Gender as a Factor When Calculating a Sex Offender’s Dangerousness

Lianne E. Henderson*

In December of 2013, the Massachusetts Supreme Judicial Court held that a hearing board must consider evidence concerning the effects of gender on recidivism when determining what category the sex offender should fall under in Doe No. 205614 v. Sex Offender Registry Board. The purpose of the categorizations is to improve public safety by imposing more stringent restrictions on those offenders more likely to re-offend. The petitioner, a female, argued that females have lower recidivism rates, and therefore are less of a threat to public safety. The hearing board did not have gender as one of the factors to consider and therefore did not look at the evidence. The Supreme Judicial Court opened a door for other states to sharpen the guidelines for which factors to consider when categorizing a sex offender by remanding the case to the Sex Offender Registry Board to hear from an expert providing scientific evidence that females pose a lower risk of re-offense. Where the purpose of sex offender registration is to improve public safety, states should consider gender when categorizing sex offenders to avoid imposing a punitive restriction on convicted sex offenders and to avoid over-classification.

I. INTRODUCTION

When one commits a sexual offense, and upon completion of whatever sentence is imposed by the courts, he or she must face the Sex Offender Registry Board (SORB or hearing board) for classification.¹ The purpose is

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to “determine the level of risk of reoffense and the degree of dangerousness posed to the public or for relief from the obligation to register and shall provide for three levels of notification depending on such risk of reoffense and the degree of dangerousness posed to the public.”

The offenders are classified based on the likelihood of re-offense, and may be required to register their information depending on how high of a risk they pose to the community.

In December of 2013, the Massachusetts Supreme Judicial Court held that a hearing board must consider evidence concerning the effects of gender on recidivism when determining what category the sex offender should fall under in Doe No. 205614 v. Sex Offender Registry Board. The petitioner, a female, argued that females have lower recidivism rates, and therefore are less of a threat to public safety. The hearing board was not required to consider gender as one of the factors and therefore did not look at the evidence presented by the petitioner that showed lower recidivism rates in females. However, the Supreme Judicial Court’s decision required the hearing board to consider the evidence related to gender and opened a door for other states to sharpen their guidelines for factors to consider when categorizing a sex offender.

As a matter of procedural due process, it is important for the hearing boards to consider existing research if it will shed light on how much of a threat the offender is to public safety. However, there is very little research on female sex offenders, where male sex offenders have increasingly been the subjects of studies regarding recidivism. Doe No. 205614 v. Sex Offender Registry Board highlights the need for more research regarding fe-

2. Ch. 6, § 178K.
3. See, e.g., id. § 178K(2) (explaining each level of classification based on likelihood of re-offense).
5. Id. at 481.
7. Doe, 999 N.E.2d at 481.
male sex offenders, as well as the importance of considering gender as one of the factors. Where the purpose of sex offender registration is to improve public safety by lowering recidivism, hearing boards should consider gender when categorizing sex offenders to avoid imposing a punitive restriction on convicted sex offenders upon reentry into society and overclassification.

Section II of this Note discusses the classification process and the guidelines commonly used in states with SORBs, particularly Massachusetts, to assess sex offenders reentering society. Section III explores statistics on female recidivism generally, and specifically amongst the sex offender population. Section IV argues why gender should be a factor when categorizing sex offenders and determining their dangerousness before reentering into society. Section IV also addresses procedural due process implications of the current classification hearing process. Finally, Section V concludes this Note.

II. THE CLASSIFICATION PROCESS

A. Sex Offender Registry Board

The SORB\(^9\) assesses all sex offenders prior to their release back into society based on the offender’s likelihood of re-offense.\(^10\) In Massachusetts, the SORB resides in the Executive Office of Public Safety and Security, and consists of seven full-time members appointed by the governor.\(^11\) Pursuant to a Massachusetts statute, the board should consist of:

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\text{[o]ne person with experience and knowledge in the field of criminal justice who shall act as chairman; at least two licensed psychologists or psychiatrists with special expertise in the assessment and evaluation of sex offenders and who have knowledge of the forensic mental health system; at least one licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of sex offenders, including juvenile sex offenders and who has knowledge of the forensic mental health system; at least two persons who have at least five years of training and experience in probation, parole or corrections; and at least one} \\
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\(^9\) These hearing boards are called different names, but for uniformity purposes I will be referring to them as Sex Offender Registry Boards.

