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Abuse Prevention Orders and Juveniles: Change in Needed to Protect Defendant Juveniles for Extra-Statutorily Issued Restraining Orders

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ABUSE PREVENTION ORDERS AND JUVENILES: CHANGE IS NEEDED TO PROTECT DEFENDANT JUVENILES FROM EXTRA-STATUTORILY ISSUED RESTRAINING ORDERS

I. INTRODUCTION

Two sixteen-year-old classmates, Jane and Joe, are dating. Their relationship voluntarily becomes intimate, although because they are juveniles, neither has the capacity to consent to intercourse. Nine months later, the pair ends the "official" relationship after an argument in which harsh words were spoken, but they continue to engage in sexual relations. Ultimately Jane and Joe stop seeing each other. Jane confides in her parents that her relationship with Joe had been intimate; Jane later claims that she felt forced to have sex to make Joe happy, and now fears Joe's presence near her at school. Pursuant to Massachusetts General Laws ch. 209A, Jane's mother, on behalf of her daughter, seeks and obtains an ex-parte Abuse Prevention Order against Joe.¹

The hypothetical above is just one possible scenario in which a domestic restraining order might be taken out against a defendant juvenile. The gender and the role of the parties could easily be reversed, and it may even be that parties are of the same-sex. That said, it has been far more common in recent years for a restraining order to be taken out against a juvenile male than against a juvenile female.²

Domestic violence poses a significant threat in our society.³ This

¹ Smith v. Jones, 852 N.E.2d 670 (Mass. App. Ct. 2006). This hypothetical is taken in part from the facts of *Smith v. Jones*.

² Donald Cochran, et al., *Young Adolescent Batterers: A Profile of Restraining Order Defendants in Massachusetts*, MASS. TRIAL CT., Commissioner of Probation, April 14, 1994 (listing results of research on restraining orders issued to juveniles). The report found that 77% of the orders issued to minors in the study period were to males, while 23% were issued to females, and the number of female defendants was nearly 50% greater than among females of all ages (13%). *Id.* at 7. Furthermore, of the 648 cases actually included in the study, 56.9% were issued as a result of a dating relationship. *Id.* at 10.

³ See 1081 Mass. Reg. 3 (6/29/2007) (establishing Governor's Commission on Sexual and Domestic Violence). Massachusetts Governor Deval Patrick issued an Executive Order establishing the Governor's Council to address sexual and domestic violence. *Id.* According to the National Institute of Justice approximately 1.5 million women and 834,000 men are raped or physi-

note does not intend to minimize that threat, nor will it argue that domestic restraining orders properly issued but later vacated should be expunged. Rather, by utilizing two recent cases as examples, it seeks to show that there are problems and inequities when the Domestic Restraining Order statute ("209A") is applied to juveniles; in such cases the total expungement of the record must be an option.⁴

This note acknowledges that in many instances juveniles are properly served with protective orders. This note also seeks to show, however, that: 1) we should be more circumspect; 2) we consider assigning counsel to protect a defendant juvenile's rights; 3) we amend the statute to guard against the negative implications of abuse of process by another juvenile or his or her parents; and 4) we allow the courts broader discretion to completely expunge 209A records of juveniles in certain appropriate circumstances. Part I of this note introduced a realistic hypothetical and noted that there are issues when minors are targets of restraining orders. Part II of this note discusses the origins of Domestic Restraining Orders/Abuse Prevention Orders in Massachusetts, and acknowledges that juveniles are capable of criminal acts that might make them the target of restraining orders. Part III briefly discusses some procedural issues in Massachusetts. Part IV of this note will look at two Massachusetts cases that illustrate critical issues involving the applicability of the 209A statute to minors. Lastly, this note suggests that the state appoint counsel to a juvenile served with an order, and allow for the expungement of a juvenile's "209A" record, not only in cases of fraud, but also when orders are not issued in conformity with the statute or established common law.

II. ABUSE PREVENTION IN MASSACHUSETTS

The Massachusetts Domestic Relations and Abuse Prevention Statute⁵ ("209A") was enacted in 1978 to help ensure the safety and security of

cally assaulted by an intimate partner each year. *Id.* More troubling is the fact that one third of all sexual assault victims who sought medical attention were under the age of eighteen, and seven percent were under the age of 13. *Id.* The Massachusetts Executive Office of Public Safety reported that in 2006 there were twenty-four domestic violence-related homicides in Massachusetts. *Id.*; see also Laura Crimaldi, *Sunday Focus: Domestic Violence: Chilling Murders Hit Home, Advocates: Burdened System Can't Keep Up with the Tragedies*, BOSTON HERALD, Sept. 2, 2007 at 5. In 2007 the rates of domestic violence related deaths in Massachusetts was on record pace; by September 2, 2007 there were at least thirty-nine domestic violence related deaths in Massachusetts. *Id.*

⁴ See *Smith*, 852 N.E.2d at 670-74 (detailing history and facts of case); *C.O. v. M.M.*, 815 N.E.2d 582, 584-85 (Mass. 2004) (outlining facts and history of case).

⁵ MASS. GEN. LAWS ANN. ch. 209A, §§ 1-10 (West 2007).

"abuse" victims and to protect them from future abuse.⁶ In recent years tens-of-thousands of domestic restraining orders have been issued in the Commonwealth of Massachusetts.⁷ Judges from Massachusetts trial courts are also on call twenty-four hours per day to issue emergency restraining orders; these on-call judges have issued such orders thousands of times since 1985.⁸ While it may seem that one can obtain a domestic restraining order as a quick "cure-all" for difficult relationships, the Massachusetts Appeals Court recently announced "[t]he statute is not a general catch-all for the regulation of all human relationships that run into difficulty, no matter how compelling some of those difficulties may objectively be or subjectively seem."⁹

Cases involving juveniles may differ from those involving adults because a parent or guardian may be the party seeking the restraining order against another juvenile on behalf of his or her own child.¹⁰ Further, a parent or guardian's motive for seeking the order, coupled with his or her influence on the child, could be a significant issue.¹¹ While the issues inherent in situations involving juveniles might also affect adults, the focus here will be on juveniles caught up in the restraining order process.¹² The state

⁶ Kostantinos Sofronas, Note, *A Question of Intent: The Massachusetts Abuse Prevention Order and the Innocent Doer of Harm*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 79, 81 (2001).

