

Sex Offender Registries and the Ex Post Facto Clause: an Exception or the New Rule?
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The history of the United States is peppered with moments when governmental vindictiveness (that bogeyman of the Ex Post Facto Clause) targeted at particular groups was particularly tempting, and the country's record in resisting these pressures is spotty. When society recognizes a virulent present epidemic, there may be an urge to administer the required medicine to all those who have ever harbored, even putatively, the infection.¹

INTRODUCTION

Jeff, a Nebraska resident, was convicted of possession of child pornography in 1997. He describes this period in his life as a distant memory and claims he has “completely turned [his] life around.” Jeff served jail time and successfully completed ten years of probation. After evaluations, doctors now consider him a low risk to reoffend. Jeff lived in anonymity until Nebraska’s sex offender laws changed on January 4, 2010. While the previous law made public only information about those offenders considered a “high risk” to reoffend, the new law requires information about all convicted sex offenders, including photo and address, to be placed online.

It did not take long for people to notice. “I have a friendly neighbor . . . and she calls me up and says people are passing your picture around the neighborhood,” Jeff explains. One night after the change in the law, Jeff came home to find threatening notes taped to his front door—the message was “move or suffer.” “A couple of other ones were really vulgar, talking about what people would like to do to me, removing body parts,” Jeff says. Others harassed his teenage children, “there's my picture [from] the Internet with a message that's too vulgar to say on TV of what this person wants to do to me because I'm a pedophile in their mind and it's taped to my son's truck.”²

Similarly, Ms. Whitaker, a Georgian resident, was convicted of performing oral sex on a minor in 1996. She was seventeen years old and her high school classmate was three weeks shy

¹ *Constitutional Law*, 117 HARV. L. REV. 268, 276-77 (2003).

² *Unjust and Ineffective*, ECONOMIST, Aug. 6, 2009, available at <http://www.economist.com/node/14164614>.

of his fifteenth birthday. In 1996, Georgia referred to oral sex as “sodomy” in the penal code.³ She finished her probation in 2002. However, as Georgia places sex offenders on a public registry, Ms Whitaker’s name, photograph, and address are easily accessible via an online database, along with the information that she was convicted of “sodomy.” Her name appears on a list described as containing those who have “been convicted of a criminal offence against a victim who is a minor or any dangerous sexual offence.” She “sees people whispering, and parents pulling their children indoors when she walks by.” In Georgia, registered sex offenders are barred from living within 1,000 feet of anywhere children congregate. As the church at the end of her street provides child-care, Ms. Whitaker was evicted from her home. A local news spot on sex offenders featured her, showing a map of her location and listing her as being convicted of sodomy.

Ms. Whitaker remains on the sex offender registry although, in fact, what she did is no longer a sex crime in Georgia. The states sodomy laws were struck down in 1998 and 2002. In 2006, Romeo and Juliet laws changed the classification of her offense. However, these new laws, unlike the sex offender registry, are not retroactive and Ms. Whitaker continues to suffer stigmatism and harassment.⁴

The aforementioned laws are a result of a public outrage against sex offenders. Beginning with a rash of child sex abuse cases in the 1980’s and 90’s, including the abduction and murder of Adam Walsh, a six-year-old boy who was taken from a Sears department store in 1981, the public has demanded more stringent laws in an effort to keep prior sex offenders from reoffending. These laws have increased in severity over time, requiring registration for additional offenses and mandating public notification. The most recent federal legislation is the Sex Offender Registration and Notification Act of 2006 (also known as Title I of the Adam Walsh Child

³ In 1996, Georgia law prohibited oral sex even as between married couples. *Id.*

⁴ *Unjust and Ineffective*, ECONOMIST, Aug. 6, 2009, available at <http://www.economist.com/node/14164614>.

Protection and Safety Act of 2006, hereinafter referred to as “SORNA”). SORNA encourages states to set up their own online registries by tying a portion of federal funding to their creation.

