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ALASKA SUPREME COURT REQUIRES RISK-ASSESSMENT HEARINGS FOR ELIGIBLE SEX OFFENDERS SEEKING AN EXIT FROM THE REGISTRY

DOE V. DEPARTMENT OF PUBLIC SAFETY, 444 P.3D 116 (ALASKA 2019)

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I. INTRODUCTION

Sex offender registration laws have proliferated and evolved since their introduction over two decades ago. What began as privately held registries at local law enforcement agencies have grown into a nationwide network of publicly accessible online databases. Registration laws now apply to an ever-expanding list of offenses and impose a variety of collateral consequences on registrants which limit their opportunities for both employment and housing. There are currently over 900,000

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registrants nationwide,[1] and for some offenders, registration is a lifetime requirement from which there is seemingly no exit.

With a June 2019 decision, Alaska joined the majority of jurisdictions in providing non-dangerous sex offenders an opportunity to seek relief from mandatory registration.[2] In *Doe v. Department of Public Safety*, the Alaska Supreme Court held that the Alaska Sexual Offender Registration Act ("ASORA")[3] violated the Alaska State Constitution's due process clause.[4] The court reasoned that ASORA's failure to exclude non-dangerous offenders infringed on those offenders' fundamental right to privacy, a specifically enumerated right under the Alaska Constitution.[5] As a remedy, the court provided a procedure for offenders to file a civil action whereby they can establish that they no longer pose a risk to the public warranting continued registration.[6]

This Comment will first provide the pertinent facts and procedural history of *Doe*, as well as the implicated statutory, constitutional, and case law. Next, it will thoroughly analyze the court's reasoning, including both the majority and dissenting opinions. Finally, it will examine the current landscape of sex offender registration laws and how this decision fits into a slowly building trend of state supreme courts requiring individualized hearings for select registrants looking for an exit.

II. STATEMENT OF THE CASE

In 2000, the petitioner, John Doe, was convicted of aggravated sexual battery in Virginia[7] and sentenced to five years' imprisonment, with all time suspended, and five years of probation.[8] He was also required to register as a sex offender under Virginia law.[9] Doe moved to Alaska in early January 2003 and promptly registered as a sex offender there.[10] In

1. Steven Yoder, *Why Sex Offender Registries Keep Growing Even as Sexual Violence Rates Fall*, APPEAL (July 3, 2018), https://theappeal.org/why-sex-offender-registries-keep-growing-even-as-sexual-violence-rates-fall/.

2. Doe v. Dep't of Pub. Safety, 444 P.3d 116, 134–36 (Alaska 2019).

3. ALASKA STAT. ANN. §§ 12.63.010–100, 18.65.087 (West, Westlaw through Chapter 2 of the 2021 First Regular Session of the 32nd Legislature).

4. *Doe*, 444 P.3d at 119; ALASKA CONST. art. I, § 7.

5. *Doe*, 444 P.3d at 126, 134–35; ALASKA CONST. art. I, § 22 (amended 1972).

6. *Doe*, 444 P.3d at 135.

7. *See* VA. CODE ANN. § 18.2-67.3 (West, Westlaw through 2021 Regular Session).

8. *Doe*, 444 P.3d at 119.

9. *Id.*; *see* VA. CODE ANN. § 19.2-298.1 (West, Westlaw through 2021 Regular Session) (repealed 2003).

10. *Doe*, 444 P.3d at 119.

April of that year, the Department of Public Safety ("DPS") informed Doe that he needed to register annually, which he did in both 2004 and 2005.[11]

In February 2005, DPS again wrote to Doe with notice that he was required to register quarterly, for life, on the basis that Doe's Virginia conviction was deemed to be the equivalent of "sexual assault [first] degree, which is an aggravated offense that requires quarterly verification of your sex offender registration information."[12] Doe refused to comply with the new requirement and did not register again after January of 2005.[13] As a result, Doe was convicted of second-degree failure to register as a sex offender in 2007.[14]

In 2016, Doe filed suit seeking a declaratory judgment that: (1) the Alaska DPS lacked jurisdiction to impose ASORA on him; (2) ASORA violated his substantive due process rights; and (3) DPS's appeal procedures were inadequate and denied him procedural due process.[15] Doe further sought an injunction on the enforcement of ASORA against him.[16] Both Doe and the State filed motions for summary judgment.[17] Following briefing and oral arguments, the superior court granted the State's motion and denied Doe's, entering a final judgment in favor of the State.[18]

On appeal, Doe argued that Alaska lacked jurisdiction to impose ASORA's requirements on out-of-state offenders, reasoning that such punitive provisions could not be enforced against a person whose acts were entirely committed outside of the jurisdiction.[19] Doe also renewed his argument that ASORA violated the Alaska Constitution's due process clause.[20] Namely, he contended that ASORA infringed upon a number of fundamental rights, including the right to privacy.[21]

11. *Id.*
12. *Id.* (citation omitted).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 121.
20. *Id.* at 124.
21. *Id.*

III. BACKGROUND

A. National Sex Offender Registry Requirements

Although California implemented the first state sex offender registration program in 1954, few other states required sex offenders to register with law enforcement prior to the 1990s, after a series of highly publicized child abduction cases raised national concern over "stranger danger."[22]

In 1994, Congress passed the Jacob Wetterling Act,[23] which tied certain federal funding to the requirement that states create sex offender registries.[24] Under the Wetterling Act, registry information was available only to law enforcement, who could share that information with the community on a discretionary basis.[25] In 1996, Congress amended the Wetterling Act with Megan's Law,[26] mandating public disclosure of information about registered sex offenders.[27]

The underlying rationale behind these laws is two-fold. First, the registration system provides law enforcement with continually updated information on convicted sex offenders, improving their ability to investigate new offenses.[28] Second, public disclosure systems inform individuals about the risks in their specific communities so they can protect themselves accordingly.[29] By the end of the 1990s, all states had sex offender registries, and by 2006, all states had either some or all of their registry available for public perusal on the internet.[30] The United

22. Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 216 (2011); Ernest E. Allen, *Keeping Children Safe: Rhetoric and Reality*, 5 JUV. JUST. 16, 21 (1998).

