

MEGAN'S LAW AND ITS PROGENY: WHOM WILL THE COURTS PROTECT?

INTRODUCTION

On July 30, 1994, Jesse Timmendequas of Hamilton Township, New Jersey, lured seven-year-old Megan Kanka into his home where he brutally raped her and strangled her to death.¹ What made this crime so shocking and outrageous was that Megan's alleged killer was previously convicted of two sex offenses against children and lived anonymously in a house across the street from the Kankas, along with two other convicted pedophiles.² The Kankas and their neighbors were unaware that convicted sexual predators lived in their neighborhood.³

The public outcry to this horrific crime was immediate.⁴ Just three months after Megan's murder, New Jersey Governor Christine Todd Whitman signed one of the toughest sex offender registration acts into law.⁵ The circumstances surrounding this crime and the feeling that it could have been prevented brought national attention to the issue of how to deal with released sex offenders.⁶ Congress responded to the public outrage by including special provisions in the Federal Violent Crime Control and Law Enforcement Act of 1994 to protect children from sex offenders.⁷ This law requires states to adopt programs that protect the public against violent sex offenders.⁸ Released sex offenders and those who commit crimes against children must register with local law enforcement agencies and notify authorities of any change in address.⁹ In addition, the law allows authorities to disseminate information to the public necessary for their protection.¹⁰

¹ See G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1633 n.1 (1995). The little girl was lured away with the promise of seeing a puppy. See *id.* Once inside the house, her murderer strangled her with a belt, sexually assaulted her, wrapped her head in a plastic bag, put her in a toy box and cut her shorts into pieces. See *id.*

² See Simeon Schopf, "Megan's Law": *Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 117 (1995).

³ See *id.*

⁴ See Ryan A. Boland, Note, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183, 183-84 (1995).

⁵ See *id.*

⁶ See Schopf, *supra* note 2, at 117.

⁷ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994).

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.* § 170101(d).

In one incident, a teacher's aide who learned of the presence of a sex offender in the community because of the new law, noticed the offender and reported to the police that he had been in contact with a child.¹¹ The police subsequently learned that the registered offender had attended a child's birthday party and had invited a nine-year-old to his home for ice cream.¹² In this instance, the law may have saved a child from the horrific trauma of sexual assault or even may have saved the child's life.

Controversy surrounds the provision in the law requiring community notification.¹³ Opponents argue that it violates the Ex Post Facto Clause of the United States Constitution ("Constitution") because the notification provisions constitute punishment.¹⁴ Proponents of the community notification requirement assert that it is an injustice that the offender is allowed to start his life anew while the victim's family must live with the emotional trauma that follows in the wake of the sexual offense.¹⁵ Moreover, the proponents argue that victims must face the reality that the crime may have been prevented had the victims been aware of the presence of the sex offender in their community.¹⁶

This Note will examine some of the constitutional concerns posed by several state sexual registration acts as interpreted by state and federal courts.¹⁷ In each of these cases the courts decided whether the registration and notification provisions of the statute, when retroactively applied, violated the Ex Post Facto Clause of the Constitution.¹⁸ The United States Supreme Court has yet to rule on this issue. Therefore, state and federal courts are applying different tests, resulting in conflicting outcomes.¹⁹ Some courts have used the test set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez* in determining whether the acts applying the statute violated the Ex Post Facto Clause of the Constitution.²⁰ Others have used a test composed of various

¹¹ See *Doe v. Pataki*, 940 F. Supp. 603, 609 (S.D.N.Y. 1996).

¹² See *id.*

¹³ See Schopf, *supra* note 2, at 118.

¹⁴ See *id.* at 136. See generally U.S. CONST., art. I, § 9, cl. 3, § 10, cl. 1.

¹⁵ See Schopf, *supra* note 2, at 136.

¹⁶ See *id.*

¹⁷ See *infra* notes 73-264 and accompanying text.

¹⁸ See *id.*

¹⁹ See, e.g., *Artway v. Attorney Gen.*, 81 F.3d 1235 (3d Cir. 1996) (*Artway II*); *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1996); *Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1996); *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996); *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995); *State v. Ward*, 869 P.2d 1062 (Wash. 1994).

²⁰ See *Doe v. Pataki*, 919 F. Supp. 691, 700 (S.D.N.Y. 1996); *Artway v. Attorney Gen.*, 876 F. Supp. 666, 673 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996); *Rowe*, 884 F. Supp. at 1378; *Ward*, 869 P.2d at 1068. See generally *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

factors, such as intent and effects, gathered from previous cases.²¹ After analyzing the totality of the circumstances encompassed in the various cases, this Note will demonstrate that the punitive effects of the acts, if any, were minor and incidental.²² That is, any punitive effects experienced by the registrants did not rise to the degree necessary to override the statutes' regulatory purpose.²³ Part I of this Note examines the compulsive nature of sex offenders and their susceptibility to re-offend.²⁴ Part II explores *ex post facto* analysis.²⁵ Part II.A. discusses *Mendoza-Martinez* which has been interpreted as establishing a framework for determining whether a statute constitutes punishment.²⁶ Part II.B. traces the development of *ex post facto* challenges to the several sex offender registration statutes and the application, and subsequent rejection, of the *Mendoza-Martinez* test.²⁷ Part II.C. explores the definition of punishment as set forth in *United States v. Ursery*.²⁸ Part III examines the varied tests applied by the several courts and the corresponding conflicting results and argues that the state statutes pass muster under any of the tests mentioned.²⁹ Part IV develops a proposed framework for the courts to follow when deciding whether a sex offender registration statute constitutes punishment and thus fails an *ex post facto* challenge.³⁰

I. REPETITIVE AND COMPULSIVE BEHAVIOR

Sex offender recidivism presents a serious problem.³¹ Seven to 35% of rapists re-offend and between 10% and 40% of child molesters repeat their offense.³² In contrast to other criminals, sex offenders' propensity to commit offenses does not decrease over time.³³ Many of those who commit a second offense do so after a long interval without

²¹ See *supra* note 20. The *Mendoza-Martinez* test looks at seven factors to determine if the statutes have punitive effects. See 372 U.S. at 168-69; *infra* notes 63-70 and accompanying text.

²² See *W.P.*, 931 F. Supp. at 1219; *Ward*, 869 P.2d at 1073; *infra* notes 274-340 and accompanying text.

²³ See *W.P.*, 931 F. Supp. at 1219; *Ward*, 869 P.2d at 1073; *infra* notes 274-340 and accompanying text.

²⁴ See *infra* notes 31-50 and accompanying text.

²⁵ See *infra* notes 51-58 and accompanying text.

²⁶ See *infra* notes 59-72 and accompanying text. See generally *Mendoza-Martinez*, 372 U.S. at 168-69.

²⁷ See *infra* notes 73-218 and accompanying text. See generally *Mendoza-Martinez*, 372 U.S. at 168-69.

²⁸ See *infra* notes 219-64 and accompanying text. See generally *United States v. Ursery*, 116 S. Ct. 2135, 2147 (1996).

²⁹ See *infra* notes 265-314 and accompanying text.

³⁰ See *infra* notes 315-40 and accompanying text.

³¹ See *Doc v. Poritz*, 662 A.2d 367, 374 (N.J. 1995).

³² See *id.*

³³ See *id.*

offense.³⁴ One study showed that 48% of recidivistic sex offenders committed a similar crime within five years after their release, while 52% repeated during the following seventeen years.³⁵ Treatment of sex offenders rarely succeeds.³⁶ In New Jersey, the Department of Correction's statistics show that during the period from 1980 to 1994, only 182 inmates were paroled from the Adult Diagnostic and Treatment Center, while 712 inmates were not released until they had served their maximum sentences.³⁷ These statistics demonstrate that a majority of sex offenders are not successfully rehabilitated.³⁸

Similar studies have shown that sexual crimes are common.³⁹ A Justice Department study found that 133,000 women in the United States, age twelve or older, were victims of rape or attempted rape during the period from 1987 to 1991.⁴⁰ The study showed that 44%, or approximately 59,000, of these offenses were committed by strangers.⁴¹ The study also found that 21% of the total assaults involved weapons and 47% of all victims (60% of which were committed by strangers) sustained injuries other than the rape itself.⁴² The Justice Department also reported that in 1988, as many as 4600 children of both sexes were abducted or detained by nonfamily members, nearly all by force (80% to 85%) and usually with a weapon (75% to 85%).⁴³ The report found that more than two-thirds of these victims were sexually assaulted.⁴⁴ The Justice Department found, in 1992, that nearly 17,000 girls under age twelve were raped—54% by nonfamily members.⁴⁵

Another Justice Department study found that, as a group, sex offenders are significantly more likely than other recidivistic criminals to re-offend with sex crimes or other violent crimes and that the tendency to re-offend persists over time.⁴⁶ The study showed that released rapists were 10.5 times more likely to be rearrested for rape than were other released prisoners.⁴⁷ The study also found that prisoners who were convicted of other sexual assaults were 7.5 times more likely

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *Doc v. Poritz*, 662 A.2d at 374.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.* Data that is available show that the impact of such crimes is substantial and widespread. See *id.*

⁴⁰ See *id.*

⁴¹ See *Doc v. Poritz*, 662 A.2d at 374.

⁴² See *id.*

⁴³ See *id.* at 374-75.

⁴⁴ See *id.* at 375.

⁴⁵ See *id.* at 374.

⁴⁶ See *Doc v. Poritz*, 662 A.2d at 375.

⁴⁷ See *id.*

to be rearrested for sexual assault than were other released prisoners.⁴⁸ Moreover, the study showed that recidivism rates do not appreciably decline over time and thus, in contrast with other types of offenders, the tendency to re-offend does not appear to decline with the offender's increasing age.⁴⁹ It has been estimated that nonfamily child molesters have an average of 19.8 victims for those molesting girls and 150 victims for those molesting boys.⁵⁰

II. TRADITIONAL EX POST FACTO LAW

In enacting the sex offender registration statutes, with their attendant community notification provisions, state legislatures have come under fire from civil rights activists challenging the constitutionality of the statutes.⁵¹ The Constitution provides that no state or federal government shall pass any ex post facto law.⁵² The United States Supreme Court has stated that the prohibition against ex post facto laws prevents state legislatures from passing laws after an act has been committed by a citizen punishing the citizen for that act.⁵³ The Constitution's prohibition against ex post facto laws encompasses every law that makes an otherwise innocent act criminal, solely because the law was passed after the act was performed, and also encompasses every law that aggravates a crime or makes it greater than it was when committed.⁵⁴ In addition, the Ex Post Facto Clause applies to every law that changes punishment and inflicts greater punishment than was annexed to the crime when committed and applies to every law that alters the legal rules of evidence, allowing less or different testimony to convict the offender than the law required when the act was committed.⁵⁵ Thus, an ex post facto law must be retrospective.⁵⁶ Not all retrospective laws, however, are ex post facto laws.⁵⁷ Only retrospective laws that take away, or impair, citizens' rights under existing laws are unjust.⁵⁸

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See, e.g., *Artway II*, 81 F.3d 1235 (3d Cir. 1996); *Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1996).