The news cycle continues in 2012, from Jerry Sandusky’s court hearings to the Miramont School district, which fired its entire staff after two teachers were accused of sex crimes, sex offenders continue to be the focus of community outrage. Currently, all fifty states have online sex offender registries. Some refer to our sex offender laws as the “strictest of any rich democracy.”⁵ In 2009, 674,000 individuals were on sex offender registries, more than the population of Vermont, Wyoming, or North Dakota.⁶

The goal of preventing vindictive legislation aimed at unpopular groups surfaced in the very first case to consider the Ex Post Facto Clause. In *Calder v. Bull*, Justice Chase, speaking on the history of ex post facto laws, stated, “[w]ith very few exceptions, the advocates of [ex post facto] laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any Ex Post Facto law.”⁷ Protection of unpopular groups, along with providing adequate notice, create the twin aims of the Clause.

However, in cases presenting Ex Post Facto challenges to SORNA and the promulgation of state laws under SORNA, courts have been silent with regard to these historical aims.⁸ The increasing deference to legislative intent, along with the absence the foundational guiding princi-

⁵ *America’s unjust sex laws*, THE ECONOMIST, Aug. 6, 2009, available at http://www.economist.com/node/14165460?story_id=14165460

⁶ *Id.*

⁷ *Calder v. Bull*, 3 U.S. 386, 389, 1 L. Ed. 648 (1798).

⁸ In 2012, in *United States v. Reynolds*, 132 S.Ct. 975 (2012) the Supreme Court held that SORNA, on its face, does not apply to pre-SORNA sex offenders who were not already otherwise required to register until the Attorney General promulgates a rule to the contrary. The Court remanded the case back to the Third Circuit to determine if the rule promulgated to this effect by the Attorney General in 2007 is valid. Therefore, since federal Ex Post Facto challenges only look to the face of the statute when making their determination, SORNA does not implicate the Ex Post Facto Clause, even though it continues to be applied retroactively according to the Attorney General’s rule. However, this does not alleviate concerns about the changing Ex Post Facto analysis, or retroactive state laws promulgated under SORNA.

ples of the clause, makes it impossible for advocates to show even the most severe SORNA-like legislation violates the Ex Post Facto Clause.

This note examines the constitutionality of the retroactive application of state laws promulgated under the federal framework. This note argues the courts' Ex Post Facto analysis of sex offender registration laws is flawed in two ways. First, when courts analyze sex offender registration laws under the Ex Post Facto Clause absent the historical aims, the multifactor test is performed in a vacuum, void of guidance, and becomes extremely subjective. This allows the outcome to be determined by the composition of the court and allows courts to be swayed by public opinion, precisely what the Ex Post Facto Clause was intended to protect unpopular groups from. Second, the courts' increased deference to the states' ability to create civil regulatory laws has made it nearly impossible for advocates to show that a "civil" law has a "criminal" purpose or effect. This enables states to circumvent an Ex Post Facto violation by labeling their laws "civil." This paper will also examine possible future influence as well as suggested solutions.

Part I will give a brief background of the Ex Post Facto Clause analysis, SORNA, and subsequent state sex offender registration laws. Part II will examine the "new" Ex Post Facto analysis under *Smith v. Doe* and other court holdings.⁹ Part III will discuss what this new analysis could mean, including discussion of how states can avoid constitutional challenges and possible future legislation. Finally, Part IV will look at potential solutions.

⁹ *Smith v. Doe*, 538 U.S. 84 (2003).

I. HISTORY OF THE EX POST FACTO CLAUSE & SEX OFFENDER REGISTRIES

A. The Ex Post Facto Clause

The ‘Ex Post Facto Clause’ states, “[n]o state shall . . . pass any . . . Ex Post Facto law.”¹⁰ The clause only applies to criminal sanctions and “assures that citizens are on notice of criminal statutes so that they can conform their conduct to the requirements of existing laws.”¹¹ As Blackstone stated, “it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.”¹² Thus, Ex Post Facto laws are unfair because they deprive individuals of notice of the wrongfulness of their behavior until after the fact.¹³ The Clause ensures that legislative acts “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”¹⁴ Such notice is vital in the context of criminal law where deprivations are greatest.¹⁵

The Supreme Court’s first interpretation of the Ex Post Facto Clause was in *Calder v. Bull*.¹⁶ Justice Chase described the specific categories encompassed within the clause as follows:

- 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the punishment, than the

¹⁰ U.S. CONST. ART. I, § 10, cl. 1. For a fuller discussion on early Ex Post Facto jurisprudence and the history of the clause see Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261 (1998). “The Framers highlighted their profound concern over ex post facto lawmaking by also prohibiting ex post facto laws by Congress. Concern over retroactive legislation is evident elsewhere in Article I, which also prohibits bills of attainder in two different sections.” *Id.* at 1275 n.88. See also U.S. CONST. ART. I, § 9, cl. 3 (as to Congress); art. I, § 10, cl. 1 (as to States).

¹¹ J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 GEO. MASON L. REV. 719, 721 (2011).

¹² 1 WILLIAM BLACKSTONE, COMMENTARIES *46.

¹³ Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1276 (1998).

¹⁴ *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

¹⁵ Logan, *supra* note 13, at 1276. “[F]air warning of that conduct that will give rise to criminal penalties is fundamental to our concept of constitutional liberty.” *Marks v. United States*, 430 U.S. 188, 191 (1977).

¹⁶ *Calder v. Bull*, 3 U.S. 386, 1 L. Ed. 648 (1798).

law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.¹⁷

In the past, the Supreme Court has focused on two major elements when deciding if a statute violates the Ex Post Facto Clause. First, the Court is guided by the overall purpose of the clause. Second, the Court looks to specific tests and factors developed over time.

1. *Historical Purpose of the Ex Post Facto Clause*

As noted in prior commentary, there were few Ex Post Facto cases in the first two hundred years after its enactment.¹⁸ However, when the Court did deal with Ex Post Facto Clause challenges, it identified two major purposes: “1) preventing ‘arbitrary and potentially vindictive legislation’” and 2) “providing notice to the general public that their actions have been criminalized prior to prosecution.”¹⁹

The goal of preventing vindictive legislation surfaced in the first case to consider the Ex Post Facto Clause. In *Calder v. Bull*, which contains the classic Supreme Court take on the clause, Justice Chase, speaking of the history of Ex Post Facto Laws, stated, “[w]ith very few exceptions, the advocates of [Ex Post Facto] laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any Ex Post Facto law.”²⁰ Additionally, in *Miller v. Florida*,²¹ the Court stated that the first historical purpose of the Clause, as derived from *Calder v. Bull*²² was to “assure that federal and

¹⁷ *Calder*, 3 U.S. 386, 390.

¹⁸ Corey Rayburn Yung, *The Disappearing Ex Post Facto Clause: From Substantive Bulwark to Procedural Nuisance*, 61 SYRACUSE L. REV. 447, 456 (2011).

¹⁹ *Id.* See also *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

²⁰ *Calder*, 3 U.S. 386, 389.

²¹ 482 U.S. 423, 429 (1987).

²² *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798).

state legislatures were restrained from enacting arbitrary or vindictive legislation . . . [and to] preventing legislative abuses.”²³

The second historical purpose, also derived from *Calder* and other early sources, is to “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”²⁴ This is essentially a notice requirement.²⁵ The two historical purposes of the Clause have traditionally been discussed in Court cases as a foundation or a framework for the specific Ex Post Facto analysis.²⁶

2. *Ex Post Facto* Factors and Test

Generally, the Ex Post Facto Clause prevents Federal or State legislatures from enacting any law “which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.”²⁷ Therefore, the Court has stated that in order for a criminal law to violate the Ex Post Facto Clause it must “be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.”²⁸

However, it is not always clear whether a law has criminal or civil implications. The court employs a two-part test, what has been called the “intent-effects test,” in order to make this determination.²⁹ According to this test, the court “must initially ascertain whether the legislature meant the statute to establish ‘civil’ proceedings.”³⁰ This inquiry determines whether the legisla-

²³ 482 U.S. 423, 429 (1987).

²⁴ *Id.* (quoting *Weaver*, 450 U.S. at 28-29).

²⁵ *Id.*

²⁶ *See, e.g.*, *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915); *Kring v. Missouri*, 107 U.S., at 229; *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L.Ed. 162 (1810)

²⁷ *Weaver*, 450 U.S. at 28 (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867)).