⁷ Lisa Redmond, *When Dating Goes Bad, Teens Seek Date in Court*, LOWELL SUN, Aug. 17, 2006, available at http://www.ncdsv.org/images/When%20Dating%20Goes%20Bad_Teens%20Seek%20Date%20in%20Court.pdf (last visited April 6, 2008) (noting number of restraining orders issued statewide between 2001 and 2003). There was an average of 33,729 restraining orders issued yearly from 2001-2003. *Id.*

⁸ Laurel J. Sweet, *Answering the Calls for Justice: Judges Serve by Cell Phone Round-the-Clock*, BOSTON HERALD, Jan. 28, 2007, at 5 (highlighting the Massachusetts Trial Court's Judicial Response System). Since 1985 there have been more than 180,000 calls for help to the system, and most come from local police after someone complains about domestic abuse. *Id.*

⁹ *Smith v. Jones*, 852 N.E.2d 670, 675 (Mass. App. Ct. 2006). The parties, both minors, met while in the sixth grade in 2002, and began a dating relationship which later became intimate. *Id.* at 673. The dating relationship lasted until January, 2004, although sexual activity continued until March, 2004 when the defendant "left school." *Id.* at 673-74. However, before leaving he sent the plaintiff "an electronic mail message stating that he wished he could 'stab [her] in the heart.'" *Id.* at 674. The plaintiff wrote in a journal that the sex had been painful and wrong, that the defendant had convinced her that it was the right thing to do, and that this was rape. *Id.* The plaintiff later told her mother about the sexual nature of the relationship, and the mother filed a "Complaint for Protection from Abuse" pursuant to MASS.GEN. LAWS ch. 209A. *Id.*

¹⁰ *Smith*, 852 N.E.2d at 674 (noting mother applied for abuse prevention order on behalf of minor child); *C.O. v. M.M.*, 815 N.E.2d 582, 585 (Mass. 2004) (noting mother obtained abuse prevention order on behalf of her daughter).

¹¹ *See Smith*, 852 N.E.2d at 674 (noting mother applied for abuse prevention order on behalf of minor child); *C.O.*, 815 N.E.2d at 585 (noting mother obtained abuse prevention order on behalf of her daughter).

¹² *See discussion infra* Parts II, III, and IV.

needs to ensure that a defendant's rights are protected against the issuance of an extra-statutory restraining order, especially when the defendant is a juvenile.¹³

The 209A statute's "protected class" initially included individuals who, in the traditional sense, were "family or household members," however, the protected class has been expanded by the legislature to include individuals who "are or have been engaged in a substantive dating or engagement relationship."¹⁴ Once a plaintiff seeking a protective order demonstrates that he or she is a member of the statute's protected class, he or she must then demonstrate abuse as it is defined under the statute.¹⁵ The burden remains with the plaintiff to show by a preponderance of the evidence that abuse has occurred; once a plaintiff meets this burden a judge may issue the domestic restraining order.¹⁶

A defendant must understand a critical issue when served with a protective order; the order (restraining order) is civil in nature, but there are criminal consequences for violating the order.¹⁷ While an adult may appre-

¹³ See *C.O.*, 815 N.E.2d at 585 (noting fact pattern and the court's acknowledgment that defendant juvenile's rights not subordinated to the plaintiff).

¹⁴ MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2007) (defining protected class). The statute is designed to protect those individuals who: (1) are or were married to one another; (2) who are or were residing together in the same household; (3) who are or were related by blood or marriage; (4) who have a child in common; (5) who are or have been engaged in a substantive heterosexual or homosexual dating or engagement relationship. Andrea J. Cabral, OBTAINING, ENFORCING, AND DEFENDING CHAPTER 209A RESTRAINING ORDERS, at § 1.1 (Mass. Continuing Legal Educ., Inc., 2003).

¹⁵ MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2007) (delineating circumstances that constitute abuse under statute). Abuse consists of any one or more of the following: attempting to cause, or causing physical harm; placing another in fear of imminent serious physical harm; or causing another to engage involuntarily in sexual relations by force, threat, or duress. *Id.*; see *Dollan v. Dollan*, 771 N.E.2d 825, 826 (Mass. App. Ct. 2002) (outlining the imminence requirement in abuse situations).

¹⁶ MASS. GEN. LAWS ANN. ch. 209A, § 2 (West 2007) (noting generally the statutory guidelines for issuance of order). The district courts, Boston Municipal Court, Probate & Family Court, and Superior Court all have jurisdiction to issue restraining orders. *Id.* at § 3. A domestic restraining order issued by a judge of The Probate & Family Court Department of the Trial Court supersedes prior orders issued by district courts. *Smith v. Joyce*, 658 N.E.2d 677, 680 (Mass. 1995); see Andrea J. Cabral, OBTAINING, ENFORCING, AND DEFENDING CHAPTER 209A RESTRAINING ORDERS, § 2.1 (Mass. Continuing Legal Educ., Inc., 2003). Oddly enough, juvenile courts do not have the authority to issue restraining orders. *Id.* Furthermore, Section One of M.G.L. ch. 209A exempts the superior courts from handling restraining orders based on a substantive dating relationship, which further limits venue in cases involving most minors. *Id.*

¹⁷ See MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2007) (declaring that each order issued must state that "[v]iolation of this order is a criminal offense"); see also Sofronas, *supra* note 6, at 79, 81 n. 23 (detailing harsh penalties of fines or imprisonment for the violation of the 209A civil remedy). But see *Mahoney v. Commonwealth*, 612 N.E.2d 1175, 1180 (Mass. 1993) (stating issuing court can hold contempt proceedings for violation of statute rather than criminal proceedings).

ciate the implications of violating the order, without a parent, guardian, or lawyer, a juvenile may not comprehend the significance of the order, or know how to proceed after being served with the order.¹⁸ The serious nature of the order and its potential negative implications underscores the importance of ensuring that each minor is afforded the opportunity to protect his or her rights under the law.¹⁹ This protection may best be achieved if the court ensures that the juvenile either has retained counsel or has counsel assigned at the Commonwealth's expense.²⁰

Further complicating the issue is the ever-changing technological world because it presents "boundary" issues relative to "stay-away" or "no-contact" orders; this further elucidates the need for a clear understanding by the minor of the order's significance and what behavior he or she is required to exhibit or to refrain from.²¹ Different orders are intended by the courts to provide different levels of protection.²² Specifically, the intricacies of the various orders and the interplay of the ways in which various orders are violated may confuse a minor and leave critical ambiguities that if not addressed could lead to his or her arrest.²³

While we should be more circumspect and aim to also protect the

¹⁸ See generally MASS. GEN. LAWS ANN. ch. 209A, §§ 1-10 (West 2007) (noting statute has no requirement that parent or guardian be present when juvenile is served with a restraining order).

