NOTE

Severing the Invisible Leash: A Challenge to Tennessee’s Sex Offender Monitoring Act in Doe v. Bredesen

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C. The Monitoring Act Is Expensive and Fails to Achieve Tennessee's Goal of Reducing Recidivism

CONCLUSION
Imagine the following scenario: Steven Perth is on the fringes of society. In July 2004, Perth pleaded guilty to attempted aggravated kidnapping and two counts of sexual battery by an authority figure in Bardon state court. Bardon state law defined each of the offenses as “sex offenses” and classified Perth as a “sex offender.” On August 1, 2004, the Bardon legislature passed two acts amending the state penal code. The new laws retroactively reclassified Perth’s offenses as “violent sex offenses” and retroactively reclassified Perth as a “violent sex offender.” Due to the new classifications, the state required Perth to comply with new registration, verification, and tracking requirements for the rest of his life. The revised laws further required Perth to wear a global positioning system (“GPS”) as a monitoring device at all times. Perth challenged these new state laws on grounds that they violated the Ex Post Facto Clause. The United States Court of Appeals for the Sixth Circuit recently encountered a similar fact pattern concerning Tennessee’s sex offender laws in the 2007 case Doe v. Bredesen. This Note argues that, contrary to the Sixth Circuit’s decision in Doe v. Bredesen, Tennessee’s Monitoring Act violates the Ex Post Facto Clause. Part I explores the legal background regarding the Ex Post Facto Clause, Tennessee’s Registration and Monitoring Acts, and prior

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1 The following hypothetical represents a variation of the facts in Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007), and the parties are fictitious.
2 Id. at 1000.
3 See id.
5 See Bredesen, 507 F.3d at 1001.
6 See id.
7 See id. (requiring Tennessee Board of Parole and Probation to carry out registered sex offender monitoring).
8 See id.
9 See id.
10 See id. at 1001; infra Part III (arguing that court applied improper precedent, that monitoring act is punitive in effect, and that monitoring act does not accomplish nonpunitive goals).
case law interpreting monitoring acts. Part II discusses the facts, procedure, and rationale in Bredesen. Part III argues that the Bredesen court erred by holding that the Tennessee Monitoring Act did not violate the Ex Post Facto Clause. First, the Sixth Circuit was incorrect to rely on the Supreme Court case Smith v. Doe because Smith, unlike Bredesen, did not involve a challenge to a monitoring act. Second, the Bredesen court should have found Tennessee’s Monitoring Act to be punitive in effect, such that its retroactive application in this case violated the Ex Post Facto Clause. Finally, the Bredesen court’s ruling fails to recognize that the Monitoring Act does not accomplish Tennessee’s intended goal of reducing sex offender recidivism rates. Thus, the Sixth Circuit should have invalidated Tennessee’s Monitoring Act, which abrogated constitutional rights and failed to achieve Tennessee’s legislative goals.

I. BACKGROUND

Legislation requiring sex offender registration gained national prominence in the U.S. following the death of Megan Kanka at the hands of a convicted child molester. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act. The legislation encouraged states to

11 See Smith v. Doe, 538 U.S. 84, 91 (2003); infra Part I (establishing framework to understand monitoring acts).
12 See infra Part II (outlining essential parts of Sixth Circuit’s opinion).
13 See infra Part III (arguing that Sixth Circuit misapplied precedent, incorrectly analyzed Mendoza-Martinez test, and should have invalidated statute on policy grounds).
14 See infra Part III.A (distinguishing Smith because it involved challenge to registration statute, not monitoring statute). See generally Smith, 538 U.S. at 105-06 (holding that sex offender registration law, not monitoring law, is constitutional).
15 See infra Part III.B (applying several Mendoza-Martinez factors to find that statute is punitive in effect and concluding that balancing factors leads to finding Monitoring Act unconstitutional).
16 See infra Part III.C (arguing that Monitoring Act does not increase recidivism, but instead increases cost of enforcement).
17 See infra Conclusion.
adopt sex offender registration laws. By 1996, every state, the District of Columbia, and Congress adopted a version of a sex offender registration law, often called Megan’s Law. Megan’s Law allowed for public dissemination of the names of registered sex offenders for the purpose of protecting the public from registered sex offenders.

Many states also enacted sex offender monitoring statutes that enabled the state to monitor sex offenders through GPS monitoring devices. These statutes require that convicted sex offenders wear a GPS device outside of their clothing. Through use of GPS monitoring, states can track the location of a convicted sex offender twenty-four hours per day, seven days per week. Sex offenders who retroactively needed to satisfy registration and monitoring


See United States v. Jensen, 278 Fed. App’x 548, 551 (6th Cir. 2008) (explaining that possible reason for compliance was that government would not give states federal funding otherwise); Davey, supra note 18, at A1 (reporting thirteen year old girl’s rape and murder); Abby Goodnough & Monica Davey, Effort to Track Sex Offenders Draws Resistance, N.Y. TIMES, Feb. 8, 2009, at A1 (stating such legislation might fail because punishment is same for high risk offenders and low risk offenders).


See Megan’s Law § 2 (noting that law enforcement is authorized to release information about registered sex offenders necessary to protect public). See generally Daniel L. Feldman, The “Scarlet Letter Laws” of the 1990s: A Response to Critics, 60 ALB. L. REV. 1081, 1085 (1997) (describing constitutional challenges to Megan’s Law such as cruel and unusual punishment, and due process violations); Richard Klein, An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness, 41 AKRON L. REV. 981, 1036 (2008) (describing various pieces of legislation from Congress designed to reduce sex offender recidivism); Jessica Varnon, Difficult Decisions: Should Alabama Laws Be Tougher on Juvenile Sexual Offenders?, 57 ALA. L. REV. 205, 205 n.2 (2005) (identifying that Megan Kanka’s death was reason for President Bill Clinton to sign Megan’s Law).


See § 47; § 14-208.40; §§ 40-39-301 to -306.

See § 47; § 14-208.40; §§ 40-39-301 to -306.
requirements challenged the validity of their respective states’ Megan’s Law on Ex Post Facto grounds.26

A. The Ex Post Facto Clause

The U.S. Constitution prohibits lawmakers from enacting any Ex Post Facto law.27 In the criminal context, courts define Ex Post Facto laws as those that retroactively alter the punishment that the offender received at sentencing.28 Courts conduct a two-part analysis whenever a defendant brings an Ex Post Facto challenge alleging that a new law changes the initial terms of punishment.29 First, a court must consider whether the state legislature intended for the statute to be civil or punitive.30 If the court determines that the legislature’s intent was punitive, then the statute violates the Ex Post Facto Clause, and the analysis ends.31 If the legislature’s intent was civil, then the court must

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28 See Lindsey v. Washington, 301 U.S. 397, 401 (1937) (holding that amended statute that punishes more severely than previous statute violates Ex Post Facto Clause); Calder, 3 U.S. at 390-91 (explaining meaning of Ex Post Facto Clause); Doe v. Otte, 259 F.3d 979, 985 (9th Cir. 2001) (stating that Ex Post Facto analysis inquires whether statute increases penalty for crime already committed).

29 See Smith v. Doe, 538 U.S. 84, 84 (2003); Otte, 259 F.3d at 982; Russell v. Gregoire, 124 F.3d 1079, 1086-87 (9th Cir. 1997) (applying Ursery-Hendricks intent-effects test, which is functionally similar to Mendoza-Martinez test).