²⁸ *Id.* at 29.

²⁹ “The categorization of a particular proceeding as civil or criminal ‘is first of all a question of statutory construction.’” *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *Allen*, 478 U.S., at 368).

³⁰ *Id.* at 361.

ture either “expressly or impliedly” desired the statute to carry a criminal or a civil label.³¹ If a court determines that the legislature wanted the statute to carry a criminal label, then they need not proceed any further and all applicable Constitutional protections will apply. If, however, the court finds that the legislature intended the regulation to be civil, it must then determine whether “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention” to deem it “civil.”³²

In order to make this determination, the court uses a multi-factor test, including:

whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.³³

Each factors is relevant to the inquiry, and as the Court noted they “may often point in differing directions.”³⁴ In the past, the Court advised that no one factor is dispositive and that this may not be an exclusive list of considerations.³⁵ Additionally, a court will only look at the face of the law, not its enforcement, to see if the Ex Post Facto Clause is implicated. Finally, the Court stated that the legislature’s express or implied intent that the statute be civil in nature will be overcome only by the “clearest proof” that the statute is actually punitive.³⁶ However, as subsequent sections will describe, as the courts have dropped the twin historical aims, the multi factor test is left without a framework or foundation. Additionally, the “clearest proof” has thus far been an impossible standard to meet in federal courts.

³¹ Ward, 488 U.S. at 248.

³² *Id.* See also United States v. Ward, 448 U.S. 242, 248-49 (1980).

³³ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

³⁴ *Id.*

³⁵ Ward, 488 at 249 (stating that these factors are neither “exclusive nor dispositive”).

³⁶ Ward, 448 U.S. at 248-49; Hendricks, 521 U.S. at 361.

B. Federal and Sex Offender Registry Laws

The very first sex offender registries started in the states. They became widespread in the 1980's and 1990's.³⁷ Public notification of sex offender release and whereabouts continued in 1996 when the federal government adopted a version of 'Megan's Law.'³⁸ SORNA, passed in 2006, is the current federal registration scheme.³⁹

1. *History of State and Federal Sex Offender Legislation*

In 1994 Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Jacob Wetterling Act").⁴⁰ The Jacob Wetterling Act established the first federal guidelines for states to track sex offenders, requiring annual or quarterly reporting if the sex offender was convicted of a violent crime.⁴¹ Additionally, during the 1990's, every state and the District of Columbia passed what is commonly referred to as a 'Megan's Law.'⁴² This is short hand for a law that requires sex offenders to register with the state. In January of 1996, Congress enacted a federal version of Megan's Law that 1) provided for the public dissemination of information from individual states' registries and 2) allowed information collected under state registration schemes to be disclosed for any purpose permitted under a state law.⁴³

³⁷ *Legislative History*, SMART, <http://www.ojp.usdoj.gov/smart/legislation.htm> (last visited May 9, 2012).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Jacob Wetterling, after whom the act was named, was an eleven-year-old boy who was abducted at gunpoint in 1989 while cycling with two friends. See *Jacobs Story*, JACOB WETTERLING RESOURCE CENTER, <http://www.jwrc.org> (last visited May 9, 2012).

⁴¹ *Legislative History*, SMART, <http://www.ojp.usdoj.gov/smart/legislation.htm> (last visited May 9, 2012).

⁴² *Id.*

⁴³ *Legislative History*, SMART, <http://www.ojp.usdoj.gov/smart/legislation.htm> (last visited May 9, 2012). It is important to note that at this time, most states allow dissemination of all information collected via sex offender registries to be shared with the public "for any reason." Also in 1996, Congress passed the Pam Lyncher Sex Offender Tracking and Identification Act. This required the "Attorney General to establish a national database (the National Sex Offender Registry or 'NSOR') by which the FBI could track certain sex offenders. The law also: Mandated certain sex offenders living in a state without a minimally sufficient sex offender registry program to register with the FBI. Required the FBI to periodically verify the addresses of the sex offenders to whom the Act pertains. Allowed for the dissemination of information collected by the FBI necessary to protect the public to federal, state and local officials responsible for law enforcement activities or for running background checks

The Jacob Wetterling Act was amended in 1998 to allow victims' rights' advocates a greater impact on whether a sex offender was labeled "violent" for purposes of the Act.⁴⁴ It also allowed states to require registration for offenses not listed in the Act and required the Bureau of Prisons to notify states when federal offenders were released or paroled.⁴⁵ In 2000, Congress passed the Campus Sex Crimes Prevention Act, which required any person who was otherwise required to register under state law to notify any higher education institution where the person worked or attended of his or her status as a sex offender.⁴⁶ It also required those institutions to report this information to local law enforcement and to keep track of it as a part of their campus crime statistics.⁴⁷ This further restricted the movements of many offenders and also placed additional stigma on institutions that allowed them to attend.

Finally, in 2003 Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act.⁴⁸ This law required states to create and maintain a website with registry information, and created a federal website, run by the Department of Justice, with links to each state site.⁴⁹ Overall, as a part of their 'civil' regulatory schemes, these statutes continued to add additional requirements to previously convicted sex offenders analogous to those of a present criminal sentence. For example, many reporting requirements, such as those mandating that an offender update his or her address, vehicle, and employment information

pursuant to the National Child Protection Act (42 U.S.C. §5119, *et. seq.*). *Id.* The Act also "[s]et forth provisions relating to notification of the FBI and state agencies when a certain sex offender moved to another state." *Id.* Like the driving influence for the all of the previous legislation, Pam Lyncher was a victim of a sexual assault. <http://www.jfa.net/lychner/Pam.html>. She became a victims' rights advocate when she was notified that the man who assaulted her was eligible for early release. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ In 1998 Congress passed the Protection of Children from Sexual Predators Act. This Act: "Directed the Bureau of Justice Assistance (BJA) to carry out the Sex Offender Management Assistance (SOMA) program to help eligible states comply with registration requirements" and "[p]rohibited federal funding to programs that gave federal prisoners access to the internet without supervision." *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

on a quarterly basis, are analogous to those required for persons on probation or parole.⁵⁰ Additionally, the websites are reminiscent of public shaming punishments used during colonial times. A website listing a persons name and mugshot under the heading of “Convicted Sex Offender” is not unlike the criminal punishment of placing a person in the stocks.

2. SORNA and Current State Requirements

In 2006, Congress passed The Adam Walsh Child Protection and Safety Act.⁵¹ The Sex Offender Registration and Notification Act (SORNA) is found in Title I. SORNA makes the previous laws stronger in several ways. First, it “expanded the number of sex offenses that must be captured by registration jurisdictions to include all State, Territory, Tribal, Federal, and UCMJ sex offense convictions, as well as certain foreign convictions.”⁵² SORNA also makes it a federal crime for sex-offenders to travel interstate without registering, and makes it a federal offense for sex offenders convicted under federal law to travel intrastate without registering.⁵³ Finally, it further encourages states to set up their own online registries by tying a certain portion of federal funding to website creation.⁵⁴

In 2012, in *United States v. Reynolds*,⁵⁵ the Supreme Court held that SORNA, on its face, does not apply to pre-SORNA sex offenders who were not already otherwise required to register until the Attorney General promulgates a rule to the contrary. The Court remanded the case back

⁵⁰ *Smith v. Doe*, 538 U.S. 84, 90 (2003).

⁵¹ As previously mentioned, this Act was named after Adam Walsh, a six-year-old boy who was abducted and murdered in 1981. http://www.msnbc.msn.com/id/28257294/ns/us_news-crime_and_courts/t/police-killing-adam-walsh-solved/#.T3nP5hww03U. The story is recited often in the media, but is equally tragic with each telling. Fishermen found the boys head two weeks after the abduction, but his body was never found. *Id.* In response to this tragic event, John Walsh, Adam’s father, became a victims’ rights’ advocate. *Id.* He is the host of America’s Most Wanted, and has written three books about his experience. *Id.* The Adam Walsh Child Protection Act was signed by George W. Bush on the twenty-fifth anniversary of Adam’s disappearance. *Id.* SORNA’s declaration of purpose recites the story of Adam Walsh, Jacob Wetterling, Pam Lyncher, and Megan Kanka, to name a few. 42 U.S.C. 16901 § 102 (2006).