⁵² See U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1. Article I of the Constitution reads in relevant part that "[n]o . . . ex post facto [l]aw shall be passed" and "[n]o State shall . . . pass any . . . ex post facto [l]aw" *Id.*

⁵³ See *Calder v. Bull*, 3 U.S. 386, 390 (1798).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.* at 391.

⁵⁷ See *id.*

⁵⁸ See *Calder*, 3 U.S. at 391.

A. Kennedy v. Mendoza-Martinez: *A Test to Determine the Penal Nature of a Statute*

The Supreme Court has yet to promulgate a test or framework to determine whether a statute constitutes punishment in the ex post facto context; therefore, when ruling on ex post facto challenges to the sex offender registration statutes, several lower courts, both state and federal, have relied instead on *Kennedy v. Mendoza-Martinez*.⁵⁹ In 1963, in *Mendoza-Martinez*, the United States Supreme Court held that statutes divesting an American of his or her citizenship for leaving or remaining outside the country during a time of war or national emergency violated the Constitution because they did not allow the protections of the Fifth and Sixth Amendments of the Constitution.⁶⁰ The Court framed the issue as whether the statutes—which automatically imposed forfeiture of citizenship without prior proceedings—were essentially penal in nature, depriving the appellees of their citizenship without due process of law and without according them their rights under the Fifth and Sixth Amendments.⁶¹

The Court found the sanction punitive in nature using the tests traditionally applied to determine the penal or regulatory nature of an act of Congress.⁶² The Court stated that the relevant inquiry to determine whether an act was punitive included seven factors.⁶³ First, the Court determined whether the sanction involved an affirmative disability or restraint.⁶⁴ Second, the Court asked whether it historically had been regarded as punishment.⁶⁵ Third, the Court decided whether the sanction requires a finding of scienter.⁶⁶ Fourth, the Court determined whether its operation promoted the traditional aims of punishment, namely retribution and deterrence.⁶⁷ Fifth, the Court considered whether the behavior to which the sanction applied was already a crime.⁶⁸ Sixth, the Court asked whether an alternative purpose existed to which it may rationally be connected.⁶⁹ Seventh, the Court deter-

⁵⁹ See *Doe v. Pataki*, 919 F. Supp. 691, 700 (S.D.N.Y. 1996); *Artway v. Attorney Gen.*, 876 F. Supp. 666, 673 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996); *Rowe v. Burton*, 884 F. Supp. 1372, 1378 (D. Alaska 1994). See generally *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

⁶⁰ See 372 U.S. at 164, 186.

⁶¹ See *id.* at 164.

⁶² See *id.* at 168.

⁶³ See *id.* at 168–69.

⁶⁴ See *id.* at 168.

⁶⁵ See *Mendoza-Martinez*, 372 U.S. at 168.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.* at 168–69.

mined whether the statute appeared excessive in relation to that alternative purpose.⁷⁰ The Court initiated this analysis only in the absence of conclusive evidence of congressional intent as to the statute's penal nature.⁷¹ The Supreme Court concluded that if the evidence indicated a legislative intent to punish, the statute would constitute punishment and thus violate the Fifth and Sixth Amendments of the Constitution.⁷²

B. *Mendoza-Martinez as Applied to Sex Offender Registration Statutes*

In 1994, using the *Kennedy v. Mendoza-Martinez* test, the Supreme Court of Washington, in *State v. Ward*, held in relevant part that Washington's Community Protection Act of 1990 ("CPA"), when applied retroactively, did not violate the Ex Post Facto Clause of the Constitution.⁷³ In *Ward*, appellants Jeffrey Ward and John Doe, two convicted sex offenders required to register under the CPA, challenged the statute's validity under the Ex Post Facto Clause.⁷⁴ Both appellants committed their crimes prior to the passage of the CPA.⁷⁵ The CPA requires all persons residing in Washington who were convicted of any sex offense to register with their county sheriff.⁷⁶ The CPA authorizes agencies to release to the public relevant and necessary information regarding offenders when necessary for public protection.⁷⁷

The court, relying on *Mendoza-Martinez*, found that the CPA did not violate the Ex Post Facto Clause because it did not constitute punishment.⁷⁸ First, the court found that collecting information from registrants and requiring them to fill out the requisite form did not

⁷⁰ See *Mendoza-Martinez*, 372 U.S. at 169.

⁷¹ See *id.*

⁷² See *id.* at 164, 186. The Court applied the seven factors to the statutes in question and found the statutes to be punitive. See *id.* at 169.

⁷³ 869 P.2d 1062, 1074 (Wash. 1994). See generally *Mendoza-Martinez*, 372 U.S. 144.

⁷⁴ See *Ward*, 869 P.2d at 1066.

⁷⁵ See *id.* at 1065, 1066.

⁷⁶ See WASH. REV. CODE ANN. § 9A.44.130(1) (West 1996). The Community Protection Act ("CPA") requires the offenders to provide their name, address, date and place of birth, place of employment, date and place of conviction, aliases used and social security number. See *id.* Registrants also have to notify the county sheriff of any change of address within the county. See *id.* § 9A.44.130(2). Furthermore, if the registrant moves to a new county, he or she has to re-register. See *id.* § 9A.44.130(4).

⁷⁷ See *id.* § 4.24.550(1). The legislature found that overly-restrictive confidentiality and liability laws governing the release of registrant information reduced the willingness to release information, thus endangering the public. See *Ward*, 869 P.2d at 1070. Therefore, the legislature's policy, as expressed in the CPA, was to require exchange of relevant information about sexual predators among public agencies and to authorize the release of necessary and relevant information about sexual predators to the public. See *id.*

⁷⁸ See *Ward*, 869 P.2d at 1066. The court used four of the factors implicated by the appellant's argument. See *id.*

create an affirmative disability or restraint.⁷⁹ In addition, the court noted that the statute limited when an agency could disclose registrant information, what information could be disclosed and where it could be disclosed.⁸⁰ Because the legislature thus restricted dissemination of registrant information to the public, the court stated that the statute did not impose additional punishment.⁸¹

Second, the court considered whether the statute's requirements historically constituted punishment.⁸² The court determined that registration was a traditional governmental method that provided necessary information to the proper law enforcement agencies.⁸³ Third, the court considered whether registration promoted the traditional aims of punishment, namely retribution and deterrence.⁸⁴ The court reasoned that conviction and punishment for the offense may deter a registrant from committing future offenses regardless of the registration requirement; therefore, registration did not increase deterrence by any significant amount.⁸⁵ The court further stated that law enforcement agencies, as well as the general public, were the intended beneficiaries of the law because it assisted them in protecting their communities by providing access to relevant and necessary information.⁸⁶ Even if registration incidentally deterred future crimes, the court refused to construe the statute's purpose as punitive in nature.⁸⁷ Fourth, the court balanced the burden of registration against its non-punitive purpose—public protection—and concluded that the burden of registration did not outweigh the benefit of public protection.⁸⁸ After weighing these factors, the Supreme Court of Washington held that the Community Protection Act did not violate the Ex Post Facto Clause because it was nonpunitive.⁸⁹

Arriving at a different result than *Ward*, the United States District Court for the District of Alaska, in 1994, in *Rowe v. Burton*, held in part that the community notification provisions of the Alaska Registration Act ("Registration Act"), imposed retroactively, would likely violate the

⁷⁹ See *id.* at 1069.

⁸⁰ See *id.* at 1069-70. The public warning can contain only the information "relevant and necessary" for protection of the public. See *id.* at 1070. The notifying agency may only disclose information in a geographic area rationally related to the threat posed by the registrant. See *id.*

⁸¹ See *id.* at 1069.

⁸² See *id.* at 1072.

⁸³ See *Ward*, 869 P.2d at 1073.

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *Ward*, 869 P.2d at 1074.

⁸⁹ See *id.*

Ex Post Facto Clause of the Constitution.⁹⁰ The court thus granted a preliminary injunction against public dissemination of the plaintiffs' registration information.⁹¹ The court implicitly found that the Registration Act had a punitive effect, despite its declared regulatory purpose.⁹²

In *Rowe*, convicted sex offenders brought an action challenging the constitutionality of the Registration Act and sought a preliminary injunction.⁹³ The Registration Act requires a person convicted of a sex offense in Alaska or in another jurisdiction to register with local authorities within seven days following their release from incarceration, or within fourteen days of arriving in Alaska.⁹⁴ The Registration Act also provides for a central registry of sex offenders maintained by Alaska's Department of Public Safety.⁹⁵ It guarantees the confidentiality of some information, but allows for public disclosure of certain facts, including the offender's name, address and photograph.⁹⁶ The plaintiffs claimed that the Registration Act was an ex post facto law and thus violated the Constitution.⁹⁷

In determining whether the Registration Act had a punitive effect, the court used the test established in *Mendoza-Martinez*.⁹⁸ The court reasoned that the Registration Act, by providing for public dissemination of information, subjected the registrants to public stigma and ostracism that affected both their personal and professional lives.⁹⁹ The court thus concluded that the Registration Act imposed an affirmative disability or restraint on the plaintiffs.¹⁰⁰

⁹⁰ 884 F. Supp. 1372, 1378, 1380 (D. Alaska 1994).

⁹¹ See *id.* at 1388.

⁹² See *id.* at 1379, 1380.

⁹³ See *id.* at 1375.

⁹⁴ See ALASKA STAT. § 12.63.010(a) (Michie 1997). To comply with the registration requirement, the sex offender must complete a form stating the offender's name, address, place of employment, date of birth, convicted offense(s), date of conviction(s), place and court of conviction(s), aliases and driver's license number. See *id.* § 12.63.010(b)(1). When a registrant's address changes, the offender has to provide written notice within 10 days. See *id.* § 12.63.010(c). The duty to register continues for a minimum of 15 years after a conviction for a registrable sexual offense and possibly could continue for life. See *id.* § 12.63.020. Duration of the duty to register for one-time offenders is 15 years, and for offenders convicted two or more times, the duty to register lasts for the offender's lifetime. See *id.*

⁹⁵ See *id.* § 18.65.087.

⁹⁶ See *Rowe*, 884 F. Supp. at 1376. Registration also required the offenders to disclose information regarding their conviction. See *id.*

⁹⁷ See *id.* at 1375.

⁹⁸ See *id.* at 1378. See generally *Mendoza-Martinez*, 372 U.S. at 168-69.

⁹⁹ See *Rowe*, 884 F. Supp. at 1378.

