GUIDO CALABRESI, *Circuit Judge*, concurring:

I join the court's opinion in full. I write separately simply to state my belief that our court was wrong in *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), and the Supreme Court equally wrong in *Smith v. Doe*, 538 U.S. 84 (2003). The notion that the Sex Offender Registration and Notification Act ("SORNA") and its equivalents are not punitive seems to me to be quite mistaken.

I cannot do better in stating why it is mistaken than to quote from the opinion by then-District Judge Chin, now presiding on this panel. Like me, he is bound by the decision of this court which reversed him, and by the Supreme Court in reviewing an analogous statute. But as far as I am concerned, his observations about the punitive nature of public notification requirements are still spot on.

Public notification of the type required by the New York State Sex Offender law and SORNA "is the modern-day equivalent of branding and shaming. . . . [T]oday's lawmakers—like their colonial counterparts—are counting on 'the invisible whip of public opinion' to deter the sex offender from future wrongdoing." *Doe v. Pataki*, 940 F. Supp. 603, 625 (S.D.N.Y. 1996), *rev'd*, 120 F.3d 1263 (2d Cir. 1997). Notification statutes also have "resulted in the banishment of sex offenders both literally and psychologically. Not only have sex offenders literally been forced to relocate to different towns and even different states, public notification has made it difficult if not impossible for them to reintegrate into society." *Id.* at 626. Such requirements increase punishment "simply because [they] increase[] the penalty—or suffering in right, person, or property—imposed on a sex offender for his crime." *Id.* Notification prevents "sex offenders from finding a home, getting a job, and reintegrating into society." *Id.* at 628. Moreover,

whatever one thinks of the goals, notification provisions in sex offender statutes do promote three of what many view as the traditional goals of punishment: deterrence, retribution, and incapacitation. *Id.* at 628–29; *see id.* at 629 ("The ostracism, public humiliation, and other harsh consequences that result from public notification certainly deter future criminal conduct. Moreover, public notification also serves the goal of retribution by giving the sex offenders what many believe they deserve. Finally, public notification has the effect of incapacitating sex offenders as it restricts their ability to reenter society and indeed results in their banishment from the community.").

As Judge Chin succinctly concluded, "one could argue, depending on the crime involved, that these sex offenders deserved this treatment. The question before the Court, however, is not whether they did, but whether the effect of public notification is to punish. Clearly, it is." *Id.* at 627 (citation omitted).

Beyond this case, I believe it to be a fundamental mistake to treat as nonpenal, and perhaps civil, any number of laws the effects of which exceed in severity those of many quite severe criminal laws. Treating deportation as civil—even though, as the Supreme Court has recognized, it often is tantamount to "banishment or exile"—is one egregious example. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). The rules governing habeas are another. Interestingly, the Supreme Court has indicated that certain limits derived from the Eighth Amendment should apply to civil forfeitures. *See Austin v. United States*, 509 U.S. 602 (1993). Analogously, the Court has put limits on tort damages that it deems punitive. *See Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding that a jury may not, consistent with due process, award punitive damages based upon its

desire to punish the defendant for harming persons who are not parties to the suit); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (holding that an award of $145 million in punitive damages on a $1 million compensatory verdict violated due process); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (holding that a $2 million punitive damages award was "grossly excessive" and therefore exceeded the constitutional limit).

For reasons well expressed by Judge Posner in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), and in the academic literature, not all extracompensatory damages should be treated as punitive. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003); Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, in Exploring Tort Law 333 (M. Stuart Madden ed., 2005); *see also generally Ciraolo v. City of New York*, 216 F.3d 236, 244 (2d Cir. 2000) (Calabresi, J., concurring).

But as Thomas Colby has explained, some extracompensatory damages indeed are punitive. *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 Yale L.J. 392 (2008). And one can sympathize with the Supreme Court's desire to impose constitutional limits in such instances. One only wishes that the Supreme Court applied analogous reasoning to situations in which those bearing the punitive effects were not large corporations but individuals without similar means.