\(^10\) See, e.g., CAL. SEX OFFENDER MGMT. BD., http://www.casomb.org (last visited Mar. 15, 2014) (providing information to the public about sex offenders, opportunity to search the state database, and answers to frequently asked questions); Rhode Island Sex Offender Community Notification Unit: Sex Offenders Fact Sheet, PAROLE BOARD & SEX OFFENDER COMMUNITY NOTIFICATION UNIT, http://www.paroleboard.ri.gov/sexoffender/agree.php (last visited Mar. 15, 2014); Sex Offender Registry Board (SORB), supra note 1.

\(^11\) MASS. GEN. LAWS ch. 6, § 178K(1) (2014).
person who has expertise or experience with victims of sexual abuse.\textsuperscript{12}

The statute not only provides a list of factors, which the hearing board should consider in determining the risk level of recidivism, but also states that the factors listed are not exhaustive.\textsuperscript{13}

\textbf{B. Common Factors for Evaluating Risk of Recidivism}

States that utilize the SORB for classification of sex offenders upon reentry into society have sets of factors to determine what level of risk the offender poses to society.\textsuperscript{14} Factors regarding the offender may include: existence of mental abnormality; age at the time of offense; relationship with the victim; the psychological profile of the offender; and his or her physical condition.\textsuperscript{15} The lists of factors are also generally not exhaustive and the SORB is not limited to what the statute outlines.\textsuperscript{16} Through regulations, the states are able to expand on the reasons for looking at each factor as a guideline.\textsuperscript{17} For example, Massachusetts’s Code of Regulations outlines each factor with a brief explanation and citation to the empirical studies in support of that factor determining risk of re-offense.\textsuperscript{18} Between the expertise of the hearing board members required by statute\textsuperscript{19} and the empirical resources available to them,\textsuperscript{20} a determination is made regarding the offender and the individual is classified in terms of his or her potential effect on public safety.\textsuperscript{21}

\textbf{C. The Classifications}

In Massachusetts, there are three levels of classification for sex offenders reentering society, which the board can mandate after considering the factors outlined in the statute and expanded upon in the regulations.\textsuperscript{22} If the board “determines that the risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability, it shall give a level [one] designation to the

\textsuperscript{12} \textit{Id.}
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} See, e.g., \textit{id.} § 178K; 42 PA. CONS. STAT. § 9799.24(b) (2014); N.J. STAT. ANN. § 2C:7-8 (West 2013); N.Y. CORRECT. LAW § 168-1(5) (McKinney 2014); KY. REV. STAT. ANN. § 17.554(2) (West 2013).
\textsuperscript{15} See sources cited \textit{supra} note 14.
\textsuperscript{16} See sources cited \textit{supra} note 14.
\textsuperscript{17} \textit{E.g.,} 803 MASS. CODE REGS. 1.40 (2014).
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} Ch. 6, § 178K(1).
\textsuperscript{20} \textit{E.g.,} REGS. 1.40.
\textsuperscript{21} \textit{E.g.,} ch. 6, § 178K(2).
\textsuperscript{22} \textit{Id.}
sex offender." The information provided by the offender upon registration is not disseminated to the general public if the offender is classified as a level one offender. However, the information provided by the level one sex offender may be released to “the department of correction, any county correctional facility, the department of youth services, the department of children and families, the parole board, the department of probation and the department of mental health, all city and town police departments and the Federal Bureau of Investigation.”

Conversely, the information provided by those offenders designated as level two or three is available to the public through the registry database maintained by the state. The Board designates the offender as a level two if the “risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information.” Finally, a level three offender classification is determined when “the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination.” Not only is the information provided by level three sex offenders made available through the registry database maintained by the state, but there is a community notification plan set in place. Pursuant to this plan, the police department is required to notify community organizations and individual citizens who are “likely to encounter such sex offender.”