¹⁰⁰ See *id.* The court did state, however, that registration did not have a historically punitive effect. See *id.* But, because the Registration Act is premised upon the past knowingly wrongful conduct of the registrant, the court found that this contributed to the law's punitive nature. See

The district court then analyzed whether registration promoted deterrence and retribution.¹⁰¹ The court determined that the legislature, by enacting the Registration Act, obviously meant to deter crime.¹⁰² The court noted, however, that the only meaningful deterrence came from the modified conduct of the police and the public, not the registrant.¹⁰³ The court reasoned that the deterrence stemmed from both forewarning the potential victims of a sex offender's presence enabling them to take evasive action and allowing the police to act more swiftly.¹⁰⁴ The court also stated that the public's strong reaction and the humiliation that could flow from registration and notification exacts retribution from the registrants.¹⁰⁵ Therefore, the court concluded that the Registration Act had a punitive effect.¹⁰⁶

In addition, the court determined that the Registration Act furthered an entirely proper nonpunitive purpose—the protection of society—and this factor thus detracted from the punitive effect of the act.¹⁰⁷ Finally, the court sought to determine whether the sanction appeared excessive in relation to its legitimate nonpunitive effect.¹⁰⁸ Here, the court found the burdens associated with *registration* insignificant.¹⁰⁹ In contrast, the court stated that the consequences resulting from *public dissemination* of the registrants' information were excessive in relation to the Registration Act's legitimate purpose.¹¹⁰ The court thus granted a preliminary injunction against public dissemination of the plaintiffs' registration information, holding that the plaintiffs would likely succeed on the merits of their claim that the community notification provisions of the Registration Act violated the prohibition on ex post facto legislation.¹¹¹

Similarly, in 1995, in *Artway v. Attorney General*, the United States District Court for the District of New Jersey held that two out of three

id. The court considered this factor lightly, to be consistent with the ruling in *United States v. Huss*, 7 F.3d 1444, 1447–48 (9th Cir. 1993). *See id.* at 1378–79. In *Huss*, an Oregon law prohibiting felons from possessing a long gun was held not to be an ex post facto law. *See* 7 F.3d at 1447–48.

¹⁰¹ *See Rowe*, 884 F. Supp. at 1379.

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See Rowe*, 884 F. Supp. at 1379. The court also found that registration applied to behavior that was already a crime, adding that, similar to the finding of scienter, this factor carried little weight, because to find otherwise would contradict the decision in *Huss*. *See id.* at 1379; *see also* *United States v. Huss*, 7 F.3d 1444, 1447–48 (9th Cir. 1993).

¹⁰⁷ *See Rowe*, 884 F. Supp. at 1379.

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.* at 1380, 1388.

provisions for notification in New Jersey's Sexual Offender Registration Act ("Megan's Law"), when applied retroactively, violated the Ex Post Facto Clause of the United States Constitution.¹¹² Megan's Law, enacted on October 31, 1994, requires a person who completed a sentence for certain designated offenses to register with local authorities if, at the time of sentencing, he or she demonstrates repetitive and compulsive behavior.¹¹³ The registrant is required to give his or her name, social security number, address and date and place of employment along with other similar information.¹¹⁴

After registration, the registering agency would forward the information, as well as any additional information it may have, such as fingerprints and a description of the conviction, to the County Prosecutor.¹¹⁵ The public cannot inspect the registration information itself, but the statute does authorize law enforcement agencies to release to the public relevant and necessary information concerning registrants when necessary for public protection.¹¹⁶ Megan's Law assigns the registrant to one of three classifications—tier one, tier two or tier three—based on the risk of recidivism that the individual posed.¹¹⁷ Each tier requires different levels of notification.¹¹⁸ For the moderate and high risk offenders, notification includes a recent photograph, physical description of the registrant, description of the offense, and place of employment or schooling, as well as a description and license plate

¹¹² 876 F. Supp. 666, 692 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996).

¹¹³ See N.J. STAT. ANN. § 2C:7-2b(1) (West 1997). The person has to register with the chief law enforcement officer of the municipality in which he or she resided within 120 days of the effective date of the law or by February 28, 1995. See *id.* § 2C:7-4b(1).

¹¹⁴ See *id.* § 2C:7-4b(1). The individual also has to give his or her age, race, sex, date of birth, height, weight, hair and eye color and address of legal residence. See *id.* The registrant also is required to verify his or her address every 90 days, notify the municipal law enforcement agency when he or she moves, and re-register with the law enforcement agency of any new municipality. See *id.* § 2C:7-2d, -2e.

¹¹⁵ See *id.* § 2C:7-4c, -4d. The prosecutor then forwards the information to the Division of State Police for inclusion in a central registry. See *id.* The information is available for use by law enforcement agencies of New Jersey, the United States and other states. See *id.* § 2C:7-5.

¹¹⁶ See *id.* § 2C:7-5.

¹¹⁷ See *id.* § 2C:7-8.

¹¹⁸ See N.J. STAT. ANN. § 2C:7-8c(1) to -8c(3). When the risk of re-offense is low (tier one), Megan's Law mandates the notification of law enforcement agencies likely to encounter the registrant. See *id.* § 2C:7-8c(1). When the registrant poses a moderate risk (tier two), the law states that the prosecutor, working with local law enforcement agencies, must notify the surrounding schools, licensed day care centers and summer camps, as well as other community organizations involved in the care or supervision of children or battered women (including rape victims). See *id.* § 2C:7-8c(2). When the registrant poses a serious threat and the risk is high (tier three), the statute requires that law enforcement agencies notify members of the public likely to encounter the registrant. See *id.* § 2C:7-8c(3).

number of the registrant's vehicle.¹¹⁹ In *Artway*, the plaintiff filed a motion for temporary and injunctive relief from enforcement of Megan's Law.¹²⁰ The plaintiff challenged the constitutionality of Megan's Law on various grounds, including that Megan's Law constituted an ex post facto law.¹²¹

The court concluded that the public notification provisions of Megan's Law, when taken in the context of the *Mendoza-Martinez* test, constituted more of a form of punishment than a regulatory scheme.¹²² Similar to the *Rowe* court, this court used the *Mendoza-Martinez* factors to determine the law's penal effect.¹²³ In doing so, the court considered whether the notification provisions of Megan's Law constituted a branding of registrants, thereby exposing them to public humiliation rising to the level of punishment.¹²⁴

The court decided that public dissemination of the registrant's information imposed an affirmative disability on the registrant.¹²⁵ The court found that dissemination may affect the registrant's employability, his or her associations with neighbors and thus the registrant's ability to return to a normal, private, law-abiding life within the community.¹²⁶ The court also stated that throughout history, people perceived public dissemination of the offender's information as punishment.¹²⁷

Furthermore, the court implied that the law sought to facilitate police in protecting the community, increase parents' vigilance in protecting their children and discourage recidivism.¹²⁸ The court thus concluded that Megan's Law promoted deterrence, one of the basic

¹¹⁹ See *Artway*, 876 F. Supp. at 669. Persons and organizations notified under tier two are warned that sharing the information with the general public is a criminal offense. See *id.*

¹²⁰ See *id.* at 667.

¹²¹ See *id.* at 668. The plaintiff also contended that Megan's Law deprived him of his right to due process, equal protection and privacy, that it violated the constitutional prohibition against cruel and unusual punishment and that it constituted a bill of attainder. See *id.*

¹²² See *id.* at 692. See generally *Mendoza-Martinez*, 372 U.S. at 168-69.

¹²³ See *Artway*, 876 F. Supp. at 673. See generally *Mendoza-Martinez*, 372 U.S. at 168-69; *Rowe*, 884 F. Supp. at 1378.

¹²⁴ See *Artway*, 876 F. Supp. at 687.

¹²⁵ See *id.* at 688-89.

¹²⁶ See *id.* The court recognized that the public already had access to criminal records. See *id.* Yet, the court emphasized that Megan's Law went beyond access to criminal records by disseminating information personal to the registrant not contained in the criminal record. See *id.*

¹²⁷ See *id.* at 689. The court found public dissemination of information punitive in view of the loathsome public perception traditionally associated with sex offenses. See *id.* The court next found that Megan's Law affected only those convicted of sex offenses—which itself required a finding of scienter. See *id.*

¹²⁸ See *id.* at 690. The court stated that Megan's Law functioned to deter recidivism through heightened police and public awareness. See *id.*

goals of punishment, thereby contributing to its punitive nature.¹²⁹ The court also noted that Megan's Law applied only to actions already defined as a crime.¹³⁰ The court did find, however, a rational, alternative purpose assignable to Megan's Law.¹³¹ Nevertheless, the court stated that, despite the presence of a legitimate alternative purpose for Megan's Law, public dissemination caused the law to have a punitive effect.¹³² Finally, the court found that Megan's Law exceeded the regulatory purpose assigned to it.¹³³

The court thus found that most, if not all, of the *Mendoza-Martinez* factors weighed in favor of finding that Megan's Law had a punitive effect.¹³⁴ It also found that all of the factors outweighed the New Jersey Legislature's regulatory intent.¹³⁵ The court held accordingly that the notification provisions in tier two and tier three violated the Ex Post Facto Clause of the Constitution.¹³⁶

Both parties appealed the district court's decision to the United States Court of Appeals for the Third Circuit in *Artway v. Attorney General* ("*Artway II*").¹³⁷ In 1996, in *Artway II*, the court upheld the constitutionality of the registration provision but refused to rule on the constitutionality of the notification provisions because the claim was not ripe.¹³⁸ Although Megan's Law required the appellant, Artway, to register, it did not necessarily follow that he would be classified as a tier two or tier three offender, such as to allow public notification.¹³⁹ The court thus refused to adjudicate such an "abstract" issue.¹⁴⁰ Accordingly, the Third Circuit vacated that part of the district court's opinion.¹⁴¹ The court implied, however, that while it was not certain whether Megan's Law required the appellant to be classified in either tiers two or three, thus allowing for public notification, the registrant would be registered in tier one at the very least.¹⁴²

¹²⁹ See *Artway*, 876 F. Supp. at 691.

¹³⁰ See *id.*

¹³¹ See *id.* The New Jersey Legislature intended to protect the public by increasing community awareness of the risk involved in having a registered offender as a neighbor. See *id.*

¹³² See *id.* at 692.

¹³³ See *id.* According to the court, Megan's Law represented an excessive intrusion into the realm of punishment. See *id.*

¹³⁴ See *Artway*, 876 F. Supp. at 692. See generally *Mendoza-Martinez*, 372 U.S. at 168-69.

¹³⁵ See *Artway*, 876 F. Supp. at 692.

¹³⁶ See *id.*

¹³⁷ 81 F.3d 1235, 1245 (3d Cir. 1996).

¹³⁸ See *id.* at 1251. The court implied that because appellant Artway must register under Megan's Law, the appeal on the constitutionality of the registration provisions was ripe. See *id.* at 1250.

¹³⁹ See *id.* at 1251.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 1252-53.

¹⁴² See *Artway II*, 81 F.3d at 1250.

