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## **Ex Post Facto Laws, Supreme Court, Dutchess County: Doe v. Division of Probation and Correction Alternatives**

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U.S. CONST. art. I, § 10:

*No State shall . . . pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts . . . .*

N.Y. CONST. art. I, § 9:

*No Bill of Attainder or ex post facto Law shall be passed.*

## SUPREME COURT

### DUTCHESS COUNTY

Doe v. Division of Probation and Correction Alternatives<sup>1</sup>  
(decided January 21, 1997)

Petitioner instituted this Article 78<sup>2</sup> proceeding to annul the determination by the Division of Probation and Correction Alternatives [hereinafter “DPCA”] that designated the petitioner a “sexually violent predator.”<sup>3</sup> The Supreme Court, Dutchess County denied his petition and the proceeding was dismissed.<sup>4</sup>

In 1992, upon a plea of guilty to sexual abuse in the first degree, the petitioner was sentenced to a six-month prison term followed by a five year probationary period.<sup>5</sup> With the

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<sup>1</sup> 171 Misc. 2d 210, 654 N.Y.S.2d 268 (1997).

<sup>2</sup> N.Y. C.P.L.R. 7801 *et seq.* (McKinney 1994). This statute affords a petitioner a quick and standardized method of obtaining judicial review and replaces the antiquated former methods of writs of certiorari to review, mandamus, and prohibition. *Id.* However, before a petition is made, the person seeking relief by an Article 78 proceeding must have had a final order entered against him and all administrative remedies must have been exhausted. *Id.* Article 78 proceedings are barred if a final determination has not yet been made, the determination is still reviewable by a court or administrative channels, or if there exists a statutory authorization for the rehearing of the matter. *Id.*

<sup>3</sup> See *infra* note 8 and accompanying text.

<sup>4</sup> DPCA, 171 Misc. 2d at 211, 654 N.Y.S.2d at 269.

<sup>5</sup> *Id.* at 211, 654 N.Y.S.2d at 269.

probationary period still running, the legislature of New York passed the Sex Offender Registration Act<sup>6</sup> [hereinafter the "Act"], which required convicted sex offenders on parole, probation, or in custody as of the Act's January 21, 1996 effective date to comply with its registration<sup>7</sup> and notification<sup>8</sup> provisions.<sup>9</sup> The petitioner, who was assessed by the DPCA as having a level three designation,<sup>10</sup> the highest level that demarks the registrant as posing the greatest threat to public safety,

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<sup>6</sup> N.Y. CORRECT. LAW § 168 *et seq.* (McKinney 1997).

<sup>7</sup> *Id.* Section 168 (i) provides: "Registration as required by this article shall consist of a statement in writing signed by the sex offender giving the information that is required by the division and the division shall enter the information into an appropriate electronics data base or file." *Id.* § 168(a)(1) defines sex offender as including "any person who is convicted of any of the offenses set forth in subdivision (2) or (3) of this section." § 168(a)(2) lists the following crimes as "sex offenses": rape in the second or third degree, sodomy in the second or third degree, and sexual abuse in the second degree as well as convictions for attempts thereof. § 168(a)(3) lists the following crimes as "sexually violent offenses": rape in the first degree and sexual abuse in the first degree as well as convictions for attempts thereof. The crime for which a person is convicted will determine the designation level given to the offender which in turn will determine the level of disclosure to the public that is allowed under the act. *See also infra* note 8 and accompanying text.

<sup>8</sup> *Id.* § 168(f)(1) requires the following: "Any sex offender, who is discharged, paroled or released from any state or local correctional facility, hospital or institution where he was confined or committed, shall register with the division within ten calendar days for purposes of verifying such sex offender's intended place of residence." *Id.* § 168 (L)(6)(a) provides that following the board examiners evaluation and recommendation, the act makes the following notification provisions:

If the risk of repeat offense is low, a level one designation shall be given to such sex offender. . . . If the risk of repeat offense is moderate, a level two designation shall be given to such sex offender. . . . If the risk of repeat offense is high and there exists a threat to the public safety, such sex offender shall be deemed a 'sexually violent predator' and a level three designation shall be given to such sex offender.

*Id.*

<sup>9</sup> DPCA, 171 Misc. 2d at 211-12, 654 N.Y.S.2d at 269.