30 See United States v. Ward, 448 U.S. 242, 248 (1980); Otte, 259 F.3d at 979; William Shimko, Note, Constitutional Law — The Supreme Court Still Hasn’t Found What It Should Be Looking for: A Test that Effectively and Consistently Defines Punishment for Constitutional Protection Analysis, 4 Wyo. L. Rev. 477, 484-85 (2004). In determining whether a statute is civil or punitive, the Court has found a law terminating benefits to a deported alien is a civil regulatory scheme. The Court stated ‘where a legislative restriction ‘is an incident of the State’s power to protect the health and safety of its citizens,’ it will be considered ‘as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.’ ” Smith 538 U.S. at 93-94 (quoting Flemming v. Nestor, 363 U.S. 603, 616 (1960)).

31 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (ruling that Selected Training and Service Act of 1940 violated U.S. Constitution’s Fifth and Sixth Amendments); Doe v. Miller, 405 F.3d 700, 718 (8th Cir. 2005) (explaining that court would end Ex Post Facto analysis after finding that legislature’s intent was punitive);
decide whether the statute is so punitive in effect that the statute is in fact properly characterized as punishment. 32

Courts rely on a multi-factor test, set forth in the 1963 case, Kennedy v. Mendoza-Martinez, to determine whether a civil statute is punitive in effect. 33 First, courts consider whether the punishment is a type of punishment present in U.S. history or recognized in U.S. traditions. 34 Second, courts look to whether the statute imposes an affirmative disability or restraint on the person suffering the punishment. 35 In the third step, courts ask whether the statute promotes the traditional aims of punishment — retribution and deterrence. 36 Fourth, courts determine if the statute requires that the defendant know that his or her act is a crime prior to committing it. 37 Under the fifth step, courts evaluate whether the statute prohibits a behavior that other laws already prohibit. 38 Sixth, courts consider whether the statute has a rational connection to a nonpunitive purpose. 39 Finally, courts evaluate whether the statute is overly broad or unduly burdensome with respect to the statute's purpose. 40

After considering the Mendoza-Martinez factors, courts decide whether the statute is punitive in effect, and thus, violates the Ex Post Facto Clause. 31 Most courts give equal weight to each factor, with the result that courts do not automatically invalidate a statute even if some
Mendoza-Martinez factors indicate a punitive effect. Additionally, courts do not need to analyze all seven factors because the factors are merely useful, nondispositive guideposts to help courts determine if a statute is punitive. Recently, courts have used the Mendoza-Martinez test to determine whether sex offender monitoring laws violate the Ex Post Facto Clause.

B. The Ex Post Facto Clause and Sex Offender Registration and Monitoring Acts

The Supreme Court analyzed the validity of a retroactive sex offender registration act in the 2003 case, Smith v. Doe. The Smith Court evaluated the Alaska Sex Offender Registration Act (“SORA”), which required sex offenders in the state to register with the state Department of Corrections. The respondents in Smith, two convicted sex offenders released from prison in 1990, challenged the new state requirement that they comply with the SORA’s registration program despite committing sex offenses prior to the SORA’s enactment date. Respondents alleged that the SORA retroactively altered their terms of punishment and, therefore, violated the Ex Post Facto Clause.

The Court applied the two-prong Ex Post Facto test. First, the Court found that the Alaska legislature intended to create a civil, rather than punitive, scheme. Second, the Court analyzed the punitive effect of

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43 See Hudson, 522 U.S. at 99 (stating that factors are useful guideposts for determining whether statute is punitive in effect); United States v. Ward, 448 U.S. 242, 249 (1980) (stating that factors are neither exhaustive nor dispositive); Simmons v. Galvin, 652 F. Supp. 2d 83, 92 (D. Mass. 2007) (concluding that two factors are not relevant to determine constitutionality of law).

44 See Smith v. Doe, 538 U.S. 84, 106 (2003) (challenging Alaska’s sex offender registration law); Kansas v. Hendricks, 521 U.S. 346, 361-63 (1997) (overruling Kansas Supreme Court's decision that Kansas sex offender registration act violates Ex Post Facto Clause); United States v. Young, 585 F.3d 199, 205 (5th Cir. 2009) (applying Mendoza-Martinez effects test to Texas's sex offender registration law); Doe v. Bredesen, 507 F.3d 998, 1001 (6th Cir. 2007) (challenging courts required use of Mendoza-Martinez to evaluate Tennessee's sex offender registration and monitoring acts).

45 See Smith, 538 U.S. at 106.

46 See id.

47 Id.

48 Id.

49 See id. at 97.
the SORA. The Court determined that the SORA’s punitive effect was not sufficient to overcome the Alaska legislature’s intent to create a civil statute. The Court found the Mendoza-Martinez factor concerning the law’s rational connection to a nonpunitive purpose to be most persuasive, holding that the law rationally related to the government’s desire to protect the public. Therefore, the Smith Court held that the SORA was not punitive and did not violate the Ex Post Facto Clause.

Courts often analyze Smith when evaluating whether sex offender monitoring acts similarly violate the Ex Post Facto Clause. Massachusetts, for instance, has distinguished Smith as only applying to retroactive registration requirements, not monitoring acts. In Commonwealth v. Cory, the Massachusetts Supreme Court determined that a Massachusetts law requiring sex offenders to wear GPS monitoring devices was punitive in effect. The court found that requiring sex offenders to wear GPS monitoring devices was an affirmative restraint under the Mendoza-Martinez test. As such, the court held that the physical attachment and constant surveillance through use of a GPS device was punitive in effect.

The Cory court distinguished Smith by emphasizing that GPS monitoring during probation or supervised release imposed greater restraints on sex offenders than mere registration requirements. The court stated that probation and supervised release, unlike registration, required state surveillance and permission to do basic tasks. The court found that GPS monitoring requirements were even more

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50 Id.
51 Id. at 105.
52 Id. at 102.
53 See id.
55 See Cory, 911 N.E.2d at 194 n.11 (distinguishing Smith).
56 See id. at 197.
57 Id. at 195.
58 Id. at 195-98 (labeling GPS monitoring as more burdensome than registration requirement).
59 Id. at 194 n.11.
60 See Smith v. Doe, 538 U.S. 84, 101-02 (2003) (rejecting registration system as parallel to probation or supervised release in terms of restraint imposed); Cory, 911 N.E.2d at 194 n.11.
burdensome than normal probation and supervised release, due to continuous tracking of an offender’s location as opposed to probation’s intermittent tracking.\textsuperscript{61} As a result, the Massachusetts court did not extend the holding of \textit{Smith} to cases evaluating the constitutionality of a monitoring act, but instead found that the retroactive monitoring requirements violated sex offenders’ constitutional rights.\textsuperscript{62}

The Massachusetts court’s refusal to uphold a monitoring act under an Ex Post Facto analysis has not convinced other states to make the same distinction between retroactive registration and monitoring requirements.\textsuperscript{63} In \textit{State v. Bare}, the North Carolina Court of Appeal held that GPS monitoring for sex offenders does not violate the Ex Post Facto Clause.\textsuperscript{64} Bare, a convicted sex offender, was required to submit to GPS monitoring upon his release from prison in 2007.\textsuperscript{65} Bare challenged the monitoring statute for violating the Ex Post Facto Clause under the U.S. and North Carolina Constitutions.\textsuperscript{66} The court held that although the monitoring law did not exist at the time Bare committed his crimes, the statute did not increase his punishment.\textsuperscript{67} Applying the \textit{Mendoza-Martinez} test, the court determined that the monitoring statute was a civil regulatory scheme because lawmakers enacted the law to protect the public.\textsuperscript{68} Additionally, the court found that GPS monitoring was nonpunitive because it did not restrict Bare’s freedom to move, and history did not consider monitoring punitive.\textsuperscript{69} In its analysis, the court opined that the GPS monitoring device could not be a shame sanction because many people in the public would think it was an innocuous device like a cell phone, not a tracking device.

\textsuperscript{61} See \textit{Cory}, 911 N.E.2d at 194 n.11, 196.