The Third Circuit stated that the United States Supreme Court clearly stated that the *Mendoza-Martinez* test did not control the issues in this case.¹⁴³ The court concluded that the *Mendoza-Martinez* test did not apply outside the context of determining whether a proceeding was sufficiently criminal in nature to warrant the criminal protections of the Fifth and Sixth Amendments of the Constitution.¹⁴⁴ The court did, however, establish a test to be applied to the registration provisions and tier one offenders.¹⁴⁵ For this test, the court formulated three questions: (1) what was the actual purpose of the measure, (2) what was its objective purpose, and (3) what were the effects of the measure?¹⁴⁶ The court focused on the objective purpose prong which had three subparts—first, whether a solely remedial purpose could justify the law; second, whether the history of registration resembled punishment; and third, if the law's history showed a regulatory purpose, incidental deterrence of future offenses did not invalidate the law as unconstitutional.¹⁴⁷ The Third Circuit applied this test to Megan's Law's registration provisions and found that they did not violate the Ex Post Facto Clause of the Constitution.¹⁴⁸

Similar to the Third Circuit in *Artway II*, the Supreme Court of New Jersey also rejected the *Mendoza-Martinez* test, stating that it applied only when determining the underlying nature of the proceeding—whether it was civil or criminal.¹⁴⁹ In 1996, in *Doe v. Poritz*, the Supreme Court of New Jersey held, in relevant part, that the purpose and implementation of Megan's Law, retroactively applied, was solely remedial and did not violate the Ex Post Facto Clause of the Constitution.¹⁵⁰ In *Doe v. Poritz*, the plaintiff, a first-time sex offender, brought an action challenging the constitutionality of Megan's Law.¹⁵¹ The plaintiff sought to enjoin the enforcement of the statute.¹⁵² The plain-

¹⁴³ See *id.* at 1262; see also *Austin v. United States*, 509 U.S. 602, 610 n.6 (1993). See generally *Mendoza-Martinez*, 372 U.S. at 168–69. In *Austin*, the Supreme Court stated that the issue in *Mendoza-Martinez* was whether a civil penalty should be reclassified as criminal and thus receive the attendant safeguards of a criminal prosecution. See *Austin*, 509 U.S. at 610 n.6. The Court further reasoned that in addressing the question of whether punishment was being imposed, the Court had not employed the *Mendoza-Martinez* test. See *id.* See generally *Mendoza-Martinez*, 372 U.S. at 168–69.

¹⁴⁴ See *Artway II*, 81 F.3d at 1262; see also *Austin*, 509 U.S. at 610 n.6. See generally *Mendoza-Martinez*, 372 U.S. at 168–69.

¹⁴⁵ See *Artway II*, 81 F.3d at 1263.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 1264–66.

¹⁴⁸ See *id.* at 1271.

¹⁴⁹ See *Doe v. Poritz*, 662 A.2d 367, 402 (N.J. 1995). See generally *Mendoza-Martinez*, 372 U.S. at 168–69; *Artway II*, 81 F.3d at 1262.

¹⁵⁰ 662 A.2d at 405.

¹⁵¹ *Id.* at 380.

¹⁵² See *id.*

tiff successfully completed treatment at the Adult Diagnostic and Treatment Center.¹⁵³ He also completed parole and lived and worked in the community at the time of the enactment of Megan's Law.¹⁵⁴

In ruling on the statute's constitutionality, the court considered the legislature's intent in enacting the statute, as well as the statute's impact on the registrants.¹⁵⁵ The court determined that whether a measure constituted punishment depended on the purposes actually served by the law, not the underlying nature of the law.¹⁵⁶ Concluding that Megan's Law had a remedial purpose, the court stated that it did not constitute punishment even though it had some incidental deterrent impact.¹⁵⁷ The court reasoned that punitive impact facilitated retribution or accomplished deterrence.¹⁵⁸ The court found the registration and notification provisions of Megan's Law unlikely to deter repetitive, compulsive offenders who, faced with the threat of long-term incarceration, were not previously deterred from committing offenses.¹⁵⁹ Furthermore, assuming that removing the offender's anonymity aided in deterrence, the court stated that this was the inevitable consequence of Megan's Law's remedial provisions.¹⁶⁰ The court found that Megan's Law did not become punitive simply because it had a punitive impact, unless the only explanation for that impact was an intent to punish.¹⁶¹ Thus, the court held that the registration and notification provisions of Megan's Law did not violate the Ex Post Facto Clause of the Constitution.¹⁶²

In contrast, in 1996, in *Doe v. Pataki*, the United States District Court for the Southern District of New York issued a preliminary injunction against retroactive application of the public notification provisions of the New York State Sex Offender Registration Act ("Act"), holding that the provisions violated the Ex Post Facto Clause of the Constitution.¹⁶³ In *Pataki*, the plaintiffs, prior sex offenders, brought an action challenging the constitutionality of the Act.¹⁶⁴ The plaintiffs

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *Doe v. Poritz*, 662 A.2d at 388.

¹⁵⁶ See *id.* at 402.

¹⁵⁷ See *id.* at 388. The court stated that it must perform the most searching inquiry before condemning honest laws that were free of punitive intent and designed to protect society. See *id.* at 389. The real issue, as stated by the court, was whether Megan's Law inflicted punishment. See *id.* at 390.

¹⁵⁸ See *id.* at 390.

¹⁵⁹ See *id.* at 404.

¹⁶⁰ See *Doe v. Poritz*, 662 A.2d at 404.

¹⁶¹ See *id.* at 388.

¹⁶² See *id.* at 405.

¹⁶³ 919 F. Supp. 691, 701, 702 (S.D.N.Y. 1996).

¹⁶⁴ See *id.* at 693.

moved for a preliminary injunction enjoining retroactive application of the Act's registration and notification provisions.¹⁶⁵

The Act requires individuals convicted of certain sex offenses to register with law enforcement officials, and it authorizes those officials, in certain situations, to disseminate information regarding the registrants to the public.¹⁶⁶ Sex offenders must register with the Division of Criminal Justice Services within ten days after discharge, parole or release.¹⁶⁷ The statute requires that sex offenders on parole or probation as of the effective date of the Act must register, even though the conduct that led to the conviction occurred prior to the passage of the Act.¹⁶⁸ To register, the individuals provide certain identifying information.¹⁶⁹ Similar to New Jersey's Megan's Law, this Act also provides for three levels of notification.¹⁷⁰ Increased notification is provided to law enforcement agencies and/or the public as the risk of recidivism and the danger to the public increases.¹⁷¹ The Act provides identifying information regarding all registrants, whether level one, two or three,

¹⁶⁵ *See id.*

¹⁶⁶ *See* N.Y. PENAL LAW § 168-f(1) (McKinney 1997). The Act allows authorities to notify the public of the identity and whereabouts of registrants. *See id.* § 168-l(6)(b), -l(6)(c). The Act creates two categories of offenses that require registration, sex offenses and sexually violent offenses. *See id.* § 168-a(2), (3). Sex offenses include rape in the second or third degree, sodomy in the second or third degree, sexual abuse in the second or third degree and convictions for attempt thereof. *See id.* § 168-a(2). Sexually violent offenses include convictions for rape in the first degree, sodomy in the first degree, sexual abuse in the first degree and convictions for attempt thereof. *See id.* § 168-a(3). The Act defines a sex offender as any person convicted of a sex offense or a sexually violent offense. *See id.* § 168-a(1).

¹⁶⁷ *See id.* § 168-f(1).

¹⁶⁸ *See id.* § 168-g(2). Sex offenders have to register annually for 10 years as well as within 10 calendar days prior to any change of address. *See id.* § 168-f(2) to -f(4), 168-h. A sexually violent predator, defined as an individual convicted of a sexually violent offense or a sex offender who suffers from a mental abnormality that makes it more likely that the individual will engage in predatory sexual conduct, must register annually and, in addition, personally verify his or her registration at the local law enforcement agency every 90 days for at least 10 years. *See id.* § 168-a(7), 168-f(3), 168-h, 168-l(6)(c).

¹⁶⁹ *See id.* § 168-b. The information required includes name, date of birth, height, weight, sex, eye color, driver's license number and home address. *See id.* Also required is a description of the offense, the date of conviction, and the sentence imposed, as well as a photograph and fingerprints. *See id.* § 168-b, 168-i.

¹⁷⁰ *See id.* § 168-l(6). *See generally* N.J. STAT. ANN. § 2C:7-8c(1) to -8c(3) (West 1997).

¹⁷¹ *See* N.Y. PENAL LAW § 168-l(6). If the offender poses a low risk of recidivism, the state assigns him or her to level one, and only law enforcement agencies receive notification. *See id.* § 168-l(6)(a). If the offender represents a moderate risk, the state classifies him or her as a level-two risk, which provides for the dissemination of an approximate address of the registrant, a photograph and background information to any entity with vulnerable populations. *See id.* § 168-l(6)(b). The Act states that any entity receiving this information can further disclose it at its discretion. *See id.* If the offender poses a serious threat to public safety, the state classifies him or her as a level-three risk. *See id.* § 168-l(6)(c). Level three provided for the same notification as level-two offenders, but also authorizes the law enforcement agencies to disclose the exact address of the registrant, not just an approximate address. *See id.*

to the public through a "900" telephone number.¹⁷² The unauthorized release of any information constitutes a crime.¹⁷³

The State convicted all three plaintiffs, John Doe, Richard Roe and Samuel Poe, of sexually violent offenses prior to the passage of the Act.¹⁷⁴ The state notified John Doe and Richard Roe in February, 1996, that the Act classified them as level three risks and therefore they had to register with the proper authorities.¹⁷⁵ Plaintiff Samuel Poe, still incarcerated at the time of this trial but slated for immediate release from prison, was required to appear before the state court for classification.¹⁷⁶ Defendants represented various New York government officials.¹⁷⁷

In determining whether the Act violated the Ex Post Facto Clause, the district court first looked at the Act's legislative intent.¹⁷⁸ The court noted that if the legislature intended that the Act serve a purely punitive purpose, then the Act clearly violated the Ex Post Facto Clause.¹⁷⁹ If the legislature intended the Act to serve a regulatory purpose, the court stated that it must further determine whether the statute had a punitive effect.¹⁸⁰ Because the New York legislature labeled the Act as regulatory, the court reviewed the Act's practical function and effect.¹⁸¹

The court analyzed five factors of the *Mendoza-Martinez* test to determine whether the Act had a punitive effect.¹⁸² First, the court found that public notification of one's crime traditionally has been viewed as punitive.¹⁸³ Next, the court concluded that the Act served one of the traditional functions of punishment, namely deterrence, and thus lent to a finding of punitive effect.¹⁸⁴ The court reasoned that the public notification provisions imposed a significant unpleasant

¹⁷² See *id.* § 168-p. To access information regarding a particular registrant, the Act requires the caller to provide information that reasonably identifies the person in question as a registrant. See *id.* The telephone calls are recorded and the callers are required to identify themselves. See *id.*

¹⁷³ See *id.* § 168-u.

¹⁷⁴ See *Pataki*, 919 F. Supp. at 696. John Doe was convicted of attempted rape in the first degree in 1990; Richard Roe was convicted of sexual abuse in the first degree in 1995; and Samuel Poe was convicted of attempted sodomy in the first degree in 1989. See *id.*

¹⁷⁵ See *id.* at 696.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 699.

¹⁷⁹ See *Pataki*, 919 F. Supp. at 700.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.* at 701. See generally *Mendoza-Martinez*, 372 U.S. at 168-69.

¹⁸³ See *Pataki*, 919 F. Supp. at 701.