<sup>10</sup> *See supra* note 8 and accompanying text.

appealed that determination.<sup>11</sup> His appeal was denied<sup>12</sup> and the petitioner thereafter initiated the instant Article 78 petition.<sup>13</sup>

The basis of petitioner's appeal was that Correction Law § 168 *et seq.* is violative of the Ex Post Facto Clause of the Federal Constitution<sup>14</sup> in that the imposition of the Act's registration and notification provisions amount to an increase in the punishment exacted for a crime after its commission.<sup>15</sup> Additionally, petitioner contended that the imposition of the statute violated his due process<sup>16</sup> and equal protection<sup>17</sup> rights guaranteed under the Federal Constitution.<sup>18</sup>

In addressing the petitioner's assertion that the Act is violative of the prohibition against ex post facto laws, the court referred to the decision of the United States District Court in *Doe v. Pataki*.<sup>19</sup>

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<sup>11</sup> *DPCA*, 171 Misc. 2d at 212-13, 654 N.Y.S.2d at 270.

<sup>12</sup> *Id.* at 213, 654 N.Y.S.2d at 270.

<sup>13</sup> *Id.*

<sup>14</sup> U.S. CONST. art. I, § 10, cl. 1. The Ex Post Facto Clause provides that "No state shall . . . pass . . . ex post facto law[s]." *Id.*

<sup>15</sup> *DPCA*, 171 Misc. 2d at 213-14, 654 N.Y.S.2d at 270.

<sup>16</sup> U.S. CONST. amend. XIV, § 1. This section provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

<sup>17</sup> U.S. CONST. amend. XIV, § 1. This section provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

<sup>18</sup> *DPCA*, 171 Misc. 2d at 213, 654 N.Y.S.2d at 270.

<sup>19</sup> *Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1996). In *Pataki*, a group of sex offenders had filed a suit that sought to challenge the New York State Sex Offender's Act as being in violation of the Ex Post Facto clause of the Federal Constitution if held applicable to individuals who had committed their crimes before the January 21, 1996 effective date. *Id.* at 604. The court determined that the notification provision of the Act did indeed violate this clause because the Act's intent, design, effect and historical roots (of "branding and other public forms of shaming") were punitive in nature. *Id.* at 604-05. The court summarized "[i]f a law increases punishment, it cannot be applied retroactively even if it would also prevent further acts of violence and abuse." *Id.* at 605. The court did however hold that the registration provision of the Act did not violate any ex post facto concerns because it did "not result in the same excesses or adverse consequences that follow public notification." *Id.* In accordance with this finding the *Pataki* court granted summary judgment for the plaintiffs "with respect to the notification provision of the Act" and

In *Doe*, the court enjoined the imposition of the notification provision of the Act<sup>20</sup> but upheld the registration provision.<sup>21</sup> With the notification provision of the Act enjoined by the *Pataki* court, the *DPCA* court held that petitioner's challenge to the notification provision was not ripe for review<sup>22</sup> and that they would not address his contentions regarding that aspect of the Act.<sup>23</sup>

Turning to the petitioner's challenge to the constitutionality of the registration provision of the act, the *DPCA* court relied upon *DeVeau v. Braisted*,<sup>24</sup> a United States Supreme Court case, and found that this provision did not violate the prohibition against enacting ex post facto laws.<sup>25</sup> In *DeVeau*, the Court reasoned that the appropriate question to be asked in determining whether a law violates the Ex Post Facto Clause of the Federal Constitution was to assess the legislative aim of the law.<sup>26</sup> If the aim was to punish an individual for past activity, the legislation was unconstitutional.<sup>27</sup> If however, the effect of the law came about as a "relevant incident" to a present situation, then no violation

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granted summary judgment for the "defendants with respect to the registration provision of the Act." *Id.*

<sup>20</sup> *Id.* at 605.

<sup>21</sup> *Id.*

<sup>22</sup> BLACK'S LAW DICTIONARY 1328 (6th ed. 1990). The ripeness doctrine stands for the principle that "the courts . . . will not act when the issue is only hypothetical or the existence of a controversy is merely speculative." *Id.*

<sup>23</sup> *Doe v. DPCA*, 171 Misc. 2d 210, 213, 654 N.Y.S.2d 268, 270 (Sup. Ct. Dutchess County 1997).

<sup>24</sup> *DeVeau v. Braisted*, 363 U.S. 144 (1960). In *Deveau*, union officials challenge the constitutionality of an act that prohibited anyone convicted of a felony to collect dues for the union unless that official has been subsequently pardoned or receives a special certificate of good conduct. *Id.* In a five to three decision, the court ruled that "the proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of felony." *Id.* at 160. In consequence, the court held that the act did not violate the prohibition against passing ex post facto laws. *Id.*

<sup>25</sup> *DPCA*, 171 Misc. 2d at 214, 654 N.Y.S.2d at 270.