23. *See Legislative History of Federal Sex Offender Registration and Notification*, SMART (Mar. 24, 2020), https://www.smart.gov/legislation.htm [hereinafter *Legislative History*]. In October 1989, Jacob Wetterling, age eleven, was abducted in St. Joseph, Minnesota. His mother, Patty Wetterling, became a national advocate for sex offender registration laws. Eli Lehrer, *Rethinking Sex-Offender Registries*, NAT'L AFFS. (Winter 2016), https://www.nationalaffairs.com/publications/detail/rethinking-sex-offender-registries.

24. Final Guidelines, 64 Fed. Reg. 572 (Jan. 5, 1999).

25. *See Legislative History*, supra note 23.

26. Megan Kanka, age seven, was abducted from Hamilton Township, New Jersey in July 1994. The case sparked a national outcry that resulted in both state and federal versions of Megan's Law. Olivia B. Waxman, *The History Behind the Law That Created a Registry of Sex Offenders*, TIME (May 30, 2017, 9:30 AM), https://time.com/4793292/history-origins-sex-offender-registry/.

27. *Legislative History*, *supra* note 23.

28. Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 745 (2016).

29. *Id.*

30. Agan, *supra* note 22, at 210.

States Department of Justice also helped establish the Dru Sjodin National Sex Offender Public Website—a single resource that allows users to search public state, territorial, and tribal sex offender registries.[31]

In 2006, Congress passed the Adam Walsh Act,[32] Title I of which—the Sex Offender Registration and Notification Act ("SORNA")—completely overhauled the federal standards for state sex offender registration and notification programs.[33] SORNA required states to expand the number of covered sex offenses[34] and classified these offenses into three tiers, based on "the type and seriousness of the offense."[35] SORNA also set minimum lengths of registration periods for the three tiers of sex offenders: Tier I offenders must register for ten to fifteen years, Tier II offenders must register for twenty-five years, and Tier III offenders must register for twenty-five years to life.[36] Like the Wetterling Act before it, SORNA uses federal funding incentives to coax states into complying with its provisions.[37]

SORNA's minimum standards are clear and rigid, leaving little room for state agency interpretation, and states have raised legitimate policy concerns in opposition to some of its requirements.[38] One of the most common objections is to SORNA's requirement that juvenile offenders be included in registries, with many states citing the higher likelihood of rehabilitation among juveniles as a reason for excluding them.[39] SORNA's required retroactive application to offenders convicted prior to the law's passage has been deemed unconstitutional by a number of state

31. *About NSOPW*, DRU SJODIN NAT'L SEX OFFENDER PUB. WEBSITE, https://www.nsopw.gov/en/About (last visited Jan. 23, 2021). Originally called the National Sex Offender Public Registry, the site was later renamed in honor of Dru Sjodin, a North Dakota college student who was kidnapped and murdered by a registered sex offender from neighboring Minnesota. *Id.*

32. Adam Walsh, age six, was abducted from a Florida mall in 1981. Olivia B. Waxman, *The U.S. Is Still Dealing with the Murder of Adam Walsh*, TIME (Aug. 10, 2016, 8:30 AM), https://time.com/4437205/adam-walsh-murder/. His father, John Walsh, subsequently co-founded the National Center for Missing & Exploited Children and went on to host the television program *America's Most Wanted*. *Id.*

33. *Legislative History*, *supra* note 23.

34. *Id.*

35. Mary P. Brewster et al., *Sex Offender Registries: A Content Analysis*, 24(6) CRIM. JUST. POL'Y REV. 695, 696 (2012).

36. *Id.*

37. McPherson, *supra* note 28, at 758.

38. Haley Snarr & Susan Parnas Frederick, *The Complexities of Sex Offender Registries*, NAT'L CONF. OF ST. LEGISLATURES (May 2018), https://www.ncsl.org/research/civil-and-criminal-justice/the-complexities-of-sex-offender-registries.aspx.

39. *Id.*

supreme courts.[40] A few states have argued that SORNA requirements do not actually increase public safety, and are therefore not worth the excessive cost of implementation.[41] As a result, thirty-two states, including Alaska, are not in full compliance with SORNA, despite maintaining comprehensive online registries.[42]

B. The Alaska Sexual Offender Registration Act

ASORA requires all sex offenders who are physically present in the State of Alaska to register with the Department of Corrections within thirty days before release from an in-state correctional facility or within one day of conviction at the local state trooper post or municipal police department if their sentence does not include incarceration.[43] Sex offenders convicted out-of-state must register within one working day of becoming physically present in Alaska.[44] A "sex offense" within the meaning of the statute includes a wide array of crimes varying significantly in their severity.[45] Enumerated offenses include: certain types of indecent exposure;[46] distribution or possession of child pornography;[47] multiple degrees of sexual assault;[48] and sexual abuse of a minor.[49] ASORA further designates a number of crimes as "aggravated sex offense[s]," including sexual assault in the first or second degree[50] and murder in the course of a sexual offense.[51]

To fulfill the registration requirement, sex offenders must disclose their name, address, place of employment, date of birth, details of their conviction, aliases and identifying physical features, driver's license number, descriptions and identification numbers of any motor vehicles they have access to, anticipated changes of address, email and other online messaging addresses, and information regarding certain

40. McPherson, *supra* note 28, at 776–79.

41. Snarr & Frederick, *supra* note 38.

42. *Id.*; Agan, *supra* note 22, at 210. For more details on individual state compliance see *Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check*, SMART (Sept. 30, 2020), https://www.smart.gov/pdfs/SORNA-progress-check.pdf.

