Just Desserts, or A Rotten Apple? Will the Ninth Circuit's Decision in Doe v. Otte Stand to Ensure That Convicted Sex Offenders Are Not Excessively Punished?

Colleen Miles

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev

Part of the Criminal Law Commons

Recommended Citation

http://digitalcommons.law.ggu.edu/ggulrev/vol32/iss1/5
WILL THE NINTH CIRCUIT'S DECISION IN *DOE v. OTTE* STAND TO ENSURE THAT CONVICTED SEX OFFENDERS ARE NOT EXCESSIVELY PUNISHED?

A state statute designed to protect the public from criminals and criminal behavior – no matter how vile the crime – must comport to constitutional guarantees.

— Judge Nathaniel R. Jones, United States Court of Appeals for the Sixth Circuit

I. INTRODUCTION

Society has determined that released sex offenders are a class of offenders that must be watched closely by the community. Whether this determination is right or wrong is debatable. Nonetheless, every state has enacted sex offender registration and notification statutes that obligate convicted sex offenders to comply with an additional commitment after they have completed their criminal sentences. Although these statutes may have laudable goals, their punitive effects may actually outweigh their permissible goals.

Most Circuit Courts of Appeal have applied the multi-factor *Mendoza-Martinez* balancing test when analyzing

---

1 Cutshall v. Sundquist, 193 F.3d 466, 484 (6th Cir. 1999).
whether a sex offender registration and notification statute is so punitive that it violates the Ex Post Facto Clause.\(^3\) One of the seven *Mendoza-Martinez* factors, the excessiveness factor, is the most vague and yet the most important factor in deciding when a sex offender registration and notification statute constitutes punishment thereby violating the Ex Post Facto Clause. The excessiveness factor is examined in terms of what measures are excessive in relation to the goal of community protection. This single factor, which is susceptible to varying interpretations, is applied differently amongst the Circuit Courts of Appeal. Thus, released sex offenders are impacted to varying degrees depending on where the sex offender resides.

Some of the excessive requirements, which result in the unlimited use of often unverifiable and inaccurate information, have resulted in violent attacks on innocent people and also extreme measures by residents of communities where the registered sex offender resides. For instance, a protest in 2000 on the East Coast led to torched cars, neighbors wearing T-shirts with slogans “pervs out” and parents making their young children in the late hours of the night shout “paedo, paedo” outside homes of registered sex offenders.\(^4\) Additionally, “lynch laws” exist in which people suspected of sex offenses have their houses destroyed by mobs.\(^5\) In one case, an innocent 78-year-old man, who was mistaken for someone else, was one such person targeted by these “lynch laws.”\(^6\) Furthermore, Alaska’s Internet database includes the names of all sex offenders, half of whom are not convicted of offenses against children, and many of whom are incarcerated and thus do not pose a threat involved a challenge to the divestment of citizenship to American citizens. *Id.* at 144.

The respondents challenged the constitutionality of the Nationality Act, 58 Stat. 746, and § 349 (a)(10)(1940), and the Immigration and Nationality Act, 8 U.S.C.S. § 1481 (a)(10)(1954). *Id.* at 144. The United States Supreme Court held that these two statutes were punitive and denied due process. Thus the court held that the United States could not divest the respondents of their citizenship. *Id.* at 144.

\(^3\) U.S. CONST. art. I, § 10, cl. 1.


\(^6\) *Id.*
to the community. Consequently, databases can lead to inaccurate information, vigilantism, and excessive punishment if not used or regulated properly.

Every state has enacted sex offender registration and notification statutes that obligate convicted sex offenders to comply with an additional commitment after they have completed their criminal sentence. By enacting Megan's Law in 1994, the United States Congress provided the impetus for these state statutes. In general, sex offender registration and notification statutes require convicted sex offenders to register with local authorities and provide personal information, such as information concerning their residency and whereabouts. Local authorities then maintain registries for the purpose of making this information about convicted sex offenders readily available.

---

available and accessible to the public. On one extreme, these statutes serve the interests of public safety. At the other extreme, these statutes deprive released sex offenders of their constitutional rights.

Within the last decade, the constitutionality of sex offender registration and notification provisions has come under heated attack. This issue will likely continue to be debated among the legislatures and in the courts due to the widely varying interpretation of the test applied to these statutes by the various Circuit Courts of Appeal. The Ninth Circuit and other Circuit Courts of Appeal have addressed both Ex Post Facto and Due Process challenges to these laws. To date, the United States Supreme Court has not weighed in on any of the challenges to these vastly differing state statutes.

In *Doe v. Otte*, the Ninth Circuit addressed the constitutionality of Alaska’s sex offender registration and notification statute. In finding that Alaska’s statute violated the Ex Post Facto Clause, the Ninth Circuit focused on the legislature’s intent and the statute’s punitive effect in deciding how far a state, and more specifically Alaska, can go to inform its citizens of the whereabouts of released sex offenders.

The decision of the Ninth Circuit in *Doe v. Otte* is important especially in terms of what the court considers excessive, because it varies greatly from the decisions of other Circuit Courts of Appeal. The Ninth Circuit held that Alaska’s sex offender registration and notification statute was excessive by allowing dissemination of sex offenders’ personal information over the Internet and requiring in-person registration four times a year. In contrast, other Circuit Courts of Appeal have upheld statutes that allow Internet posting and excessive registration requirements based on the same Ex Post Facto Clause considerations. As a result, the Ninth Circuit has opened the door for similar challenges to sex offender registration and notification provisions from other states based on the Ex Post Facto Clause.

---

11 Id. The Ninth Circuit did not address the Due Process challenge, but rather decided the case on the narrower Ex Post Facto issue. *Id.*
12 Id.
13 Feneudeer v. Utah Dep’t. of Corr., 227 F.3d 1244 (10th Cir. 2000).
In Part II, this Note outlines the facts and procedural history of *Doe v. Otte*.\textsuperscript{14} Part III discusses the history of the Ex Post Facto Clause and Megan's Law, and the varying Circuit Courts of Appeal approaches to sex offender registration and notification provisions. Part IV describes the Ninth Circuit's reasoning in *Doe v. Otte*.\textsuperscript{15} Part V proposes an alternative to sex offender registration and notification provisions through supervised probation. Part V also suggests that supervised probation will achieve the legislative goal of community protection without the deprivation of the released sex offender's constitutional rights. Part VI concludes that the Ninth Circuit properly held that the Alaska Statute violated the Ex Post Facto Clause, and suggests that supervised probation is a better means of accomplishing a balance between the legislature's goal of community protection and the rights of released sex offenders.

II. FACTS AND PROCEDURAL HISTORY

In *Rowe v. Burton*,\textsuperscript{16} three plaintiffs, John Doe I, Jane Doe, and John Doe II, challenged the constitutionality of the Alaska Sex Offender Registration Act (hereinafter "the Act"),\textsuperscript{17} under both the United States and the Alaska Constitutions.\textsuperscript{18} The plaintiffs' main challenges to the Act were based on the Ex Post Facto Clause and privacy rights of the United States Constitution.\textsuperscript{19} The Act required all convicted sex offenders, even those who were convicted before the statute became effective, to comply with the Act's requirements.\textsuperscript{20} Among other things, the Act required sex offenders with two or more convictions to register four times per year with law

\textsuperscript{14} *Otte*, 259 F.3d 979.

\textsuperscript{15} Id.


\textsuperscript{17} 1994 Alaska Sess. Laws 41.

\textsuperscript{18} *Burton*, 844 F. Supp. 1372. The plaintiffs filed their claims in the United States District Court for the District of Alaska. Id. John Doe I initially used the pseudonym James Rowe, but the court changed his name to John Doe I due to a complaint by a real James Rowe who suffered harm because his name was easily confused and associated with the registered sex offender. Id.

\textsuperscript{19} *Burton*, 844 F. Supp. at 1375.

\textsuperscript{20} Id. at 1374-75.
enforcement agencies for the remainder of their lives. All other offenders were required to register four times per year for a minimum of fifteen years. In addition, the Act provided for full disclosure to the public of information about all sex offenders through a central registry. The notification provisions included posting sex offenders’ home and work addresses to the public at large with no limitations on who could obtain the information.