¹⁹ See *C.O. v. M.M.*, 815 N.E.2d 582, 585 (Mass. 2004) (explaining plaintiff did not meet burden, and noting defendant's due process rights violated). The defendant in this case had counsel for a related criminal matter, but the issues related to the issuance of the restraining order further bolster the argument that counsel should be assigned to address the separate civil matter. See *id.*

²⁰ Massachusetts law provides that counsel be assigned for juveniles who are facing the civil Child in Need of Services ("CHINS") proceedings, and in certain custody proceedings. MASS. GEN. LAWS ANN. ch. 119, §§ 29, 39F (West 2007). The Supreme Judicial Court has also recently ruled that indigent parents may also be entitled to counsel in CHINS cases where custody of a child is at issue. See *In re Hilary*, 880 N.E.2d 343, 344 (Mass. 2008).

²¹ See *Redmond*, *supra* note 7 (listing some modern technological advances that present opportunities to harass and potentially violate a restraining order). New technologies such as instant messaging and Web sites provide "instant access," but also leave a discoverable trail. *Id.*

²² See MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 2007) (describing remedies available to plaintiff); see also *Commonwealth v. Finase*, 757 N.E.2d 721, 724 (Mass. 2001) (delineating difference between "stay-away", "refrain from abusing", and "no-contact" orders). The most obvious distinction between no-contact and stay-away orders is that a stay-away order does not bar oral contact between the parties, whereas a no-contact order bars all communication and physical contact. *Id.*

²³ See *id.* See generally *Cochran*, *supra* note 2 (outlining results of research on restraining orders issued to juveniles). Between September, 1992 and June, 1993, there were 757 restraining orders issued against adolescents between eleven and seventeen years of age. *Id.* at 6. Of the issued orders, 97.9% required the defendant to refrain from abuse, and 81.5% were issued as no-contact or stay-away orders, thus underscoring the importance of understanding the legal limitations placed on a defendant. *Id.* at 9.

rights of a juvenile 209A defendant, we should not be blind to the fact that statistics do show that, as a group, juveniles do commit offenses that result in protective orders being issued against them.²⁴ In fact, it was recently estimated that more than four juveniles were arrested for various criminal acts every minute across the United States.²⁵ The offenses for which juveniles were arrested range from murder, to the "status offense" of being a runaway.²⁶ These statistics suggest that some juveniles, like adults, may be just as prone to commit a criminal act, and that the juvenile could act in a way that compels a court to issue a restraining order.²⁷ If there is any correlation between criminal behavior and being issued a restraining order, then, of the orders issued to juveniles, many or most might be justified.²⁸ However, the focus here is on what remedy the state will allow for those who are not criminals and are not the true intended targets of the 209A process.

The public policy of the Commonwealth of Massachusetts has historically been to try to rehabilitate and redeem children who violate the laws.²⁹ As early as 1941, the courts stated that delinquent children who have committed criminal acts should be treated, "... not as criminals, but as children in need of aid, encouragement and guidance."³⁰ In light of this history it is not a stretch to suggest that the state should do more to protect the rights of a minor ensnared in a civil 209A matter that only has the *potential* to become a criminal matter.

Every state has enacted laws which authorize its courts or other bodies to issue civil or criminal protective orders.³¹ When Massachusetts

²⁴ Howard N. Snyder, *Juvenile Arrests 2002*, JUV. JUST. BULLETIN (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.) Sept., 2004, at 3 (listing types of crimes resulting in arrest committed by Juveniles in 2002). In 2002, juveniles under the age of eighteen were arrested an estimated 9400 times for "offenses against the family and children"; 61,610 times for of aggravated assault; 4,720 times for forcible rape; 236,300 for "other assaults"; and 19,400 for other sex offenses besides forcible rape and prostitution. *Id.* As of 2002 there were ten states where all seventeen year-olds were defined as adults, and three states where all sixteen and seventeen year-olds are defined as adults, but for this study a Juvenile constituted anyone under eighteen. *Id.* at 11.

²⁵ *Id.* at 2-3 (listing prevalence of various crimes committed by juveniles).

²⁶ *Id.* at 4 (delineating broad scope of crimes for which juveniles have been charged).

²⁷ *Id.* at 2-3 (suggesting statistically that a violent basis may exist leading to restraining order).

²⁸ See *supra* notes 24-27 and accompanying text (discussing criminal statistics for juveniles).

²⁹ *Commonwealth v. Connor C.*, 738 N.E.2d 731, 736 (Mass. 2000) (detailing goal of helping and encouraging children to be law-abiding citizens and not label and treat them as criminals).

³⁰ *Commonwealth v. Johnson*, 35 N.E.2d 801, 805 (Mass. 1941) (outlining public policy goals of dealing with delinquent children).

³¹ Office of Justice Prog., U.S. Dep't of Justice, LEGAL SERIES BULLETIN 4, Enforcement of Protective Orders 1 (2002) (noting that all states have enacted laws allowing for the issuance of

enacted its Abuse Prevention Act in 1978, it was in response to the public's growing awareness and intolerance of domestic violence.³² In Massachusetts, an individual can use the power of the Massachusetts courts and law enforcement agencies to enforce violations of a protective order.³³ The Massachusetts Act provides for easy access to the courts, no filing fee, and judicial review of each case.³⁴ These features encourage victims to utilize the process to gain a measure of protection from abuse.³⁵ This simplicity may also contribute to a defendant ultimately being penalized where no legitimate legal basis for issuing an order exists, because the review process a judge must employ when deciding whether or not to issue an order is subjective by its very nature.³⁶

In 1992, the Commonwealth of Massachusetts began using a mandatory tracking system (database) to log all domestic restraining orders issued in the Commonwealth.³⁷ The purpose of this system is to provide to trial judges and law enforcement officials certain information about an individual's prior involvement in domestic violence proceedings.³⁸ Once a protective order is issued it must be entered into this database; the only way to expunge an order from this database is by showing through clear and convincing evidence that a plaintiff perpetrated a fraud on the court.³⁹ Some restraining orders are later vacated or not extended at a hearing (but not expunged) because evidence did not support allegations of actual or

protective orders).

³² Esther M. Bixler, *The Legal Effects of the Massachusetts Abuse Prevention Act, the Stalking Statute, and the Marital Rape Exemption on Victims of Domestic Abuse*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 79, 81-82 (1997) (detailing reason for enactment and history of statute).

³³ See MASS. GEN. LAWS ANN. ch. 209A, §§ 3, 7 (West 2007).

³⁴ See Bixler, *supra* note 32, at 82-85.

³⁵ See MASS. GEN. LAWS ANN. ch. 209A, §§ 1-9 (West 2007) (detailing guidelines and process of obtaining and enforcing "209A" order); see Bixler, *supra* note 32, at 82-85.

³⁶ See *Smith v. Jones*, 852 N.E.2d 670, 675 (Mass. App. Ct. 2006) (noting the subjective nature of the review of the application and extension of restraining orders).

³⁷ *Comm'r of Prob. v. Adams*, 843 N.E.2d 1101, 1105 (Mass. App. Ct. 2006) (outlining legislative history establishing database system; Comm'r of Prob. charged with its maintenance).

³⁸ See *Vaccaro v. Vaccaro*, 680 N.E.2d 55, 57 (Mass. 1997) (detailing utility and intent of statewide database). The court also noted in *Vaccaro* that protective orders are often vacated at the request of a plaintiff, often because of family pressure, coercion, intimidation, or other factors, thus the need for a database tracking all orders issued. See *id.*

³⁹ *Comm'r of Prob.*, 843 N.E.2d at 1111 (holding clear and convincing evidence of fraud perpetrated on court necessary to expunge record of issued restraining order). The court cautioned that before an order to expunge a record may be given, a court must balance the state's interest in maintaining the record against the possible harms suffered by the maintenance of the record. *Id.* at 1110. The existence of a record of a vacated 209A order which was fraudulently obtained is unhelpful to the state because it provides false information to law enforcement and it impedes the fair administration of justice. *Id.*

imminent abuse.⁴⁰ Some arguably should not have been issued at all; therefore, limiting the remedy of expungement from the database to only those cases where clear and convincing evidence of fraud exists might not be sufficient to protect the liberties and rights of a defendant juvenile served with restraining orders.⁴¹

A juvenile defendant could be the target of a restraining order taken out by the parent of another juvenile with whom the juvenile defendant was intimate (mutually voluntary); it could be a race to the courthouse by the parents who find out first about the intimacy between the juveniles.⁴² Even if this restraining order is later vacated, and law enforcement agencies are ordered to destroy any and all record of it, the record of its issuance remains in the statewide database, even though it never should have been issued in the first place.⁴³ Judges must search this database when a complaint is filed under 209A; the existence of this record could negatively impact the juvenile if he or she is subject to future bail hearings, or future 209A situations.⁴⁴

⁴⁰ See, e.g., *C.O. v. M.M.*, 815 N.E.2d 582, 589 (Mass. 2004) (holding that no "substantive dating relationship" existed between two juveniles such that they were covered by the statute).

⁴¹ See *id.* at 589 (holding that no "substantive dating relationship" existed between two juveniles who otherwise fell outside class of persons statute was passed to protect). The juvenile defendant in this case was accused of sexually assaulting a juvenile female, but the pair did not have any substantive dating or engagement relationship. *Id.* at 585 n.3. Furthermore, the court recognized that the statute was a domestic relations statute, and the legislature did not intend for it to apply "to acquaintance or stranger violence. . ." *Id.* at 588; see also *Larkin v. Ayer Div. Dist. Ct. Dep't*, 681 N.E.2d 817, 818 (Mass. 1997) (holding complainant's claimed fear of imminent physical harm because she was served with lawsuit by defendant not sufficient basis for restraining order); *Uttaro v. Uttaro*, 768 N.E.2d 600, 603 (Mass. App. Ct. 2002) (discussing husband obtained restraining order against wife who had obtained multiple orders against him). The husband in *Uttaro* claimed that he applied for the order to protect himself from selective enforcement of prior orders against him. *Id.*; *Carroll v. Kartell*, 775 N.E.2d 457, 460 (Mass. App. Ct. 2002) (holding plaintiff's assertions did not support issuance of a restraining order). The court held that a defendant's persistent phone calls and other unsolicited efforts to contact plaintiff, even when combined with plaintiff's knowledge of pending criminal charges against defendant, did not support the issuance of a restraining order because such actions amount to subjective and unspecified fear, which did not meet the statutory definition of abuse. *Id.* "Generalized apprehension, nervousness, feeling aggravated or hassled, i.e., psychological distress from vexing but nonphysical intercourse, when there is no threat of imminent serious physical harm, does not rise to the level of fear of imminent serious physical harm." *Id.* (quoting *Wooldridge v. Hickey*, 700 N.E.2d 296, 298 (Mass. App. Ct. 1998)).

⁴² See *Smith v. Jones*, 852 N.E.2d 670, 674-75 (Mass. App. Ct. 2006) (noting parent obtained ex-parte order). Plaintiff's mother initially obtained ex-parte restraining order on behalf of her daughter because of a past "threatening" e-mail and fear by the plaintiff that defendant would embarrass her at school, even though plaintiff had no imminent fear of abuse. *Id.*

⁴³ *Comm'r of Prob. v. Adams*, 843 N.E.2d 1101, 1111 (Mass. App. Ct. 2006) (detailing limited circumstances where expunging record allowed).