¹⁸⁴ See *id.*

consequence upon the plaintiffs and thereby deterred future criminal conduct.¹⁸⁵ The court reasoned that public notification attached a stigma to the registrants that would interfere with their personal and professional lives.¹⁸⁶ Furthermore, the court decided that the public notification provisions of the Act imposed an affirmative disability or restraint on the registrants.¹⁸⁷

Next, the court determined that the Act applied only to behavior that already constituted a crime.¹⁸⁸ The court found that this factor also weighed in favor of a finding of punitive effect.¹⁸⁹ Finally, even though the New York legislature stated a legitimate regulatory purpose for the Act, because the Act's public notification provisions led to excessively harsh results, the court considered these provisions punitive.¹⁹⁰ After analyzing the totality of the circumstances, the court found that the public notification provisions, including the "900" telephone number, constituted punitive measures.¹⁹¹ Therefore, the court held that retroactive application of the provisions violated the Ex Post Facto Clause and thus issued a preliminary injunction.¹⁹²

Later that same year, in September 1996, the parties in *Doe v. Pataki* brought cross-motions for summary judgment on the constitutionality of the Act in *Doe v. Pataki* ("*Pataki II*").¹⁹³ The United States District Court for the Southern District of New York ruled in favor of the plaintiffs on their claim that retroactive application of the notification provisions of the Act violated the Ex Post Facto Clause.¹⁹⁴ The court, however, ruled in favor of the defendants on their claim that the retroactive application of the registration provisions of the Act did not violate the Ex Post Facto Clause.¹⁹⁵ The court reasoned that it had to look at the totality of the circumstances, keeping in mind the definition and purposes of punishment and the Ex Post Facto Clause.¹⁹⁶ The court stated that regardless of what factors it used, there were no "rigid hurdles" that had to be overcome.¹⁹⁷ The court further stated

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *Pataki*, 919 F. Supp. at 701.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 702.

¹⁹² See *id.*

¹⁹³ 940 F. Supp. 603, 604 (S.D.N.Y. 1996).

¹⁹⁴ See *id.* at 631.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 620.

that the issue of which legislative actions would be sufficiently harsh to constitute punishment was a matter of degree.¹⁹⁸

The court analyzed the circumstances—including some of the factors considered in the *Mendoza-Martinez* test—by grouping them into four areas: (1) intent, (2) design, (3) history and (4) effects.¹⁹⁹ The court required the clearest proof before it could find that the Act—intended to provide a civil remedy—became punitive by its “form and effect.”²⁰⁰ The court reasoned that intent must be viewed both subjectively—the stated intent of the legislature—and objectively—whether punitive goals were implicated or whether the Act had mixed motives.²⁰¹ The court determined that the subjective intent, as stated in the preamble to the Act, was regulatory.²⁰²

The court noted that the design of the Act also contained classic indicia of a punitive scheme.²⁰³ For example, provisions of the Act applied to behavior already defined as a crime.²⁰⁴ The court stated that many of the risk factors used to determine the level of notification came from the registrant’s criminal history.²⁰⁵ Furthermore, the court reasoned that punishment historically has been characterized by stigmatization and banishment.²⁰⁶ The court found that public notification represented the modern-day equivalent of branding and shaming.²⁰⁷ The court stated that the notification provisions resulted in banishment of the offenders from their communities, both literally and psychologically.²⁰⁸ Thus, the court found that public notification made it difficult for some registrants to reintegrate into society.²⁰⁹

The court emphasized that the effects of the Act clearly demonstrated the punitive nature of the notification provisions of the Act.²¹⁰ The court stated that the Act imposed an “affirmative disability or restraint” on registrants because it forced some of them to relocate.²¹¹

¹⁹⁸ See *Pataki II*, 940 F. Supp. at 620.

¹⁹⁹ See *id.* See generally *Mendoza-Martinez*, 372 U.S. at 168–69.

²⁰⁰ See *Pataki II*, 940 F. Supp. at 620–21.

²⁰¹ See *id.* at 621.

²⁰² See *id.* The court did note, however, that in this case, the comments of legislators during the debate revealed their loathe toward sex offenders and thus strongly indicated that the legislators intended to punish sex offenders. See *id.* at 621, 622.

²⁰³ See *id.* at 623.

²⁰⁴ See *id.*

²⁰⁵ See *Pataki II*, 940 F. Supp. at 623.

²⁰⁶ See *id.* at 624.

²⁰⁷ See *id.* at 625. Instead of using a physical brand, the court reasoned that the Act allowed the use of “900” numbers and photocopying. See *id.*

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *Pataki II*, 940 F. Supp. at 626.

²¹¹ See *id.* at 627, 628.

The court held that the Act also led to excessively harsh results.²¹² The court determined that the public notification provisions of the Act impeded the rehabilitation of the registrants and thus increased punishment.²¹³ The court reasoned that the notification provisions of the Act prevented some registrants from finding a home, getting a job and reintegrating into society.²¹⁴ Finally, the court concluded that the Act promoted traditional aims of punishment—deterrence and retribution.²¹⁵ The court found that the ostracism and humiliation cast upon the registrants sufficed as a deterrent for future offenses.²¹⁶ It also stated that, by imposing the notification provisions on registrants, the Act served as retribution for the offenders' past harm.²¹⁷ After viewing the totality of the circumstances, the district court held that the public notification provisions of the Act, as applied retroactively, violated the Ex Post Facto Clause of the Constitution.²¹⁸

C. *United States v. Ursery: Punishment Defined*

The United States Supreme Court recently defined punishment for constitutional purposes in 1996, in *United States v. Ursery*, holding that *in rem* civil forfeitures did not constitute punishment for the purposes of the Double Jeopardy Clause of the Fifth Amendment of the Constitution.²¹⁹ The Court established a two-part test for determining whether a statute constituted punishment.²²⁰ First, the Court looked to Congress's intent in enacting the statute.²²¹ Second, the Court considered whether the statute was so punitive in effect that it could not be viewed as civil in nature, despite Congress's intent.²²² The Court focused on whether the proceedings called for in the statute had been traditionally viewed as civil proceedings, whether they covered non-criminal conduct and whether they satisfied remedial aims—detering

²¹² See *id.* at 627.

²¹³ See *id.* at 628.

²¹⁴ See *id.*

²¹⁵ See *Pataki II*, 940 F. Supp. at 629.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.* at 631.

²¹⁹ 116 S. Ct. 2135, 2149 (1996); see U.S. CONST. amend. V. The Fifth Amendment of the Constitution states in relevant part that "[n]o person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V. The Court also held that the *in rem* civil forfeiture was not criminal for purposes of the Double Jeopardy Clause. See *Ursery*, 116 S. Ct. at 2149.

²²⁰ See *Ursery*, 116 S. Ct. at 2147.

²²¹ See *id.* at 2142.

²²² See *id.* at 2147.

certain activity and protecting society.²²³ Furthermore, the Court stated that deterrence did not necessitate a finding of punishment.²²⁴ The Court also considered the historical nature of the statute—whether it had been traditionally regarded as punishment.²²⁵ Finally, the Court considered whether there was the “clearest proof” that the statute was so punitive in form and effect that it negated the legislature’s intent to establish a remedial measure.²²⁶ In *Ursery*, the Court rejected the contention that because the statute attached itself to criminal behavior, it rendered the statute punitive.²²⁷ The Supreme Court held that *in rem* civil forfeitures did not constitute punishment for the purposes of the Double Jeopardy Clause of the Fifth Amendment of the Constitution.²²⁸

The United States District Court for the District of New Jersey relied on *Ursery* in 1996, in *W.P. v. Poritz*, and held that the notification provisions of the New Jersey Registration and Community Notification Laws (“Megan’s Law”), as retroactively applied, did not violate the Ex Post Facto Clause of the Constitution.²²⁹ In *W.P.*, the parties brought cross-motions for summary judgment on this issue.²³⁰ Relying on *Artway*, the court had previously issued a preliminary injunction against the enforcement of the community notification provisions of Megan’s Law.²³¹ The injunction terminated ten days after the United States Court of Appeals for the Third Circuit handed down its decision in *Artway II*.²³²

The district court stated that it had planned to use the formula set out in *Artway II* when the United States Supreme Court handed

²²³ See *id.* at 2142.

²²⁴ See *id.* at 2149.

²²⁵ See *Ursery*, 116 S. Ct. at 2149.

²²⁶ See *id.* at 2142.

²²⁷ See *id.* at 2149.

²²⁸ See *id.*

²²⁹ 931 F. Supp. 1199, 1203, 1204, 1209, 1224 (D.N.J. 1996). See generally *Ursery*, 116 S. Ct. at 2147.

²³⁰ See 931 F. Supp. at 1203.

²³¹ See *id.* at 1205. See generally *Artway v. Attorney Gen.*, 876 F. Supp. 666, 673 (D.N.J. 1995), *aff’d in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996).

²³² See *W.P.*, 931 F. Supp. at 1205. See generally *Artway II*, 81 F.3d 1235 (3d Cir. 1996). The Third Circuit, in *Artway II*, did not rule on the constitutionality of the claims attacking tier two and tier three notification provisions because they lacked ripeness. See 81 F.3d at 1251; see also *supra* notes 138–41 and accompanying text. Although the Third Circuit found that the tier two and tier three challenges were not ripe, the court structured a rigid analysis applicable to registration and tier one offenders. See *Artway II*, 81 F.3d at 1263; see also *supra* notes 142–47 and accompanying text. Because this test was used to determine whether a law constituted punishment, the *W.P.* court reasoned that it also applied to determine whether the community notification provisions of tier two and tier three offenders constituted punishment. See 931 F. Supp. at 1207.

down its opinion in *Ursery*, altering the analysis.²³³ The *W.P.* court found that the decision in *Artway II* did not survive *Ursery* and concluded that it had to follow *Ursery*.²³⁴ Under *Ursery*, the court reasoned that the considerations for analysis consisted of the expressed intent of the legislature as reflected in the legislation itself and the legislative history, the objective purpose of that legislation, the balancing of remedial and punitive goals, the historical treatment of such laws and the effect of such laws.²³⁵ The court found the expressed legislative intent, as well as its objective nature, remedial.²³⁶ The court stated that even though the law may deter the registrant from recidivism in his community, *Ursery* stated that deterrence did not equal punishment.²³⁷ The court thus reasoned that incidental deterrence did not undercut the regulatory nature of Megan's Law.²³⁸ Nor did the court find that the legislature sought to impose retribution through Megan's Law.²³⁹ The court stated that Megan's Law was not an "instrument of vengeance," but rather the statute sought to affect the future conduct of those deemed threats to society.²⁴⁰

The court also found that Megan's Law significantly differed from the shaming behavior historically associated with punishment.²⁴¹ The court expressed that a government always had the right to warn the community about the presence of dangerous persons.²⁴² The court stated that it had never understood such warnings as imposing unconstitutional punishment.²⁴³ The court determined that the purpose and effects of the public notification provisions did not rise to the degree necessary for the court to consider Megan's Law punishment.²⁴⁴ Therefore, the court held that the public notification provisions of Megan's Law did not violate the Ex Post Facto Clause of the Constitution.²⁴⁵

In 1996, the United States District Court for the District of Massachusetts handed down one of the more recent decisions regarding sex offender registration in *Doe v. Weld*.²⁴⁶ The court held that the plaintiff,

²³³ See *W.P.*, 931 F. Supp. at 1207. See generally *Ursery*, 116 S. Ct. at 2147.