43. ALASKA STAT. ANN. § 12.63.010(a)(1)–(2), (b) (West, Westlaw through Chapter 2 of the 2021 First Regular Session of the 32nd Legislature).

44. *Id.* § 12.63.010(a)(3) (Westlaw).

45. *Id.* § 12.63.100(7) (Westlaw).

46. *Id.* §§ 12.63.100(7)(C)(iii)–(iv), 11.41.458, 11.41.460 (Westlaw).

47. *Id.* §§ 12.63.100(7)(C)(v), 11.61.125, 11.61.127 (Westlaw).

48. *Id.* §§ 12.63.100(7)(C)(i), 11.41.410, 11.41.420, 11.41.425, 11.41.427 (Westlaw).

49. *Id.* §§ 12.63.100(7)(C)(i)–(ii), 11.41.436, 11.41.438, 11.41.440(a)(2) (Westlaw).

50. *Id.* §§ 12.63.100(1)(B), 11.41.110(a)(3) (Westlaw).

51. *Id.* §§ 12.63.100(1)(A)–(B), 11.41.100(a)(3), 11.41.110(a)(3) (Westlaw).

psychological treatment they have received.[52] All registrants are fingerprinted and photographed.[53] Sex offenders must update their registration information with written verification on a periodic basis; the frequency and duration of this obligation differs depending on the underlying offense.[54] Those convicted of a single sex offense must provide written verification annually for fifteen years.[55] Those convicted of either more than one sex offense or an aggravated sex offense must provide written verification quarterly for life.[56]

Under the statute, DPS is required to maintain a central sex offender registry containing the submitted information, which is posted online.[57] Through this database, the public has access to registrants' names, aliases, addresses, dates of birth, photographs and physical descriptions, places of employment, and motor vehicle information, as well as certain details of their convictions and sentences, and whether or not the registrant is in compliance with ASORA.[58]

C. Alaska Constitutional Protections

The Alaska Constitution, much like the United States Constitution, ensures the right to due process for its citizens. Article I, section 7 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[59]

Unlike in federal constitutional jurisprudence, which infers a privacy right from the "penumbras" of the Bill of Rights,[60] the right to privacy is explicitly enumerated in the Alaska Constitution, which states that the "right of the people to privacy is recognized and shall not be infringed."[61] Consequently, the Alaska Supreme Court has repeatedly found greater protection for privacy rights under the Alaska Constitution than under the United States Constitution.[62] On the basis of privacy, the court has upheld the right of individuals to use marijuana in their own homes,[63]

52. *Id.* § 12.63.010(b)(1) (Westlaw).
53. *Id.* at (b)(2) (Westlaw).
54. *Id.* at (d) (Westlaw).
55. *Id.* §§ 12.63.010(d)(1), 12.63.020(a)(1)(B) (Westlaw).
56. *Id.* §§ 12.63.010(d)(2), 12.63.020(a)(1)(A) (Westlaw).
57. *Id.* § 18.65.087(a), (h) (Westlaw); *Sex Offender/Child Kidnapper Registry*, ALASKA DEP'T PUB. SAFETY, https://sor.dps.alaska.gov (last visited Feb. 10, 2020) (allowing users to search by name or by map).
58. § 18.65.087(b) (Westlaw).
59. ALASKA CONST. art. I, § 7.
60. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483–84 (1965).
61. ALASKA CONST. art. I, § 22.
62. Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29, 31 (2003).
63. Ravin v. State, 537 P.2d 494, 511 (Alaska 1975).

struck down a municipal policy subjecting employees to random suspicionless drug testing,[64] and deemed the warrantless recording of conversations by a police informant to be unreasonable.[65]

However, this constitutional privacy right does have limitations. Despite Alaska's enumerated right to privacy, the court has rejected a constitutional right to physician-assisted suicide[66] and upheld drug testing for private employees,[67] as well as suspicionless drug testing for police and firefighters applying for promotions.[68]

IV. THE COURT'S REASONING

A. The Majority Opinion

In *Doe v. Department of Public Safety*, the Alaska Supreme Court held that, by failing to exclude non-dangerous offenders from the registration requirement, ASORA violated the Alaska Constitution's due process clause.[69] The court grounded this conclusion in the fundamental right to privacy enumerated in the Alaska Constitution, finding that sex offenders have a legitimate expectation of privacy in the information publicly disclosed in the online registry database.[70]

Writing for the majority, Senior Justice Matthews began by concluding that Alaska had proper jurisdiction to require out-of-state offenders to register under ASORA once they are physically present in the state.[71] Doe based his lack of jurisdiction argument on the following chain of premises: (1) that Alaska did not have jurisdiction to impose punitive provisions on persons whose acts were committed outside of the state; (2) that ASORA's requirements were fundamentally punitive in nature; and (3) that Alaska therefore lacked jurisdiction to apply ASORA to out-of-state offenders.[72]

Doe cited the court's 2008 decision in *Doe v. State* (*Doe 08*) as supporting the characterization of ASORA as punitive.[73] In *Doe 08*, the court held that application of ASORA to sex offenders convicted before

64. Alaska Police Dep't Emps. Ass'n v. Mun. of Anchorage, 24 P.3d 547, 550–51, 557–59 (Alaska 2001).

65. State v. Glass, 583 P.2d 872, 880–81 (Alaska 1978), *modified on reh'g*, 596 P.2d 10 (Alaska 1979).

66. Sampson v. State, 31 P.3d 88, 90 (Alaska 2001).

67. Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989).