<sup>26</sup> *DeVeau*, 363 U.S. at 160.

<sup>27</sup> *Id.*

exits.<sup>28</sup> Admonishing this, the *DPCA* court easily found that the Act's design was "remedial rather than punitive" in that the registration provided law enforcement with information that could be used to prevent sexual victimization.<sup>29</sup> Further, the court stated that registration would also help law enforcement "resolve incidents involving sexual abuse and exploitation promptly."<sup>30</sup> Consequently, the court held that petitioner's argument that the registration provision of the Act is unconstitutional was rejected.<sup>31</sup>

Next, petitioner claimed a denial of his due process rights<sup>32</sup> because his labeling as a level three sex offender was made "without any input from him and he had no right to confront witnesses, be represented by counsel, present evidence, or appeal the *DPCA*'s determination."<sup>33</sup> Admitting this issue to be one of first impression, the *DPCA* court cited to the United States Supreme Court case of *Mullane v. Central Hanover*.<sup>34</sup> In *Mullane*, the Court held that whenever a proceeding is to be accorded finality "notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" is required.<sup>35</sup> The *DPCA* court found constitutional sufficiency in that the statute provided notice of the impending classification,

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<sup>28</sup> *Id.* at 160.

<sup>29</sup> *DPCA*, 171 Misc. 2d at 214, 654 N.Y.S.2d at 271.

<sup>30</sup> *Id.* at 214, 654 N.Y.S.2d at 271.

<sup>31</sup> *Id.* at 216, 654 N.Y.S.2d at 272.

<sup>32</sup> See *supra* note 15 and accompanying text.

<sup>33</sup> *DPCA*, 171 Misc. 2d at 214, 654 N.Y.S.2d at 271.

<sup>34</sup> 339 U.S. 306 (1950). In *Mullane*, a New York statute was reviewed by the Supreme Court of the United States to determine if the notice provided by a Trust Co.'s publication in a local paper (as proscribed by the statute) was sufficient to afford interested beneficiaries due process of the law. *Id.* at 311. The publication announced the name and address of the Trust company, the name and date of the common fund's creation, and a list of all participating estates, trusts or funds. *Id.* at 310. The Court held that it was sufficient notice to beneficiaries whose address was unknown to the Trust company, but held as insufficient regarding parties whose address was known. *Id.* at 319. For these individuals the Court noted that notice by a direct mailing would be sufficient. *Id.* at 319.

<sup>35</sup> *Id.* at 314

the availability of an administrative review process, the availability of an Article 78 proceeding and a procedure for relief in the sentencing court.<sup>36</sup> Accordingly, it rejected the petitioner's claim of a deprivation of due process rights.<sup>37</sup>

Finally, the petitioner claimed that the Act deprived him of his equal protection rights guaranteed by the Federal Constitution because his risk assessment was made by the DPCA whereas sex offenders incarcerated at the time the statute took effect were assessed by the court.<sup>38</sup> The *DPCA* court rejected petitioner's claim and found that a rational basis existed for the statute's proscribing the task of risk assessment for sex offender's on parole to the DPCA.<sup>39</sup> The court agreed with the logic of the Act that the DPCA, already in a supervisory role for the paroled offender, is best suited to make a determination in the risk level of that individual.<sup>40</sup> The court recognized a great difference in those that are incarcerated and about to be freed and those already out on parole and reporting to an agency such as the *DPCA*.<sup>41</sup> In consequence they held a claim of equal protection violations must fail.<sup>42</sup>

In summary, the *DPCA* court applied federal law to find that the registration provision of the New York State Sex Offender's Act was non-punitive in nature and therefore did not pose any ex post facto problems.<sup>43</sup> The *DPCA* court also summarily dismissed the petitioner's due process and equal protection claims after finding that the act provided reasonable notice and an opportunity to protest the classification assessment and that a rational basis existed for distinguishing prisoners about to be released from prison and those already out and on parole.<sup>44</sup>

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<sup>36</sup> *DPCA*, 171 Misc. 2d at 215, 654 N.Y.S.2d at 271.

<sup>37</sup> *Id.*

<sup>38</sup> *DPCA*, 171 Misc. 2d at 215, 654 N.Y.S.2d at 271.

<sup>39</sup> *Id.* 654 N.Y.S.2d at 271.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 216-17, 654 N.Y.S.2d at 272.

<sup>43</sup> *Id.* at 214, 654 N.Y.S.2d at 271.

<sup>44</sup> *Id.* at 215, 654 N.Y.S.2d at 271.