²³⁴ See *W.P.*, 931 F. Supp. at 1209. See generally *Ursery*, 116 S. Ct. at 2147.

²³⁵ See *W.P.*, 931 F. Supp. at 1209. See generally *Ursery*, 116 S. Ct. at 2147.

²³⁶ See *W.P.*, 931 F. Supp. at 1213, 1214.

²³⁷ See *id.* at 1214; see also *Ursery*, 116 S. Ct. at 2149.

²³⁸ See *W.P.*, 931 F. Supp. at 1214.

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See *id.* at 1217.

²⁴² See *id.*

²⁴³ See *W.P.*, 931 F. Supp. at 1217.

²⁴⁴ See *id.* at 1219.

²⁴⁵ See *id.* at 1203, 1204, 1209, 1224.

²⁴⁶ 954 F. Supp. 425, 426 (D. Mass. 1996). The plaintiff pled guilty to four counts of indecent assault and battery on a child. See *id.* at 429.

a convicted juvenile sex offender, was unlikely to prevail on his claim that the retroactively applied registration statute violated the Ex Post Facto Clause of the Constitution.²⁴⁷ Thus, the court refused to grant a preliminary injunction in favor of the plaintiff.²⁴⁸

The Massachusetts statute at issue in *Weld* resembled those at issue in similar cases.²⁴⁹ It established a central registry of information regarding the state's sex offenders, including juveniles, and a three-tiered system similar to that of New Jersey's Megan's Law.²⁵⁰ The Massachusetts statute allowed for public disclosure even for tier one offenders—those with the lowest risk of re-offending.²⁵¹ The registry allowed public disclosure for a tier one offender, however, only if a person inquired whether an identified person was an offender.²⁵²

The court defined the threshold issue as whether the statute punished the registrants.²⁵³ Because the plaintiff had no prior criminal record and had served only four months probation, the court determined that he probably would be classified as a tier one registrant, and thus the court did not rule on the constitutionality of the Massachusetts statute regarding tiers two or three.²⁵⁴ The court stated that although no strict formula existed to define punishment, *Ursery* provided the best analytical framework to determine whether the nature of the statute constituted punishment.²⁵⁵

In so finding, the court first determined that the legislative record revealed that the legislature had a purely regulatory intent in enacting the statute.²⁵⁶ Next, the court found that the state carefully circumscribed public access to the data involving a level one offender, thus contributing to its nonpunitive nature.²⁵⁷ The court reasoned that the statute took the most restrictive approach to the distribution of registry

²⁴⁷ See *id.* at 436.

²⁴⁸ See *id.* at 436, 438.

²⁴⁹ See *id.* at 427; see also *Doc v. Pataki*, 919 F. Supp. 691 (S.D.N.Y. 1996); *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994); *Doc v. Poritz*, 662 A.2d 367 (N.J. 1995).

²⁵⁰ See generally MASS. GEN. LAWS ANN. ch. 6, §§ 178C–178O (1997). The Massachusetts statute provides for a central registry of information regarding the state's sex offenders and a three-tiered system whereby the registration information, such as offender's name, home and work addresses, personal characteristics and photograph, may be distributed to the public. See *id.* § 178D, 178K(2). The statute provides for three levels of notification depending on the degree of the risk of re-offense. See *id.* § 178K(2). An offender with a low risk of re-offense, as determined by the Sex Offender Registry Board, is classified as level one, moderate risks are classified as level two and high risks are classified as level three. See *id.*

²⁵¹ See *id.* § 178K(2)(a).

²⁵² See *id.* § 178I.

²⁵³ See *Weld*, 954 F. Supp. at 431.

²⁵⁴ See *id.* at 433.

²⁵⁵ See *id.* at 432. See generally *Ursery*, 116 S. Ct. at 2147.

²⁵⁶ See *Weld*, 954 F. Supp. at 433.

²⁵⁷ See *id.* at 435.

data.²⁵⁸ The court determined that the statute allowed level one notification only when concerned community members personally sought information to protect themselves and their children.²⁵⁹ Although the state traditionally kept juvenile criminal records confidential, unlike those of their adult counterparts, the court concluded that the newfound public disclosure provision of the statute did not constitute punishment even when applied to juvenile offenders.²⁶⁰ Furthermore, the court found the level one notification scheme rationally connected to the statutory purpose of permitting a vulnerable community to protect itself.²⁶¹ Thus, the court held that the statute did not constitute punishment.²⁶² Therefore, the district court found the plaintiff unlikely to prevail on his claim that the registration and community notification provisions, retroactively applied, violated the Ex Post Facto Clause of the Constitution.²⁶³ Consequently, the court did not grant a preliminary injunction.²⁶⁴

III. VARIED TESTS LEAD TO INCONSISTENT RESULTS

The United States Supreme Court has yet to rule on the constitutionality of the various state sex offender registration statutes ("statutes"). This has led to conflicting decisions among various state and federal courts.²⁶⁵ No universal test or framework has been developed to guide courts in deciding whether the statutes, as applied retroactively, violate the Ex Post Facto Clause of the United States Constitution.²⁶⁶ Although courts are applying different tests, all the tests have

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ See *id.* at 435-36.

²⁶¹ See *Weld*, 954 F. Supp. at 436.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See *id.* at 438.

²⁶⁵ Compare, e.g., *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996), and *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), and *State v. Ward*, 869 P.2d 1062 (Wash. 1994), with *Doe v. Pataki* ("*Pataki II*"), 940 F. Supp. 603 (S.D.N.Y. 1996), and *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994).

²⁶⁶ Compare, e.g., *W.P.*, 931 F. Supp. 1199, and *Doe v. Poritz*, 662 A.2d 367, and *Ward*, 869 P.2d 1062, with *Pataki II*, 940 F. Supp. 603, and *Rowe*, 884 F. Supp. 1372. Thus, pre-*Ursery* cases relied heavily on the *Kennedy v. Mendoza-Martinez* test. See, e.g., *Doe v. Pataki*, 919 F. Supp. 691, 700 (S.D.N.Y. 1996); *Rowe*, 884 F. Supp. at 1378; *Ward*, 869 P.2d at 1068. See generally *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The courts considered most, if not all, of the seven factors set out in the test. See *Pataki*, 919 F. Supp. at 700; *Rowe*, 884 F. Supp. at 1378; *Ward*, 869 P.2d at 1068. Nevertheless, according to the Third Circuit in *Artway II*, and the New Jersey Supreme Court in *Doe v. Poritz*, the *Mendoza-Martinez* test is inapplicable outside the context of deciding whether a particular measure is sufficiently criminal in nature to invoke the protections of the Fifth and Sixth Amendments. See *Artway II*, 81 F.3d 1235, 1262 (3d Cir. 1996); *Doe v. Poritz*,

some overlapping characteristics.²⁶⁷ Each involves determining the effects of the statute, some to a greater extent than others.²⁶⁸ In most cases the effects of the statutes were of paramount importance, if not dispositive, in deciding whether the statute constituted punishment.²⁶⁹ In every case where a court found that the effects constituted punishment, it held that the statute violated the Ex Post Facto Clause.²⁷⁰ Thus, the effects of the statute appear to be the deciding issue.

Of the cases discussed, only one, *State v. Ward*, relied on the test set forth in *Kennedy v. Mendoza-Martinez* and found that the statute did not violate the Ex Post Facto Clause.²⁷¹ Although, in *Artway II*, the

662 A.2d at 402. See generally *Mendoza-Martinez*, 372 U.S. at 168–69. In spite of this, lower courts continue to apply the *Mendoza-Martinez* test. See, e.g., *Rowe*, 884 F. Supp. at 1378. In 1996, the United States Supreme Court defined punishment for constitutional purposes in *United States v. Ursery*, 116 S. Ct. 2135, 2147 (1996). In *Ursery*, the Court focused on the legislative intent and actual effects of the statute. See *id.* Some subsequent cases relied on the test set forth in *Ursery* when deciding whether the statutes constituted punishment. See, e.g., *Weld*, 954 F. Supp. at 432; *W.P.*, 931 F. Supp. at 1209. See generally *Ursery*, 116 S. Ct. at 2147. Until the United States Supreme Court specifically rules on the constitutionality of the registration statutes, however, lower courts will continue to apply different tests; in doing so, the courts' decisions will fall on different sides of the issue. Compare, e.g., *W.P.*, 931 F. Supp. 1199, and *Doe v. Poritz*, 662 A.2d 367, and *Ward*, 869 P.2d 1062, with *Pataki II*, 940 F. Supp. 603, and *Rowe*, 884 F. Supp. 1372.

²⁶⁷ See generally *Artway II*, 81 F.3d at 1263 (court looked at legislative intent and effects); *W.P.*, 931 F. Supp. at 1209 (court considered legislative intent and effects). The *Mendoza-Martinez* test employs seven factors: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment, namely retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and, whether it appears excessive in relation to the alternative purpose assigned. See *Mendoza-Martinez*, 372 U.S. at 168–69. Of all of the sex offender registration cases discussed, four used the *Mendoza-Martinez* test. See *Pataki*, 919 F. Supp. at 700; *Artway v. Attorney Gen.*, 876 F. Supp. 666, 673 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996); *Rowe*, 884 F. Supp. at 1378; *Ward*, 869 P.2d at 1068. See generally *Mendoza-Martinez*, 372 U.S. at 168–69. Two cases, *W.P.* and *Weld*, applied the *Ursery* test, at least in part. See *Weld*, 954 F. Supp. at 432; *W.P.*, 931 F. Supp. at 1209. See generally *Ursery*, 116 S. Ct. at 2147. The remaining three cases, *Artway II*, *Pataki II* and *Doe v. Poritz*, used tests similar to *Ursery*. See *Artway II*, 81 F.3d at 1263; *Pataki II*, 940 F. Supp. at 620; *Doe v. Poritz*, 662 A.2d at 388. See generally *Ursery*, 116 S. Ct. 1235. The Third Circuit, in *Artway II*, used a three-prong test: whether the legislature actually intended to inflict punishment; whether it objectively inflicted punishment; and, whether the effects were punitive in nature. See 81 F.3d at 1263. In *Pataki II*, the United States District Court for the Southern District of New York considered four areas subject to discussion in similar cases—intent, design, history and effect. See 940 F. Supp. at 620. In *Doe v. Poritz*, the New Jersey Supreme Court studied the intent and effects of the statute. 662 A.2d at 388.