John Doe I and John Doe II were both convicted sex offenders. Jane Doe was married to John Doe I and was not a convicted or alleged sex offender. John Doe I and John Doe II pled no contest to the alleged sex offenses in Alaska State courts. At the time they entered their plea bargains, no sex offender registration requirements existed. John Doe I entered a plea of nolo contendere to a charge of sexual abuse of his daughter in 1985. Upon his release in 1990, the court made a determination that John Doe I had been successfully rehabilitated and granted him custody of his daughter. The court determined that John Doe I was not a pedophile and had a very low risk of reoffending. Jane Doe, John Doe I’s wife, alleged that her connection with John Doe I and the information disseminated about her husband jeopardized her career.

21 Id. at 1376.
22 Id.
23 Id.
24 See Otte, 259 F.3d at 981. The Act authorized posting of sex offenders’ personal information over the Internet once the offenders completed their sentence. Id. The regulations provide that Alaska “will in all cases post the information from the registry for public viewing in print or electronic form so that it can be used by any person for any purpose.” Id.
25 See ALASKA ADMIN. CODE tit 13 § 09.050(a) (2000).
26 Burton, 259 F.3d at 1375.
27 Id. at 1387.
28 Id. at 1375.
29 See id. at 1373-75. The Act required convicted sex offenders to register personal information with law enforcement and authorized public disclosure of the sex offenders’ personal information through a central registry became effective in 1994. Id.
30 See Otte, 259 F.3d at 981. “In 1985, 9 years before the Alaska statue was enacted, Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter while she was between the ages of 9 and 11. Id.
31 Id.
32 Id.
33 Id. Jane Doe was a registered nurse in Anchorage. Id. She was well known in the community and alleged that releasing details of her husband's criminal history
John Doe II was convicted of sexual abuse of a 14-year-old child in 1984. He served his time, completed a treatment program for sex offenders and was released in 1990. John Doe II did not receive any determination that he had been rehabilitated.\(^{34}\)

The plaintiffs filed motions seeking a preliminary injunction and permission to proceed under pseudonyms.\(^ {35}\) The district court denied the motion to proceed under pseudonyms holding that the present action “does not warrant anonymity.”\(^ {36}\) Finally, the court held that the Act did not violate the Ex Post Facto Clause because the state had a duty to regulate under the circumstances for purposes of public safety, and thus the Act was not punitive.\(^ {37}\) John Doe I, Jane Doe, and John Doe II appealed to the United States Court of Appeals for the Ninth Circuit.\(^ {38}\) The Ninth Circuit granted review of the district court’s decision that the Act did not violate the Ex Post Facto Clause.\(^ {39}\)

III. BACKGROUND

A. THE EX POST FACTO CLAUSE

The Ex Post Facto Clause forbids application of any new punitive measures to a crime that has already been adjudicated.\(^ {40}\) The Ex Post Facto Clause offers protection to those who commit a crime before a law is enacted with the purpose of prohibiting greater punishment than that allowed at

\(^{34}\) See id. at 981. John Doe II, entered a plea of nolo contendere on April 8, 1984, to one count of sexual abuse of a 14-year-old child. Id.

\(^{35}\) Burton, 844 F. Supp at 1385.

\(^{36}\) Id. at 1385-1388. Plaintiffs failed to demonstrate “exceptional” circumstances that would have justified proceeding under pseudonyms since the plaintiffs only sought to limit the dissemination of facts that were already public. Id.

\(^{37}\) Id. at 1385.

\(^{38}\) Otte, 259 F.3d 979.

\(^{39}\) Id.

\(^{40}\) See U.S. CONST. art. I, § 10, cl. 1. See also Dept of Corr. v. Morales, 514 U.S. 499, 505 (1995) (finding that the decreased frequency of parole suitability hearings for prisoners violated the Ex Post Facto Clause, quoting Lindsey v. Washington, 301 U.S. 39, 41 (1937), holding that a charge within statutory requirements cannot increase a prisoner’s sentence to the maximum allowed for offences that took place before the enactment. To do so would be a violation of the Ex Post Facto Clause).
the time the offense was committed. Fair notice and restraint of vindictive legislation are the primary goals of the Ex Post Facto Clause. Thus, before someone can be punished, they must first have notice of the legal consequences of such actions and should not be subjected to legislation that aims to punish a criminal beyond their initial sentence.

To find that a statute, such as the sex offender registration and notification statute, violates the Ex Post Facto Clause, a court must first determine that the effects of the statute are punitive. Only statutes that are punitive violate the Ex Post Facto Clause. If a sex offender registration and notification statute is not punitive, then it is merely regulatory and meant to balance the needs of public safety against the privacy of the convicted sex offender.

To determine whether a law is punitive, a court must analyze both the legislature's intent and the effect of the legislation under the intent-effects test. Under this test, if the legislature's intent is clearly regulatory rather than punitive, then the burden falls on those challenging the law to submit the "clearest proof that the punitive effects negate the state's regulatory intent." In order to determine the extent of

---

41 See Calder v. Bull, 3 U.S. 386, 391 (1798). (Holding that a state can pass new laws without creating an Ex Post Facto violation since the law was not meant to punish).
42 See Weaver v. Graham, 450 U.S. 24 (1981). The Supreme Court held that a statute enacted after defendant's sentence pertaining to credits for time served did not pertain to the defendant because the law cannot be applied retrospectively in violation of the Ex Post Facto Clause. Id.
43 See Mendoza-Martinez, 372 U.S. 144.
44 Id. at 168-69.
45 See Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997). This case involved a convicted sex offender's challenge to Washington's Community Protection Act, WASH. REV. CODE § 9A.44.130 (1997) based on the Ex Post Facto Clause and privacy and due process challenges. Id. The Ninth Circuit concluded that the registration and notification provision of the statute were constitutional because the legislature did not intend the act to be punitive and did not support the finding that the act was excessive in relation to the regulatory goal of community protection. Id.
47 See Mendoza-Martinez, 372 U.S. 144. This test came as a result of the United States Supreme Court decision that a United States citizen could not be divested of citizenship under the Nationality Act, 58 Stat. 746 (1940), and the Immigration and Nationality Act, 8 U.S.C.S. § 1481 (a)(10) (1952), because the statutes used to divest citizenship were unconstitutional. Id. The Supreme Court concluded that the statutes were punitive and did not provide for due process. Id.
the statute’s punitive effects, courts usually rely on an examination of the Mendoza-Martinez balancing test in weighing the legislative purpose against the punitive effects.48

Courts generally use the Mendoza-Martinez test to determine whether the effects of the law are punitive to such a degree that the punitive effect outweighs the legislative intent of public safety.49 This is the traditional test used for distinguishing regulatory from punitive measures.50 Under the Mendoza-Martinez test, the court balances seven factors, in light of the language used in the statute and the statute’s effect on the offender, to determine whether the statute is punitive.51 Those factors are:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether it has historically been regarded as a punishment;
3. Whether it comes into play only on a finding of scienter;
4. Whether its operation will promote the traditional aims of punishment – retribution and deterrence;
5. Whether the behavior to which it applies is already a crime;
6. Whether an alternative purpose to which it may rationally be connected is assignable to it; and
7. Whether it appears excessive in relation to the alternative purpose assigned.

If the punitive effects of the statute are “excessive and beyond that necessary to promote public safety” the court will find that the statute violates the Ex Post Facto Clause.52

B. MEGAN’S LAW

In 1994, Megan Kanka, a seven-year-old girl, was abducted, raped and murdered near her home in New Jersey.53 Jesse Timmendequas, the man convicted for the crimes, was previously convicted of two other sex offenses involving two

---

48 Id.
49 See generally, Roe v. Office of Prob., 125 F.3d 47 (2d Cir. 1997), Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999), Burr v. Snider, 234 F.3d 1052 (8th Cir. 2000), and Russell v. Gregorie, 124 F.3d 1079 (9th Cir. 2000).
50 See Mendoza-Martinez, 372 U.S. at 169.
young girls. No one in Megan's community was aware of Timmendequas's history of sex offenses.

Within three months of Megan's death, the New Jersey legislature enacted Megan's Law, known as the Registration and Community Notification Law. This was the first sex offender registration and notification provision of its kind in the United States. Its purpose was to alert the community to the presence of sex offenders and therefore, promote the safety of the community.