68. *Alaska Police Dep't Emps. Ass'n*, 24 P.3d at 556–57, 560.

69. 444 P.3d 116, 119 (Alaska 2019).

70. *Id.* at 126, 130.

71. *Id.* at 124.

72. *Id.* at 121.

73. *Id.* (citing 189 P.3d 999 (Alaska 2008)).

the law's effective date violated the ex post facto clause of the Alaska Constitution, reasoning that, regardless of the legislative intent, ASORA's effects were punitive in nature and therefore could not be imposed retroactively.[74] However, the court concluded that *Doe 08* only barred application of ASORA to offenders convicted in Alaska prior to the law's effective date, not out-of-state offenders who later move to Alaska.[75]

The court was equally unpersuaded by Doe's reliance on cases holding that states cannot prosecute criminal acts occurring outside their boundaries.[76] The court found that, unlike states which have no legitimate interest in prosecuting crimes commissioned in other jurisdictions, Alaska does have a legitimate interest in public safety which is served by the registration of sex offenders present within its borders.[77]

Finally, the court rejected Doe's legal analogy to *State Farm Mutual Automobile Insurance Co. v. Campbell*, in which the United States Supreme Court held that a state court's imposition of excessive punitive damages on a civil defendant, based in part on evidence of the defendant's out-of-state conduct, violated that defendant's Fourteenth Amendment right to due process.[78] The Alaska Supreme Court concluded there was no logical nexus between requiring a sex offender with an out-of-state conviction to register under ASORA and the imposition of punitive damages for out-of-state conduct in the civil context.[79]

Having found that Alaska had jurisdiction to apply ASORA's requirements to out-of-state offenders like Doe, the court next turned to Doe's procedural and substantive due process arguments.[80] Under procedural due process, the state is required to employ fair and adequate procedures before taking action that infringes on life, liberty, or property interests.[81] Under substantive due process, the state may not take action infringing on those protected interests without a sufficient justification, regardless of what procedures are implemented.[82]

In assessing the application of these doctrines to sex offender registries, the court looked first to *Connecticut Department of Public Safety v. Doe*, in which the United States Supreme Court considered a procedural due process challenge to Connecticut's sex offender

74. *Doe 08*, 189 P.3d at 1007, 1018; *Doe,* 444 P.3d at 121–22.
75. *Doe*, 444 P.3d at 123.
76. *Id.*
77. *Id.*
78. *Id.* (citing 538 U.S. 408 (2003)).
79. *Id.* at 123–24.
80. *Id.* at 124.
81. *Id.*
82. *Id.* at 124–25.

registration statute.[83] Much like ASORA, Connecticut's sex offender registry law required registration based on the offender's prior conviction rather than his current risk to the community.[84] The Court held that, because an offender's current dangerousness was not a material fact under the state's statutory scheme, procedural due process did not apply.[85] However, the Court noted "that the statute's failure to exclude non-dangerous offenders from [its] registration requirements could [present] a violation of *substantive* due process," were the plaintiff to identify a conflicting provision of the Constitution and recast his claim accordingly.[86]

Because Doe invoked the right to privacy protected under the Alaska Constitution, the court concluded that a fundamental right was at stake and, therefore, the strict scrutiny standard of review must be applied to Doe's substantive due process claim.[87] Reserved for those state actions which infringe on fundamental rights, strict scrutiny requires the State to articulate a compelling state interest and demonstrate that the chosen means are narrowly tailored to achieve that objective.[88]

In cases where the due process violation rests on a right to privacy claim, the plaintiff must have "both a legitimate expectation of privacy and a claim of a substantial infringement, as distinguished from a minimal one."[89] The court defined a legitimate expectation of privacy as one that "society is prepared to recognize as reasonable" and noted that Alaska generally recognizes two types of protected privacy interests: an interest in personal autonomy and an interest in protecting "sensitive personal information."[90] The court found that Doe's claim fit into the informational privacy category.[91]

Due to the widespread public scorn known sex offenders often face, the court concluded that sex offender status was highly sensitive information.[92] While the State argued that an offender's conviction is a matter of public record, the court distinguished a public court file from the online sex offender database, which broadly disseminates registrant information.[93] The court concluded that the aggregation of once relatively

83. *Id.* at 125 (citing 538 U.S. 1 (2003)).
84. *Id.* (citing *Connecticut Dep't of Pub. Safety*, 538 U.S. at 4).
85. *Id.* (citing *Connecticut Dep't of Pub. Safety*, 538 U.S. at 1–2).
86. *Id.* (emphasis added) (citing *Connecticut Dep't of Pub. Safety*, 538 U.S. at 8–9).
87. *Id.* at 126.
88. *Id.* at 125, 127.
89. *Id.* at 126–27.
90. *Id.* at 127 (quoting Int'l Ass'n of Fire Fighters, Loc. 1264 v. Mun. of Anchorage, 973 P.2d 1132, 1134 (Alaska 1999)).
91. *Id.*
92. *Id.* at 128.
93. *Id.* at 128–29.

obscure information into a single, highly accessible clearinghouse raised legitimate privacy concerns.[94] Furthermore, while the State contended that a registrant's places of residence and employment are not of a "sensitive" nature, the court disagreed, noting that this information is not ordinarily in the public domain, and its publication can leave a registrant vulnerable to reprisals, harassment, and even physical attack.[95]