D. The Factors Promote Public Safety

As stated above, the purpose of sex offender registration is to “determine the level of risk of reoffense and the degree of dangerousness posed to the public or for relief from the obligation to register and shall provide for three levels of notification depending on such risk of reoffense and the degree of dangerousness posed to the public.” In Massachusetts, the Legislature declared the law concerning sex offender registration “an emergen-

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23. Id. at ch. 6, § 178K(2)(a).
24. Id.
25. Id.
26. Ch. 6, § 178K(2)(b)-(c); ch. 6, § 178D.
27. Ch. 6, § 178K(2)(b).
28. Id. § 178K(2)(c).
29. Id. § 178D.
30. Id. § 178K(2)(c).
31. Id.; see 803 MASS. CODE REGS. 1.33 (2014) (“Organizations in the community that are likely to encounter the sex offender include, but are not limited to, public and private organizations, areas and establishments which provide services of any type to children, the elderly, or other vulnerable members of the population.”).
32. Ch. 6, § 178K.
cy law, necessary for the immediate preservation of the public convenience.\textsuperscript{33} The above list of factors,\textsuperscript{34} although not exhaustive, provide a general idea of what legislators and professionals see as important considerations when determining recidivism.\textsuperscript{35} Recidivism is an obvious public safety concern.\textsuperscript{36} However, if studies show that females have lower recidivism rates than males,\textsuperscript{37} it follows that concern for public safety is lowered, so SORBs should consider the supporting evidence and gender should be weighed as a factor in determining classification upon release.

E. Where is Gender Among the Factors?

By statute, gender is not utilized as a factor for the SORB to determine the likelihood of recidivism of a sexual offender.\textsuperscript{38} Generally, about 5\% of females are sex offenders.\textsuperscript{39} Although it is difficult to find statistics on female sexual offenders specifically, studies have found that females are less likely to recidivate than males.\textsuperscript{40} A Florida study, considering all crimes, shows that the recidivism rate for males is 34\% three years post-release, where the rate for females is only 19\%.\textsuperscript{41} A California study shows that at three years post-release, males have a recidivism rate of 66.3\% whereas females have a recidivism rate of 55.1\%.\textsuperscript{42} These statistics, although general and not specific to sex offenders, show that females are different than

\begin{itemize}
\item \textsuperscript{33} 2014 Mass. Legis. Serv. ch. 239 (West).
\item \textsuperscript{34} See supra Part II.B.
\item \textsuperscript{36} See S. 1675, 113th Cong. (2014) (proposing “to reduce recidivism and increase public safety” as a conjunctive goal).
\item \textsuperscript{38} See, e.g., sources cited supra note 14 (failing to include gender as a factor to consider when classifying an offender before releasing them into society). Although gender could be considered because these lists are not exhaustive, the hearing boards are not required to consider it. See Mass. Gen. Laws ch. 6, § 178K (2014); N.Y. Correct. Law § 168-1(5) (McKinney 2014); 42 Pa. Cons. Stat. § 9799.24(b) (2014); Ky. Rev. Stat. Ann. § 17.554(2) (West 2013); N.J. Stat. Ann. § 2C:7-8 (West 2013).
\item \textsuperscript{39} Cortoni, Hanson & Coache, supra note 6, at 388.
\item \textsuperscript{40} See, e.g., sources cited supra note 37.
\item \textsuperscript{41} Dep’t of Corr., State of Fla., supra note 37.
\item \textsuperscript{42} Office of Research, Cal. Dep’t of Corr. and Rehab., supra note 37.
\end{itemize}
males in terms of recidivism, and therefore, should be considered differently when assessing risk of re-offense. However, gender is not among the factors in guiding the classification process in most jurisdictions. The Supreme Judicial Court in Massachusetts rendered a decision that requires the SORB to consider gender as a factor if the sex offender presents evidence that gender will affect the SORB’s determination of the likelihood of his or her recidivism.