Megan's Law requires sex offenders, who have completed their sentences for certain designated offenses, to register with local police departments. Registration is only to occur if the sex offenders' conduct at the time of sentencing was to be "characterized by a pattern of repetitive and compulsive behavior." Megan's Law also created a registration requirement and a three-tiered notification program. Additionally, Congress made the implementation of state sex offender registration and notification provisions a prerequisite for receiving certain federal funds.

Currently, all states have enacted their own versions of Megan's Law. Many Circuit Courts of Appeal have interpreted these laws broadly, imposing restrictions on released sex offenders, thus allowing punishment to continue...
after the released sex offender has completed his sentence. Other states, most notably Washington, have narrowly interpreted the language of Megan's Law and have made an effort to balance the needs of society against the needs of the sex offender.

C. VARYING APPROACHES TO SEX OFFENDER REGISTRATION AND NOTIFICATION STATUTES BY CIRCUIT COURTS OF APPEAL

Various Circuit Courts of Appeal have interpreted the Mendoza-Martinez excessiveness factor and have applied the sex offender registration and notification statutes in widely varying ways. Some Circuit Courts of Appeal allow the dissemination of a sex offender's personal information over the Internet, while other Circuit Courts of Appeal hold that this type of dissemination is excessive, and therefore, violates the Ex Post Facto Clause. The varying interpretations and applications of sex offender registration and notification provisions evidence the fact that this system may not be the best way of ensuring uniform attempts at public safety because this system results in the violation of released sex offenders' constitutional rights.

1. Ninth Circuit

a. Russell v. Gregoire

In Russell v. Gregoire, the Ninth Circuit addressed the Ex Post Facto Clause and Due Process challenges to Washington’s Community Protection Act. The provisions of this statute imposed registration requirements on all sex offenders, regardless of date of conviction, and subjected some to

---

64 See Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997), Femedeer v. Utah Dep't of Corr., 227 F.3d (10th Cir. 2000), Roe v. Office of Adult Prob., 125 F.3d 47 (2d Cir. 1997) and Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999).

65 See Russell, 124 F.3d 1079.

66 See Femedeer, 227 F.3d 1244.

67 See Otte, 259 F.3d 979.

68 Russell, 124 F.3d 1079. The majority decision was written by Judge O'Scannlain.

69 Id.

Id.
community notification. The statute applied to sex offenders found guilty as well as those found not guilty by reason of insanity. The release of personal information about a sex offender under the notification provision was limited to the release of information to persons living in the general vicinity of the offender's residence. Further, the statute provided for a tiered system of classification based on the nature of the initial offense and the likelihood of recidivism.

Willie Russell and Johnny Sterns were both convicted of sex related offenses in 1989. Both were imprisoned and released. The Washington legislature enacted the Community Protection Act in 1990 and amended the statute in 1994, 1995 and 1996. Each amendment increased the registration requirements imposed on sex offenders. Initially, the registration requirements were minimal and subjected some only to community notification. Later, the statute was broadened to include specific requirements imposing time frames within which a sex offender had to register new addresses and included penalties for non-compliance. Thus, Russell and Sterns claimed that the statute violated the Ex Post Facto Clause because the statute's requirements increased the initial punishment imposed at sentencing.

The Ninth Circuit considered the registration and notification provisions separately. The court first looked at the intent of the statute. After analyzing the statutory language, the court held that the legislature meant to regulate, not to punish. The expressed intent underlying the legislation was to monitor the whereabouts of sex offenders for the purpose of

---

70 Id. at 1082-83.
71 Id. at 1082.
72 Id. at 1082-83.
73 Russell, 124 F.3d at 1082. Level one offenders were not subject to public notification. Id Level two offenders were subject to notification by government to law enforcement agencies and schools. Id. Level three had the same notification requirements but this information was also provided to local news media. Id.
74 Id. at 1081.
75 Id.
76 Washington Community Protection Act § 9A 44.130(1).
77 Russell, 124 F.3d at 1081. See Washington Community Protection Act § 9A 44.130(1).
78 Washington Community Protection Act § 9A 44.130(1).
79 Russell, 124 F.3d at 1082.
80 Id.
81 Id. at 1087.
public safety, not to impose additional punishment upon their release.\textsuperscript{82}

Since the legislature's intent was clearly regulatory, the court considered whether there was the clearest proof that the punitive effects of the statute outweighed the legislative goal of community protection. The court analyzed the \textit{Mendoza-Martinez} factors and found that none of the factors supported the conclusion that the effects of the Act were punitive.\textsuperscript{83} The court found no affirmative disability or restraint, found the registration aspect to be regulatory, found that the statute did not serve retributive purposes and found that the statute was not excessive in relation to the state's interest of public protection.\textsuperscript{84} The court concluded that the statute's punitive effects were "not so egregious as to prevent us from viewing the Act as regulatory or remedial."\textsuperscript{85} Further, the court noted that, "the harsh results of notification come not as a result of government action, but as a societal consequence of the offender's crime."\textsuperscript{86}

b. \textit{Neal v. Shimoda}

In \textit{Neal v. Shimoda}, A. J. Neal and Marshall Martinez claimed that Hawaii's sex offender treatment program violated the Ex Post Facto Clause.\textsuperscript{87} The Ninth Circuit's decision in this case expanded the application of sex offender registration statutes to those who have never been convicted of sex related offenses. Hawaii's guidelines for the treatment program resulted from the legislature's conclusion that "sexual assault is a heinous crime committed by offenders with deviant behavior patterns that cannot be controlled by incarceration alone."\textsuperscript{89}

In 1993, Neal was charged with sex offenses, but those charges were dismissed when he entered a plea agreement

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 1089. The court compared the statute's registration requirements to those in other statutes which have been found to be constitutional by other courts. \textit{Id.}
\item \textit{Russell}, 124 F.3d at 1089.
\item Id. at 1092.
\item Id. at 1092.
\item Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997).
\item Id. at 821.
\item See id., citing 1992 HAW. SESS. LAWS 304-305.
\end{enumerate}
\end{footnotesize}
based on other related non-sexual charges. Although Neal was never convicted of any sex related offenses, he was classified as a sex offender during his incarceration in order to allow him to "benefit from sex offender treatment."

Accordingly, the Ninth Circuit held that the narrowly constructed statute was not excessive in relation to the goal of community protection, was constitutional and thus did not violate the Ex Post Facto Clause. This decision provided the basis for comparison in Doe v. Otte and cases in other Circuit Courts of Appeal in regards to what requirements in a sex offender registration and notification are permissible.

Martinez had two prior sex related offenses and was previously convicted of attempted rape and kidnapping. Martinez was sentenced to a prison term and became eligible for parole in 1998. Martinez was classified as a sex offender, but refused to participate in the prison's treatment program.

Neal and Martinez brought separate claims challenging the treatment program under the Ex Post Facto Clause, on the basis that the policy under which they were classified and treated as sex offenders was created after they were convicted. Both claimed that the classification made them ineligible for parole and imposed an additional punishment, thereby violating the Ex Post Facto Clause.

Judge Nelson wrote the majority opinion for the Ninth Circuit, with Judge Reinhardt dissenting. Judge Nelson relied on the United States Supreme Court's holding in Kansas v. Hendricks, which held that the prison's classification system

See Neal, 131 F.3d at 822. Neal was charged with sexual assault in the first degree, terrorist threats and attempted murder. Id. Neal was not found guilty of sexual assault, but rather plead to terrorist threats and attempted murder in exchange for the dismissal of the sexual assault charge. Id.

Id. at 822.

Id. at 1093.

Otte, 259 F.3d 979.

Id. at 822-23.

Id. at 823.

Id.

Neal, 131 F.3d at 823.

Id. at 821. The two cases were consolidated for the appeal to the Ninth Circuit because of the similarity in Neal's and Martinez's claims. Id.

See Hendricks, 521 U.S. at 346. This case upheld Kansas's Sexually Violent Predator Act which implemented involuntary civil commitment for sex offenders likely to re-offend and declared these individuals to be sexually violent predators. Id.
in Kansas did not violate the Ex Post Facto Clause. Judge Nelson held that the mandatory treatment programs did not constitute punishment because of their rehabilitative purpose. He rationalized the denial of parole to Neal and Martinez under the classification as necessary for them to complete the treatment program.