Citing these serious and potentially harmful consequences, the court concluded that a sex offender has a "legitimate and objectively reasonable privacy expectation" in the information disseminated under ASORA.[96] The court observed that those convicted of serious crimes, including sex offenders, already struggle with re-integrating into society and that "a program of continuous publicity," such as ASORA, only serves to make re-integration harder.[97] Therefore, the right to privacy necessitated that the State demonstrate a compelling interest for such a program and narrowly tailor it to fulfill that need.[98]

The State argued that ASORA furthered a compelling interest in protecting the public, citing studies showing that those convicted of sex crimes are more likely to re-offend than other offenders.[99] While the court noted that such studies had been widely questioned, Doe did not refute the State's public safety argument, and the court accepted the State's assertion that public safety was a compelling state interest justifying the ASORA database.[100]

Next, the court turned to the question of whether ASORA was the least restrictive means available to advance the interest of public safety.[101] Doe contended that ASORA was not the least restrictive means because it did not provide registrants with a hearing by which to challenge their characterization as currently dangerous sex offenders.[102] Without the opportunity for a hearing, ASORA was over-inclusive, infringing upon the liberties of rehabilitated offenders without providing any public benefit.[103] In response, the State argued that ASORA reflected a legislative judgment that individual members of the public should be

94. *Id.* at 129–30 (citing U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 764 (1989)).
95. *Id.* at 128–29.
96. *Id.* at 130.
97. *Id.*
98. *Id.*
99. *Id.* at 131.
100. *Id.* at 131–32.
101. *Id.* at 132.
102. *Id.*
103. *Id.*

able to decide for themselves what level of risk they are willing to tolerate when interacting with a registered sex offender.[104]

Ultimately, the court concluded that ASORA was not narrowly tailored to serve public safety, noting that "without 'the likelihood [that the offender] will commit new sex offenses, there is no compelling government interest in requiring' him to comply with ASORA."[105] By precluding the possibility of a hearing, the Act swept too broadly, arbitrarily applying to those sex offenders who did not present a danger of re-offending.[106] The court therefore held that ASORA violated substantive due process.[107]

As a remedy, the court required that an "individualized risk-assessment hearing" be provided to those offenders seeking to contest their characterization as dangerous.[108] The court concluded that the hearing remedy sufficiently narrowed ASORA so as to cure its constitutional deficiency.[109] Pursuant to this remedy, Doe was permitted to file a civil action in superior court in order to present evidence that he no longer poses a risk to the public and should therefore be exempt from registration.[110] Observing that the majority of states now provide for such individualized risk-assessment hearings, the court suggested the superior court look to the laws of other jurisdictions in formulating its proceedings and identifying relevant factors for consideration.[111]

B. Chief Justice Bolger's Dissenting Opinion

In his dissent, Chief Justice Bolger took issue with the court's decision to subject ASORA to strict scrutiny.[112] He noted that Doe's offense was substantially similar to first degree sexual assault under Alaska law, an offense carrying a term of twenty to thirty years' imprisonment and at least fifteen years' probation for a first time offender.[113] Based on these substantial penalties, Chief Justice Bolger contended that such sex offenders have a reduced expectation of privacy in the information disclosed in the sex-offender registry, emphasizing that conviction information is already a matter of public record and that

104. *Id.*
105. *Id.* (quoting Doe v. Dep't of Pub. Safety (Doe 04), 92 P.3d 398, 412 (Alaska 2004)).
106. *Id.* at 132–33 (citing Doe v. State (Doe 08), 189 P.3d 999, 1017 (Alaska 2008)).
107. *Id.* at 134–35.
108. *Id.* at 135.
109. *Id.*
110. *Id.*
111. *Id.* at 135–36.
112. *Id.* at 136–37 (Bolger, C.J., dissenting).
113. *Id.* at 137.

serious sex offenses are, by nature, notorious crimes.[114] He also characterized the State's interest in public safety as a constitutional concern.[115] He grounded this assertion in the Alaska Constitution's requirement that "criminal administration" be based on, among other things, "the need for protecting the public," a principle on which the legislature relied when enacting ASORA.[116]

After weighing these competing interests, Chief Justice Bolger concluded that a lower level of scrutiny was more appropriate and that, under such a standard of review, ASORA constituted "a fair and reasonable tool" for furthering the State's valid interest in public safety.[117]

Chief Justice Bolger further questioned the wisdom of the court's chosen remedy.[118] He observed that the central issue of the individualized risk-assessment hearing—whether the offender no longer poses a risk to the public justifying continued registration—would present the superior court with a cascade of policy questions, the most essential being "[w]hat quality of risk to the public is sufficient to justify registration?"[119] He contended that, by inviting the superior court to consult the laws of other states in finding a model for the newly required hearing, the court had charged the superior court with "an essentially legislative function" that it was ill-equipped to perform.[120]

Finally, Chief Justice Bolger disagreed with the court's finding that the entire ASORA statute was unconstitutional absent the hearing provision, reasoning that Doe's injuries stemmed only from the law's public disclosure requirement, not its registration requirement.[121] He felt that the public disclosure provision could be severed from the rest of the Act and maintained that the hearing requirement should only apply to the statute's public disclosure provision.[122]

V. ANALYSIS AND IMPLICATIONS

In adopting individualized-risk assessment hearings, Alaska joins an increasing number of states in providing a means for select, non-

114. *Id.*
115. *Id.* at 138.
116. *Id.* (quoting ALASKA CONST. art. I, § 12).
117. *Id.* Chief Justice Bolger did not specify precisely what level of scrutiny he would have applied, although his analysis seems to utilize rational basis review. *See id.*
118. *Id.*
119. *Id.* at 138–39.
120. *See id.*
121. *Id.* at 139.
122. *Id.*

dangerous sex offenders to exit the mandatory registration system. Currently, a majority of jurisdictions provide some opportunity for preterm registry exit for limited categories of sex offenders.[123] This trend represents a modest and reasonable course correction to a well-intentioned law enforcement policy that has grown overbroad and unwieldy in its application.