1. Doe No. 205614 v. Sex Offender Registry Board

In Massachusetts, a female sex offender faced the SORB for classification and tried to present evidence that females have a lower risk of recidivism than males. The SORB hearing officers ignored the evidence and did not consider the effect of gender on Doe’s risk of recidivism and dangerousness. Doe was subsequently classified as a level one sex offender and appealed to the Superior Court, which held that the SORB’s decision was “supported by substantial evidence,” and affirmed Doe’s classification as a level one sex offender. Doe again appealed to the Massachusetts Supreme Judicial Court, arguing that the SORB’s decision was “[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.” The Supreme Judicial Court vacated the Superior Court’s judgment and remanded the matter to the hearing board to evaluate Doe while considering the evidence presented of female recidivism statistics.

The Supreme Judicial Court’s discussion began by explaining that the burden lies on the SORB to justify the classification of Doe by a preponderance of the evidence. The Court considered the fact that, although the body of research that the SORB has been using is outdated, the research available specifically concerning female sex offenders is increasingly available. Also, the Supreme Judicial Court pointed out that although gender is not a statutory factor, the SORB may consider “any information useful” to make a decision. The Court considered both the fact that the

43. See sources cited supra note 37.
44. See, e.g., sources cited supra note 14.
46. Id. at 480.
47. Id. at 481.
48. Id. at 484.
49. Id. (quoting MASS. GEN. LAWS ch. 30A, § 14(7)(g) (2014)).
50. Id. at 490. See generally Cortoni, Hanson & Coache, supra note 6; Cortoni & Hanson, supra note 6.
51. Doe, 999 N.E.2d at 485.
52. Id. at 485-86.
53. Id. at 486 (quoting ch. 6, § 178L(1)).
sex offender bears no burden of proof and that the information on female recidivism rates could fall under the catch-all factor, as it is certainly useful in determining Doe’s dangerousness. In reaching their decision, the Supreme Judicial Court has created gender as a factor the hearing board needs to consider in Massachusetts. This decision certainly opens the door for other states to include gender as a factor in determining which classification an offender should fall under.

2. Does Gender Fall Within Other Factors?

Perhaps it can be argued that gender is not necessary as a distinct factor because the mitigating attributes of a female sex offender are adequately considered in the statutory factors already in place. For example, physical condition and age could be comparatively similar, yielding parallel arguments as gender, if brought to the hearing board. Also, the psychological factor could be considered as tied to gender, as Franca Cortoni, R. Karl Hanson, and Marie-Eve Coache propose that females “have particular vulnerabilities that are linked to their sexually offending behavior.” These vulnerabilities are perhaps due to past experiences of physical and sexual abuse, learning disabilities, and social and psychological alienation.

“There are several typologies of women who sexually offend: those who engage with adolescent males[,] . . . those who offend in the presence of a co-offending male[,] . . . those who offend against prepubescent children[,] . . . and those who offend as part of a wider criminal career.” Therefore, gender could be parsed out of the psychological factor fairly easily or merely used as a supplement to the psychological factor, since the list provided in the statute is not exhaustive.

In light of the similarities between gender and other factors, it is still crucial to establish gender as a new factor to further support the public safety purpose of the sex offender registry. Females are less likely to recidivate, so they are less of a public safety concern. If studies can show that females have lower recidivism rates than males, the SORB should not be

54. Id. at 485-86.
55. See id. at 491.
56. Cortoni, Hanson & Coache, supra note 6, at 397.
57. Id.
60. See, e.g., sources cited supra note 37.
61. See, e.g., OFFICE OF RESEARCH, CAL. DEP’T OF CORR. AND REHAB., supra note 37; DEP’T OF CORR., STATE OF FLA., supra note 37; Cortoni, Hanson & Coache, supra note 6, at
able to use discretion and disregard the supporting empirical evidence. Ignoring this evidence directly conflicts with the purpose of the sex offender registry and violates the offender’s right to procedural due process.

III. FEMALE RECIDIVISM STATISTICS

A. Females v. Males Generally

Studies concerning recidivism, even those separating the offenders by gender, include samples of a wide variety of offenders. Therefore, “[r]ecidivism studies of persons convicted of the same type of sexual offense, such as rapists, child molesters, or, more specifically, extrafamilial child molesters are less common.” A report by the Florida Department of Corrections compares male and female recidivism rates, finding that the female population is much less likely to recidivate with a 19% recidivism rate, as opposed to the male recidivism rate of 34%. The Florida Department of Corrections provides variables that could cause the lower recidivism rates, such as the fact that males serve a higher average time in prison, and females have less supervision following their imprisonment. Also, the California study, referred to above, shows that at three years post-release males have a recidivism rate of 66.3%, while the female recidivism rate is only 55.1%. A clear discrepancy exists between the recidivism rates of males and females, which directly supports the fact that females are less of a public safety concern.