Judge Reinhardt dissented, stating that the classifications did violate the Ex Post Facto Clause. He noted that the delay in parole eligibility resulted in substantially adverse effects on those to whom the program applied. He concluded that the terms and conditions of Neal's and Martinez's parole dates were unlawfully changed by the application of the sex offender treatment program's provisions and thus violated the Ex Post Facto Clause. In reaching that conclusion, Judge Reinhardt noted that the most glaring error in the majority's opinion, especially in Neal's case, was that a court never determined that he was a sex offender.

Judge Reinhardt was also distressed by the Hawaii's prison officials' practice of basing the classifications on past acts rather than on the current threat of the inmate. The distinguishing feature between the Kansas and Hawaii statutes is that the Kansas statute provided for rehabilitation through a long-term treatment program for sex offenders and segregated them from the general prison population for purposes of treatment. In contrast, Hawaii's statute is excessive because it maintains sex offenders in the general population and imposes additional punishment through denial of parole and extended incarceration.

While the Mendoza-Martinez factors were not specifically applied in this case, the majority's central focus was on whether the statute was excessive. Thus, the Ninth Circuit in Russell and Neal came to differing conclusions. The Act in

---

100 Neal, 131 F.3d at 825.
101 Id. at 827.
102 Id.
103 Id. at 834.
104 Id. at 834-35.
105 Neal, 131 F.3d at 834-35.
106 Id. at 835.
107 Id.
108 Id. at 835-36.
109 Russell, 124 F.3d at 1079.
Russell\textsuperscript{11} was upheld based on the statute’s narrow construction which limited the requirements imposed on the released sex offender. To the contrary, the sex offender treatment program in \textit{Neal}\textsuperscript{12} was upheld even though it was broadly constructed and expanded the state’s powers to continue to punish under the guise of a sex offender registration and notification statute. Consequently, the Ninth Circuit’s decision in \textit{Neal}\textsuperscript{113} has broadened the state’s powers beyond the dictates of Megan’s law, while \textit{Russell}\textsuperscript{114} set clearer and more limited parameters on the reach of sex offender registration and notification requirements.

2. Tenth Circuit

In \textit{Femedeer v. Utah Department of Corrections},\textsuperscript{115} the Tenth Circuit examined the constitutionality of Utah’s sex offender registration and notification statute.\textsuperscript{116} Femedeer challenged the constitutionality of Utah’s statute under the Ex Post Facto Clause.\textsuperscript{117}

The Tenth Circuit analyzed whether the legislature intended to create a civil remedy or a criminal penalty.\textsuperscript{118} The court analyzed the placement of the statute in the civil code, rather than criminal code, and concluded that this was evidence of the legislature’s nonpunitive intent.\textsuperscript{119} Further, the court held that access to information over the Internet was to furnish the general public with easy access to information to enable citizens to assist with police investigations.\textsuperscript{120}

\footnotesize
\textsuperscript{110} \textit{Neal}, 131 F.3d at 818.
\textsuperscript{111} \textit{Russell}, 124 F.3d at 1079.
\textsuperscript{112} \textit{Neal}, 131 F.3d at 818.
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Russell}, 124 F.3d at 1079.
\textsuperscript{115} \textit{Femedeer}, 227 F.3d at 1244.
\textsuperscript{116} See id. In 1998, Utah amended its sex offender registration and notification statute to apply to all convicted sex offenders regardless of date of conviction and eliminated all geographic restrictions on the notification provision. \textit{Id.} The increase in the number of requests for information about registered sex offenders, specifically 100,000 requests from Boy Scouts of America checking into the background of its volunteers, created a backlog. \textit{Id.} To remedy this problem, the Department of Corrections allowed unlimited access to information through its website. \textit{Id}.
\textsuperscript{117} \textit{Id.} at 1246.
\textsuperscript{118} \textit{Id.} at 1248-49.
\textsuperscript{119} \textit{Id.} at 1249.
\textsuperscript{120} \textit{Femedeer}, 227 F.3d at 1249.
Tenth Circuit found that Internet notification was "clearly a civil remedy." Accordingly, the Tenth Circuit concluded that the legislature intended to protect the public rather than to punish.

Since the Tenth Circuit concluded that the legislature had an unambiguous, nonpunitive intent, the court examined whether Femedeer had shown the "clearest proof" that the punitive effects outweighed the legislature's regulatory intent. In doing so, the court relied on the Mendoza-Martinez factors.

First, the Tenth Circuit found that the statute did not impose an affirmative disability or restraint because registrants were free to choose a place to live and work and were "free to come and go as they please." The court found that Utah's statute, like Washington's statute, imposed no affirmative disability. Unlike the Washington statute, however, which provided information in only specified geographic areas, the Utah statute provided information about registered sex offenders worldwide. Further, the Tenth Circuit determined that access to unlimited information about convicted sex offenders over the Internet is not analogous to public shaming and thus does not equate with historical punishment. The court emphasized that the information released was true and accurate. Although the court acknowledged that allowing access to such information has "substantial negative consequences involved," nevertheless, it has never been regarded as punishment.

Next, the court found that application of Utah's statute was not dependent on the finding of scienter because all sex offenders, whether convicted or committed to mental institutions for their crimes, were subject to the registration

---

121 Id.
122 Id.
123 Id. at 1249-50.
124 Id.
125 Femedeer, 227 F.3d at 1250.
126 Id. at 1250.
127 See Russell, 124 F.3d at 1089.
128 Femedeer, 227 F.3d at 1250-51.
129 Id. at 1251.
130 Id.
and notification provisions. The court was unable to determine whether the statute promoted retribution and deterrence, the traditional aims of punishment, and held that this element of the Mendoza-Martinez test was "inconclusive." Although the court acknowledged that the statute applied to behavior that was already a crime, it did not give much weight to this factor. Rather, the court concluded that the statute's purpose was to prevent future crime, specifically sex offenses. Thus, the civil, non-punitive purpose of promoting public safety outweighed the statute's application to behavior already deemed criminal.

Finally, the court considered the excessiveness factor. The court acknowledged that the negative impact of disseminating information over the Internet was great. The court, however, was confident that few inquiries would be made since "the farther removed one is from a sex offender's community...the less likely one will be to have an interest in accessing this particular registry." Accordingly, the court concluded that the statute was not excessive in relation to its public safety goals, and therefore, did not violate the Ex Post Facto Clause. Thus, the Tenth Circuit expanded the scope of limited community notification provided for by Megan's Law, to include world-wide access to a registered sex offender's personal information over the Internet.

In upholding Utah's sex offender notification scheme, Tenth Circuit dealt a crushing blow to Due Process and Ex Post Facto rights for convicted sex offenders. Thus, the Tenth Circuit has broadened sex offender registration and notification provision to the greatest extent by concluding that dissemination of sex offenders' information worldwide, over the Internet, is an appropriate avenue for assuring public safety and was not excessive punishment.

---

131 Id. at 1252.
132 Id. at 1251-52.
133 Femeedee, 227 F.3d at 1252.
134 Id.
135 Id. at 1253.
136 Id. The Tenth Circuit reversed the District Court's decision which found the statute unconstitutional under the Ex Post Facto Clause. Id. Note that this is the exact opposite holding from Otte, which concluded that unlimited access to information over the Internet is excessive and thus punitive. Id.
3. Fifth Circuit

In Moore v. Avoyelles Correctional Center, the Fifth Circuit closely followed the Ninth Circuit's decision in Russell. Moore contended that Louisiana's sex offender statute violated the Ex Post Facto Clause by subjecting him to a sex offender registration and notification law that was enacted after he was convicted of indecent behavior with a minor. Moore's five-year prison sentence was suspended and Moore was placed on probation. One of the conditions of his probation required him to register as a sex offender.

The Fifth Circuit applied the intent-effects test used in Russell and compared Louisiana's statute to other states' statutes, including those in Washington and Connecticut. The court concluded that Louisiana's statute did not impose punishment and was not excessive to the extent that it violated the Ex Post Facto Clause. The court found that the language of Louisiana's statute closely mirrored the language of the Washington statute. Therefore, the legislature's intent was clearly to protect the public from recidivist sex offenders.

Without applying the seven factors from the Mendoza-Martinez effects test, the Court concluded that Moore failed to satisfy the clearest proof standard because he failed to show that the statute was so punitive or excessive that it outweighed the legislature's non-punitive intent. Thus, this decision is in line with the Ninth Circuit's holding in Russell by holding that if the statute is narrowly construed then it will not be considered excessive or punitive under the Ex Post Facto Clause.

