Law and the Public's Health

"MEGAN'S LAWS" AND THE U.S. CONSTITUTION: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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A fundamental focus of public health law is the tension between individual liberty, autonomy, and privacy and the government's power and duty to protect the public's health and welfare.[1] The U.S. Supreme Court recently addressed this fundamental tension in *Smith v. Doe*[3] and *Connecticut v. Doe*,[2] two cases involving state sex offender registration acts known as "Megan's Laws," which by 1996 were in effect in every state, the District of Columbia, and at the federal level.[4] These laws are named after Megan Kanka, a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children.

The cases concerning the validity of state Megan's Laws turned on the meaning of the Constitution's due process and *ex post facto* clauses, which, respectively, prohibit the deprivation of liberty without due process of law and prohibit states from passing laws that constitute retroactive criminal punishment. This issue's *Law and the Public's Health* column briefly explains the concept of due process, describes the two Supreme Court cases, and assesses the cases' implications for public health practice and policy.

DUE PROCESS: A THUMBNAIL SKETCH

The Due Process Clause of the 14th Amendment to the Constitution contains both procedural and substantive guarantees. Procedural due process is based on the idea that although the Constitution protects substantive interests in life, liberty, and property, such protections are not absolute and may be displaced through appropriate procedural safeguards designed to ensure a fair process. Typically, these safeguards involve the right to a formal and impartial hearing at which the legitimacy of the state's conduct in a particular case can be considered through the presentation of evidence specific to the individual.[5] In certain instances, where the liberty interest is sufficiently serious, this hearing must happen *prior to* the state's action. Procedural due process lies at the heart of both criminal and civil law.

Substantive due process, on the other hand, forbids government infringement on certain "fundamental" liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.[6] Thus, an individual may claim that a deprivation of certain interests violates the Constitution no matter what level of procedural due process protection is provided. Much of the debate around government's authority to regulate human reproduction and abortion, for example, turns on the notion of fundamental substantive rights.

SMITH V. DOE

Smith v. Doe involved Alaska's Sex Offender Registration Act. Like other Megan's Laws, the Alaska statute is intended to protect the public against child sex offenders[7]; it requires convicted sex offenders to register with law enforcement authorities, verify personal information quarterly or annually (depending on the severity of the past offense), and notify authorities regarding relocation.[8] Furthermore, much of the individual information is classified as public.[9] Offenders who fail to comply with the law are subject to criminal prosecution.

The law's registration and notification provisions apply retroactively to individuals convicted prior to its 1994 passage. Two convicted sex offenders, who had been released from prison in 1990 and had completed their rehabilitation programs, challenged the law's constitutionality on due process and *ex post facto* grounds. Two lower federal courts struck down the law as violative of the prohibition against *ex post facto* punishment but did not reach the due process arguments.

The Supreme Court reversed the lower courts, ruling that Alaska's law was a permissible non-punitive civil regulation designed to protect public health and safety, rather than a law constituting retroactive criminal punishment.[10] In reaching this conclusion, the Court looked to the text of the statute to determine the legislature's intent.[11] Significantly, the statute included express legislative "findings" regarding the public risk of re-offense, identified public protection from repeat offense as the law's primary aim, and classified released information about sex offenders as a public protection.[12] The Court found nothing in the text of the statute to indicate an intent to impose retroactive criminal punishment and, applying a seven-factor test from a previous case,[13] the Court further

determined that the statute's effects were not criminal in nature and did not operate to negate Alaska's intention to establish a civil regulatory scheme.[14]

CONNECTICUT V. DOE

In the companion case of *Connecticut v. Doe*, the Court at least partially addressed the due process question. This case raised the question of whether the guarantees of individual liberty and procedural safeguards are violated by a state public safety law that considers neither rehabilitation nor the lack of future risk in imposing its sanctions and that imposes restrictive requirements and obligations on sexual offenders who already have been punished for their crimes.

Connecticut's Megan's Law requires convicted sex offenders to register with the state Department of Public Safety (DPS) upon their release into the community, and requires DPS to post a sex offender registry containing registrants' names, addresses, photographs, and descriptions on the DPS website.[15] The registry must also be made available to the public at certain state offices. "John Doe," a convicted sex offender, filed a class-action lawsuit alleging that the law violated the 14th Amendment's Due Process Clause. Doe won at both the Federal trial and appellate court levels; the lower courts ruled that the law's public disclosure provisions deprived registered sex offenders of a "liberty interest" and, furthermore, that in its lack of procedures for "pre-deprivation" hearings and specific individual findings of "current danger," the law violated procedural due process requirements.[16] In other words, the lower courts found that sex offenders possessed a substantive liberty interest following their terms of punishment and that, by imposing registration and publication requirements on punished persons without a hearing and an express finding of *current risk*, the law violated standards of procedural due process.

The Supreme Court again reversed, holding that current risk is immaterial under the Connecticut law and that therefore additional procedural due process safeguards are unnecessary prior to its imposition. The Court held that the law's registration and publication requirements stem solely from a *prior* conviction and are not related to any notion of current risk. Given the law's basis in a prior conviction, according to the Court, the criminal prosecution that led to the conviction offered sufficient procedural due process protection.[17]

While the majority opinion in *Connecticut v. Doe* turned solely on procedural due process considerations, Justice Souter, in a separate concurrence, left the door open to a challenge to such laws on substantive due process grounds, noting that the majority's "holding does not foreclose a claim that Connecticut's dissemination of registry information is actionable on a substantive due process principle."[18]

IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

Taken together, *Smith v. Doe* and *Connecticut v. Doe* underscore the power of states to widely disseminate highly personal information about individuals in situations in which the justification for such dissemination is a previous criminal conviction for a heinous crime, and where dissemination is tied expressly to prospective public protection. In both cases, individuals who had been tried, convicted, and sentenced for criminal sexual conduct, who had served their punishment, and who displayed no current evidence of risk, were nonetheless compelled under threat of further sanctions to provide disclosable information about their past as a means of safeguarding communities against speculative future threats. In this sense, Megan's Laws are viewed not as punitive, but rather as prospective and preventive (and thus differ significantly, for example, from the punishment in Nathaniel Hawthorne's *The Scarlet Letter*, in which Hester Prynne is forced to wear a revealing symbol as punishment for her adultery). The fact that disclosure effectively perpetuates punishment and may impair rehabilitation is irrelevant, since its purpose is public safety. Moreover, there is no need to show current risk, since the justification of disclosure stems from a prior criminal conviction.

Do these decisions mean that a state would be justified in compelling registration and disclosure of individuals whose *health status alone* arguably created either current or future risk? It would be improper to read such a conclusion into these cases, at least in the absence of a declared public health emergency, and even here, public health law experts disagree.[19] But the Megan's Laws cases do illustrate the Court's tolerance of states' efforts to protect the public from potential future harm that the evidence suggests may be linked solely to past criminal offenses.

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