Since their inception, registration and notification laws have enjoyed enthusiastic public, political, and judicial support.[124] As a policy objective, protecting children has a near universal appeal.[125] And, at first glance, sex offender registries appear to have worked: the expansion of registration and notification laws has coincided with an overall improvement in national public safety.[126] Rape rates and reported child sexual abuse cases have both declined since the 1990s.[127] One 2011 study concluded that registration reduced the number of sex offenses by thirteen percent, after controlling for other pertinent variables.[128] While calls for criminal justice reform have found bi-partisan support in recent years, this support has not extended to sex offender registration laws, which have only strengthened over time as more states comply with SORNA requirements.[129]

Yet, as registration and notification laws have become more expansive and onerous, legal reformers and human rights organizations

123. Thirty-four states now allow certain classes of sex offenders to petition for relief from the registration requirement or for a reduction in the length of their registration period. *50-State Comparison: Relief from Sex Offender Registration Obligations*, RESTORATION RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/ (Nov. 14, 2019) [hereinafter *50-State Comparison*].

124. Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 240 (2015).

125. *See id.*; *see also* Lehrer, *supra* note 23 (noting the reason for unanimous support for registries is that "[a]ll parents are horrified by the thought of their children being snatched from them and sexually abused").

126. Lehrer, *supra* note 23.

127. *Id.* (noting that rape rates fell by thirty percent between 1995 and 2016, while child sexual-abuse cases dropped from 88,000 reported cases in 1999 to fewer than 61,000 in 2013). Of course, rape and sexual abuse are notoriously underreported crimes, so all official estimates are considered relative measures. *Id.* There is also no definitive proof that this decrease in reported sexual crimes is a direct result of the proliferation of sex offender registries. *Id.*

128. *Id.*; *see also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 192 (2011).

129. Michael Hobbes, *Sex Offender Registries Don't Keep Kids Safe, but Politicians Keep Expanding Them Anyway*, HUFFPOST: POLITICS (July 16, 2019, 5:45 AM), https://www.huffpost.com/entry/sex-offender-laws-dont-make-children-safer-politicians-keep-passing-them-anyway_n_5d2c8571e4b02a5a5d5e96d1.

have begun to question the wisdom and efficacy of these policies.[130] Critics note that the registration requirement is overbroad, applying in many states to those convicted of an array of non-violent and non-coercive crimes, such as "Romeo and Juliet" offenses, indecent exposure, and even public urination.[131] Despite the wide variety of encompassed crimes, all offenders go on the same registration list. Furthermore, under SORNA, states are required to register juvenile offenders as young as fourteen, and some states have subjected even younger children to the registration requirement.[132] Many states require visiting out-of-state offenders to be added to their registries, leading to "duplicate" entries, and twenty-three states keep these "duplicate" offenders on their registries for life.[133] Inclusion of both out-of-state visitors and non-dangerous juveniles has contributed to registry "clutter" that both misrepresents the number of sex offenders living in a particular state and diverts law enforcement resources away from monitoring the most dangerous offenders.[134]

While the registration requirement itself is a collateral consequence of a criminal conviction, many state and local sex offender registration laws also carry further collateral consequences for offenders. States have imposed employment restrictions on registered offenders and required designated high-risk registrants to submit to GPS monitoring.[135] But the most common consequence is the imposition of residency restrictions, which prohibit registrants from living near places where children congregate, regardless of whether their underlying offense involved children.[136] In many urban areas, these restrictions make it virtually impossible for offenders to find housing.[137] An extreme example can be found in Miami, Florida, where a small encampment of homeless sex offenders began living under a bridge in the mid-2000s, because they

130. *See, e.g.*, Hum. Rts. Watch, *No Easy Answers: Sex Offender Laws in the U.S.*, at 1–12, Report No. 4(G) (Vol. 19), (Sept. 2007), https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf.

131. *See id.* at 5.

132. *Id.* at 8–9 (describing a 10-year-old boy who was required to register as a sex offender after inappropriately touching his cousin).

133. Yoder, *supra* note 1.

134. *Id.*; Lehrer, *supra* note 23.

135. McPherson, *supra* note 28, at 787–88, 789.

136. Hum. Rts. Watch, *supra* note 130, at 100–01. Most residency restrictions impose 1,000 to 2,500-foot "buffer zones" from places such as schools, bus stops, day care centers, churches, parks, and attractions, such as movie theaters, swimming pools, and pet stores. *Id.* at 100–03.

137. *Id.* at 102–03.

could not find restriction-compliant housing within the county.[138] The camp has since grown to more than 300 people.[139]

Legal reformers cite such provisions, and their more draconian effects, as proof that the current scope of sex offender registration and notification laws potentially causes more net harm to society than good.[140] State sex offender registries are "disproportionately black and overwhelmingly poor," reflecting and exacerbating existing inequities in American society and the criminal justice system at large.[141] Some registration requirements can actually be detrimental to encouraging reintegration and reform, as sex offender status often prevents registrants from finding gainful employment, obtaining housing, and building and maintaining personal relationships.[142] Meanwhile, because state laws afford local prosecutors, judges, and police discretion in enforcing registration requirements, wealthy and influential offenders may be able to avoid compliance without consequence.[143] A notorious example is billionaire Jeffrey Epstein, who violated registration laws with impunity for over eight years after being convicted as a Tier III sex offender in 2011.[144]

A growing body of research also calls into question how well-tailored public registries are to the ultimate goal of protecting children. Notification requirements in particular are focused on the prevention of child sexual victimization by strangers.[145] However, ninety-three percent of child victims are abused by a family member or someone otherwise

138. Hobbes, *supra* note 129.

139. *Id.*

140. *See* Hum. Rts. Watch, *supra* note 130, at 119–25.