⁵² *Legislative History*, SMART, <http://www.ojp.usdoj.gov/smart/legislation.htm> (last visited May 9, 2012).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *United States v. Reynolds*, 132 S.Ct. 975 (2012).

to the Third Circuit to determine if the rule promulgated to this effect by the Attorney General in 2007 is valid.⁵⁶ Therefore, since federal Ex Post Facto challenges only look to the face of the statute, SORNA does not implicate the Ex Post Facto Clause even though it may continue to be applied retroactively according to the Attorney General's rule. However, as most if not all state laws promulgated under SORNA are retroactive on their face, this does not alleviate concerns about the changing Ex Post Facto analysis, or retroactive state laws promulgated under SORNA.

The Attorney General has stressed that the SORNA requirements are meant to be a floor, not a ceiling. Most states employ additional restrictions and publish more information on their websites than required. For example, in Michigan you can search the sex offender registry by first name, last name, estimated age, zip code, city, or county, or search for offenders within a certain radius.⁵⁷ Examples of additional restrictions include residency and working restrictions on convicted offenders. Recently, New York has banned convicted offenders from Internet gaming sites. Restrictions such as these are present in most states. Many states also publish the information by handing out flyers in neighborhoods where sex offenders are locating after leaving prison or jail, and many state websites contain a quick print button, where site visitors can print a "mugshot" and fact sheet on any offender. Many states now also publish information concerning any email addresses or online user names a convicted sex offender may use or plan to use. Most, if not all state and federal laws are applied retrospectively, including SORNA, and offenders who committed crimes before enactment of these laws are nevertheless required to register and have information published online.

The stories of Adam Walsh and Jacob Wetterling, along with others mentioned, are no doubt terrible tragedies. These laws are a response to the extremely negative feelings people

⁵⁶ *Id.*

⁵⁷ *Michigan Public Sex Offender Registry*, MICHIGAN STATE POLICE WEBSITE, http://www.mipsor.state.mi.us/PSOR_Search.aspx (last visited May 9, 2012).

have about these terrible sex crimes and their perpetrators, and this paper in no way suggests that negative feelings are not warranted in response to such actions. However, traditionally, the Ex Post Facto Clause was utilized to protect persons who may become subject to overreaching retrospective state action because of “feelings of the moment.”⁵⁸

II. ANALYSIS: SEX OFFENDER REGISTRIES AND THE EX POST FACTO CLAUSE

As previously stated, almost every circuit and the Supreme Court have found that sex offender registration laws do not violate the Ex Post Facto Clause. However, this section concludes that the Court made an unannounced shift in Ex Post Facto Clause jurisprudence with these decisions, one that allows states and the federal government to enact ‘civil’ schemes impossible to overcome with the “clearest proof.” This shift came in three areas: 1) the Court moved away from the historical purpose of the Ex Post Facto Clause 2) the “clearest proof” portion of the test has become almost insurmountable and 3) inaction may now suffice for a continuing criminal act, thereby allowing states and the federal government to legislate retrospectively.

A. Movement Away from the Historical Purpose of the Ex Post Facto Clause

While never a portion of the Ex Post Facto “test,” the recitation of these historical purposes traditionally set forth the foundation or structure for the Court’s analysis. Therefore, the historical purposes were important in framing the Court’s thinking about the Ex Post Facto Clause, and would provide an important reference point in discussing the outcome of various factors.

There have been many Ex Post Facto Clause challenges to state sex offender registries, retrospective changes to laws regarding sex offenses, and SORNA, most of which have been unsuccessful. The following sub sections will discuss several Supreme Court and appellate court cases dealing with sex offender laws and the Ex Post Facto Clause.

⁵⁸ Fletcher v. Peck, 10 U.S. (1 Cranch) 87, 137-38 (1810).