B. Females as Sex Offenders

A 2007 report on female sex offenders by the Center for Sex Offender Management reports that “arrests of women represented only 1% of all adult arrests for forcible rape and 6% of all adult arrests for other sex offenses.” The report also lists several factors affecting the under-recognition of female-perpetrated sexual offenses, including sociocultural influences, professional biases, research limitations, and individual concerns of the victims. However, as a group, it is clear that females still

396.
62. See, e.g., sources cited supra note 37.
63. HEPBURN & GRIFFIN, supra note 35, at 2.
64. DEP’T OF CORR., STATE OF FLA., supra note 37.
65. Id.
66. OFFICE OF RESEARCH, CAL. DEP’T OF CORR. AND REHAB., supra note 37.
68. Id.
consist of a small minority of sexual offenders.69

A study by Franca Cortoni, R. Karl Hanson, and Marie-Eve Coache exclusively explores female sexual offenders and their likelihood of recidivism.70 The Massachusetts Supreme Judicial Court in Doe No. 205614 v. Sex Offender Registry Board cited to this study.71 Their meta-analytic review of ten studies showed that “the recidivism rates of female sexual offenders were much lower for all types of crime than the comparable rates for male sexual offenders.”72 One of the studies analyzed by Cortoni, Hanson and Coache showed that in Canada, the two year reconviction rate for males ranged between 41% and 44% and the rate for females ranged between 23% and 30%.73 Women showed between 1% and 3% recidivism rates for sexual offenses.74 That extremely low rate can be compared to about 13.7% recidivism rate for male sexual offenders.75 The rates for females were higher for violent crimes, including sexual offenses—but still low—ranging from 4% to 8%.76 Compare this figure with a 25% recidivism rate for male sexual offenders committing violent offenses.77 It is not exactly clear why women are generally not involved in crime, particularly sexual offenses.78 However, this study makes it apparent that females are less likely to recidivate than males, and more specifically, when relating to sexual offenses.79

Another study by Franca Cortoni and R. Karl Hanson, also cited in Doe No. 205614 v. Sex Offender Registry Board,80 compiles five studies out of various countries to compare recidivism rates of female and male sex offenders.81 The studies were averaged to find only a 1% sexual recidivism rate, a 6.3% violent recidivism rate, and 20.2% general recidivism rate for female sexual offenders with a follow up period of five years.82 This is compared to a 13% to 14% sexual recidivism rate, a 25% violent recidivism rate, and a 36% to 37% general recidivism rate for male sexual off-
fenders with a five year follow up period. Due to this significant statistical difference, females pose less of a public safety concern, and the SORB should consider gender as a factor to further their purpose of improving public safety while maintaining the offender’s right to due process.

IV. WHY SHOULD GENDER BE A FACTOR?

A. Important Characteristics Specific to Female Sex Offenders

Based on the empirical evidence indicating the decreased likelihood for re-offense, it should be considered as a factor in order to further the intended purpose of improving public safety. A study by Donna M. Vandiver and Jeffrey T. Walker indicates that female sex offenders have unique characteristics and should be treated differently. After reviewing and analyzing forty cases, patterns emerge as to the characteristics of female sex offenders. Offenders fell into a broad age range. Only four of the studies reported marital status, and in those studies the offenders were mostly single. Three of the studies analyzed reported the race of the offender, but most female sex offenders in those studies were Caucasian. Further, “[h]igh rates of mental illness were also found among the female sex offenders in these studies.” Only four studies discussed drug and alcohol abuse, and in those studies there is a prevalence of substance abuse, indicating a lack of ability to cope and issues in other areas of functioning besides sexual behavior. Four studies included and indicated that these female sexual offenders were likely to be victims of sexual abuse themselves. One final differentiating characteristic is that “female sex offenders engage in more pro-social activities.”