⁴⁴ MASS. GEN. LAWS ANN. ch. 276, § 58 (West 2007) (listing factors a judge must consider when considering "traditional bail"). Mass. General Laws requires that a judge consider, when

III. PROCEDURE IN MASSACHUSETTS

Protective orders are issued to protect persons suffering from “abuse.”⁴⁵ This includes abuse in a family or household relationship as well as abuse in a substantive dating or engagement relationship.⁴⁶ Once a complaint is filed the court may enter “such temporary orders as it deems necessary” to protect the plaintiff.⁴⁷ The judge may enter these orders *ex parte*, with notice to the defendant followed by an opportunity to be heard within ten court business days.⁴⁸ Among the orders that an individual plaintiff can seek from the court are, for example: an order for the defendant to refrain from abusing plaintiff; an order that defendant have no contact with the plaintiff; or an order that defendant stay away from the plaintiff.⁴⁹ The police are given broad powers of enforcement under the statute and they can arrest an individual when they have probable cause to believe that a protective order is violated.⁵⁰

The Massachusetts statute is broader than statutes in some other states, Arizona as an example, because it also covers substantive dating or engagement relationships, and it protects both heterosexual and homosexual victims from abuse.⁵¹ When the protection afforded by the Massachu-

determining bail for a defendant, if there exists any history of restraining orders against the defendant. *Id.*; *Vaccaro v. Vaccaro*, 680 N.E.2d 55, 57 (Mass. 1997) (detailing the history of the state’s domestic violence registry and who has access to the registry).

⁴⁵ MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2007) (defining meaning of abuse in statute). For the purpose of this statute, “abuse” is defined as “the occurrence of one or more of the following acts between family or household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; (c) causing another to engage involuntarily in sexual relations by force, threat or duress.” *Id.*

⁴⁶ The statute states:

Family or household members [is defined to include] persons who: (a) are or were married to one another; (b) are or were residing together in the same household; (c) are or were related by blood or marriage; (d) having a child in common regardless of whether they have ever married or lived together; (e) or are or have been in a substantive dating or engagement relationship, which shall be adjudged by district, probate, or Boston municipal courts consideration of the following factors: (1) length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

Id. at § 1.

⁴⁷ *Id.* at § 4 (detailing procedures for temporary orders, notice, and hearing).

⁴⁸ *Id.*

⁴⁹ *Id.* at § 3 (noting some various orders available as a remedy for a plaintiff).

⁵⁰ *Id.* at § 6 (detailing the broad statutory powers of the police in 209A situations).

⁵¹ ARK. CODE ANN. § 9-15-103 (2008). Arkansas’ statute limits coverage under a dating relationship by excluding casual relationships and ordinary fraternization in a social or business

setts statute is compared with a similar statute from Arizona it is evident that the added protection under the Massachusetts statute to those in a substantive dating or engagement relationship is why teenage "couples" fall within the ambit of the Massachusetts statute's protection.⁵² Statutes in some states simply do not contemplate restraining orders arising out of a "high-school romance" where the lovers are not married and are not and never were living together.⁵³

The protections afforded to individuals by 209A apply equally to minors and to adults, as do the penalties of arrest for violation of the order.⁵⁴ The records of abuse prevention orders issued against minors, however, are specifically shielded from public view by the statute.⁵⁵ While this ensures that a minor suffers limited "public" harm, the possibility still exists that a record of an abuse protection order will negatively impact him or her if served with future protective orders or if involved in bail proceedings, therefore the issue is not moot.⁵⁶ As previously stated, the law cur-

context. ARK. CODE ANN. § 9-15-103 (2008). Arizona's statute does not cover those who are involved in a substantive dating or engagement relationship. ARIZ. REV. STAT. ANN. § 13-3601 (West 2007). Arizona's statute protects the following:

(1) The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household; (2) The victim and the defendant have a child in common; (3) The victim or the defendant is pregnant by the other party; (4) The victim is related to the defendant or the defendant's spouse by blood or court order as a parent, grandparent, child, grandchild, brother or sister or by marriage as a parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law; (5) The victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.

Id.

⁵² Compare MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2007) (noting the class protected under the statute includes those in substantive dating or engagement relationship), with ARIZ. REV. STAT. ANN. § 13-3601 (West 2007) (noting that there is no statutory protection for those in a substantive dating or engagement relationship). Although in both states it is clear from the statute that if a person otherwise fell within another protected category he or she would be covered. See ARIZ. REV. STAT. ANN. § 13-3601 (West 2007); MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2007).

⁵³ See *supra* notes 51-52 (noting most juveniles in a relationship do not live together or otherwise fall into a category covered by statute (other than substantive dating relationship)).

⁵⁴ See MASS. GEN. LAWS ANN. ch. 209A, §§ 1-10 (West 2007) (showing that other than record maintenance and limited access to juvenile records as provided in section eight, minors otherwise subject to enforcement of statute).

⁵⁵ MASS. GEN. LAWS ANN. ch. 209A, § 8 (West 2007) (establishing who may access 209A records of minor, and limiting public access to records except on order of court).

⁵⁶ See *Frizado v. Frizado*, 651 N.E.2d 1206, 1209 (Mass. 1995) (acknowledging claim of possible future adverse effects has some merit, assuming abuse prevention order not completely removed from probation record). In any future cases involving the defendant a judge "must con-

rently does not allow for a record to be expunged from the state's computerized domestic violence record system unless it can be shown that a plaintiff perpetrated a fraud on the court.⁵⁷ Even if no fraudulent intent exists, a person who files a complaint for protection under 209A could still have an improper motive for seeking the order, and the behavior of a juvenile defendant, such as mutually willful sexual activity, may not itself justify the issuance of an order.⁵⁸ Furthermore, the subjective nature of the judicial inquiry and the ex-parte emergency proceedings where a permanent "mark" is left on a defendant's record raises concerns and it suggests that the statute needs to be modified to allow expungement in certain limited circumstances. The statute should ensure that no permanent adverse action be taken until the defendant has an opportunity for a fair hearing.⁵⁹

sider whether the defendant has a record of domestic violence contained in the statewide domestic violence record keeping system" *Id.* at n.2. Furthermore,

[w]hen the Commonwealth moves in a criminal case for an order that the defendant is dangerous and should not be released on bail, the judge may consider whether the defendant has a history of orders issued against him . . . in deciding whether there are conditions of release that will assure the public safety.

