

Sex Offender Registry; *Ex Post Facto* ; NonPunitive

In a 5 to 4 decision, the U.S. Supreme Court ruled that the Alaska Sex Offender Registration Act (SORA) was not punitive and, thus, its retroactive application did not violate the *Ex Post Facto* Clause. *Smith v. Doe, 123 S. Ct. 1140 (2003)*.

John Doe I and John Doe II, both convicted of sexual abuse of a minor, brought a §1983 action challenging the SORA as a violation of the *Ex Post Facto* Clause. The district court granted summary judgment to the State of Alaska. The Ninth Circuit reversed, determining that although the state legislature had intended the act to be a non-punitive, civil regulatory scheme, its effects were punitive.

The Supreme Court reversed. Justice Kennedy delivered the opinion, in which Justices Rehnquist, O'Connor, Scalia, and Thomas joined. The determinative question is whether the legislature meant to establish "civil proceedings." See *Kansas v. Hendricks*, 521 U.S. 346 (1997), 21 MPDLR 820. If the intention was to enact a regulatory scheme that is civil and non-punitive, the court must examine whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to deem it civil. *Id.* Here, the Alaska legislature intended to create a civil scheme. In finding that sex offenders pose a high risk of re-offending, the legislature identified protecting the public as the law's primary interest, and declares that release of certain information about sex offenders to public agencies and the public will assist in protecting public safety. Imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate, non-punitive governmental objective. *Id.* at 363. Further, where the legislative restriction is an incident of the state's power to protect public health and safety, it is considered as evidencing an intent to exercise the regulatory power, and not a purpose to add to the punishment. See *Flemming v. Nestor*, 363 U.S. 603 (1960).

The SORA's notification provisions are codified in the state's health, safety, and housing code, confirming the conclusion that the statute was intended as a nonpunitive regulatory measure. The fact that the act's registration provisions are codified in the state's code of criminal procedure is not dispositive, because a statute's location and

labels do not, by themselves, transform a civil remedy into a criminal one. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). The code of criminal procedure contains many provisions that do not involve criminal punishment. Further, the act vests the authority to promulgate implementing regulations with the Department of Public Safety, an agency charged with enforcing both criminal and civil regulatory laws. Finally, the SORA does not require the procedures adopted to contain any safeguards associated with the criminal process. By contemplating distinctly civil procedures, the legislature indicated clearly that it intended a civil, not a criminal, sanction. *See United States v. Ursery*, 518 U.S. 267 (1996).

In analyzing the act's effects, the Court referred to the factors *in Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). First, the regulatory scheme has not been regarded in the nation's history and traditions as a punishment. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. Second, the SORA does not subject respondents to an affirmative disability or restraint. It imposes no physical restraints, and its obligations are less harsh than the sanctions of occupational debarment, which the court has held to be non-punitive. *See Hudson v. United States*, 522 U.S. 93 (1997). Third, the act does not promote traditional aims of punishment. That it might deter future crimes is not dispositive. *Id.* at 105. Fourth, the act is rationally related to a legitimate nonpunitive purpose—public safety—by alerting the public about sex offenders in their community. Finally, the regulatory scheme is not excessive. The state's decision to legislate convicted sex offenders as a class, rather than require individual dangerousness determinations, does not render the SORA punitive. *See Hawker v. New York*, 170 U.S. 189 (1898). Moreover, the wide dissemination of offender information does not render the act excessive. The question is not whether the legislature has made the best choice possible, but whether the regulatory means chosen are reasonable in light of the non-punitive objective.

Justice Thomas, concurring, filed a separate opinion

to reiterate that "there is no place for [an implementation-based] challenge" in our *ex post facto* jurisprudence. *See Selig v. Young*, 531 U.S. 250, 273 . . . (2001) [25 MPDLR 128]. Instead, the determination whether a scheme is criminal or civil must be limited to the analysis of the obligations actually created by the statute. *See id.*, at 273-274. . . . As we have stated, the categorization of a proceeding as civil or criminal is accomplished by examining "the statute on its face." *Hudson v. United States*, 522 U.S. 93, 100 . . . (1997).

Justice Thomas found that "the Court has strayed from the statute," because it considered whether Internet dissemination renders the act punitive, despite the fact that the act "does not specify a means of making registry information available to the public."

Justice Souter concurred, citing other grounds. "The Court has held that `only the clearest proof that a law is punitive based on substantial factors will be able to overcome the legislative categorization." *See Flemming*, 363 U.S. at 617. However, "this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction." Because the evidence points to both a civil and criminal characterization of the SORA, he would find the act valid based only on "the presumption of constitutionality normally accorded a State's law."

Justice Stevens dissented, stating that the Court "will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment." SORA imposes "significant affirmative obligations and a severe stigma on every person to whom they apply." Registrants have to provide local law enforcement with extensive personal information (i.e., address, place of employment, current photo, identifying features, and medical treatment) at least once a year for 15 years. Before shaving their beards, coloring their hair, changing their employer, or borrowing a car, registrants have to report these events to the authorities. Thus, Stevens concluded: "It is clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted."

Justice Ginsburg, joined by Justice Breyer, also dissented. Given that the SORA is "ambiguous in intent and punitive in effect, I would hold its retroactive application incompatible with the *Ex Post Facto* Clause. . . . Because it was unclear whether the SORA was conceived as a regulatory measure or as a penal law, this dissent "would not demand 'the clearest proof' that the statute is in effect criminal rather than civil" in determining whether it "ranks as penal for *ex post facto* purposes." Based on the factors in *Kennedy*, Ginsburg opined that the SORA's effect is punitive, for it "involves an 'affirmative disability or restraint,'" "imposes onerous and intrusive obligations on convicted sex offenders," and "exposes registrants . . . to profound humiliation and community-wide ostracism." In addition, SORA's "requirements resemble historically common forms of punishment," and "past crime alone is the 'touchstone' triggering the Act's obligations."

More importantly, the law is excessive "in relation to its nonpunitive purpose." The SORA exceeds its legitimate civil purpose—"to promote public safety by alerting the public to potentially recidivist sex offender in the community." "The Act applies to all convicted sex offenders, without regard to their future dangerousness." Also, "the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated." And, most significantly, "the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation."