

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOES #1-5; MARY DOE,

Plaintiffs-Appellees (15-1536)

Plaintiffs-Appellants/Cross-Appellees (15-2346 & 15-2486),

v.

RICHARD SNYDER, Governor of the State of Michigan, in his
official capacity; KRISTE ETUE, Director of the Michigan State
Police, in her official capacity,

Defendants-Appellants (15-1536),

Defendants-Appellees/Cross-Appellants (15-2346 & 15-2486).

Nos. 15-1536/2346/2486

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:12-cv-11194—Robert H. Cleland, District Judge.

Argued: January 27, 2016

Decided and Filed: August 25, 2016

Before: MERRITT, BATCHELDER, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Erik A. Grill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants in 15-1536 and for Appellees/Cross-Appellants in 15-2346 and 15-2486. Miriam J. Aukerman, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Grand Rapids, Michigan, for Appellees in 15-1536 and for Appellants/Cross-Appellees in 15-2346 and 15-2486. **ON BRIEF:** Erik A. Grill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants in 15-1536 and for Appellees/Cross-Appellants in 15-2346 and 15-2486. Miriam J. Aukerman, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Grand Rapids, Michigan, Michael J. Steinberg, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, Paul D. Reingold, MICHIGAN CLINICAL LAW PROGRAM, Ann Arbor, Michigan, William W. Swor, Detroit, Michigan, for Appellees in 15-1536 and for Appellants/Cross-Appellees in 15-2346 and 15-2486. Christian J. Grostic, KUSHNER & HAMED CO., LPA, Cleveland, Ohio, Candace C.

"School safety zones" in the city of Grand Rapids

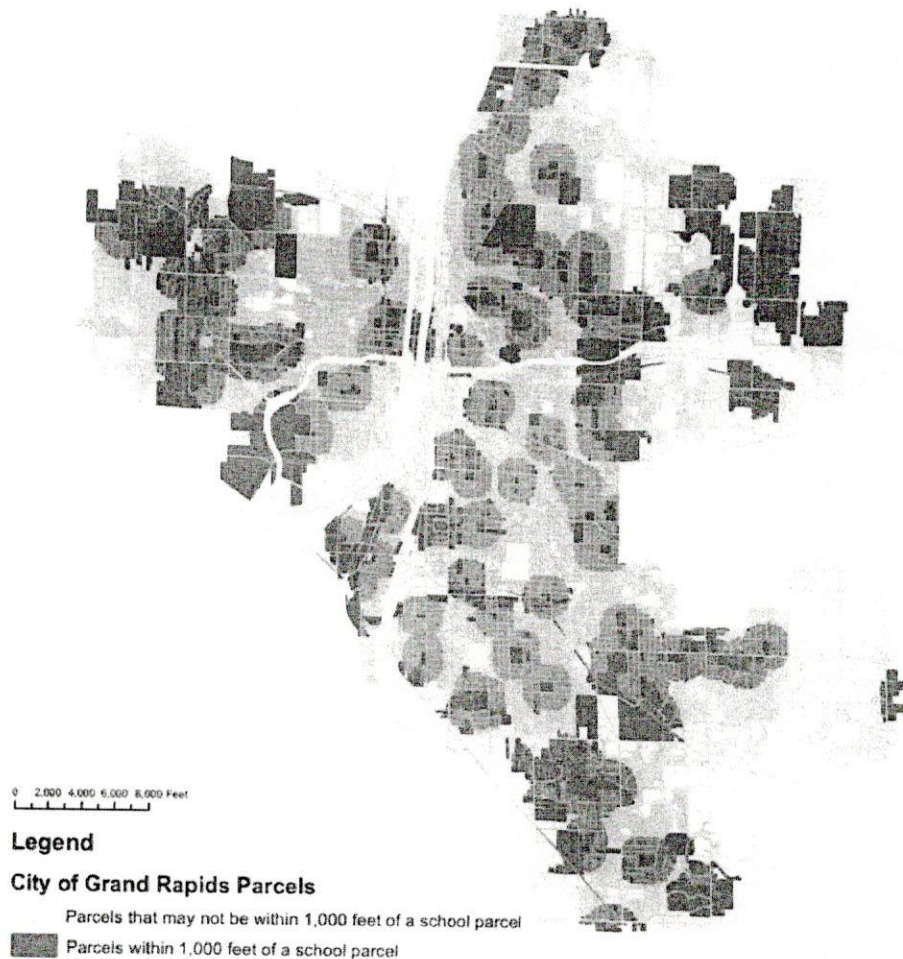


Figure 10.

Sex Offenders are forced to tailor much of their lives around these school zones, and, as the record demonstrates, they often have great difficulty in finding a place where they may legally live or work. Some jobs that require traveling from jobsite to jobsite are rendered basically unavailable since work will surely take place within a school zone at some point.

SORA's requirements also resemble traditional shaming punishments. Unlike the law in *Smith*, which republished information that was already publically available, SORA ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness

without providing for any individualized assessment. These designations are unappealable, and apply even to those whose offenses would not ordinarily be considered sex offenses. Doe # 1, for example, is on the registry because of a non-sexual kidnapping offense arising out of a 1990 robbery of a McDonald's. In other cases, SORA discloses otherwise non-public information. Doe # 2, for example, is on the registry because, in 1996, when he was eighteen years old, he pled guilty under Michigan's "Holmes Youthful Trainee Act," Mich. Comp. Laws § 762.11, a record-sealing statute for young offenders, to "Criminal Sexual Conduct III" for having sex with a fourteen-year-old girl with whom he had a romantic relationship. But for SORA's retroactive application to him, his criminal record would not be available to the public. Thus, unlike the statute in *Smith*, the ignominy under SORA flows not only from the past offense, but also from the statute itself.

Finally, SORA also resembles the punishment of parole/probation. In *Smith*, which involved nothing more than reporting requirements, the Court took seriously the claim that the Alaska statute resembled parole/probation, acknowledging that "[t]his argument has some force, but," concluding that it was ultimately dissimilar because, unlike parolees, "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." 538 U.S. at 101. Under SORA, by contrast, registrants are subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person, rather than by phone or mail. Failure to comply can be punished by imprisonment, not unlike a revocation of parole. And while the level of individual supervision is less than is typical of parole or probation, the basic mechanism and effects have a great deal in common. In fact, many of the plaintiffs have averred that SORA's requirements are more intrusive and more difficult to comply with than those they faced when on probation.

In sum, while SORA is not identical to any traditional punishments, it meets the general definition of punishment, has much in common with banishment and public shaming, and has a number of similarities to parole/probation. This factor thus weighs in Plaintiffs' favor.

Affirmative Disability or Restraint. As should be evident, SORA requires much more from registrants than did the statute in *Smith*. Most significant is its regulation of where registrants may live, work, and "loiter." As discussed above, these restrictions put significant

restraints on how registrants may live their lives. Further, as also mentioned above, registrants must appear in person, both initially and for updates, and, if they are “Tier III” offenders, they must do so for life. These are direct restraints on personal conduct.

Michigan points out, however, that these restraints are not physical in nature and contends that the actual effects are therefore “minor and indirect” like those in the statute considered in *Smith*, 538 U.S. at 100. But surely something is not “minor and indirect” just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment. These restraints are greater than those imposed by the Alaska statute by an order of magnitude. *Cf. Smith*, 538 U.S. at 101 (noting, for example, that “[t]he Alaska statute, on its face, does not require these updates to be made in person”).

Michigan has a stronger point in noting that SORA’s restrictions are in some ways not as severe as complete occupation-disbarment, which has been held to be non-punitive. *Id.* at 100; *see also De Veau v. Braisted*, 363 U.S. 144 (1960) (forbidding work as a union official); *Hawker v. New York*, 170 U.S. 189 (1898) (revocation of a medical license). But no disbarment case we are aware of has confronted a law with such sweeping conditions or approved of disbarment without some nexus between the regulatory purpose and the job at issue. SORA’s restrictions are again far more onerous than those considered in *Smith*. And this factor too therefore weighs in Plaintiffs’ favor.