141. Hobbes, *supra* note 129.

142. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 416–17 (2010) (describing limited employment and housing opportunities available to registered sex offenders, as well as the "vigilantism, ostracism, and community segregation" many experience); Hobbes, *supra* note 129 (noting that unemployment and homelessness are particularly linked to an increased risk of recidivism).

143. Hobbes, *supra* note 129.

144. Epstein failed to appear thirty-four times for mandatory, in-person check-ins with law enforcement. Elizabeth Rosner et al., *NYPD Let Convicted Pedophile Jeffrey Epstein Skip Judge-Ordered Check-Ins*, NY POST (July 10, 2019, 9:19 PM), https://nypost.com/2019/07/10/nypd-let-convicted-pedophile-jeffrey-epstein-skip-judge-ordered-check-ins/. In New York, violating such registration requirements is a felony carrying up to a four-year prison sentence for the first offense. *Id.* Epstein was arrested on federal sex-trafficking charges in 2019 and died in Manhattan federal jail while awaiting trial. *See 60 Minutes Investigates the Death of Jeffrey Epstein*, CBS NEWS (Jan. 5, 2020), https://www.cbsnews.com/news/did-jeffrey-epstein-kill-himself-60-minutes-investigates-2020-01-05/.

145. Bonnar-Kidd, *supra* note 142, at 414.

known to them.[146] Because of the manipulation inherent in these relationships, child sexual abuse too often goes unreported, meaning most "sex offenders" never wind up on a registry at all.[147] Of those sex crimes which are reported, over ninety percent are committed by first-time offenders.[148] One comprehensive meta-analysis of twenty-one studies found that, on average, only twelve percent of registered sex offenders committed another crime and that the risk of recidivism declined the longer a registrant lived in the community crime-free.[149] Overall, studies suggest harsher registration requirements do not actually correlate to a decline in sex abuse victims and that sex offenders are statistically less likely to reoffend than other criminals.[150]

Due perhaps in part to these new findings on sex offender recidivism, state courts and legislatures have begun to adopt modest remedies for those non-dangerous sex offenders seeking an exit from the registry. Most jurisdictions now offer an opportunity for an early exit, although relief is limited to a small class of registrants.[151] Adjudicated juveniles are those most often permitted to petition for exemption, usually after complying with registration requirements for a number of years.[152] Some states also permit those convicted of lesser offenses to petition, again after a mandated period of compliance.[153] Of course, qualifying for the right to petition is only the first hurdle offenders must overcome. Qualifying registrants still face the financial impediments inherent in legal proceedings: paying for filing fees, risk assessment evaluations, and an attorney.[154]

146. *Id.*; *see also Children and Teens: Statistics*, RAINN, https://www.rainn.org/statistics/children-and-teens (last visited Jan. 23, 2021). Similarly, child abductions are most often committed by family members, typically a non-custodial parent; among those cases where surrounding circumstances are recorded, "only 0.1 percent are reported as having been abducted by a stranger." *Kidnapped Children Make Headlines, but Abduction Is Rare in U.S.*, REUTERS (Jan. 11, 2019, 3:31 PM), https://www.reuters.com/article/us-wisconsin-missinggirl-data/kidnapped-children-make-headlines-but-abduction-is-rare-in-u-s-idUSKCN1P52BJ.

147. *See* Deborah Jacobs, *Why Sex Offender Laws Do More Harm Than Good*, ACLU N.J., https://www.aclu-nj.org/theissues/criminaljustice/whysexoffenderlawsdomoreha (last visited Jan. 31, 2021).

148. Yoder, *supra* note 1 (citing studies out of New York and Minnesota); Bonnar-Kidd, *supra* note 142, at 414 (citing studies out of Ohio and New York).

149. Yoder, *supra* note 1.

150. Hobbes, *supra* note 129; Bonnar-Kidd, *supra* note 142, at 413–14.

151. Logan, *supra* note 124, at 227–30; *see also 50-State Comparison*, *supra* note 123 (listing categories of sex offenders eligible for relief by state).

152. Logan, *supra* note 124, at 227–28 (describing juvenile relief available in Pennsylvania, Wyoming, Florida, and Missouri).

153. *Id.* at 229–30 (describing relief available for low tier offenders in Iowa, Tennessee, Utah, New Hampshire, and Colorado).

154. *Id.* at 233.

