

Opinion of STEVENS, J.

SUPREME COURT OF THE UNITED STATES

No. 01–729

DELBERT W. SMITH AND BRUCE M. BOTELHO,
PETITIONERS *v.* JOHN DOE I ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March 5, 2003]

JUSTICE STEVENS, dissenting in No. 01–729 and concurring in the judgment in No. 01–1231.*

These two cases raise questions about statutes that impose affirmative obligations on convicted sex offenders. The question in No. 01–729 is whether the Alaska Sex Offender Registration Act is an *ex post facto* law, and in No. 01–1231 it is whether Connecticut’s similar law violates the Due Process Clause.

The Court’s opinions in both cases fail to decide whether the statutes deprive the registrants of a constitutionally protected interest in liberty. If no liberty interest were implicated, it seems clear that neither statute would raise a colorable constitutional claim. Cf. *Meachum v. Fano*, 427 U. S. 215 (1976). Proper analysis of both cases should therefore begin with a consideration of the impact of the statutes on the registrants’ freedom.

The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply. In Alaska, an offender who has served his sentence for a single, nonaggravated crime must provide local law enforcement authorities with extensive personal informa-

* [This opinion applies also to No. 01–1231, *Connecticut Dept. of Public Safety v. Doe*, ante, p.—.]

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tion—including his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment—at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has *one* working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities. Much of this registration information is placed on the Internet. In Alaska, the registrant's face appears on a webpage under the label "Registered Sex Offender." His physical description, street address, employer address, and conviction information are also displayed on this page.

The registration and reporting duties imposed on convicted sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. And there can be no doubt that the "[w]idespread public access," *ante*, at 12 (opinion in No. 01–729), to this personal and constantly updated information has a severe stigmatizing effect. See Brief for the Office of the Public Defender for the State of New Jersey et al. as *Amici Curiae* 7–21 (providing examples of threats, assaults, loss of housing, and loss of jobs experienced by sex offenders after their registration information was made widely available). In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty. Cf. *Wisconsin v. Constantineau*, 400 U. S. 433 (1971).

It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2)

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are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a *sufficient* and a *necessary* condition for the sanction.

To be sure, there are cases in which we have held that it was not punishment and thus not a violation of the *Ex Post Facto* Clause to deny future privileges to individuals who were convicted of crimes. See, e.g., *De Veau v. Braisted*, 363 U. S. 144 (1960) (upholding prohibition of convicted felons from working for waterfront unions); *Hawker v. New York*, 170 U. S. 189 (1898) (upholding prohibition of doctors who had been convicted of a felony from practicing medicine). Those cases are distinguishable because in each the prior conviction was a sufficient condition for the imposition of the burden, but it was not a necessary one. That is, one may be barred from participation in a union because he has not paid fines imposed on him. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 191–192 (1967). And a doctor may not be permitted to practice medicine because she is no longer competent to do so. See, e.g., N. J. Stat. Ann. §45:1–21 (West Supp. 2002).

Likewise, in *Kansas v. Hendricks*, 521 U. S. 346 (1997), the Court held that a law that permitted the civil commitment of persons who had committed or had been charged with a sexually violent offense was not an *ex post facto* law. But the fact that someone had been convicted was not sufficient to authorize civil commitment under Kansas law because Kansas required another proceeding to determine if such a person suffered from a “mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” *Id.*, at 352. Nor was the conviction even a necessary predicate for the commitment. See *ibid.* (Kansas’ civil commitment procedures also applied to individuals charged with a sexually violent offense but found

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incompetent to stand for trial, or found not guilty by reason of insanity or by reason of mental disease or defect). While one might disagree in other respects with *Hendricks*, it is clear that a conviction standing alone did not make anyone eligible for the burden imposed by that statute.

No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment.

It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. As the Court recognizes, "recidivism is the statutory concern" that provides the supposed justification for the imposition of such retroactive punishment. *Ante*, at 18 (opinion in No. 01–729). That is the principal rationale that underlies the "three strikes" statute that the Court has upheld in *Ewing v. California*, — U. S. — (2003). Reliance on that rationale here highlights the conclusion that the retroactive application of these statutes constitutes a flagrant violation of the protections afforded by the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution.

I think it equally clear, however, that the State may impose registration duties and may publish registration information as a part of its punishment of this category of defendants. Looking to the future, these aspects of their punishment are adequately justified by two of the tradi-

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tional aims of punishment—retribution and deterrence. Moreover, as a matter of procedural fairness, Alaska requires its judges to include notice of the registration requirements in judgments imposing sentences on convicted sex offenders and in the colloquy preceding the acceptance of a plea of guilty to such an offense. See Alaska Rules Crim. Proc. 11(c)(4) and 32(c) (2002). Thus, I agree with the Court that these statutes are constitutional as applied to postenactment offenses.

Accordingly, I would hold that the Alaska statute violates the constitutional prohibition on *ex post facto* laws. Because I believe registration and publication are a permissible component of the punishment for this category of crimes, however, for those convicted of offenses committed after the effective date of such legislation, there would be no separate procedural due process violation so long as a defendant is provided a constitutionally adequate trial. I therefore concur in the Court's disposition of the Connecticut case, No. 01–1231, and I respectfully dissent from its disposition of the Alaska case, No. 01–729.