\textsuperscript{62} See generally id. at 189 (distinguishing \textit{Smith} because it did not involve monitoring act).


\textsuperscript{64} For purposes of this paper, GPS monitoring includes satellite-based monitoring because both use the same type of GPS devices. See \textit{Bare}, 677 S.E.2d at 531. Compare State v. Stines, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009) (detailing satellite-based monitoring program), with \textit{Cory}, 911 N.E.2d at 189 (detailing GPS program).

\textsuperscript{65} See \textit{Bare}, 677 S.E.2d at 531.

\textsuperscript{66} See id. at 518.

\textsuperscript{67} Id. at 522.

\textsuperscript{68} See id. at 526-28.

\textsuperscript{69} See id. at 527-28.
device for sex offenders. Therefore, the court held that North Carolina could require sex offenders who were convicted prior to the passage of the state’s monitoring laws to wear GPS monitoring devices upon release without violating the Ex Post Facto Clause.

A similar case brought in North Carolina challenged retroactive monitoring requirements under both the Ex Post Facto Clause and procedural due process rights. In State v. Stines, the North Carolina Court of Appeal upheld its prior ruling in Bare, rejecting the argument that a retroactive law requiring the monitoring of sex offenders through GPS devices violates the Ex Post Facto Clause. Stines, a convicted sex offender, appealed a decision requiring him to enroll in North Carolina’s GPS monitoring program. In Stines, the defendant claimed that the GPS monitoring program violated the Ex Post Facto Clause. The court relied on Bare to dismiss Stines’s Ex Post Facto claim and reaffirmed that GPS monitoring does not violate the Ex Post Facto Clause. However, Stines also argued that GPS monitoring violated his procedural due process rights, allowing the court to reach a different outcome from Bare.

C. The Due Process Clause and Sex Offender Monitoring Statutes

The U.S. Constitution’s Due Process Clause guarantees that no state shall deprive any person of life, liberty, or property without due process of law. As part of this protection, the Due Process Clause assures that all U.S. persons receive procedural due process throughout the criminal law conviction and sentencing procedures. Procedural due process prevents the state from taking a person’s liberty interest

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70 See id. at 528.
71 See id. at 530-31.
73 Id.
74 See id. at 413.
75 Id.
76 Id. at 412.
77 U.S. CONST. amend. V; U.S. CONST. amend. XIV (applying Fifth Amendment against states); see Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (upholding Fifth Amendment’s due process protection in racial segregation case); see also N.C. CONST. art. 1, § 19 (analogizing Law of Land to similar due process protection found in Federal Constitution).
without fair procedure, which includes notice of the crime. Courts have held that other protected liberty interests include an opportunity for a trial in front of a neutral arbiter and freedom to move. In monitoring cases, courts first analyze whether physical GPS monitoring deprives a convicted sex offender of a protected liberty interest. Next, courts determine if the state deprived a sex offender of that interest by requiring him or her to wear a GPS monitoring device.

In Stines, the court held that the monitoring statute unconstitutionally infringed on the defendant’s protected liberty interest in having freedom to move, by requiring constant surveillance and through permanent attachment of GPS devices. The GPS monitoring program limited Stine’s ability to travel to certain locations and could provide the state with a near real-time account of his location. Therefore, the court held that GPS monitoring violated Stine’s due process rights because it infringed on a protected liberty interest.

D. Tennessee’s Sex Offender Registration and Monitoring Laws

In July 2004, Tennessee Governor Phil Bredesen and the General Assembly enacted two statutes expanding the powers of Tennessee’s Board of Probation and Parole (“BOPP”). The Tennessee Sexual

79 See Hamdi, 542 U.S. at 533 (stating notice and opportunity to be heard are fundamental to citizens’ due process); Loudermill, 470 U.S. at 542; Mullane, 339 U.S. at 313.
80 Wolf v. McDonnell, 418 U.S. 539, 559 (1974) (stating that liberty interest includes right to neutral and objective arbiter and opportunity to be heard); Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (same); Specht v. Patterson, 386 U.S. 605, 610 (1967) (holding Colorado’s Sex Offender Act as unconstitutional because it violated liberty interests like right to neutral arbiter and opportunity to be heard).
82 See Smedley, 611 F. Supp. 2d at 975; Merritt, 612 F. Supp. 2d at 1079; Stines, 683 S.E.2d at 413.
83 See Merritt, 612 F. Supp. 2d at 1079; Commonwealth v. Cory, 911 N.E.2d 187, 196-97 (Mass. 2009); Stines, 683 S.E.2d at 413.
84 Stines, 683 S.E.2d at 413.
85 Id. at 418.
Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 ("Registration Act"), requires sex offenders to register with the BOPP.87 Under the Registration Act, convicted sex offenders must provide the state with their name, address, a DNA sample, and a description of their sex offense.88 A sex offender who violates this statute commits a felony, and the BOPP may return the violator to custody for more than one year.89

The second act, the Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act ("Monitoring Act"), authorizes the BOPP to monitor sex offenders through GPS.90 The legislature instituted the Monitoring Act as a one-year pilot program to evaluate its success in reducing recidivism rates in a cost-effective manner.91 In 2008, the state legislature extended the program for an additional five years.92 The Monitoring Act requires sex offenders to wear a GPS device twenty-four hours per day, seven days per week.93 The BOPP may punish any person who tampers with or removes the GPS device with 180 days in county jail or with immediate parole revocation.94

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88 Id. (requiring sex offender to provide information such as physical address, offender’s email address, instant message aliases, and photo to Tennessee Bureau of Investigation).
89 Id. (allowing BOPP to return parolee back to custody for violation of his or her parole terms).
90 Id. (detailing statutes experimental nature to evaluate whether GPS tracking reduces recidivism).
91 Id. (stating Tennessee had interest in utilizing technology to reduce recidivism to protect public safety).
94 Id. (punishing anyone who aids and abets person with GPS device).
The Tennessee legislature intended both Acts to further deter sex offenses and to decrease sex offender recidivism. Like in other states, many previously convicted sex offenders became subject to these new laws after their initial sentencing. These persons challenged Tennessee’s requirement that they comply with the new Registration and Monitoring Acts, alleging that the Acts violate the Ex Post Facto Clause.

II. **DOE V. BREDESEN**

The Sixth Circuit Court of Appeals recently decided a challenge to Tennessee’s Registration and Monitoring Acts in the 2007 case, *Doe v. Bredeisen*. Prior to 2004, Doe pleaded guilty to attempted aggravated kidnapping and two counts of sexual battery by an authority figure in Tennessee state court. At the time of Doe’s convictions, Tennessee categorized his offenses as “sex offenses” and Doe himself as a “sex offender.” In August 2004, the Tennessee Registration and Monitoring Acts went into effect, leading Tennessee to re-categorize Doe’s offenses as “violent sex offenses” and Doe as a “violent sex offender.” The Registration Act required violent sex offenders to comply with registration, verification, and tracking requirements (though not electronic monitoring) for life. The Monitoring Act

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95 See id. (reporting general assembly’s finding that repeat sex offenders are danger to society and registration will increase public safety).
96 See Doe v. Bredeisen, 507 F.3d 998, 1008 (6th Cir. 2007) (affirming Tennessee’s Registration and Monitoring Acts); Doe v. Miller, 405 F.3d 700, 723 (8th Cir. 2005) (upholding Iowa’s sex offender statutes against Ex Post Facto challenge); State v. Germane, 971 A.2d 355, 593 (R.I. 2009) (dismissing Ex Post Facto challenge to Rhode Island’s sex offender statute).
98 See Bredeisen, 507 F.3d at 1008.
99 See id. at 1000.
100 See id. (stating that Tennessee Registration and Monitoring Acts of 2004 included more stringent registration requirements and GPS tracking than preexisting sex offender registration law).
101 Id.
102 Id.
103 Id.
separately required Doe to wear a GPS device at all times for GPS monitoring by BOPP. 104