Most states consider risk of recidivism when hearing these petitions, but how that risk is assessed varies by jurisdiction.[155] In most jurisdictions, the burden of proof a petitioner must satisfy is clear and convincing evidence, although some states only require a preponderance of the evidence, and still others do not specify a burden of proof at all.[156] Risk level determinations are typically made via actuarial assessment, and a number of different models are currently in use, with varying levels of predictive accuracy.[157] Given the varying approaches states have taken in implementing risk-assessment hearings, the Alaska Supreme Court's suggestion in *Doe v. Department of Public Safety* that the superior court consult other jurisdictions for guidance in setting its own protocols does little to clarify what form those proceedings may ultimately take.[158]

The majority opinion in *Doe v. Department of Public Safety* cites a number of the more noteworthy state supreme court interventions mandating risk-assessment hearings for certain sex offenders who request them.[159] In *Doe v. Attorney General*, the Supreme Judicial Court of Massachusetts held that the state's registration act was "unconstitutional as applied to the plaintiff in the absence of a right to a hearing" to determine whether he posed a continued risk to the community, resting its analysis on procedural due process.[160] In *State v. Bani*, the Supreme Court of Hawai'i likewise relied on procedural due process in holding that the state's public notification requirements were unconstitutional absent an individualized risk-assessment hearing.[161] Finally, in *Doe v. State*, the Supreme Court of New Hampshire imposed a similar hearing requirement when that state's registration statute was challenged on ex post facto grounds.[162]

The proliferation of risk-assessment hearing procedures is part of a gradual shift in the legal system's conception of the way sex offender

155. *Id.* at 230–31.

156. *Id.* at 231.

157. Bonnar-Kidd, *supra* note 142, at 416.

158. *See* 444 P.3d 116, 135–36 (Alaska 2019).

159. *Id.* at 133–35.

160. 686 N.E.2d 1007, 1014 (Mass. 1997). The offender was convicted of indecent assault and battery after soliciting sex from an undercover police officer at a place frequented by men seeking consensual sexual activity. *Id.* at 1009.

161. 36 P.3d 1255, 1268 (Haw. 2001). The defendant had pled no contest to a sexual assault charge arising out of an incident he claimed not to remember due to intoxication. *Id.* at 1257. The Hawai'i legislature subsequently amended its sex offender registration and notification statute to comply with the new hearing requirement. *See* HAW. REV. STAT. ANN. §§ 846E-3, -10 (West, Westlaw through Act 19 of the 2021 Regular Session).

162. 111 A.3d 1077, 1102 (N.H. 2015). The permanently disabled registrant was unable to obtain housing as a result of his 1987 aggravated felonious sexual assault conviction. *Id.* at 1082.

registration and notification laws intersect with registrants' individual liberties. Courts have also begun to strike down other facets of sex offender registration statutory schemes as unconstitutional. In 2015, the Supreme Court of California held the 2,000-foot buffer zones mandated by the state's residency restriction statute were unconstitutional.[163] In 2017, the District Court of Colorado held that the "[p]ublic shaming and banishment" caused by the state's notification law amounted to cruel and unusual punishment.[164] Most notably, that same year, the United States Supreme Court held that a North Carolina law banning sex offenders from social media violated the First Amendment.[165]

While these developments indicate that we may be receding from a high watermark of sex offender registry requirements, legal reformers continue to advocate for more comprehensive changes. Human Rights Watch has proposed excluding juvenile offenders, those who have committed non-violent offenses, and those considered low risk on the basis of individual assessment from registration requirements.[166] Some activists even support the extreme and highly unlikely step of repealing community notification requirements entirely and limiting sex offender registry access to law enforcement.[167]

Researchers, civil libertarians, victims' rights advocates, and public health organizations all agree that more resources should be devoted to sexual violence prevention programs, sex offender treatment and reintegration programs, and mental health services for survivors of sexual assault and abuse.[168] About one in four girls and one in thirteen boys experience some form of childhood sexual abuse—a traumatic experience that can lead to long-term adverse physical, mental, and emotional health consequences.[169] Because so many of these crimes go unreported, a more holistic public health approach to safety and prevention is needed to support existing criminal justice measures.[170] Well-funded public education programs focused on raising awareness,

163. *In re* Taylor, 343 P.3d 867, 869 (Cal. 2015).

164. Millard v. Rankin, 265 F. Supp. 3d 1211, 1226–27 (D. Colo. 2017).

165. Packingham v. North Carolina, 137 S. Ct. 1730, 1737–38 (2017).

166. Hum. Rts. Watch, *supra* note 130, at 15–16.

167. *See id.* at 17–18; *see also* Lehrer, *supra* note 23 (arguing that registration requirements are more effective than notification requirements).

168. *See, e.g.*, Yoder, *supra* note 1; Hum. Rts. Watch, *supra* note 130, at 20; *Safety and Prevention*, RAINN, https://www.rainn.org/safety-prevention (last visited Feb. 7, 2021); *Preventing Child Sexual Abuse*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/childsexualabuse.html (Mar. 20, 2020).

169. *Preventing Child Sexual Abuse*, *supra* note 168.

170. *See id.* (identifying current gaps in prevention as well as promising avenues for future research and community outreach).

teaching children about boundaries and consent, and encouraging victims to report abusers could help to both identify first-time offenders and stop sexual violence before it occurs.[171]

VI. CONCLUSION

In *Doe v. Department of Public Safety*, the Alaska Supreme Court held that ASORA violated substantive due process by failing to provide non-dangerous sex offenders with a hearing to contest their inclusion on the state sex offender registry.[172] The court grounded its holding in the Alaska Constitution's enumerated right to privacy, which it characterized as a fundamental right.[173] By requiring a hearing for non-dangerous offenders seeking an exit from the state registry, the court followed a gradual trend of similar holdings pushing back on increasingly broad registration and notification laws.[174] Such individualized risk-assessment hearings offer an appropriate venue for registrants to demonstrate successful rehabilitation and will hopefully lead to leaner registries, focused on the most dangerous offenders. Regardless of what other changes the future may bring to state registration and notification laws, sex offender registries should be only one small part of larger national efforts to prevent sexual violence.

171. Jacobs, *supra* note 147; Bonnar-Kidd, *supra* note 142, at 418; Hobbes, *supra* note 129.

172. 444 P.3d 116, 135–36 (2019).

173. *Id.* at 126.

174. *Id.* at 135–46.