1. *Smith v. Doe*⁵⁹ & *Stogner v. California*:⁶⁰ *Same Court, Different Outcomes*

In 2003 the Court ruled on two cases concerning sex offender laws and the Ex Post Facto Clause. The juxtaposition of these cases demonstrates a tension in the Court and highlights the difference in the Ex Post Facto analysis absent the historical factors. It is also revealing to look at the members of the majority and minority when analyzing these holdings and predicting future Court decisions. Finally, it is important to remember that the Ex Post Facto Clause only prevents retroactive laws that are criminal in nature. The point, however, is that several provisions in current sex offender registration laws cross the line from civil to criminal and thus their retroactive application is violative of the Clause. This becomes especially clear in light of the vindictive purpose and animosity behind the laws.

a. Smith v. Doe

In *Smith v. Doe* sex offenders convicted prior to the passage of the Alaska Sex Offender Registration Act (ASORA) challenged the act under § 1983 as a violation of the Ex Post Facto Clause.⁶¹ ASORA is very similar to SORNA and other state laws in that it requires an offender to report his or her “name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history.”⁶² Much of the information is public, including “the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance

⁵⁹ *Smith v. Doe*, 538 U.S. 84 (2003).

⁶⁰ *Id.*

⁶¹ *Stogner v. California*, 539 U.S. 607 (2003).

⁶² *Smith*, 538 U.S. at 90. See also ALASKA STAT §§ 12.63.010(b)(1) (2000).

with [the update] requirements . . . or cannot be located.”⁶³ While ASORA did not specify the means by which the registry information was to be shared with the public, Alaska, like all states today, chose to make the information available on the Internet.⁶⁴

Ultimately, the Supreme Court held that ASORA did not violate the Ex Post Facto Clause.⁶⁵ The Court made no mention of the historical aim of protecting unpopular groups anywhere in the opinion, but instead began its analysis by stating the aforementioned Ex Post Facto tests. In the Court’s analysis, it found that 1) the legislature intended ASORA to be non-punitive and that none of the seven factors articulated in *Martinez-Mendoza* were in favor of finding the law punitive in nature, in other words, the respondents failed to show that ASORA’s effect was punitive by the “clearest proof.”⁶⁶

First, the Court found that sex-offender laws are of recent origin, suggesting they are not punitive in nature, or at least not traditionally punitive.⁶⁷ Respondents argued that ASORA was analogous to public shaming laws, which are punitive in nature. The Court agreed that the Respondents may suffer social ostracism but concluded, “[i]n contrast to the colonial shaming punishments . . . the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.”⁶⁸ Despite the Courts conclusions, this is not automatically clear considering the language used on the ASORA website and on state websites today. Placing a convicted offender’s name, address, car, and place of employment under a sometimes flashing heading of “Convicted Sex Offender” does seem to suggest shaming is integral to the legislative

⁶³ § 18.65.087(b). *See also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

⁶⁴ Smith, 538 U.S. at 91.

⁶⁵ *Id.* at 97.

⁶⁶ The Court limited the scope of its inquiry to five of the seven factors stating, “[t]he factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.” *Id.*

⁶⁷ *Id.* at 98.

⁶⁸ *Id.*

scheme. Additionally, on the aforementioned websites, states do not list the offender's crime with any detail. Thus, the websites are not tools the public can use for making educated decisions about the dangerousness of any one individual, but a place to see which of their neighbors was once convicted of a sex crime. This is very similar to public shaming, and thus a criminal punishment.

It also seems that the Court was focused on the stated *purpose* of the law, not the *effect* of the law when it made this determination. Traditionally, the seven *Martinez-Mendoza* factors were supposed to be used to determine the purpose of the law, and this was aided by framing the factors within the twin historical aims of the Clause. However, as the Court's analysis was done without this context, the outcome of the factors was determined by the law's stated purpose.