---

138 Russell, 124 F.3d at 1079.
139 Moore, 253 F.3d at 871.
140 Id.
141 See id. A condition of Moore's probation was a requirement that he register his personal information with law enforcement. Id. The statute required released sex offenders to notify their neighbors of their residence and sex offender status. Id.
142 Russell, 124 F.3d at 1079.
143 Moore, 253 F.3d at 872-73.
144 Id. at 873.
145 Id. at 872-73.
4. Second Circuit

The Second Circuit, in *Roe v. Office of Adult Probation*, 146 considered an Ex Post Facto Clause challenge to an internal sex offender notification policy of a Connecticut state agency, the Probation Department. 147 The issues before the court were whether the agency policy should apply to those sex offenders whose crimes took place before the enactment of the policy and whether the policy constituted punishment. 148 Thus, the court addressed the constitutionality of the probation department's sex offender notification policy on Ex Post Facto grounds. 149

Roe was convicted of six counts of sexual assault against a minor in 1991. 150 He was released on parole in August 1994. 151 In approximately November 1994, Roe's parole was revoked and he was returned to prison. 152 He was released again and placed on probation in 1995, at which time the probation department concluded that Roe had a high rate of reoffending. 153

The agency policy allowed for public notification of the sex offenders' criminal records while under the supervision of a probation officer. 154 Prior to the implementation of the Adult Probation Sex Offender Notification Policy, Connecticut's legislature enacted a sex offender registration scheme in 1994, that only applied to those persons convicted of seven specified offenses after January 1, 1995. 155 In 1995, the statute was broadened to provide for notification to specific people in the registrant's vicinity. 156 In 1997, the statute was broadened again, requiring all sex offenders to comply with the

146 *Roe*, 125 F.3d 47.
147 *Id.* at 48. Considering sex offender notification through an internal state agency policy rather than the implementation through a Connecticut statute. *Id.*
148 *Id.* Police, victims, victim's parent and guardian received information about sex offenders' change of address or changed in conditions of probation. *Id.*
149 *Id.*
150 *Id.* at 51.
151 *Roe*, 125 F.3d at 51.
152 *Id.*
153 *Id.* at 51.
154 *Id.* at 50.
155 *Id.* at 47.
156 *Roe*, 125 F.3d at 49. The sex offenders' personal information could be disclosed to "any specific person if such disclosure is deemed necessary by the chief of police... to protect said person from any person subject to" registration. *Id.*
registration requirements regardless of conviction date and authorizing unlimited notification.\textsuperscript{167}

In analyzing whether the policy was punitive, the Second Circuit used the intent-effects analysis.\textsuperscript{158} The court noted that the Probation Department’s primary intention was to protect the public from the sex offenders under its supervision and to aid in their rehabilitation.\textsuperscript{159} The court also found that the policy was regulatory, rather than punitive.\textsuperscript{160} In applying the clearest proof standard, the court determined that any punitive effects of the policy were outweighed by the policy’s goals of community protection.\textsuperscript{161} Although the district court applied the \textit{Mendoza-Martinez} test and determined the policy was punitive, the Second Circuit applied the \textit{Mendoza-Martinez} factors and decided that the policy was \textit{not} punitive based on the same criteria.\textsuperscript{162} The Second Circuit held that Roe failed to establish the clearest proof that the notification policy was punitive. Further, the court held that the policy was “not excessive in relation to its purpose of enhancing public awareness and helping to prevent the recovering offender from harmful relapses.”\textsuperscript{163}

The Second Circuit in \textit{Roe v. Office of Adult Probation}\textsuperscript{164} upheld the constitutionality of the internal state policy provision, despite the retroactive application of the provisions to sex offenders. Clearly, the Second Circuit’s decision evidences the trend to broaden sex offender registration and notification provisions to apply to those whose crimes took place before the statute was enacted.

5. \textit{Sixth Circuit}

In \textit{Cutshall v. Sundquist},\textsuperscript{165} the Sixth Circuit reviewed the Tennessee Sex Offender Registration and Monitoring Act\textsuperscript{166}
which required released sex offenders to register with law enforcement agencies and allowed the information to be disseminated to the public.\textsuperscript{167} Cutshall challenged the constitutionality of the registration and notification provisions of the Tennessee Sex Offender Registration and Monitoring Act, arguing that the sex offender registration and notification provisions violated the Ex Post Facto Clause.\textsuperscript{168}

The Act required Cutshall to register personal information with the Tennessee Bureau of Investigation following discharge from incarceration.\textsuperscript{169} Further, the Act authorized the maintenance of a registry for law enforcement to keep track of sex offenders.\textsuperscript{170} Cutshall claimed these provisions punished him twice for the same offense, and alleged that the legislature intended to further punish sex offenders in addition to their sentences of incarceration, through the Act.\textsuperscript{171} He also argued that the maintenance of the central registry did not serve the state’s alleged purpose of aiding law enforcement, but rather that the effects of the registry were punitive.\textsuperscript{172}

In \textit{Cutshall},\textsuperscript{173} the district court had found that the registration provision was constitutional. The court, however, found that the notification provision violated Cutshall’s constitutional right to Due Process. The court reasoned that Cutshall was denied an opportunity to challenge the dissemination of the information that he was required to provide to the central registry.\textsuperscript{174}

The Sixth Circuit analyzed Cutshall’s Ex Post Facto Clause and Fifth Amendment Double Jeopardy challenges simultaneously, upholding the district court’s Ex Post Facto determination, but reversing on Due Process grounds.\textsuperscript{175} First, the court looked at the intent behind the Tennessee Act.\textsuperscript{176}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{167} \textit{Cutshall}, 193 F.3d at 469.
\item \textsuperscript{168} \textit{Id.} Cutshall also argued that the registration and notification provisions also violated other constitutional violations such as substantive and procedural due process, right to privacy, and equal protection.\textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Cutshall}, 193 F.3d at 472.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Cutshall}, 193 F.3d at 1079.
\item \textsuperscript{174} \textit{Id.} at 469.
\item \textsuperscript{175} \textit{Id.} at 474.
\end{itemize}
\end{footnotesize}
After analyzing the language of the statute, the court concluded that the statute was regulatory in nature since the intent underlying the statute was to assist law enforcement and to protect the public.\textsuperscript{177}

Next, the Sixth Circuit analyzed the effects of the statute under the \textit{Mendoza-Martinez} factors to determine whether the punitive effects significantly outweighed the regulatory intent so as to constitute punishment in violation of the Ex Post Facto Clause.\textsuperscript{178} The court found that the statute did not impose any restraint on registrants because they were not incarcerated, did not lose their livelihood, and were not deprived of a driver’s license like those convicted of less serious crimes.\textsuperscript{179} The court also noted that registration and notification requirements did not constitute historical punishment because they did not impose imprisonment, incapacitation, or rehabilitation.\textsuperscript{180} Application of the Tennessee Act did not depend on the finding of scienter because the statute did not require a culpable mens rea.\textsuperscript{181} The court found that the statute probably served traditional aims of punishment, such as deterrence, but stated that this was not dispositive of the punitive nature of the statute.\textsuperscript{182} Although the statute applied to acts that were already crimes, the court found that the statute was still more regulatory than punitive.\textsuperscript{183} Finally, the court combined the last two \textit{Mendoza-Martinez} factors and determined that the statute’s requirements were minimal in comparison to the benefit from regulation.\textsuperscript{184}

In his dissenting opinion, Judge Jones stated that, “a state statute designed to protect the public from criminals and criminal behavior – no matter how vile the crime – must comport with constitutional guarantees.”\textsuperscript{185} Judge Jones was primarily concerned with the denial of due process based on the

\begin{flushleft}
\textsuperscript{177} Cutshall, 193 F.3d at 474.
\textsuperscript{178} \textit{Id.} at 474-477. The court applied the clearest proof standard because it determined that the statute’s intent was regulatory based on the limited disclosure, the intent to protect the public, and the minimal reporting requirements.
\textsuperscript{179} \textit{Id.} at 474.
\textsuperscript{180} \textit{Id.} at 475.
\textsuperscript{181} \textit{Id.} The statute applied to those found guilty of a sex related offense as well as those found not guilt by reason of insanity. \textit{Id.}
\textsuperscript{182} Cutshall, 193 F.3d at 475.
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.} at 476.
\textsuperscript{185} \textit{Id.} at 484.
\end{flushleft}
fact that the statute treated all offenders alike, regardless of the severity of the crime or the risk of recidivism.\footnote{Id.} Thus, when a statute fails to categorize according to the severity of the crime, the offender's threat to the public cannot be accurately determined.\footnote{Cutshall, 193 F.3d at 484.} If the primary aim of the law is to protect the public, an offender must have the right to a court's determination of the likelihood of recidivism before the offender is required to register.\footnote{Id.}

The Sixth Circuit concluded that Tennessee's sex offender registration statute was not punitive and, therefore, did not violate the Ex Post Facto Clause.\footnote{Id.} This decision did not broaden the dictates of Megan's Law, but did validate the actions taken by the state to control released sex offenders.