Id.

⁵⁷ The legislature, by St. 1992, c. 188 § 7, modified the 209A statute and directed the Commissioner of Probation to develop and implement a computerized record system to record the issuance and violation of any restraining or protective order. MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2007); see *Comm'r of Prob. v. Adams*, 843 N.E.2d 1101, 1105 (Mass. App. Ct. 2006) (holding that the court has no statutory authority to remove or expunge a record from the database). Even though an order is later vacated, the record of the original order and proof that it was vacated remains in the state's database even though the enforcement agency may have destroyed all physical records. See *Vaccaro v. Vaccaro*, 680 N.E.2d 55, 57-58 (Mass. 1997). The legislature's directive that a record be kept of all orders, inactive as well as active, and the absence of any provision for removal or expunction, suggests that they intended all records to be available to a judge who is considering an application for a protective order, and by other authorized agencies with a legitimate need to see the record. *Id.* at 58.

⁵⁸ See *Smith v. Jones*, 852 N.E.2d 670, 679 (Mass. App. Ct. 2006) (vacating extension of protective order, but affirming ex-parte temporary order). Two minors began a relationship in July of 2002 when they were thirteen, which relationship voluntarily became intimate. *Id.* at 673. The teenagers broke up in January of 2004, but continued sexual activity until March of 2004. *Id.* at 673-74. The defendant left the private school in March, and sent plaintiff an e-mail in which he said he wished he could stab her in the heart. *Id.* at 674. Plaintiff did not take the threat seriously, but later expressed concern that when the defendant returned to a school in the area that he would embarrass her. *Id.* at 674. After learning of her daughter's sexual relationship, that her daughter now considered it wrong, and that the defendant allegedly convinced her that the relationship was right, plaintiff's mother sought and obtained an ex-parte protection order. *Smith*, 852 N.E.2d at 674. The judge issued the order because of the prior "threat" and because the plaintiff, now attending another nearby school, had "reasonable fear" that defendant would attempt to resume their sexual relationship, and this would be abuse because they could not consent to sex. *Id.* The judge later extended the order for one year. *Id.* at 675.

⁵⁹ See *C.O. v. M.M.*, 815 N.E.2d 582, 589 (Mass. 2004) (holding that the lower court judge violated defendant's due process rights and misapplied the law). The defendant appeared at the

Due to the possibility of ulterior motives held by plaintiffs filing for a protective order, and the adverse consequences that a record of such order may cause a defendant, the state should ensure that counsel be appointed as early in the process as possible if not already retained, as it is in other situations involving the welfare of minors.⁶⁰ We as a society, based on our history of zealous protection of children, should also protect them against abuse of process by a former intimate or by that person's parent. Perhaps certain revisions in the 209A statute as it relates to minors will stop the parental race to the courthouse.

IV. SMITH AND C.O. CASES SUGGEST CHANGE IS NEEDED

*Smith v. Jones*⁶¹ and *C.O. v. M.M.*⁶² are both cases that suggest a need for the legislature to modify the 209A statute as it is applied to juveniles.⁶³ In *C.O. v. M.M.* the Supreme Judicial Court boldly stated that the due process and statutory rights of a defendant may not be violated in an effort to accommodate a plaintiff.⁶⁴ The trial judge in *C.O.* applied judicially constructed factors, including the fact that there was a pending sexual

10-Day Hearing and was denied the right to present evidence or to cross-examine the plaintiff. *Id.* Furthermore, the judge ignored the required legislative criteria for evaluating a substantive dating or engagement relationship, and issued a restraining order based on the age of the alleged victim, and the fact that the defendant was also being criminally charged with sexual assault, charges which were later dropped. *Id.*

⁶⁰ See MASS. GEN. LAWS ANN. ch. 119, § 29 (West 2007) (outlining where counsel must be assigned in civil matters pertaining to the care and protection of children, and proceedings against them).

⁶¹ 852 N.E.2d 670 (Mass. App. Ct. 2006).

⁶² 815 N.E.2d 582 (Mass. 2004).

⁶³ See *Smith*, 852 N.E.2d at 670-71 (noting record of counsel's claim). Defense counsel argued in *Smith* that the ex-parte and one-year extension were issued despite a lack of evidence of abuse under the statute, and both should be vacated and expunged as the judges lacked the authority to issue the orders. *Id.* at 673-74; see *C.O.*, 815 N.E.2d at 589-91 (holding that judge abused discretion in issuing a protective order, and that defendant minor's due process rights under the statute were violated).

⁶⁴ *C.O.*, 815 N.E.2d at 591. In this case defendant minor was charged with sexual assault and was suspended from school. *Id.* at 585. As a result of the charge an abuse prevention order was issued, and was extended at the 10-day hearing. *Id.* Defendant sought, through counsel, to challenge the evidence, but was denied the right to be heard and to present witnesses or cross-examine the plaintiff. *Id.* at 589. The judge said he had the opportunity to be heard in the other forum (criminal). *Id.* at 591. The sexual assault charges were dropped, and the defendant sought to modify and vacate the order which was denied. *C.O. v. M.M.*, 815 N.E.2d 582, 585 (Mass. 2004). The SJC ultimately vacated the order because the judge used improper criteria in deciding to issue the order, and there was no proof that a "substantive dating relationship" existed as required under the statute. *Id.* at 586, 592. The court, however, never addressed the issue of the original order remaining in the database. See generally *C.O. v. M.M.*, 815 N.E.2d 582 (Mass. 2004) (noting remaining record in database not addressed in decision).

assault charge against defendant, and he ignored the established legislative criteria when he determined that a substantive dating relationship existed between the two juveniles in the case.⁶⁵ This case is evidence that there must be a means of having all notations, in any form, of a wrongfully obtained or wrongfully issued order expunged from a record.⁶⁶ There is no need to have a record of prior orders issued against a defendant if it is later determined that the conduct did not rise to the level of behavior that the statute was intended to protect against.

Massachusetts judges who issue emergency restraining orders should take note of the Massachusetts Appeals Court's recent pronouncement in *Smith v. Jones*.⁶⁷ The Appeals Court admonished that "[t]he statute is not a general catch-all for the regulation of all human relationships that run into difficulty, no matter how compelling some of those difficulties may objectively be or subjectively seem."⁶⁸ This language suggests that the court recognized that the purpose and application of the statute may at times be at odds.⁶⁹ There are numerous instances in the case law where restraining orders have been issued in a manner that disregards the purpose and intent of the statute.⁷⁰

It was likely not the goal of the legislature to keep records forever of restraining orders against minors issued in contravention of legislative intent and statutory language.⁷¹ The goal of the statute when it was enacted was to protect individuals from abuse.⁷² Later, the legislature established a

⁶⁵ MASS. GEN. LAWS ANN. ch. 209A, § 1 (e) (1)-(4) (West 2007). The legislature established the following criteria to determine if a substantive dating relationship exists under the statute: (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship. *Id.*; see *C.O.*, 815 N.E.2d at 589 (noting that the trial judge is obligated to apply the legislative criteria to determine if a substantive dating relationship exists).

⁶⁶ See *C.O.*, 815 N.E.2d at 589 ("the judge committed an error of law in relying on improper factors as the basis for his finding that the parties were engaged in a 'substantive dating relationship'"). The appellate court acknowledged that the trial court maintains judicial discretion and flexibility when applying the statutory definition of a substantive dating relationship, the lower court is still obligated to apply the legislature's criteria. *Id.*

⁶⁷ See *Smith v. Jones*, 852 N.E.2d 670, 675 (Mass. App. Ct. 2006) (admonishing that restraining orders are not a catch-all for the regulation of all human relationships).

⁶⁸ See *id.*

⁶⁹ *Id.*

⁷⁰ See cases cited *supra* note 41 (listing examples where restraining orders were issued either in contravention of the intent of statute, or where orders were vacated because no evidence of abuse existed).

⁷¹ See text accompanying notes 37-38 (noting goal of legislature to track issuance of domestic restraining orders).

⁷² See Sofronas, *supra* note 6, at 81-82 (stating intent of statute to protect victims from abuse and from future abuse).

statewide registry to track all issued domestic restraining orders, even if vacated.⁷³ The logic behind this system is that a vacated order may have been appropriately issued because of the perceived threat of violence; even if in hindsight little or no threat existed.⁷⁴ That being said, there is no benefit to society to have an individual listed in the database who improperly had a restraining order issued against him in the first place, who did not commit abuse, or whose activity otherwise fell outside of the statutory protections.⁷⁵

Smith v. Jones showcases the subjective nature of a judge's evaluation of the circumstances that may require a protective order; unfortunately it also showcases that the discretion afforded a judge can have negative implications for a juvenile not present at an ex-parte hearing.⁷⁶ In *Smith*, the plaintiff never had any imminent fear, the plaintiff and defendant had no contact for at least five months, and there was no evidence of any attempt by either party to contact the other during this time period.⁷⁷ Despite this factual scenario, the judge felt that the defendant *might* attempt to resume a sexual relationship and that would be abuse because neither could legally consent to sex.⁷⁸ Although there was arguably no imminent threat of any kind, a restraining order was issued against the defendant, and this order will permanently stay in the domestic violence database and potentially impact him in any future criminal bail hearings or 209A situations.⁷⁹

According to the Massachusetts Supreme Judicial Court, the judge in *C.O. v. M.M.* committed an error of law in not applying the proper legislative criteria; he infringed the defendant's due process rights; and he issued a restraining order outside of the ambit of the statute.⁸⁰ However, due

⁷³ See text accompanying note 38 (delineating legislative intent and utility of domestic violence registry).

⁷⁴ See *supra* text accompanying notes 37-38 (discussing the statewide tracking system).

⁷⁵ See *supra* notes 63-69 and accompanying text (discussing *Smith* and *C.O.* cases, and issuance of order outside statutory intent).

⁷⁶ See *Smith v. Jones*, 852 N.E.2d 670, 673-76 (Mass. App. Ct. 2006) (detailing events of *Smith* case and extra-statutory reasons for issuance of ex-parte restraining order).

⁷⁷ *Id.* at 678 (detailing facts of case). There was evidence introduced that the defendant had said he "wished he could stab [her] in the heart," but plaintiff did not take this seriously, and this utterance (by email) was several months prior to taking out the restraining order. *Id.* at 674.

⁷⁸ *Id.* at 674 (noting judge's reason for issuing the restraining order).

⁷⁹ See *id.* at 678 (acknowledging claim of future adverse effects if record not expunged has some merit). Among the many factors under Massachusetts law that a judge must consider in traditional bail proceedings is whether there exists any history of a restraining order issued against the defendant. Cabral, *supra* note 14, at § 2.1 (citing MASS. GEN. LAWS ANN. ch. 276 § 58 (West 2002)). Furthermore, the existence of prior restraining orders is also factored into a judge's decision when pretrial detention is sought pursuant to MASS. GEN. LAWS ch. 276, § 58A. *Id.* at § 3.8.

⁸⁰ See *C.O. v. M.M.*, 815 N.E.2d 582, 588-90 (Mass. 2004) (noting that the defendant's due

to the ruling in *Commissioner of Probation v. Adams*, the order can only be vacated and not expunged from the domestic violence registry.⁸¹ The presence of this record, although shielded from public view, creates a risk of future adverse effects on this juvenile.⁸²

Massachusetts appellate courts have held that expunging a record of an issued restraining order is beyond judicial discretion, and there is no ability for the court to expunge a record absent a finding of fraud.⁸³ Based on the court's reasoning in *Adams*, even if the judge who initially misapplied the law or otherwise constructed a basis for issuing an order sought to expunge their own order, this expungement is outside of the judiciary's authority.⁸⁴ The legislative objective surely cannot be to protect society from those who have not yet committed abuse as defined under the statute, unless the courts have found a way to predict abusive behavior absent any history of a defendant actually engaging in such conduct.⁸⁵ The statewide database should absolutely retain data on orders that were *properly* issued, even if they were later vacated or denied extension because of the particu-

process rights violated and judge acted outside legislature's intent). The violation of due process assertion was due to the judge denying the defendant a statutory meaningful right to be heard. *Id.* at 589. Although the *C.O.* Court did not have to address the expungement issue, its language is a strong reminder that we must also protect defendant's rights. *Id.* at 591-92. The *C.O.* Court said:

[T]he issue of family violence has become the focus of legitimate and increasing public concern. However, that concern must not be permitted to affect or diminish the court's responsibility to remain neutral, to protect the rights of the accused in each case, and to address each case individually on its own merits. . . . Just as we must guard against the potential that G.L. c. 209A proceedings may be used to harass and intimidate victims of domestic abuse, so too must we resist a culture of summarily issuing and extending these [restraining] orders. Such a culture would ignore the legislative intent behind G.L. c. 209A and undermine a basic pillar of our judicial tradition—that all parties be given a fair and equal opportunity to be heard.