Traditional Aims of Punishment. SORA advances all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence. Its very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend. It is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community. Further, as discussed below, it does so in ways that relate only tenuously to legitimate, non-punitive purposes. Finally, its professed purpose is to deter recidivism (though, as discussed below, it does not in fact appear to do so), and it doubtless serves the purpose of general deterrence. *See J.J. Prescott & Jonah E. Rockoff, Do Sex offender Registration and Notification Laws Affect Criminal Behavior?*, 54 *J.L. & Econ.* 161 (2011).

Of course, many of these goals can also rightly be described as civil and regulatory. *See Smith*, 538 U.S. at 102 (“Any number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal would severely undermine the Government’s ability to engage in effective regulation.” (internal quotation marks and citation omitted)). And we accordingly give this factor little weight.

Rational Relation to a Non-Punitive Purpose. “The Act’s rational connection to a nonpunitive purpose is a ‘[m]ost significant’ factor in our determination that the statute’s effects are not punitive.” *Id.* (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)) (brackets in original). As in *Smith*, the legislative reasoning behind SORA is readily discernible: recidivism rates of sex offenders, according to both the Michigan legislature and *Smith*, are “frightening and high”; informing the public of sex offenders’ addresses, photos, tier rankings, etc. provides a mechanism to keep tabs on them with a view to preventing some of the most disturbing and destructive criminal activity; and school zones keep sex offenders away from the most vulnerable.

Intuitive as some may find this, the record before us provides scant support for the proposition that SORA in fact accomplishes its professed goals. The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’” 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)). One study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals. *See* Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003). Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism. [R. 90 at 3846–49]. In fact, one statistical analysis in the record concluded that laws such as SORA actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities. *See* Prescott & Rockoff, *supra* at 161. Tellingly, nothing the parties have pointed to in the record suggests that the residential

restrictions have any beneficial effect on recidivism rates. And while it is intuitive to think that at least some sex offenders—*e.g.*, the stereotypical playground-watching pedophile—should be kept away from schools, the statute makes no provision for individualized assessments of proclivities or dangerousness, even though the danger to children posed by some—*e.g.*, Doe # 1, who never committed a sexual offense—is doubtless far less than that posed by a serial child molester.

Excessiveness. Further, while the statute’s efficacy is at best unclear, its negative effects are plain on the law’s face. As explained above, SORA puts significant restrictions on where registrants can live, work, and “loiter,” but the parties point to no evidence in the record that the difficulties the statute imposes on registrants are counterbalanced by any positive effects. Indeed, Michigan has never analyzed recidivism rates despite having the data to do so. [R. 90 at 3768–69]. The requirement that registrants make frequent, in-person appearances before law enforcement, moreover, appears to have no relationship to public safety at all. The punitive effects of these blanket restrictions thus far exceed even a generous assessment of their salutary effects.

So, is SORA’s actual effect punitive? Many states confronting similar laws have said “yes.” *See, e.g., Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Starkey v. Oklahoma Dep’t of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008). And we agree. In reaching this conclusion, we are mindful that, as *Smith* makes clear, states are free to pass retroactive sex-offender registry laws and that those challenging an ostensibly non-punitive civil law must show by the “clearest proof” that the statute in fact inflicts punishment. But difficult is not the same as impossible. Nor should *Smith* be understood as writing a blank check to states to do whatever they please in this arena.

A regulatory regime that severely restricts where people can live, work, and “loiter,” that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more

troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.

We conclude that Michigan's SORA imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased. Indeed, the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause. As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice. Such lawmaking has "been, in all ages, [a] favorite and most formidable instrument[] of tyranny." *The Federalist No. 84, supra* at 444 (Alexander Hamilton). It is, as Justice Chase argued, incompatible with both the words of the Constitution and the underlying first principles of "our free republican governments." *Calder*, 3 U.S. at 388-89; accord *The Federalist No. 44, supra* at 232 (James Madison) ("[E]x post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation."). The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease.

As we have explained, this case involves far more than an Ex Post Facto challenge. And as the district court's detailed opinions make evident, Plaintiffs' arguments on these other issues are far from frivolous and involve matters of great public importance. These questions, however, will have to wait for another day because none of the contested provisions may now be applied to the plaintiffs in this lawsuit, and anything we would say on those other matters would be dicta. We therefore reverse the district court's decision that SORA is not an Ex Post Facto law and remand for entry of judgment consistent with this opinion.