6. Eight Circuit

In \textit{Burr v. Snider},\footnote{Burr v. Snider, 234 F.3d 1052 (8th Cir. 2000).} Burr claimed that North Dakota's sex offender registration statute,\footnote{N.D. CENT. CODE § 12.1-32-15(3) (1999).} which required address registration by convicted sex offenders, imposed an excessive punishment on a released sex offender.\footnote{Burr, 234 F.3d at 1052.} Burr pled guilty to violating this statute when he failed to notify the police of his new address.\footnote{Id. at 1053.} He claimed that the statute improperly authorized dissemination of sex offender information to the public. Burr further argued that this dissemination of information constituted punishment that was not imposed at the time the offender was originally sentenced, and thus violated the Ex Post Facto Clause.\footnote{Id.}

The Eight Circuit first analyzed the statute under the intent-effects test.\footnote{Id. at 1054.} The court examined the legislative history of the statute and concluded that the legislature did not intend the registration requirement to constitute a punitive
measure. The court based its conclusion on the lack of evidence that indicated that the registration requirement was being used to punish. The court found that the legislature did not intend to increase the offenders' initial penalty, and therefore, did not intend to punish.

Next, the court considered whether the statute was punitive under the Mendoza-Martinez effects test. Taken as a whole, the court stated that any punitive effects of the statute were not outweighed by the legislature's intent to protect communities from convicted sex offenders. Furthermore, the court found that the statute did not impose an affirmative disability or restraint, did not promote the traditional aims of punishment, but did further the legitimate interest of public protection. The court, however, failed to substantiate the claim that these provisions actually protect the community. Accordingly, Burr has also followed the nationwide trend of upholding sex offender registration and notifications statues under the guise of community protection.

Accordingly, the Eighth Circuit held that North Dakota's sex offender registration statute, which required sex offenders to notify police upon changing their residence, did not constitute punishment under the Ex Post Facto Clause. The court found that requiring sex offenders to keep police informed of their whereabouts when they move was not excessively punitive. The penalty imposed for violation of this provision, according to the Eighth Circuit, did not create an additional punishment in relation to the original sentence, and therefore did not violate the Ex Post Facto Clause. Thus, this case is in line with the dictates of Megan's Law and has validated the

---

196 Id. See also Burr v. Snider, 598 N.W. 2d at 152-53 (1998). The Eighth Circuit looked to the North Dakota Supreme Court's decision for guidance on the statue's legislative history. Burr, 234 F.3d at 1052.
197 Burr, 234 F.3d at 1054.
198 Id.
199 Id. The North Dakota Supreme Court held that the statute was not punitive under the Mendoza-Martinez effects test. Nonetheless, the Eighth Circuit acknowledged that this test "usually involves a certain degree of judicial discretion." Id.
200 Id.
201 Id. Thus, the Eighth Circuit found that the North Dakota Supreme Court's analysis was reasonable under the facts of this case. Id.
202 Id.
203 Burr, 234 F.3d at 1055.
204 Id.
state’s application of the sex offender registration and notification requirements.

The Circuit Courts of Appeal remain in conflict about what constitutes punishment and what regulations promote public safety. Notably, the Ninth Circuit’s decisions in cases involving sex offender registration and notification are also inconsistent. The Ninth Circuit’s decisions in *Otte,*205 *Russell,*206 and *Neal,*207 when considered collectively, evidence the differences in the outcomes of the cases depending on which Judge authored the decision. Judge Reinhardt, writing for the majority in *Otte,*208 established greater protections for released sex offenders by holding that the Alaska Act violated the Ex Post Facto Clause.209 Judge Reinhardt in *Otte*210 held that Internet publication of sex offenders’ personal information and the Act’s extensive registration requirements were clearly excessive and thus punitive. Judge O’Scannlon wrote a more conservative decision in *Russell,*211 but nevertheless followed the guidelines set forth in Megan’s Law. Lastly, Judge Nelson wrote the most conservative decision of the three judges by upholding the application of sex offender registration requirements in *Neal*212 to those who have not been convicted of sex offenses. Thus, due to the conflicting decisions among the Circuits, as well as within the Ninth Circuit itself, the line between when regulations constitute punishment and what regulations intend to promote public safety remains unclear.

IV. NINTH CIRCUIT'S ANALYSIS OF *DOE v. OTTE*

In *Doe v. Otte,*213 the Ninth Circuit considered whether Alaska’s sex offender registration and notification provisions violated the Ex Post Facto Clause of the United States

---

205 *Otte,* 259 F.3d at 979.
206 *Russell,* 124 F.3d at 1081.
207 *Neal,* 131 F.3d at 818.
208 *Otte,* 259 F.3d at 979.
209 See infra Part IV.
210 *Id.*
211 *Russell,* 124 F.3d at 1087.
212 *Neal,* 131 F.3d at 818.
213 *Otte,* 259 F.3d at 979. When the initial complaint was filed, John Doe I chose the pseudonym “James Rowe.” After complaints from an individual named James Rowe, the court changed the pseudonym to John Doe. *Id.*
Constitution. Specifically, the court focused on the varying degrees of registration and notification requirements contained in the statute, especially the provision that allowed the dissemination of sex offender personal information over the Internet. The court determined that the statute was excessive and, thus unconstitutional because it violated the Ex Post Facto Clause.

A. INTENT TEST

The plaintiffs in Doe v. Otte claimed that the Act was punitive, and therefore, violated the Ex Post Facto Clause. First, the court examined the Act under the intent-effects test. The intent prong of the test states that if the legislature's intent is to punish, then the law must be struck down. If the legislature's intent is not punitive, then the court must determine if the punitive effects outweigh the legislative goal of community protection.

The court determined that the Alaska legislature's intent was non-punitive. The court concluded that the placement of the Act in the criminal code was not necessarily determinative of the legislature's intent to punish. The court also considered the legislative findings in concluding that the Act was non-punitive. Thus, the court moved on to consider the Mendoza-Martinez factors.

B. EFFECTS TEST – MENDOZA-MARTINEZ FACTORS

Next, the court used the Mendoza-Martinez test to decide if the punitive effects of the Act were so egregious that it violated the Ex Post Facto Clause. The court explicitly did not apply the clearest proof standard, which is only used when the legislature's intent is clearly regulatory, because the

---

214 Id.
215 Id. at 982.
216 Id. at 986.
217 Id. at 986-88, See also Russell, 124 F.3d at 1086.
218 See Russell, 124 F.3d at 1079.
219 Otte, 259 F.3d at 985-95, citing Hendricks, 521 U.S. at 361.
220 Id. at 986-89.
221 Otte, 259 F.3d at 986.
222 Id.
223 Id.
legislature's intent in this instance was ambiguous. The court examined the seven criteria set forth in the Mendoza-Martinez test to determine the extent to which the punitive effects outweighed any regulatory intent.

1. The Act is Punitive if it Results in Affirmative Disability or Restraint

The court first considered whether the Act imposed an affirmative disability or restraint on the convicted sex offender. To find that a sex offender registration and notification statute imposes an affirmative disability or restraint, the statute must not impose any more burdens than necessary to accomplish its goal of community protection. The court closely compared the disabilities and restraints imposed by the Washington statute in Russell with those imposed by the Act. While both statutes required registration upon release, the Act’s registration requirements were vastly more burdensome. The Act required released sex offenders to register four times a year for a minimum of fifteen years and a maximum of life. In contrast, the Washington statute only required a one-time registration.