Doe filed a complaint in Tennessee’s Federal District Court alleging that the Registration Act and Monitoring Act requirements violated the Ex Post Facto Clause of the U.S. and Tennessee Constitutions. 105 The court found no constitutional violations and dismissed Doe’s claims. 106 Doe appealed the decision and the Sixth Circuit affirmed the dismissal. 107

The Sixth Circuit held that the Registration Act and Monitoring Act did not violate the Ex Post Facto Clause of the U.S. Constitution. 108 In reaching this conclusion, the court followed the Supreme Court’s two-part framework from Smith for evaluating an Ex Post Facto claim. 109 First, the court examined the actual language of both acts and found that the legislature’s intent was to ensure public safety and rehabilitate sex offenders. 110 Based on this finding, the court found that the legislature intended both the Registration Act and the Monitoring Act to be civil and not to function as retroactive punishments. 111 Furthermore, the court relied on Smith to hold that monitoring sex offenders with GPS devices is nonpunitive. 112 The court equated Alaska’s SORA in Smith to Tennessee’s Acts in Bredesen and found that nothing on the face of the statutes suggested anything other than a civil scheme. 113

In evaluating the effects of the Tennessee statutes, the Sixth Circuit examined the Registration Act and Monitoring Act using five of the

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104 Id.
105 See id. at 1000 (noting also that Doe raised due process violation claim but abandoned it by failing to support claim in opposing government’s motion to dismiss).
106 See id.
107 See id.
108 Id.
109 See id. at 1003.
111 See § 40-39-201(b)(8) (stating that legislature did not intend for law to have punitive or retributive effect); Bredesen, 506 F.3d at 1007.
112 See Smith v. Doe, 538 U.S. 84, 93 (2003) (holding that Alaska’s sex offender registration requirement is not punitive in either intent or effect); Bredesen, 507 F.3d at 1003-07.
113 See Bredesen, 507 F.3d at 1003-07.
seven factors in the *Mendoza-Martinez* test.\(^{114}\) The court relied heavily
on *Smith* as controlling precedent in applying the test to both
Tennessee laws.\(^{115}\) First, the court determined that the Acts did not
impose an affirmative disability on Doe.\(^{116}\) Second, the court held that
tradition and history did not support finding that the registration or
monitoring requirements were punishments.\(^{117}\) The court stated the
registration and monitoring requirements were less harsh than other
penalties found to be nonpunitive, such as revocation of a medical
license.\(^{118}\) Specifically, the requirements did not increase length of
incarceration or prevent offenders from changing jobs.\(^{119}\) Under these
two factors — the lack of an affirmative disability and the historical
analysis of punitive statutory schemes — the court determined that
the Registration Act and Monitoring Act were nonpunitive.\(^{120}\)

The next *Mendoza-Martinez* factor that the court considered was
whether the statutes’ intended deterrent effect promoted a traditional
aim of punishment.\(^{121}\) The *Bredesen* court stated that a deterrent effect
alone does not make the Acts punitive under the Ex Post Facto
Clause.\(^{122}\) The court reasoned that most statutes have a deterrent
effect, so finding that deterrent effect alone violated the Ex Post Facto
Clause would require courts to invalidate many state regulations.\(^{123}\)
Therefore, the court stated the Acts could have deterrent effects,
without necessarily having a punitive effect under the *Mendoza-
Martinez* test.\(^{124}\)

The court also found that the Acts satisfied the sixth *Mendoza-
Martinez* factor because the legislature’s goals rationally related to a
nonpunitive purpose.\(^{125}\) The court deferred to the legislature’s

\(^{114}\) See id. at 1004-07 (finding two *Mendoza-Martinez* factors unnecessary and
inapplicable).

\(^{115}\) See id. at 1005.

\(^{116}\) See id.

\(^{117}\) See id.

\(^{118}\) See *Smith v. Doe*, 538 U.S. 84, 100 (2003); *Hawker v. New York*, 170 U.S. 189,
200 (1898) (holding that medical license revocation is not punitive).

\(^{119}\) See *Bredesen*, 507 F.3d at 1005.

\(^{120}\) See id. (concluding that two *Mendoza-Martinez* factors were not relevant and
would not change outcome).

\(^{121}\) See id. (stating that courts define tradition through American history and that
GPS monitoring is novel technology).

\(^{122}\) See *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (holding that while forfeiture
has deterrent effect, it is distinct from any punitive purpose); *Calero v. Pearson Yacht
Leasing Co.*., 416 U.S. 663, 677-78 (1974); *Bredesen*, 507 F.3d at 1006.

\(^{123}\) See *Bredesen*, 507 F.3d at 1005.

\(^{124}\) See id. at 1005-06.

\(^{125}\) See id. at 1006.
judgment that the Acts could lower recidivism and protect public safety in Tennessee neighborhoods without further punishing sex offenders. Finally, the court analyzed whether the Acts exceeded their regulatory purpose of lowering sex offender recidivism rates. The court found no basis for excessiveness because Doe failed to argue this point in his briefs. Ultimately, the court held that under the *Mendoza-Martinez* test, Tennessee’s Registration and Monitoring Acts did not violate the Ex Post Facto Clause.

III. ANALYSIS

The Sixth Circuit erred in finding that Tennessee’s Monitoring Act did not violate the Ex Post Facto Clause. The Sixth Circuit misapplied *Smith* as controlling precedent in evaluating Tennessee’s Monitoring Act because *Smith* only evaluated the constitutionality of a registration act. *Smith* did not evaluate whether constant GPS monitoring violated the Ex Post Facto Clause and should not have precedential effect on this issue. The *Bredesen* court also incorrectly determined that the Monitoring Act’s retroactive punishment of sex offenders was not punitive in effect under the *Mendoza-Martinez* test. Finally, the court failed to consider that the Monitoring Act is expensive and fails to achieve Tennessee’s goal of reducing recidivism. Ultimately, the *Bredesen* court should have found that Tennessee’s Monitoring Act retroactively punishes sex offenders and therefore violates the Constitution.

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126 See id.
127 See id.
128 See id.
129 See id. at 1007 (affirming dismissal of offender’s complaint).
130 See infra Part III.B (arguing that *Mendoza-Martinez* test and policy disfavor upholding *Bredesen*).
131 See infra Part III.A (outlining *Smith* and demonstrating that *Smith* is distinguishable).
133 See infra Part III.B (arguing that many factors show that Monitoring Act is punitive).
134 See infra Part III.C (detailing failed Monitoring program’s finance reports and evaluations).
135 See infra Conclusion (concluding that Monitoring Act is unconstitutional and inefficient).
A. The Sixth Circuit Incorrectly Applied Smith to Uphold Tennessee’s Monitoring Act

The Bredesen court relied heavily on the holding in Smith to find that Tennessee’s Monitoring Act was constitutional.\(^\text{136}\) In its analysis, the Bredesen court acknowledged that Tennessee’s Registration Act and Monitoring Act were separate and distinct.\(^\text{137}\) However, the Sixth Circuit used Smith as guiding precedent to uphold Tennessee’s Monitoring Act, even though Smith did not challenge a monitoring act.\(^\text{138}\)

Unlike Tennessee’s Monitoring Act, Alaska’s SORA only contained a registration requirement and a dissemination of registration information.\(^\text{139}\) The SORA did not retroactively require sex offenders to wear GPS devices through the registration requirement.\(^\text{140}\) Additionally, Smith noted that a registration requirement is distinguishable from mandatory conditions of parole because registration allows a parolee to live and work without supervision.\(^\text{141}\) A mandatory condition of parole, like GPS monitoring, imposes an affirmative restraint that is unlawful if it severely infringe a person’s liberty interests.\(^\text{142}\) Tennessee’s Monitoring Act is burdensome because the law imposes a lifelong parole condition that requires sex offenders to bind obtrusive GPS devices onto their bodies.\(^\text{143}\) Yet, the Bredesen

\(^{136}\) See Smith, 538 U.S. at 1004-07. See generally Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007) (citing Smith over fourteen times in majority opinion).

