open the door for more than thirteen thousand new hearings for level one offenders.¹¹¹ The Supreme Judicial Court of Massachusetts reasoned in *Doe(1)* that the primary purpose for enacting the sex offender registry was to protect those who were vulnerable from becoming a victim of a sex crime.¹¹² Absent a showing that the offender poses some threat to the community, disclosure of the information would serve no legitimate purpose.¹¹³ Although the crimes committed under *Doe(1)* require registration in the sex offender registry, the court for the first time, acknowledged that a plaintiff has the right to rebut the presumption that he is not a threat to the community.¹¹⁴ The court has opened the floodgates.¹¹⁵

Judicial decisions holding that the Act fails to provide appropriate procedural due process to level one offenders leaves the state of the law unclear.¹¹⁶ The court acknowledged that the disclosure of an offenders crime varies with the level of risk that the offender poses.¹¹⁷ The court's focus, however, is on what happens when the

¹¹⁰ See *supra* note 107 and accompanying text (observing recent case law damaged Act).

¹¹¹ See *Doe*, 1997 WL 709859, at *6 (acknowledging right to hearing to determine risk of sex offender to vulnerable people).

¹¹² See *id.* (reiterating purpose of Act); see also *Opinion of the Justices*, 423 Mass. 1201, 668 N.E.2d 738 (1996) (characterizing sex offender registry as a remedial measure to protect potential victims). The court further acknowledged that the Act, as applied to the plaintiff, would serve no remedial purpose. *Doe*, 1997 WL 709859, at *3.

¹¹³ *Doe*, 1997 WL 709859, at *4.

¹¹⁴ See MASS. GEN. LAWS ch. 6, § 178C (1997) (defining what constitutes sex offense); see also *Doe*, 1997 WL 709859, at *1 (admitting offender's right to hearing).

¹¹⁵ See *supra* note 107 and accompanying text (acknowledging court has weakened sex offender law).

¹¹⁶ See *Doe*, 1997 WL 709859, at *4 (noting current law as applied to level one offender is unworkable).

¹¹⁷ See *id.* at *2 (affirming disclosure varies with risk that offender will re-offend).

level one offender is not given an opportunity to show that he is not a risk at all.¹¹⁸ The case law suggests that absent a showing of risk to the community, registration may not be warranted.¹¹⁹

IV. CONCLUSION

Prior to *Doe v. Attorney General(1)*, level one offenders were not provided any procedural due process to determine whether they presented any risk to vulnerable people for whose protection the Act was adopted. The Supreme Judicial Court's recent pronouncement that the Act is unconstitutional as applied to low-level risk offenders has left the current law unclear and unworkable. The Sex Offender Registry Act was enacted to provide the public with information about known sex offenders. The court, however, has disregarded the purpose of the Act. The Supreme Judicial Court of Massachusetts has given known sex offenders more rights than the victims and potential victims.

The well-known saying, "[y]ou do the crime, you pay the time," has little meaning after this decision. All level one sex offenders have committed a crime, a crime they claim should not require registration until after a hearing. The question the court must ask itself, is how should we reconcile the imposition of requiring sex offenders' to register with the need to protect the public?

In our society, we have enacted laws for people to follow to keep our communities safe. When someone breaks a law they should be punished. Allowing over thirteen thousand new hearings for level one offenders to assess the risk they pose to society will impede not only the purpose of the Act, but also hinder law enforcement agencies in their obligation to keep our communities safe.

The level one offenders' argument that the Act is overinclusive and therefore unconstitutional has little strength. The Act specifically

¹¹⁸ See *id.* at *5 (announcing Act offers no procedure for determining if person is risk to community).

¹¹⁹ See *supra* note 104 and accompanying text (recognizing need for hearing to determine whether threat exists).

lays out what will constitute a sex offense. The offenders have notice that any of the proscribed acts will require registration. In addition, the community notification schemes for level one offenders requires only that the offenders register with their local police departments. The information is not given to the public unless the public specifically inquires about that individual.

The sex offender registry was implemented to protect the public, not to protect an offender. The public has a right to know when someone in their community poses a risk to loved ones when they inquire about that particular offender. The argument that the law is overinclusive overlooks the entire purpose and intent of the Act.

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