²⁶⁸ See, e.g., *Artway II*, 81 F.3d at 1263; *Weld*, 954 F. Supp. at 434–35; *Pataki II*, 940 F. Supp. at 620; *W.P.*, 931 F. Supp. at 1209; *Pataki*, 919 F. Supp. at 700; *Artway*, 876 F. Supp. at 673; *Rowe*, 884 F. Supp. at 1378; *Doe v. Poritz*, 662 A.2d at 388; *Ward*, 869 P.2d at 1068.

²⁶⁹ See cases cited *supra* note 268.

²⁷⁰ See *Pataki*, 919 F. Supp. at 701, 702; *Rowe*, 884 F. Supp. at 1378, 1380.

²⁷¹ See *Ward*, 869 P.2d at 1074. See generally *Mendoza-Martinez*, 372 U.S. at 168–69.

Third Circuit found that the United States Supreme Court never meant for the *Mendoza-Martinez* test to apply when determining whether a statute constituted punishment.²⁷² Nevertheless, several lower courts, both state and federal, continued to apply it when analyzing the effects of the statutes.²⁷³

Even so, in applying the *Mendoza-Martinez* test to the sex offender registration statutes, it is difficult to understand the courts' logic in finding that the statutes constituted punishment. The *Ward* court was correct in finding that the potential for public disclosure did not create an affirmative disability or restraint on the registrants.²⁷⁴ State criminal justice agencies already authorized the public release of criminal records.²⁷⁵ Therefore, the disclosure of additional information regarding the offender did not impose an additional burden.²⁷⁶ Only when the disclosure contained personal data not associated with the conviction was there a possibility of additional restraint.²⁷⁷ Any incidental restraint, however, was minimal because of the legislatures' limited public disclosure of registrant information.²⁷⁸

In addition to determining whether the statutes imposed an affirmative disability or restraint on the offenders, the courts gave great weight to whether the statutes served the traditional aims of punishment—deterrence and retribution.²⁷⁹ Sexual predators are compulsive by nature.²⁸⁰ It is hard to believe that sexual predators fail to realize the consequences of their actions.²⁸¹ When caught, they face a significant period of incarceration, probation and public humiliation.²⁸² The local media usually broadcast the arrest and conviction, their court hearing is open to the public and after conviction, their criminal records are available to the public.²⁸³ Yet, people are still committing sex offenses.²⁸⁴ If the threat of a lengthy prison sentence (and/or

²⁷² See *Artway II*, 81 F.3d at 1262. See generally *Mendoza-Martinez*, 372 U.S. at 168–69.

²⁷³ See *Pataki*, 919 F. Supp. at 700; *Artway*, 876 F. Supp. at 673; *Rowe*, 884 F. Supp. at 1378; *Ward*, 869 P.2d at 1068.

²⁷⁴ See *Ward*, 869 P.2d at 1069.

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See *id.* at 1074.

²⁷⁹ See, e.g., *Rowe*, 884 F. Supp. at 1379; *Ward*, 869 P.2d at 1073.

²⁸⁰ See *Doe v. Poritz*, 662 A.2d 367, 404 (N.J. 1995).

²⁸¹ See Claire M. Kimball, Note & Comment, *A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders are Released into the Community*, 12 GA. ST. U. L. REV. 1187, 1200 (1996).

²⁸² See generally *Doe v. Poritz*, 662 A.2d at 404; Kimball, *supra* note 281.

²⁸³ See generally *Ward*, 869 P.2d at 1069.

²⁸⁴ See, e.g., *Artway II*, 81 F.3d 1235 (3d Cir. 1996); *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1996); *Doe v. Poritz*, 662 A.2d 367.

probation) and the public humiliation and ostracism associated with the offense did not deter the offenders, it can hardly be said that the potential for future public disclosure would act as a deterrent.²⁸⁵ Under certain state laws, not all sex offenders are classified such as to warrant community notification.²⁸⁶ Furthermore, community notification, if applicable, does not occur until the offender is released back into society.²⁸⁷ This could be years from the date of offense. The offender who faces immediate incarceration and still is not deterred will probably not be deterred by the possibility of an arguably additional burden in the distant future.²⁸⁸

Courts that concluded that the statutes were a deterrent reasoned that deterrence stems from the forewarning given to the public and the police, which enables the public to take evasive action and the police to act more swiftly.²⁸⁹ The courts' reasoning appears to be flawed. The courts' goal was to determine whether the statutes' effects are punishment *as enforced against the offenders*.²⁹⁰ Yet, behavior *wholly apart from and quite possibly unbeknownst to the offenders* is used as a measuring stick to determine the statutes' punitive effects on the offenders.²⁹¹ The courts seem to imply that by protecting innocent victims and moving them out of harm's way (the offenders' vicinity), the statutes are punishing the offenders.²⁹² This logic yields the conclusion that because the offenders may have a reduced lot of victims to choose from, they are being punished.²⁹³ *Black's Law Dictionary* defines "deter" as "[t]o discourage or stop by fear . . . [t]o stop or prevent from acting by danger, difficulty, or other consideration which disheartens or countervails the motive for the act."²⁹⁴ The public's evasive actions, although making it harder for the offender to re-offend, are not discouraging the offender through fear of reprisal, but rather, they present the offender with less chance to re-offend.²⁹⁵ Nor is the public "disheartening" or "countervailing" the offender's motive by making themselves less vulnerable to the offender. The motive of the sex offender is in

²⁸⁵ See generally Kimball, *supra* note 281.

²⁸⁶ See *Doe v. Pataki*, 919 F. Supp. 691, 695-96 (S.D.N.Y. 1996); *Artway v. Attorney Gen.*, 876 F. Supp. 666, 668-69 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996); *Rowe v. Burton*, 884 F. Supp. 1372, 1376 (D. Alaska 1994).

²⁸⁷ See *Pataki*, 919 F. Supp. at 695-96; *Artway*, 876 F. Supp. at 668-69; *Rowe*, 884 F. Supp. at 1376.

²⁸⁸ See generally Kimball, *supra* note 281.

²⁸⁹ See *Artway*, 876 F. Supp. at 690; *Rowe*, 884 F. Supp. at 1379.

²⁹⁰ See *Weld*, 954 F. Supp. at 434-35; *Doe v. Pataki*, 940 F. Supp. 603, 620 (S.D.N.Y. 1996).

²⁹¹ See generally *Artway*, 876 F. Supp. at 690; *Rowe*, 884 F. Supp. at 1379.

²⁹² See generally *Artway*, 876 F. Supp. at 690; *Rowe*, 884 F. Supp. at 1379.

²⁹³ See generally *Artway*, 876 F. Supp. at 690; *Rowe*, 884 F. Supp. at 1379.

²⁹⁴ BLACK'S LAW DICTIONARY 450 (6th ed. 1990).

²⁹⁵ See generally *Artway*, 876 F. Supp. at 690; *Rowe*, 884 F. Supp. at 1379.

his or her psyche. While evasive action may countervail the would-be re-offender's attempt or plan, it does not countervail the offender's motive. The motive, or impetus, driving the offender to re-offend is not softened because of the public's actions. A reasonable reading of this definition leads to the conclusion that a statute is a deterrent only when conduct is stifled by the offender's fear of reprisal, not by the community's evasive action, of which the offender may be unaware. Especially in the context of punishment, deterrence should connote an affirmative discouragement of the offender's conduct, not a modification of the public's or the police's conduct that would render the offender less likely to re-offend.²⁹⁶ Otherwise, action solely by others, entirely separate from and independent of the offender, could contribute to the punitive effect that the statute has on the offender.²⁹⁷

Not only do the statutes fail to act as a deterrent, they also fail to serve as retribution for the offenders' past criminal conduct.²⁹⁸ The legislatures' primary intent was to aid law enforcement agencies' efforts to protect their communities and the public's efforts to protect themselves.²⁹⁹ While the statutes may result in some retributive effects, these effects are purely incidental to the main focus of the statutes.³⁰⁰ The incidental retributive effects do not override the statutes' regulatory and protective purposes.³⁰¹

The last two factors of the *Mendoza-Martinez* test provided the greatest support for finding that the statute had a nonpunitive effect—whether there was an alternative purpose rationally connected to the statute and whether the statute was excessive in relation to that alternative purpose.³⁰² The courts unanimously concluded that the legislatures enacted the statutes primarily, if not solely, for the purpose of protecting the public.³⁰³ Yet, a vast majority of those same courts found that the statutes imposed burdens on registrants that were excessive in relation to their nonpunitive, regulatory purpose.³⁰⁴ The burdens im-

²⁹⁶ See generally BLACK'S LAW DICTIONARY, *supra* note 294; Edward Miller, *Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales*, 43 RUTGERS L. REV. 15, 47-48 (1990).

²⁹⁷ See generally *Artway*, 876 F. Supp. at 690; *Rowe*, 884 F. Supp. at 1379.

²⁹⁸ See *W.P. v. Poritz*, 931 F. Supp. 1199, 1214 (D.N.J. 1996).

²⁹⁹ See *Rowe*, 884 F. Supp. at 1379 (nonpunitive purpose); *State v. Ward*, 869 P.2d 1062, 1073 (Wash. 1994) (same).

³⁰⁰ See *W.P.*, 931 F. Supp. at 1219; *Ward*, 869 P.2d at 1073.

³⁰¹ See *W.P.*, 931 F. Supp. at 1219; *Ward*, 869 P.2d at 1073.

³⁰² See *Ward*, 869 P.2d at 1073; see also *W.P.*, 931 F. Supp. at 1219; *Doe v. Poritz*, 662 A.2d 367, 388 (N.J. 1995). See generally *Mendoza-Martinez*, 372 U.S. at 168-69.

³⁰³ See *Rowe*, 884 F. Supp. at 1379; *Ward*, 869 P.2d at 1073.

³⁰⁴ See *Rowe*, 884 F. Supp. at 1379.

posed on offenders, such as being subject to pre-arrest suspicion, were merely incidental to registration.³⁰⁵ Although courts voiced their concerns regarding public ostracism and threats of physical violence toward registrants, these incidents were rare.³⁰⁶ While community vigilance is a concern, the statutes include measures designed to protect against that very harm.³⁰⁷ The statutes generally provide for punishment of the unauthorized release of registrant information received by any member of the public.³⁰⁸ The courts, even those that found that the statutes constituted punishment, gave little weight to the fact that these statutes apply to past criminal conduct or that they apply upon a finding of scienter.³⁰⁹ Therefore, even under the *Mendoza-Martinez* test, the statutes were not punitive in nature, and thus, retroactively applied, did not violate the Ex Post Facto Clause of the Constitution.³¹⁰

In examining other tests used by the courts, intent, as well as form and effect, were the primary factors considered.³¹¹ The legislative intent was viewed as regulatory and thus detracted from the statutes' punitive nature.³¹² As discussed above, the effects, such as possible incidental deterrence and stigmatization that could accompany registration, did not rise to the degree necessary to undercut the regulatory nature of the statutes.³¹³ Some courts also contemplated the historical nature of the law, but this factor carried little weight.³¹⁴

IV. A PROPOSED FRAMEWORK TO GUIDE THE COURTS

Inevitably, the United States Supreme Court will rule on the constitutionality of the sex offender registration statutes. In so doing, the Court will develop a test to determine whether a particular statute constitutes punishment. A test articulated by the Supreme Court will

³⁰⁵ See *Ward*, 869 P.2d at 1073.