\(^{137}\) See Bredesen, 507 F.3d at 1000 n.1.

\(^{138}\) See Smith, 538 U.S. at 91; Bredesen, 507 F.3d at 1003.

\(^{139}\) Compare Smith, 538 U.S. at 91 (describing challenge to registration law, not monitoring law), with Bredesen, 507 F.3d at 998 (contrasting Tennessee’s Monitoring Act with Alaska’s registration requirement).

\(^{140}\) See Bredesen, 507 F.3d at 998-1000. See generally Smith, 538 U.S. 84 (2003) (ruling in case that involved registration act but not monitoring act).


\(^{142}\) See Doe v. Otte, 239 F.3d 979, 985 (9th Cir. 2001); Kansas v. Myers, 923 P.2d 1024, 1041 (Kan. 1996) (holding that parole condition that allowed for public inspection of sex offender records and permitted newspapers to disseminate that information was affirmative restraint); Commonwealth v. Cory, 911 N.E.2d 187, 196-97 (Mass. 2009). Contra Doe v. Pataki, 120 F.3d 1263, 1269-70 (2d Cir. 1997) (limiting public inspection and dissemination to some cases only).

\(^{143}\) See Cory, 911 N.E.2d at 196 (concluding that permanently wearing GPS device is more burdensome than yearly registration requirement); Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 308 (Mass. 2008) (quoting Doe v. Att’y Gen., 715 N.E.2d 37, 43 (Mass. 1997) (Fried, J., concurring)) (characterizing yearly registration requirement as intrusive and humiliating); see also Smith, 538 U.S. at 116-17
court relied on Smith, even though Smith’s registration requirement was less burdensome than a lifelong monitoring requirement.\footnote{See Bredesen, 507 F.3d at 1005.} The Bredesen court should not rely on Smith as controlling precedent because permanently wearing a GPS device is different from providing basic registration information.\footnote{See Smith, 538 U.S. at 102 (stating that other constitutional objections to mandatory reporting requirement are beyond opinion’s scope); Jones v. United States, 527 U.S. 373, 404 (1999) (distinguishing Clemons v. Mississippi, 494 U.S. 738, 753-54 (1990), on factual grounds); Bredesen, 507 F.3d at 998-1000 (applying Smith to uphold GPS monitoring law); Cory, 911 N.E.2d at 194 n.11.}


Tennessee’s Monitoring Act imposes significantly more control over sex offenders through GPS monitoring.
than Smith's registration requirement. Therefore, the Sixth Circuit erred in applying Smith to uphold the Monitoring Act in Bredesen. Yet, some courts confirm that Bredesen's holding was correct and have similarly upheld sex offender monitoring requirements against Ex Post Facto challenges without relying on Smith. In Bare, the North Carolina Court of Appeal analyzed a GPS monitoring statute by using the Ex Post Facto analysis. That court upheld a GPS monitoring act as a civil regulatory scheme by determining that the legislature enacted the requirement with civil intent. After finding civil intent, the Bare court applied the Mendoza-Martinez factors and found that the monitoring law was not punitive in effect. Based on these findings, Bare held that the GPS monitoring law did not violate the Ex Post Facto Clause. Therefore, even without relying on Smith, courts can find that monitoring acts do not impose retroactive punishment that violates the Ex Post Facto Clause.

However, this argument fails here because even if Tennessee's Monitoring Act satisfies the Ex Post Facto analysis, the Act violates the Due Process Clause. In Stines, the North Carolina Court of Appeal rejected an Ex Post Facto argument but conceded that continually monitoring convicted sex offenders violated their due process liberty interests. In addition, the Massachusetts Supreme Court held in Cory that wearing a GPS monitoring device burdened an individual's

150 Compare § 40-39-302 (b)(1) (describing continuous surveillance through GPS devices attached to sex offenders), with Smith, 538 U.S. at 90 (requiring sex offenders to provide basic information such as name, address, and birth date).

151 See Cory, 911 N.E.2d at 196; Vogt, 685 S.E.2d at 28 (Elmore, J., dissenting); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting).


153 See Bare, 677 S.E.2d at 522.

154 Id. at 531; see also Vogt, 685 S.E.2d at 28; Morrow, 683 S.E.2d at 758; Stines, 683 S.E.2d at 413; Wagoner, 683 S.E.2d at 399.

155 See Bare, 677 S.E.2d at 527-31 (explaining that history and tradition do not regard GPS monitoring as shame because it does not impose more affirmative restraints than registration requirements).

156 Id. at 531-32.

157 See Vogt, 685 S.E.2d at 28; Morrow, 683 S.E.2d at 758; Wagoner, 683 S.E.2d at 399; Bare, 677 S.E.2d at 531-32.


159 See Stines, 683 S.E.2d at 413.
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liberty through its physical, permanent nature and continuous surveillance.\textsuperscript{160} Tennessee’s Monitoring Act similarly imposed continuous surveillance on convicted sex offenders through permanent GPS monitoring.\textsuperscript{161}

Additionally, the Supreme Court has held that long-term government surveillance is punishment because enduring regulations are as restraining as prisons.\textsuperscript{162} Tennessee’s GPS monitoring constitutes this sort of long-term surveillance by continuously tracking and monitoring sex offenders throughout the state.\textsuperscript{163} Therefore, the \textit{Bredesen} court improperly upheld Tennessee’s Monitoring Act, which violates sex offenders’ liberty interests through constant GPS surveillance.\textsuperscript{164} The Monitoring Act infringes convicted sex offenders’ liberty interests and retroactively imposes punishment after they serve their sentences in prison.\textsuperscript{165}

\textsuperscript{160} See id. at 413. But see Commonwealth v. Cory, 911 N.E.2d 187, 196 (Mass. 2009) (citing Stine’s language from \textit{Cory} court’s analysis in Ex Post Facto argument that held that Massachusetts’s monitoring statute was punitive in effect).


\textsuperscript{162} See \textit{Weems} v. United States, 217 U.S. 349, 381 (1910) (detailing different forms of punishment, including surveillance, through American history); Michele L. Earl-Hubbard, Comment, \textit{The Child Sex OFFender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with Scarlet Letter Laws of the 1990s}, 90 NW. U. L. REV. 788, 819 (1996) (arguing that case law historically recognizes government surveillance as punishment); Symposium, \textit{Brief on Behalf of the Public Defender, Amicus Curiae}, 6 B.U. PUB. INT. L.J. 107, 123 (1996) (noting that sentence of permanent government surveillance was cruel and unusual permanent surveillance).

\textsuperscript{163} \textit{Compare} Tennessee Serious and Violent Sex OFFender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-301(b)(1)(B), GPS: PROJECT EVALUATION, supra note 86, at 13 (stating that Tennessee’s GPS monitoring tracks offenders throughout state), \textit{and GPS: FOLLOW-UP EVALUATION, supra note 92, at 8 (stating that Tennessee GPS monitoring follows offenders in several counties at nearly continuous intervals), with Weems, 217 U.S. at 381 (1910) (describing constant surveillance as punishment).