The Ninth Circuit held that the Act’s registration and notification provisions imposed significant disabilities on the convicted sex offender. The notification provision was excessive because the posting of the convicted sex offender’s information on the Internet subjects the sex offender and his family “to community obloquy and scorn that damage them personally and professionally.”

---

224 Id. at 985. See also Russell, 124 F.3d at 1086. The “clearest proof standard”, is a high standard that is only imposed on the party challenging the statute when the legislative intent is clearly regulatory. Id.
225 Otte, at 259 F.3d at 986-95. See also Mendoza-Martinez, 372 U.S. at 169.
226 Id.
227 Id.
228 Russell, 124 F.3d at 1079.
229 Id. at 987-89.
230 Other requirements of Alaska’s statute included, appearing in person at law enforcement agencies and providing home address, work address, vehicle registration, and disclose the nature of any mental health treatment.
231 See id. Other requirements of Alaska’s statute included, appearing in person at law enforcement agencies and providing home address, work address, vehicle registration, and disclose the nature of any mental health treatment.
232 Id. at 989.
233 Id. at 987.
Accordingly, the court concluded that the burdensome registration and notification requirements under the Act imposed an affirmative disability and restraint. The Act did not limit the dissemination of information to specific geographic areas, but rather publicized the convicted sex offender's information over the Internet. The Act also did not take into account the sex offender’s likelihood of recidivism. Accordingly, this factor demonstrated that the statute had a punitive effect because it imposed substantial disabilities on convicted sex offenders.

2. The Act is Punitive if it is Historically Regarded as Punishment

The court next addressed the issue of whether sex offender registration acts have historically been regarded as punitive. Because similar statutes have been in place for less than a decade, the court focused on the decisions of lower courts. Specifically, the court compared the Alaska Act to the Washington statute, and concluded that neither statute was meant to punish. The court also found that the statutes were not analogous to historical forms of shaming punishment. Therefore, this factor favored characterizing the Act as non-punitive.

---

234 Otte, 259 F.3d at 987. The Court in Russell upheld the Washington statute because the law was narrowly tailored to serve the interest of public protection and had only minimal imposition on the sex offender.
235 Id. at 988.
236 Id.
237 Id. at 989.
238 See id. at 989. The Court noted that some of the offenses that triggered application of the Act were "strict liability" offenses that are committed whether or not the defendant is aware that his conduct is criminal (e.g. statutory rape). Id.
240 Russell, 124 F.3d at 1092.
241 Otte, 259 F.3d at 989.
242 Id. See also Russell, 124 F.3d at 1092, (acknowledging that there is no historical antecedent to sex offender registration and notification provision). Id. The closest analogy to the notification provision is "wanted" posters for dangerous persons. Id. Although the court states that the notification provisions carry a great risk of vigilantism, the court maintains that they are not historically regarded as punitive. Id.
3. The Act is Punitive if it Applies Only upon the Finding of Scienter

The third issue addressed by the court was whether the Act comes into play only upon the finding of scienter. The court noted that the Act’s requirements were imposed on those offenders without knowledge that their actions were a crime, such as those found mentally incompetent, as well as those who had the necessary mens rea.243 Accordingly, because the court found that application of the Act was not dependent on a finding of scienter, this factor supported the conclusion that the Act was not punitive.244

4. The Act is Punitive if it Promotes Traditional Aims of Punishment

The court next determined whether the Act specifically promoted the aims of retribution and deterrence, the traditional aims of punishment.245 The court found that the registration and notification provisions of the Act were retributive because of the excessive obligations imposed on sex offenders.246 These provisions required frequent contact with the police department over a minimum of fifteen years, and therefore were excessive.247

The court again compared the Act to the Washington statute in *Russell*248 and found that the Washington statute “may implicate deterrence,” and similarly the Act had its own deterrent effect.249 Unlike the Washington Statute, the Act’s “onerous” registration obligations were inherently punitive.250 In reaching this conclusion, the court analogized the

243 Otte, 259 F.3d at 989.
244 Id.
245 Id. at 989-91.
246 Id. at 990.
247 Id.
248 See *Russell*, 124 F.3d at 1082-83.
249 Otte, 259 F.3d at 990, See also *Russell*, 124 F.3d at 1091. The Washington statute required convicted sex offenders to register with local law enforcement authorities and subjected some to community notification. Id. The statute required registration within twenty-four hours of release and to notify of change of address. Id. The notification element required that a public agency must have some evidence of an offender's future dangerousness or likelihood of recidivism in order to justify disclosure. Id. Further dissemination was restricted to narrow geographic areas.
250 Otte, 259 F.3d at 990.
registration requirements with supervised probation in the respect that both required regular reports to law enforcement, and concluded that this supported the conclusion that the requirements were punitive.\textsuperscript{251} The court also noted that the registration requirements did not differentiate between the gravity of the offender's initial offense and the potential of risk to the community.\textsuperscript{252} Overall, the court found that the Act furthered the traditional aims of retribution and deterrence. Therefore, the court determined that this factor also supported the conclusion that the Act was punitive.\textsuperscript{253}

5. The Act is Punitive if the Behavior to which the Act Applies is Already a Crime

Next, the court examined whether the behavior to which the Act applies was already criminal in nature.\textsuperscript{254} Since the Act applied only to those found guilty, it followed that imposition of the Act's requirements depended on an actual conviction.\textsuperscript{255} In contrast, the Court noted that the Washington statute in \textit{Russell},\textsuperscript{256} which the Ninth Circuit concluded was non-punitive, applied to sex offenders whether or not they had been convicted.\textsuperscript{257} Specifically, the Washington statute subjected those sex offenders who were incompetent to stand trial and persons found not guilty by reason of insanity to its registration and notification requirements.\textsuperscript{258} In contrast, because the Act's requirements were only imposed on those who had been convicted in a court of law and not to those found not guilty by reason of mental impairment, the court found this factor demonstrated that the Act was punitive.\textsuperscript{259}

\textsuperscript{251} \textit{Id.} at 991.
\textsuperscript{252} \textit{Id.} at 990.
\textsuperscript{253} \textit{Id.} at 991.
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Otte}, 259 F.3d at 991.
\textsuperscript{256} \textit{See Russell}, 124 F.3d at 1082.
\textsuperscript{257} \textit{Otte}, 259 F.3d at 991. \textit{See also Russell}, 124 F.3d at 1091. The Ninth Circuit made frequent reference to the Washington statute and used this as a means of comparison in analyzing the Alaska Act. \textit{Id.}
\textsuperscript{258} \textit{See Russell}, 124 F.3d at 1082. Similarly, the Ninth Circuit found the Tenth Circuit's holding that Utah's Sex Offender Notification Act was not punitive because it also applied to those offenders found not guilty because of a mental impairment. \textit{Id.}
\textsuperscript{259} \textit{Otte}, 259 F.3d at 991.
6. The Act is Punitive Unless the Non-Punitive Purposes Outweigh the Punitive Effects

The sixth factor the court considered in determining if the Act was punitive was whether the Act’s non-punitive purpose, that is public safety, outweighed the punitive purpose of the registration and notification.260 The court found that the Act legitimately and reasonably served the non-punitive purpose of public safety.