The report by the Center of Sex Offender Management highlights some key differences between female and male sex offenders, including:

83. Id.
84. See, e.g., sources cited supra note 37.
86. Id.
87. Id. However, the average age has consistently fallen in the range of twenty-six to thirty-six years old. Id.
88. Id.
89. Id.
90. Id. It is noted, however, that these studies were based on clinical samples, which could influence the number of subjects who struggle with mental illness. Id.
91. Id. at 289.
92. Id.
93. Id. at 289-90.
sexual victimization histories are exceedingly more common among . . . female sex offenders than with male sex offenders, and their maltreatment experiences are often more longstanding, extensive, and severe; [a]dult women are more likely than men to commit sex offenses with a co-offending male, either in concert with the male or as a result of coercion by the male; [o]ffending by adult and adolescent females is more likely to occur within the context of caregiving situations; [a]cts of rape are less common among female sex offenders, but when they occur, the victims tend to be the same gender, unlike the victims of male-perpetrated rapes . . . .

These differences are important in distinguishing female from male perpetrators of sexual offenses.95

Based on the available research, it is clear that there are differences between female and male offenders generally and as sexual offenders.96 Where the purpose of the classification is to improve public safety,97 hearing boards should recognize the differences between male and female sexual offenders, and that these differences may affect their likelihood of recidivism.98

B. Due Process Implications

Statutory factors to consider in determining which classification the hearing board will place the sex offender in gives the sex offender an opportunity to present any useful information that speaks to the individual’s likelihood of recidivism.99 This is an important safety measure to protect the sex offender’s due process rights.100 In Doe No. 205614 v. Sex Offender Registry Board, the Massachusetts Supreme Judicial Court recognized the importance of this right by stating, “[t]he ability to consider other useful information not specifically contemplated by the guidelines is an important safety valve protecting a sex offender’s due process rights.”101 The Supreme Court stated in Mathews v. Eldridge that individuals are allowed procedural due process rights when a decision made by the Government deprives that individual of liberty or property interests.102

95. Id. at 13.
96. See id.; Vandiver & Walker, supra note 85, at 288-90.
97. See, e.g., MASS. GEN. LAWS ch. 6, § 178K (2013).
98. Cortoni, Hanson & Coache, supra note 6.
99. Ch. 6, § 178L(1).
100. U.S. CONST. amend. XIV, § 1.
The Court went on to outline a factor test to determine whether pro-
dural due process should be applied:\footnote{103}

First, the private interest that will be affected by the official action
[should be considered]; second, the risk of an erroneous deprivation of
such interest through the procedures used, and the probable value, if
any, of additional or substitute procedural safeguards; and finally, the
Government’s interest, including the function involved and the fiscal
and administrative burdens that the additional or substitute procedural
requirement would entail.\footnote{104}

Due process requires states to consider gender as a specific factor when
determining the level of classification of a female sex offender. The Gov-
ernment bears the burden of establishing that a female sex offender poses a
risk of re-offense and is a danger to the public.\footnote{105} By barring a female sex
offender from presenting gender-specific evidence, in the form of statistical
and psychological studies, the state shifts the burden and deprives the of-
fender of her due process rights. Moreover, ignoring any evidence present-
ed regarding gender is an erroneous deprivation of liberty, and therefore, in
violation of the Constitution. In such a case, the private interest\footnote{106} is high
due to the fact that the offender will be classified incorrectly, and therefore,
has stricter notification requirements as a result of the exclusion of the em-
pirical evidence presented by the offender. In a sense, the individual’s lib-
erty is at stake because the sex offender, in the stricter classifications, will
be living in a community with access to information about his or her crimi-
nal past.\footnote{107} The availability of information and, when applicable, communi-
ity notification will impose significant challenges to the individual who has
already served his or her sentence and is trying to reintegrate into society.

The risk of erroneous deprivation of the private interest through the clas-
sification hearing\footnote{108} is high because the exclusion of empirical evidence
that shows the female offender has a lower risk of recidivism is arbitrary.
Although gender cannot be considered as a factor, empirical evidence
should be admitted through the catch-all provision in the statute that allows
for “review of any materials submitted by the sex offender.”\footnote{109} Again, the
burden falls on the Government, and thus, any evidence that supports the
purpose of improving public safety must be considered. If gender became a
factor in every state, it would remove the discretionary power of the hear-

\footnote{103}{Id. at 334-35.}
\footnote{104}{Id.}
\footnote{105}{See, e.g., Mass. Gen. Laws ch. 6, § 178K (2013).}
\footnote{106}{See Mathews, 424 U.S. at 335.}
\footnote{107}{See, e.g., ch. 6, § 178K(2).}
\footnote{108}{See Mathews, 424 U.S. at 335.}
\footnote{109}{Ch. 6, § 178K(1)(f).}
ing boards in regards to accepting empirical evidence related to gender and the lower recidivism rates of females. Furthermore, the substitute procedural safeguard would be simply for the hearing board to consider additional empirical evidence concerning gender and effects it has on the likelihood of recidivism, adding an additional layer of review to further the purpose of public safety.

Finally, the Government’s interest must be considered. The hearing boards and classification hearings were established to improve public safety. The only interest in refusing to consider gender as a factor is to reduce the amount of time spent reviewing information in determining which classification an offender falls under. By adding gender as a factor, the regulations will guide the hearing board to the leading empirical evidence regarding female recidivism rates versus male recidivism rates, so the only burden on the hearing boards would be to review the evidence. This substitute procedural safeguard does not impose a heavy burden on the hearing boards and therefore the Government interest is low. The monetary cost imposed on the Government might be simply adding more time to the hearing to review the individual in light of the additional factor, but this cost is minimal. The hearing board is required to promulgate guidelines for each factor, so once the new factor of gender is established, the hearing board will only have to review the facts of the case in light of the literature pointed to in the guidelines.

Using Doe No. 205614 v. Sex Offender Registry Board as an example, it is clear that, upon balancing the factors outlined in Mathews, procedural due process is violated if the sex offender does not have the opportunity to present empirical evidence that supports the lower risk of recidivism in females pursuant to the purpose of increased public safety. Therefore, hearing boards across the country must be required to consider gender as a factor when classifying sex offenders prior to their release in order to effectively gauge the likelihood of recidivism to promote public safety.

V. CONCLUSION

As stated above, gender could fit within the factors already outlined within the guidelines. However, the lists are not exhaustive, and the

110. See Mathews, 424 U.S. at 335.
111. Ch. 6, § 178K(1).
112. E.g., sources cited supra note 61.
113. See, e.g., 803 MASS. CODE REGS. 1.40.
114. Mathews, 424 U.S. at 335.
115. See supra Part II.E.2; see also Cortoni, Hanson & Coache, supra note 6, at 397; Gannon, Rose & Ward, supra note 58.
116. See, e.g., sources cited supra note 14; see also Doe v. Sex Offender Registry Bd.,
SORB should consider evidence, if provided by the offender, that could indicate a lower likelihood of recidivism. Further, “[f]emale sex offenders may not fit the same typology that has been developed for male sex offenders,” indicating the need for a separate factor for gender. The purpose of the classification process is to improve public safety. With this purpose in mind, it is important for hearing boards to consider empirical evidence indicating a lower risk of recidivism so as to not deny the offender any due process rights. Although the evidence is limited, it has been shown that females are less likely to recidivate and therefore are less of a public safety concern. Due to the unique characteristics of females, this evidence should absolutely be considered to comply with the Fourteenth Amendment right to procedural due process. If the hearing board does not consider evidence that would speak to the likelihood of recidivism, it is clearly in violation of procedural due process. The Massachusetts Supreme Judicial Court has provided a great example for other states in adding gender as a factor to be considered in Doe No. 205614 v. Sex Offender Registry Board.

999 N.E.2d 478, 485 (Mass. 2013) (quoting ch. 6, § 178L(1)).
117. Vandiver & Walker, supra note 85, at 298.
118. Ch. 6, § 178K.
119. E.g., sources cited supra note 61.
120. Doe, 999 N.E.2d at 480.