\textsuperscript{165} See \textit{Cory}, 911 N.E.2d at 196 (explaining that wearing GPS monitoring devices is more intrusive and burdensome than sex offender registration); Vogt, 685 S.E.2d at 28 (Elmore, J., dissenting) (discussing how GPS monitoring is illegal as post-probation punishment); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).
B. The Monitoring Act Violates the Ex Post Facto Clause as a Law that Is Punitive in Effect

The Bredesen court should have found that Tennessee’s Monitoring Act was unconstitutional because the statute retroactively punishes convicted sex offenders.\textsuperscript{166} Under the Mendoza-Martinez test, the Monitoring Act is clearly punitive in effect and, therefore, violates the Ex Post Facto Clause.\textsuperscript{167} In Bredesen, the court found that a majority of Mendoza-Martinez factors weighed in favor of finding that the Monitoring Act was not punitive.\textsuperscript{168} The court, however, improperly analyzed three factors that would have resulted in finding that the Monitoring Act imposed retroactive punishment and was thus constitutionally invalid.\textsuperscript{169}

The first Mendoza-Martinez factor considers whether history and tradition regard the statute as punishment.\textsuperscript{170} The Bredesen court failed to acknowledge that history and tradition consider public shaming a form of punishment.\textsuperscript{171} Public shaming is a traditional form of punishment that carries symbolic meaning.\textsuperscript{172} Early American colonists required that criminals wear visible symbols, like brands or

\textsuperscript{166} See Smedley, 611 F. Supp. 2d at 975; Cory, 911 N.E.2d at 196; Vogt, 685 S.E.2d at 28 (Elmore, J., dissenting); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting).

\textsuperscript{167} See Cory, 911 N.E.2d at 196 (holding Massachusetts’s similar monitoring act is punitive in effect); Vogt, 685 S.E.2d at 28 (Elmore, J., dissenting) (explaining that six of seven Mendoza-Martinez factors show that monitoring act is punitive in effect); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

\textsuperscript{168} See Doe v. Bredesen, 507 F.3d 998, 1007-08 (6th Cir. 2007).

\textsuperscript{169} See Cory, 911 N.E.2d at 196 (holding that Massachusetts’s similar monitoring act is punitive in effect); Vogt, 685 S.E.2d at 28 (Elmore, J., dissenting) (explaining that six of seven Mendoza-Martinez factors show that monitoring act is punitive in effect); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).


\textsuperscript{171} See State v. Noble, 829 P.2d 1217, 1222 (Ariz. 1992) (stating that history traditionally considered sex offender requirement punitive); In re Birch, 515 P.2d 12, 17 (Cal. 1973) (describing sex offender requirement as ignominious badge); Cory, 911 N.E.2d at 197 (describing how other courts have found that permanently affixing GPS devices on parolees is punitive); Vogt, 685 S.E.2d at 30 (Elmore, J., dissenting) (characterizing monitoring as akin to public shaming, humiliation, and banishment). See generally NATHANIEL HAWTHORNE, THE SCARLET LETTER (Bantam Classic 1986) (1850) (explaining how society forced protagonist to wear symbol as public shaming).

patches affixed to clothing, so that people would publicly ridicule or ostracize them. GPS monitoring is a form of public shaming because it requires that sex offenders wear visible GPS devices. The multicomponent, bulky, conspicuous GPS device signals to onlookers that the wearer is a sex offender, which carries a similar shame stigma. Sex offenders cannot wear GPS devices under any outer garment because doing so would block the device's signal. Thus, requiring that sex offenders wear GPS devices is akin to public shaming because GPS devices are visible, eye-grabbing symbols that stigmatize the people wearing them. This shame stigma makes the GPS device punitive in effect because history and tradition regard shaming as a form of punishment.


174 See Noble, 829 P.2d at 1222 (stating that history has traditionally considered sex offender requirement punitive); In re Birch, 515 P.2d at 17 (describing sex offender requirement as ignominious badge); Cory, 911 N.E.2d at 196 (noting that wearing GPS device is similar to wearing some item for length of time as retribution for crime which people consider punitive); Vogt, 685 S.E.2d at 28 (characterizing monitoring as akin to historical punishments like public shaming, humiliation, and banishment). See generally Hawthorne, supra note 171 (retelling story where government forced woman to wear symbol as punishment).


176 See Bredesen, 507 F.3d at 1002 (stating that GPS device is visible to onlooker); Vogt, 685 S.E.2d at 28 (Elmore, J., dissenting) (noting that defendant cannot conceal or camouflage GPS device); State v. Wagoner, 683 S.E.2d 391, 400 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (same).

177 See Bredesen 507 F.3d at 1002 (Keith, J., dissenting) (describing GPS device as obvious to any onlooker); State v. Morrow, 683 S.E.2d 734, 758 (N.C. Ct. App. 2009) (Elmore, J., concurring in part, dissenting in part) (agreeing with Judge Keith that GPS monitoring is similar to public shaming); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

178 See Noble, 829 P.2d at 1222 (stating that history traditionally considered sex offender requirement punitive); In re Birch, 515 P.2d at 17 (describing sex offender requirement as ignominious badge); Cory, 911 N.E.2d at 196 (noting that wearing GPS device is similar to wearing some item for length of time for a crime, which people consider punitive); Vogt, 685 S.E.2d at 28 (characterizing monitoring as akin to historical punishments like public shaming, humiliation, and banishment). See generally Hawthorne, supra note 171 (retelling story in which woman had to wear symbol as punishment).
The Tennessee Monitoring Act also fails under the second Mendoza-Martinez factor because electronic monitoring imposes an affirmative disability or restraint.\footnote{See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); Cory, 911 N.E.2d at 196-97; State v. Stines, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009).} GPS monitoring actively restrains a person’s movement by limiting where an offender can go and by being more intrusive than traditional parole monitoring.\footnote{See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-303(b)(1)(B) (2004) (reporting violations of location requirements); Smith v. Doe, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting); Cory, 911 N.E.2d at 196-97 (stating that GPS monitoring is more invasive than traditional parole).} GPS monitoring laws enable authorities to bar sex offenders from certain locations or implicate them in crimes.\footnote{See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-303(b)(1)(B) (2004) (reporting violations of location requirements); Smith v. Doe, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting); Cory, 911 N.E.2d at 196-97 (stating that GPS monitoring is more invasive than traditional parole).} The Monitoring Act allows authorities to include nearby sex offenders in investigations by using an automated system that compares crime locations with sex offender locations.\footnote{See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-302(b)(1)(C) (2004).} In effect, the Monitoring Act illegally allows police to harass sex offenders by investigating them whenever someone commits a crime near their location.\footnote{Mass. Ann. Laws ch. 265, § 47 (LexisNexis 2010) (prohibiting sex offenders from exclusion zones, but not clarifying exclusion zones’ locations); § 40-39-303(b)(1)(B) (prohibiting sex offenders from undefined locations); Cory, 911 N.E.2d at 196 n.19 (holding that Massachusetts monitoring law is vague and could dramatically limit offender’s freedom of movement).} GPS devices also report to authorities whenever a sex offender travels to a prohibited location, but the Monitoring Act fails to define areas where sex offenders may not travel.\footnote{United States v. Laughrin, 438 F.3d 1245, 1247 (10th Cir. 2006) (stating that Constitution and society do not allow police officers to round up usual suspects); United States v. Rideau, 969 F.2d 1572, 1584 (5th Cir. 1992) (Smith, J., dissenting) (expressing concerns that approving law that allows for authorities to frisk any person in high-crime area late at night condones rounding up usual suspects); United States v. Giangola, No. CR 07-0706 JB, 2008 U.S. Dist. LEXIS 108747, at *44 (D.N.M. July 24, 2008) (stating that Fourth Amendment prohibits laws that allow officers to round up usual suspects).} As a result, sex offenders could violate the monitoring requirements by simply stepping outside their home if the authorities decide their...
neighborhood is off-limits.\footnote{§ 40-39-302(b)(1)(B) (prohibiting sex offenders from undefined locations); see, e.g., Levenson, supra note 184, at 4 (describing how sex offender laws exclude sex offenders from most urban areas); O’Brien, supra note 184, at 3 (reporting monitoring law excludes ninety percent of town from travel).} By prohibiting sex offenders from traveling to certain locations, the Monitoring Act violates an individual’s freedom to move.\footnote{United States v. Merritt, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009); United States v. Arzberger, 592 F. Supp. 2d 590, 600 (S.D.N.Y. 2008); State v. Stines, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009).} Courts have held that statutes limiting a person’s freedom to move implicate a fundamental right to travel.\footnote{See Jones v. Helms, 452 U.S. 412, 418 (1981) (recognizing travel as fundamental right); United States v. Torres, 566 F. Supp. 2d 591, 597 (W.D. Tex. 2008) (holding that sex offender law implicates right for individual to move from place to place); United States v. Natividad-Garcia, 560 F. Supp. 2d 561, 570 (W.D. Tex. 2008) (dismissing defendant’s violation of statute because it retroactively punished travel and violated Ex Post Facto Clause).} GPS monitoring curtails a sex offender’s right to travel, which prevents the offender from rehabilitation through gainful employment.\footnote{See CTR. FOR SEX OFFENDER MGMT., TIME TO WORK: MANAGING EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION 2 (2002), available at http://www.csom.org/pubs/timetowork.pdf (citing employment as critical factor in lowering recidivism); CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS 1 (2001), available at http://www.csom.org/pubs/recidsexof.html (citing high recidivism rates for unemployed sex offenders); Russell L. Curtis & Sam Schulman, Ex-Offenders, Family Relations, and Economic Supports: The “Significant Women” Study of the TARP Project, 30 CRIME AND DELINQ. 507, 507-28 (1984).} Therefore, Tennessee’s Monitoring Act limits a parolee’s ability to move freely and constitutes an affirmative restraint.\footnote{See Doe v. Bredesen 507 F.3d 998, 1010 (6th Cir. 2007) (Keith, J., dissenting); Commonwealth v. Cory, 911 N.E.2d 187, 198 (Mass. 2009); State v. Stines, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009).} GPS monitoring’s physical restrictions suggest that the Bredesen court should have found that the Monitoring Act does not satisfy the second Mendoza-Martinez factor.\footnote{See Bredesen, 507 F.3d at 1010 (Keith, J., dissenting); Cory, 911 N.E.2d at 196; Stines, 683 S.E.2d at 414.}