7. The Act is Punitive if the Act is Excessive in Relation to Purpose

Lastly, the court addressed the issue of whether the Act’s registration and notification provisions were excessive in relation to the public safety interests advanced by the Act.261 The court stated that the excessiveness factor is the most telling and significant evidence of whether a statute is punitive.262 Sex offender registration and notification statutes cannot impose requirements that are excessive in relation to the legislature’s intended purpose.263

Again, the court compared the Act to the Washington statute and found that the Act was excessive in comparison to the more narrowly constructed requirements imposed by the Washington statute.264 The Alaska legislature made no attempt to classify sex offenders by degrees to which they posed future risk, but rather applied a blanket punishment on all offenders.265 Notably, a judicial determination of rehabilitation was irrelevant under the Act.266 Furthermore, the court found the statute was “exceedingly broad” because the notification

260 Id.
261 Id. at 991-93.
262 Id. at 991.
263 Id. at 991.
264 See id. at 991-93. See also Russell, 124 F.3d at 1082. Specifically the Washington statute only allowed dissemination of sex offenders’ personal information within a narrow geographic area. Id.
265 See id. at 992. The Court noted that all Federal Court of Appeals have upheld registration and notification statutes that are tailored to the risk of the sex offenders with the exception of the Tenth Circuit’s decision in Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000). In Russell, the court considered “evidence of the offender’s future dangerousness, likelihood of re-offending or threat to community to justify disclosure to the public.”
266 Id.
provisions allowed access to information worldwide over the Internet. 267 The powerlessness of law enforcement authorities to limit the widespread public distribution of this information under the Act demonstrates the exceedingly broad nature of the Act. 268 The court stated that "broadcasting the information about all past sex offenders on the Internet does not in any way limit its dissemination to those whom the particular offender is of concern." 269 Accordingly, the court concluded that under this factor the Act was punitive. 270

The Court analyzed the Mendoza-Martinez criteria and found that the Act's effects were excessively punitive in comparison to any non-punitive intent alleged by the legislature. In reaching this conclusion, the court focused on the excessive registration requirements, the fact that the Act applied only to behavior that was already a crime, the retributive aspects of the registration requirements and the imposition of substantial disabilities and restraints on the offender. 271 Although the Act was not punitive in every respect, the Act taken as a whole was excessively punitive in relation to the purpose of community protection. 272 Thus, the court held that the Act violated the Ex Post Facto Clause and was invalid.

In addition to the Ex Post Facto Clause violations, the plaintiffs raised other constitutional challenges. The plaintiffs also claimed that the Act violated their Due Process and privacy rights. 273 The court acknowledged that the Act "brands sex offenders without any attempts to classify them by the risk posed" and denies them an opportunity to prove rehabilitation. The court strongly suggested that the plaintiff's Due Process challenges had merit, however, the court declined to address the Due Process challenge because of its holding that the Act violated the Ex Post Facto Clause.

267 Id.
268 Id.
269 Otte, 259 F.3d at 992.
270 Id.
271 Id. at 993-95.
272 Id.
273 Id. Jane Doe also challenged the Act as violating her right to privacy. Id. The court found that Jane Doe's privacy claim was taken care of by the finding of the Ex Post Facto Clause violation. Id.
V. CRITIQUE: PROPOSED SOLUTION: SUPERVISED PROBATION

In *Doe v. Otte*, the Ninth Circuit properly found that the Alaska Act violated the Ex Post Facto Clause. The Act's excessive registration requirements and the unrestrained ability to post sex offenders' personal information on the Internet clearly punished sex offenders after the completion of their original sentences. What began as the regulation of sex offenders in order to protect our communities, has become a mechanism that deprives sex offenders, who have completed their original sentences and others who had been rehabilitated, of their constitutional rights.

The Ninth Circuit acknowledged that the Alaska Act was enacted as a result of the pending release of a large number of sex offenders back into the community. Thus, the Act's requirements and notification provisions were the result of a knee-jerk reaction to a "crisis" that was never substantiated. Such hysteria leads to an overzealous attempt to ensure public safety, but results in the deprivation of the constitutional rights of the released sex offenders.

Many factors must be considered in determining the most appropriate course of action to protect the public from sex offenders who are likely to reoffend. Once a sex offender completes his or her sentence, however, he or she should not be subjected to an excessive and indefinite term of punishment, which was not previously imposed by the trial court upon conviction. If an offender continues to pose a severe risk after being released, then the sentence may have been too light in the first place.

The Circuits have recognized that the needs of the community must be balanced with the rights of the released sex offender. In order to accomplish this goal of community protection, sex offenders should be subject to a probation-like term, with definite timelines and guidelines, after completing their prison sentence. The sex offender should be made aware

---

274 *Id.*
275 *Id.* at 984.
276 Knee-jerk is often associated with "liberals" but in this context is meant to refer merely to acting on preconceived, unsubstantiated ideas and stereotypes.
277 *Otte*, 259 F.3d at 984.
of the requirements for probation upon sentencing in order to avoid any Ex Post Facto violations. The guidelines and timelines for probation should be decided by a board of experienced individuals, such as physicians, psychologists, social workers and law enforcement upon completion of the sex offender's initial sentence. The criteria for probation, such as threat to the community, rehabilitation and likelihood of recidivism, not the initial crime, should be based on a sliding scale.

Megan's Law is meant to protect the community against this group of people. Thus, this great responsibility should not be put on the shoulders of the community that is ill equipped to handle this job due to the lack of training and access to accurate information. A period of probation, under the supervision and guidance of a trained officer, will place the burden of protecting communities on law enforcement, rather than on inexperienced citizens. The terms of supervised probation should be prospective and based on the sex offender's threat to the community upon release, the risk of recidivism, and whether or not the sex offender has been rehabilitated.

Although requiring supervised probation for released sex offenders who fit into certain designated criteria might inundate the probation system, this is the best way of ensuring that those who continue to pose a threat to the community are supervised in an appropriate manner. Supervised probation is the only practical way to address public safety concerns. Supervised probation will address concerns of accountability through frequent contracts with trained professionals. This system will enable the released sex offender to obtain rehabilitative resources, but also violate those offenders who choose not to abide by the terms of probation. Thus, supervised probation is also the best way to balance the safety interests of the public against the rights of the released sex offender.

Internet posting and excessive registration requirements cannot accomplish the goal of community protection. Internet posting merely advertises the presence of sex offenders but does not provide the community with the necessary tools to protect themselves from released sex offenders who might re-offend. Additionally, requiring the released offender to register four times a year with law enforcement serves no purpose other than an address check for those who have been released. Thus, incarceration followed by supervised probation, only if the
released sex offender continues to pose a risk, is the best way to promote public safety. This huge responsibility of monitoring a group of people who are likely to re-offend should not be left to the watchful, untrained and unrestrained eyes of the community.

VI. CONCLUSION

The Ninth Circuit's decision in *Otte*,\(^{278}\) has brought greater attention to the real and potential deprivations of liberty interests under sex offender registration and notification provisions, especially those who have been rehabilitated or those who have a very low risk of re-offending. Unlike other Circuit Courts of Appeal that have reaffirmed state statutes broadening the provisions of Megan's Law, the Ninth Circuit reduced a state's ability to violate sex offenders' constitutional rights through excessively punitive registration and notification requirements.

Public labeling of sex offenders might be socially effective because it sell newspapers and gets votes, not because it actually promotes public safety. While society has a right to be fearful of any criminal, including sex offenders, the monitoring of such a complex problem should not be turned over to untrained communities that are misinformed on recidivism, and that are more fixated on punishing released sex offenders than on curing the problem. The focus should be on protecting the public by using resources to structure a probation-like system that includes law enforcement supervision, not merely community supervision.

Constant legal challenges to states' use of sex offender registration and notification statutes to protect the public, are important ways of ensuring that those sex offenders who have been rehabilitated or pose no threat are not subject to these laws. The community has a right not to be misinformed about the risks these people pose and the offenders have a right to be free from a classification as "Mr. Mo Lester" if they pose no threat to the community and their crime was a minor offense. Accurate classifications, and appropriate measures such as

\(^{278}\) *Otte*, 259 F.3d at 979.
requiring supervised probation of sex offenders, will free up
time and energy expended by law enforcement and allow them
to concentrate on those offenders who pose the greatest threat
to public safety.

Some might argue that the risk sex offenders pose to the
community is so grave that all measures should be taken to get
the word out to the community about released sex offenders. However, the Ninth Circuit properly found that the Alaska Act
imposed disabilities on registrants that were unnecessary and
excessive in relation to what was necessary to protect the
community and what was intended by the registration and
notification provisions set forth by Congress in Megan’s Law.

The United States Supreme Court granted review of the
Otter decision on February 19, 2002. While the nationwide
trend is to define what states can do within the parameters of
sex offender registration and notification provisions, the United
States Supreme Court should not overrule Otter. Thus, even
though increased punishment through excessive registration
and notification requirements is politically seductive, the
United States Supreme Court must stand firm in ensuring that
these statutes do not erode the very basis of our Constitution.

Colleen Miles*

---

*J.D. Candidate, Golden Gate University School of Law, (May 2003). Many thanks to
Crystal Howard, who worked tirelessly on editing this article, and Chris Kroblin, who
had insightful suggestions on this topic.