³⁰⁶ See *W.P.*, 931 F. Supp. at 1211.

³⁰⁷ See *id.* at 1211-12; *Doc v. Pataki*, 919 F. Supp. 691, 696 (S.D.N.Y. 1996); *Artway v. Attorney Gen.*, 876 F. Supp. 666, 669 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996).

³⁰⁸ See *W.P.*, 931 F. Supp. at 1212; *Pataki*, 919 F. Supp. at 696; *Artway*, 876 F. Supp. at 669. Megan's Law provided that any action taken by a member of the public, after receiving registrant information, including vandalism of property, verbal or written threats of harm or physical assault against registrant, his family or employer will result in the vandal's arrest and prosecution for criminal acts. See *W.P.*, 931 F. Supp. at 1212.

³⁰⁹ See *Artway*, 876 F. Supp. at 690; *Rowe*, 884 F. Supp. at 1378.

³¹⁰ See *Ward*, 869 P.2d at 1069, 1074.

³¹¹ See, e.g., *United States v. Ursery*, 116 S. Ct. 2135, 2147 (1996); *W.P.*, 931 F. Supp. at 1209.

³¹² See, e.g., *Pataki II*, 940 F. Supp. 603, 621 (S.D.N.Y. 1996); *Ward*, 869 P.2d at 1073.

³¹³ See *W.P.*, 931 F. Supp. at 1214; *Ward*, 869 P.2d at 1073.

³¹⁴ See *W.P.*, 931 F. Supp. at 1217; *Pataki II*, 940 F. Supp. at 624.

not necessarily mean that the lower courts will apply it with uniformity.³¹⁵ To the contrary, it will most likely yield differing interpretations resulting in different conclusions.³¹⁶ While there is not a "bright-line" test to determine whether a statute constitutes punishment, a uniform framework to guide the courts should be developed.

This framework should be a patchwork of the different tests presently being employed by the lower courts and involve two parts—intent and effects—similar to the tests used in *Artway II* and *Doe v. Poritz*.³¹⁷ Every statute must clear the threshold hurdle—whether the legislature's intent in enacting the statute was punitive. If the intent was punitive, then the inquiry need not go any further, for the statute should be declared punitive. If the legislative intent was nonpunitive, the court should then determine whether the effects of the statute were punitive in nature. This is the crux of the problem now facing the courts and also the point where the courts diverge.³¹⁸ Thus, this is the area where the courts need the most guidance. The effects prong should encompass four sub-parts, listed in order of importance: (1) whether the statute has an alternative rational purpose, and if so, whether the statute is excessive in relation to this alternative purpose; (2) whether the statute serves the traditional aims of punishment—deterrence and retribution; (3) whether the statute imposes an affirmative disability or restraint upon the registrant; and, (4) whether the statute historically has been regarded as punishment. The courts should consider all of these factors and accord each its relative weight.

First, every statute that has been enacted providing for sex offender registration and community notification has a nonpunitive purpose—to aid in the protection of the public.³¹⁹ Although it is possible that the registrants experience unpleasant incidental effects, these effects do not exceed the statute's nonpunitive purposes.³²⁰ It is difficult to estimate how many lives are saved, or how many little boys and girls, as well as adults, are spared the horrifying ordeal of forcible rape and/or sexual torture. If each statute saves but one of these innocent

³¹⁵ Compare, e.g., *Rowe v. Burton*, 884 F. Supp. 1372, 1380 (D. Alaska 1994) (holding that the statute violated Ex Post Facto Clause under *Mendoza-Martinez* test), with *Ward*, 869 P.2d 1062, 1074 (holding that the statute did not violate Ex Post Facto Clause under *Mendoza-Martinez* test).

³¹⁶ Compare, e.g., *Rowe*, 884 F. Supp. at 1380, with *Ward*, 869 P.2d at 1074.

³¹⁷ See *Artway II*, 81 F.3d 1235, 1263 (3d Cir. 1996); *Doe v. Poritz*, 662 A.2d 367, 388 (N.J. 1995).

³¹⁸ Compare, e.g., *W.P.*, 931 F. Supp. at 1219, and *Doe v. Poritz*, 662 A.2d at 405, with *Pataki II*, 940 F. Supp. at 629, and *Rowe*, 884 F. Supp. at 1378.

³¹⁹ See *Rowe*, 884 F. Supp. at 1379; *Ward*, 869 P.2d at 1073.

³²⁰ See *W.P.*, 931 F. Supp. at 1219.

victims from having to endure such a nightmare, however, the statute will have served its purpose and should not be held to exceed its nonpunitive goals. This Note is not endorsing every retroactive law, no matter how punitive, that may protect the public. But, it is claiming that when determining whether the statutes exceed their nonpunitive purpose, the threshold of unpleasantness that the offender must endure has to rise far above mere name-calling, public humiliation and ostracism before the statutes can be found to exceed their legitimate goals. In California, out of 46,000 registered sex offenders the state has received fewer than ten complaints regarding the notification provisions of the statute.³²¹ The California Department of Justice has not received any reports from law enforcement agencies indicating that public disclosure has led to harassment, discrimination or crimes against the registrants.³²² In Oregon, the Oregon Department of Corrections published a report that found that less than ten percent of registrants subjected to community notification experienced "some form of harassment."³²³ In Washington, during the first three years of the law, a report found only fourteen incidents of harassment toward registrants.³²⁴ Although there are instances of vigilance against registrants because of the community notification provisions, as noted, these are few.³²⁵ Most statutes have safeguards in effect to prevent this very abuse.³²⁶

Second, the courts should look at whether the statutes serve both as a deterrent and as retribution. Offenders who are not deterred by a lengthy prison term and/or probation, a public criminal record, and a public court hearing, will not be deterred even slightly by the *possibility* of future public disclosure of their status as sex offenders.³²⁷ As a convicted sex offender stated "[w]e were well-respected in the community . . . [and] knew the consequences, it did not stop us"³²⁸ As stated above, courts should not view the public's evasive action, taken as a result of community notification, as a deterrent, because this approach implies that the states are punishing the offenders simply by

³²¹ See *Pataki II*, 940 F. Supp. at 610.

³²² See *id.*

³²³ See *id.* at 610-11.

³²⁴ See *id.* at 610.

³²⁵ See *supra* notes 322-24 and accompanying text.

³²⁶ See *W.P. v. Poritz*, 931 F. Supp. 1199, 1212 (D.N.J. 1996); *Doc v. Pataki*, 919 F. Supp. 691, 696 (S.D.N.Y. 1996); *Artway v. Attorney Gen.*, 876 F. Supp. 666, 669 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996).

³²⁷ See *Kimball*, *supra* note 281, at 1200.

³²⁸ *Id.*

providing the offenders with fewer innocent victims from which to choose.

Moreover, the states did not adopt these statutes seeking retribution against the offenders.³²⁹ The legislatures' primary intent was to aid law enforcement agencies in their efforts to protect the public, as well as to allow the public to protect itself.³³⁰ Although the statutes may bring about some retributive effects, these effects are purely incidental.³³¹ They do not rise to a sufficient level to negate the protective purposes of the statutes.³³²

Similar to retribution, any disability or restraint the statutes impose upon the registrants are minor consequences of the statutes.³³³ Most statutes limit public disclosure and impose penalties for its abuse.³³⁴ Any interference with the lives of the registrants is merely incidental to the statutes' legitimate goals and does not rise to the level necessary to place the statute in the realm of punishment.³³⁵

Finally, the statutes do not involve a concept historically perceived as punishment.³³⁶ These statutes differ significantly from the shaming behavior historically associated with punishment.³³⁷ The government always had the right to warn the community about the presence of dangerous persons.³³⁸ Courts never understood such warnings to impose unconstitutional punishment.³³⁹

The courts should consider each of the above-mentioned factors, accord them their respective weight and then determine, after viewing the totality of the circumstances, whether the statute at issue constitutes punishment and thus violates the Ex Post Facto Clause. Certain statutes may fail an ex post facto challenge because of inadequate safeguards to protect against abuse of the registration system. Yet, overall, courts should find that the intended purposes of the statutes greatly outweigh any minor incidental inconveniences that the registrant may encounter.³⁴⁰

³²⁹ See *W.P.*, 931 F. Supp. at 1214; *State v. Ward*, 869 P.2d 1062, 1073 (Wash. 1994).

³³⁰ See *Rowe v. Burton*, 884 F. Supp. 1372, 1379 (D. Alaska 1994); *Ward*, 869 P.2d at 1073.

³³¹ See *W.P.*, 931 F. Supp. at 1214; *Ward*, 869 P.2d at 1073.

³³² See *W.P.*, 931 F. Supp. at 1214.

³³³ See *Ward*, 869 P.2d at 1069.

³³⁴ See *W.P.*, 931 F. Supp. at 1212; *Doc v. Pataki*, 919 F. Supp. 691, 696 (S.D.N.Y. 1996); *Artway v. Attorney Gen.*, 876 F. Supp. 666, 669 (D.N.J. 1995), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996).

³³⁵ See *W.P.*, 931 F. Supp. at 1214.

³³⁶ See *Rowe*, 884 F. Supp. at 1378; *Ward*, 869 P.2d at 1072.

³³⁷ See *W.P.*, 931 F. Supp. at 1217.

³³⁸ See *id.*

³³⁹ See *id.*

³⁴⁰ See *id.* at 1219; *Ward*, 869 P.2d at 1074.

CONCLUSION

The manner in which the issue of community notification is addressed in the lower courts consists of pooling a hodgepodge of factors gathered from previous cases. The outcomes are determined, in large part, by the effects of such notification statutes. Until the United States Supreme Court rules on this issue, the varying tests will continue and the inconsistent results will follow. Based on the different reasoning and interpretations of the lower courts, it is unlikely that even a test or framework developed by the Supreme Court will yield consistent results. A "bright-line" test will not suffice to determine whether a statute constitutes punishment, nor should a series of rigid hurdles have to be overcome.

This Note has set forth a workable test, or guide, for determining whether a statute constitutes punishment. The courts must view the totality of the circumstances before reaching a decision. Although the offenders may experience minor incidental effects due to the community notification provisions, the overall aim of the statutes, both regulatory and protective, is justly served and cannot be negated by tangential inconveniences to the offender. Courts must consider the drastic consequences of striking down the community notification provisions. To find that the incidental effects, such as public humiliation and ostracism, are excessive in relation to the statutes' actual goal of protecting the public, courts are implying that the right of registrants to be free from the mere possibility of harassment is greater than the rights of would-be Megan Kankas to be apprised of the presence of a sexual predator in their midst. The consequences of taking away the rights of the former do not pose a significant burden upon them. Stripping away the rights of potential victims to be made aware of the presence of a sexual predator, however, can have horrific and permanent consequences, as seen with the brutal rape and strangulation of little Megan Kanka.

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