The third Mendoza-Martinez factor that the court evaluated asks whether the statute promotes traditional aims of punishment.\footnote{See Bredesen, 507 F.3d at 1010 (Keith, J., dissenting); Cory, 911 N.E.2d at 196-97; Stines, 683 S.E.2d at 415.} GPS monitoring arguably promotes traditional aims of punishment — deterrence and retribution.\footnote{See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. §§ 40-39-303 to -304 (2004) (making GPS monitoring mandatory condition of parole and providing additional punishments for interfering with parole conditions).} The Bredesen court stated that a statute
must have more than a deterrent effect because deterrence can have civil or punitive effects.\(^{193}\) However, the court failed to recognize that, in addition to deterrence, the Monitoring Act promotes retribution.\(^{194}\) The Monitoring Act retroactively re-punishes defendants for their sex offenses even though they have already paid their debt to society through incarceration.\(^{195}\) The Monitoring Act forces sex offenders to wear GPS devices, bans them from certain locations, and allows the state to monitor their every movement.\(^{196}\) The Monitoring Act promotes retribution because participants in the Act must acquiesce to new requirements that severely limit their rights and liberty throughout their life.\(^{197}\) GPS monitoring qualifies as retribution because it continuously restrains and violates sex offenders' rights.\(^{198}\) Therefore, Tennessee's Monitoring Act is punitive because it advances retribution.\(^{199}\)

The *Bredesen* court only considered five *Mendoza-Martinez* factors.\(^{200}\) Proper analysis of these factors exposes the Monitoring Act's punitive effect.\(^{201}\) As such, the Monitoring Act violates the Ex Post Facto Clause condition of parole); *Marshall v. Garrison*, 659 F.2d 440, 443 (4th Cir. 1981) (noting that Congress requires retribution factor in parole evaluation); *Cory*, 911 N.E.2d at 197 (stating that GPS monitoring as condition of probation promotes both deterrence and retribution).

\(^{193}\) See *Hudson v. United States*, 522 U.S. 93, 105 (1997); *Bredesen*, 507 F.3d at 1005.


\(^{195}\) See *Bredesen*, 507 F.3d at 1000-01.


\(^{197}\) See § 40-39-302; *Cory*, 911 N.E.2d at 195 n.16 (noting that statute that expands probation length is clearly punitive); *Commonwealth v. Talbot*, 830 N.E.2d 177, 185 (Mass. 2005) (reasoning that lifelong community parole is enhanced penalty for sex offenders that government cannot impose retroactively).


\(^{200}\) See *Bredesen*, 507 F.3d at 1007.

\(^{201}\) See *Cory*, 911 N.E.2d at 196 (holding that similar Massachusetts monitoring act
because it imposes a retroactive punishment on previously sentenced sex offenders.202

However, the Smith court elevated one Mendoza-Martinez factor above others, specifically, a rational connection to a nonpunitive purpose.203 Using this analysis as the primary basis for its decision, the Bredesen court cited the legislature’s intent to protect the public by reducing recidivism through the use electronic surveillance of sex offenders.204 The court reasoned this is a nonpunitive purpose because the legislation focused on protecting the public, not punishing offenders.205 When there is any reasonable connection to a nonpunitive purpose, courts must defer to the legislature’s decision and uphold the law.206 Therefore, the Bredesen court held that the Monitoring Act is not punitive in effect because it rationally relates to the nonpunitive purpose of protecting the public from sex offenders.207

This argument fails because precedent suggests that each Mendoza-Martinez factor serves as an equal guidepost to determine whether statutes violate the Ex Post Facto Clause.208 The Supreme Court and

advances both retribution and deterrence); Vogt, 685 S.E.2d at 28 (Elmore, J., dissenting) (explaining that six of seven Mendoza-Martinez factors demonstrate that monitoring act is punitive in effect); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

202 See Bredesen, 507 F.3d at 1008 (Keith, J., dissenting); United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) (holding that monitoring law violated Constitution); Cory, 911 N.E.2d at 198; Vogt, 685 S.E.2d at 30 (Elmore, J., dissenting) (finding majority, but not all of Mendoza-Martinez factors, in favor of punitive effects and finding North Carolina’s GPS monitoring statute invalid); Wagoner, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).


204 See Bredesen, 507 F.3d at 1006.

205 See id.

206 See Smith, 538 U.S. at 103 (finding that statute does not fail because there is deterrent effect and stating that courts should not second guess whether law best promotes nonpunitive purpose); Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005) (explaining that reasonable connection is not demanding standard and most nonpunitive purposes can meet this low standard).

207 See Smith, 538 U.S. at 102; Bredesen, 507 F.3d at 1006. Contra Cory, 911 N.E.2d at 196 (explaining that Massachusetts Supreme Court’s view is consistent with other jurisdictions).

208 See Hudson v. United States, 522 U.S. 93, 100-01 (1997) (holding that previous Court erred by elevating one Mendoza-Martinez factor to dispositive status); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (holding that court should not consider any one factor controlling); Lee v. State, 895 So. 2d 1038, 1042 (Ala. Crim.
other courts instruct that no single factor is controlling. Just as the presence of one factor does not prove that the entire law is unconstitutional, neither should the absence of one factor be used to show that the law is nonpunitive. The Bredesen court should have invalidated the Monitoring Act because a majority of Mendoza-Martinez factors indicate that the law is punitive in effect. The Monitoring Act fails to show that its effects are not punitive under a multi-factor analysis, even though the legislature intended for the law to have a nonpunitive purpose.