Id.

⁸¹ See *Comm'r of Prob. v. Adams*, 843 N.E.2d 1101, 1105, 1111 (Mass. App. Ct. 2006) (holding that records can be expunged in only rare and limited circumstance of fraud on the court). But see *Police Comm'r of Boston v. Mun. Ct. of the Dorchester Dist.*, 374 N.E.2d 272, 274 (Mass. 1978) (noting that right to maintain and disseminate juvenile arrest records should be subject to balancing test). While a restraining order in this situation is not an "arrest" like the *Police Comm'r* case discussed, the idea of balancing the state's need against the interest of affected juveniles from being unnecessarily harmed is analogous. *Id.*

⁸² See *Frizado v. Frizado*, 651 N.E.2d 1206, 1209 (Mass. 1995) (acknowledging claim of future adverse effects if record not expunged has some merit).

⁸³ See *Comm'r of Prob.*, 843 N.E.2d at 1110-11 (outlining reasoning for holding that fraud is only basis to expunge).

⁸⁴ See *id.* at 1111 (recalling the court's reasoning that expunging only allowed in case of fraud).

⁸⁵ See *Vaccaro v. Vaccaro*, 680 N.E.2d 55, 57-58 (Mass. 1997) (outlining legislative intent in creating and maintaining a system to track domestic restraining orders).

lar circumstances that existed at the time of the order.⁸⁶ That is a very different scenario than the one in the instant cases where a restraining order was arguably issued outside of the statutory guidelines.⁸⁷

To better protect the rights of those who are targets of a restraining order the legislature should not only amend the statute to specifically allow for the expungement of 209A orders obtained through fraud, but it should also include an allowance for the expungement of those orders later found to have been issued outside of the statutory guidelines.⁸⁸ Furthermore, just as counsel is assigned to protect the interests of juveniles in other civil proceedings, so too should counsel be assigned to advocate for a juvenile defendant caught up in a 209A proceeding.⁸⁹ If counsel is assigned, but with no change to the statute, an order may still ultimately be vacated, but the notation in the domestic violence registry will remain an unfortunate problem. This is quite possibly an unintended consequence.

V. CONCLUSION

The 209A statute provides plaintiffs easy access to gain a measure of protection that was not available before its enactment. The statute is not without flaws. It must be revised so that it will protect juvenile defendants from abuse of the process and from misapplication of the law. The legislature must act now to protect juveniles, not just the ones whose parents make it to the courthouse first and become plaintiffs. The legislature must ensure that only those defendants who are the legitimate targets of the 209A statute (as abusers defined by the statute) actually have protection orders issued against them. If a defendant is erroneously charged with burglary, murder, rape, or many other serious crimes (as opposed to being

⁸⁶ See MASS. GEN. LAWS ANN. ch. 276 §§ 3, 6 (West 2007) (noting hearing required to extend order, at which hearing the order may be vacated, but no authority noted to expunge record).

⁸⁷ See *Smith v. Jones*, 852 N.E.2d 670, 678 (Mass. App. Ct. 2006) (discussing reasons for vacating restraining orders issued against juveniles); see also *C.O. v. M.M.*, 815 N.E.2d 582, 585-89 (Mass. 2004); *Comm'r of Prob.* 843 N.E.2d at 1111 (noting that this order was retaliatory and therefore fraudulent).

⁸⁸ See *Comm'r of Prob.*, 843 N.E.2d at 1111 (noting that expunction allowed in rare and limited circumstance of fraud perpetrated on court); see also Luz A. Carrion, *Rethinking Expungement of Juvenile Records in Massachusetts: The Case of Commonwealth v. Gavin G.*, 38 NEW ENG. L. REV 331, 335 (2004) (discussing commentators' argument favoring expungement of juvenile records). The Expungement argument has been gaining momentum in Massachusetts and nationally. *Id.* There are also adverse consequences to children in maintaining juvenile records, especially when that juvenile pursues certain career paths, such as law enforcement, politics, certain licensed professions, and others. *Id.*

⁸⁹ See MASS. GEN. LAWS ANN. ch. 119, § 29 (West 2007) (noting other civil matters where counsel is assigned to protect interests of minor).

found “not guilty,”) the fact that he or she was charged erroneously is not admissible in subsequent cases to prove the present conduct or to set bail. Erroneous “offensive” restraining orders issued against a defendant must not be allowed to remain on record and affect the defendant in future proceedings.

The legislature should, at a minimum, take the following steps to protect minors from overprotective parents, misapplication of law, and extra-statutorily issued protective orders: (1) the “10-day hearing” where possible should be in front of a different judge or magistrate so fresh eyes can evaluate the initial and continuing appropriateness of the order; (2) the legislature should allow for the immediate expungement of the record at the “10-day hearing” if a protective order is not extended and it was determined that there was no legal basis for its issuance; (3) the juvenile courts should have concurrent jurisdiction; and (4) counsel should be assigned to a juvenile 209A defendant at least through the 10-day hearing and appeal.

There are usually no easy answers in legal situations where domestic violence is an issue, but protection of our children, whether they are a plaintiff or defendant, is of paramount importance. The legislature might not be willing to tackle this issue head-on because of fear of being painted as soft on crime or domestic violence. The cases referenced here suggest strongly that the system is flawed, and that the legislature needs to take action. Perhaps this type of scenario will someday present the courts with another opportunity to step in and protect the constitutionally guaranteed due process rights of defendants because the popularly elected legislature has failed to act.

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