C. The Monitoring Act Is Expensive and Fails to Achieve Tennessee’s Goal of Reducing Recidivism

The Tennessee legislature enacted the Monitoring Act to protect the community through increased supervision of sex offenders. The legislature instituted the Monitoring Act as a one-year pilot program to evaluate whether GPS monitoring reduced sex offender recidivism. However, the one-year report found there was no statistically significant difference between those offenders monitored with GPS devices and those without. These statistics refute the Bredesen court’s statement that constant surveillance will reduce the

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209 See Hudson, 522 U.S. at 100-01 (holding previous Court erred by elevating Mendoza-Martinez factor to dispositive status); Mendoza-Martinez, 372 U.S. at 169 (holding that court should not consider any one factor as controlling); SEC v. Palmisano, 135 F.3d 860, 865 (2d Cir. 1998) (stating that nature of sanction cannot turn on one issue); Cory, 911 N.E.2d at 196 (noting that Smith does not overrule Hudson’s precaution against elevating factors to dispositive status).

210 See Hudson, 522 U.S. at 100-01 (noting that courts err by considering one factor as controlling because factors point in differing directions); Mendoza-Martinez, 372 U.S. at 169 (holding that all factors are relevant); Miller, 405 F.3d at 719 (noting that Ward court erred by elevating one factor as dispositive).


212 Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, Tenn. Code Ann. § 40-39-301(a) (2004); see Bredesen, 507 F.3d at 1003; Cory, 911 N.E.2d at 197; Janicki, supra note 198, at 300.

213 § 40-39-301(a) (laying out legislature’s intent to create experimental program to test if communal safety increases).

214 § 40-39-301 (stating Tennessee had interest in utilizing technology to reduce recidivism to protect public safety and extended program for five years).

risk of recidivism. Once paroled, both GPS-monitored and parole officer–monitored offenders had similar numbers of violations and new charges, and committed their first violations within similar numbers of days.

Many people believe that GPS monitoring prevents crime. However, GPS monitoring only explains a sex offender’s location at the time that a crime occurs and is not effective as a tool to stop crime. Rather than preventing crime, GPS monitoring requires an increased budget that impedes Tennessee from hiring more police officers who could actually stop crime. In effect, this inefficient use of funds hinders Tennessee’s crime prevention goal.

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216 See Bredesen, 507 F.3d at 1006 (stating that registration requirements and constant satellite surveillance reduce recidivism); GPS: FOLLOW-UP EVALUATION, supra note 92, at 8 (reporting that more funds will increase greater success in recidivism). Contra Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005) (holding that government satisfied rational connection easily).

217 GPS: FOLLOW-UP EVALUATION, supra note 92, at 3 (reporting numerous problems with GPS tracking including overextending resources and increasing danger for probation officers reporting to crime scenes without weapon).


219 Clarridge, supra note 218, at A1; McKay, supra note 218, at 4; Megerian, supra note 218, at A2.

220 BOPP, PROGRAM PERFORMANCE PLAN 261 (2007), available at http://www.tn.gov/bopp/Docs/07-08%20BOPP%20Performance%20Measures.pdf (noting that original program’s limited duration required extra funding for training); GPS: FOLLOW-UP EVALUATION, supra note 92, at 7 (requesting funds in order to meet deficiencies in program such as lack of staffing, equipment, and training); GPS: PROJECT EVALUATION, supra note 86, at 7 (calling Monitoring Act success but acknowledging that funding must address major flaws in Act).

Act did not show any significant improvements since its enactment in reducing recidivism and thereby fails its statutory mission.\textsuperscript{222}

Despite these shortcomings, the legislature continued the program for five more years.\textsuperscript{223} In 2008, BOPP requested nearly two million dollars from the legislature to maintain the program.\textsuperscript{224} BOPP will use the funds to monitor twenty-three offenders convicted of rape of a child, which is approximately $87,000 per sex offender.\textsuperscript{225} The court erred in failing to consider that, despite exorbitant expense, the program did not demonstrate any real progress toward crime prevention or recidivism reduction.\textsuperscript{226} The Monitoring Act failed to achieve its statutory purpose while simultaneously imposing retroactive punishment that infringed sex offenders' individual liberty interests.\textsuperscript{227}

**CONCLUSION**

The *Bredesen* court wrongly decided that Tennessee’s Monitoring Act did not violate the Ex Post Facto Clause.\textsuperscript{228} *Bredesen* misapplied the Supreme Court’s reasoning in *Smith* to uphold the Monitoring Act as constitutional, despite the punitive differences between registration acts and monitoring acts.\textsuperscript{229} In addition, the Monitoring Act in *Bredesen* imposes an affirmative restraint on movement and publicly

\textsuperscript{222} Annual Report, *supra* note 221, at 15; Strategic Plans, *supra* note 221, at 307; GPS: Project Evaluation, *supra* note 86, at 4–7 (reporting no statistical significance between experimental and control groups, but still requesting more funding).

\textsuperscript{223} Memorandum from James W. White, *supra* note 92, (summarizing Senate Bill 2235/House Bill 2314 and showing increased BOPP expenditures); GPS: Project Evaluation, *supra* note 86, at 1 (reporting that Jessica’s Law expanded BOPP’s global positioning system pilot project for five years from 2007); Press Release, *supra* note 92 (furthering sex offender restrictions during 2009 year).

\textsuperscript{224} Annual Report, *supra* note 221, at 15; Strategic Plans, *supra* note 221, at 307; GPS: Follow-Up Evaluation, *supra* note 92, at 2 (reporting that entire budget was two million dollars from 2009 to 2010).

\textsuperscript{225} Annual Report, *supra* note 221, at 15 (detailing sex offender population and total program cost); Strategic Plans, *supra* note 221, at 307; GPS: Follow-Up Evaluation, *supra* note 92, at 4 (reporting sex offender population as of 2008).

\textsuperscript{226} GPS: Follow-Up Evaluation, *supra* note 92, at 8 (reporting that GPS will not prevent sex crimes from occurring); GPS: Project Evaluation, *supra* note 86, at 8 (reporting no statistical significance in recidivism rates between experimental and control groups); Annual Report, *supra* note 221, at 15 (totaling BOPP budget expenses with significant funding for Monitoring Act).

\textsuperscript{227} See *supra* Part III.A–C.

\textsuperscript{228} See *supra* Part III.A–C.

\textsuperscript{229} See *supra* Part III.A (arguing that registration acts differ significantly from monitoring acts).
shames sex offenders, a punitive effect making the law’s retroactive application to sex offenders unconstitutional.\textsuperscript{230} Finally, the Monitoring Act is a costly program that has not fulfilled its goal of creating a safer community.\textsuperscript{231} States should find ways to reduce sex offender recidivism rates without infringing upon the rights of those who have already served time for the crimes they committed.\textsuperscript{232} Sacrificing the rights that protect Americans from government intrusion in order to achieve illusory public safety goals leads society down a slippery slope.\textsuperscript{233} Monitoring acts in general strip away liberties from citizens and bring the country perilously closer to dystopian fiction governments with constant monitoring of all citizens.\textsuperscript{234}

\textsuperscript{230} See supra Part III.B (analyzing Mendoza-Martinez effects test to determine that monitoring act is punitive).
\textsuperscript{231} See supra Part III.C (demonstrating how GPS does not increase safety or reduce cost).
\textsuperscript{233} See Vitiello, supra note 232, at 672; Janicki, supra note 198, at 296; Morse, supra note 232, at 1793.