Next, the Court found that ASORA did not create any affirmative disability or restraint on offenders.⁶⁹ This, the Court stated, was because offenders were not required to register in person by the language of the Act (although the state had interpreted it in this way), and because any employment or housing troubles could not be proven as a result of the act, because the criminal conviction was already public record.⁷⁰

In this way, ASORA was different than most state laws promulgated under SORNA, which now contain several express restraints on sex offenders including living, working, and loitering, and require reporting in person. This is also an excellent example of how the purpose of the Clause—protecting unpopular individuals from vindictive legislation—can guide the Court where the laws stated purpose is “civil” but the effect is “criminal.” There is no data showing

⁶⁹ It is important to note that many, if not all, states do now impose living, working, and social restraints on sex offenders. These often include requiring sex offenders to live a certain distance from any place children would gather, requiring that sex offenders not be allowed to work with children, and making it a crime for a sex offender to “loiter” in a school zone. It is unclear how the Court would view these restrictions. SORNA does not contain any requirements for residential or working restrictions, although after the comment period the Attorney General stressed that SORNA is intended to be a “floor not a ceiling” for state sex offender registry laws. *Legislative History*, SMART, <http://www.ojp.usdoj.gov/smart/legislation.htm> (last visited May 9, 2012).

⁷⁰ Smith, 538 U.S. at 91.

that such restrictions on reporting, living, or working actually serve the legitimate state regulatory goal of protecting the public. In fact, often times this can create a more dangerous situation, where portions of cities, due to living restrictions, contain a dense population of prior offenders. Looking at the outrage at the group as a whole, this has more to do with “not in my back yard” syndrome than with any legitimate state objective. It is by considering the purpose of the Clause, and looking at the effects of the legislation, that it becomes clear that certain portions of these laws are criminal in nature and therefore violate the Ex Post Facto Clause.

Third, even the state conceded that the statute may deter future crimes, and thus the law served one of the traditional aims of punishment, and Respondents argued that this was a factor in favor of finding the law punitive.⁷¹ However, the Court stated that “[a]ny number of governmental programs might deter crime without imposing punishment.”⁷² As for the fourth factor, the Court stated “[t]he Act's rational connection to a nonpunitive purpose is a ‘[m]ost significant’ factor in our determination that the statute's effects are not punitive.” However, the Court seemed willing to accept any rational basis, including ones the court imagined may have been the driving force behind ASORA.⁷³ The court did not require, as Respondents suggested, that the statute be more narrowly drawn to meet that purpose.⁷⁴ Again, with the absence of the historical aim of protecting unpopular individuals from vindictive legislation, these factors could be determined with a great amount of subjectivity and a blind eye to the social emotions towards sex offenders as a group in conjunction with the law’s criminal consequence.

⁷¹ *Id.*

⁷² *Id.* at 102.

⁷³ “Alaska *could* conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism.” *Id.* at 103 (emphasis added).

⁷⁴ *Id.* at 104.

Finally the Court found that ASORA was not excessive.⁷⁵ Studies that showed persons may reoffend as late as twenty years following release justified lifetime reporting requirements.⁷⁶ However, if a person was convicted at eighteen, they may be on the registry for some fifty, sixty, or seventy years. This does not suggest why it would be reasonable for a person to report for such a long time, and would likely be considered had the Court included the historical framework of protecting unpopular individuals in its analysis.⁷⁷ The excessiveness, therefore, shows that the law was motivated at least in part by a desire to punish. Keeping offenders on the registries longer than necessary 1) burns up the states valuable law enforcement resources and drains funds through administrative expenses and 2) unduly harasses the offenders. There is no legitimate state purpose in keeping offenders on the registries forty or fifty years after the original offense. No studies support this state action.

Three Justices dissented and two concurred in the result.⁷⁸ Kennedy, joined by Rehnquist, O'Connor and Scalia joined in the Court's opinion. Thomas concurred and formed the fifth vote for the majority opinion. In his concurrence, Justice Thomas argued that Ex Post Facto analysis of a statute is limited to the face of the statute.⁷⁹ Therefore, he argued, any reference to Internet registration or other provisions that were the result of the statutory interpretation was out of place.⁸⁰ Alaska delegated many details of the law to state agencies, and only the face of the legislation, not their interpretations, was subject to Ex Post Facto Analysis. This, unfortunately, means that states, in order to avoid violating the Ex Post Facto Clause can delegate interpretation to state agencies, which are not considered even if punitive in effect.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 103.

⁷⁸ *Id.* at 106.

⁷⁹ *Id.*

⁸⁰ *Id.*

Justice Souter concurred in the result only, stating that, to him, this was a much closer case.⁸¹ He pointed out that ASORA does not specify whether it is civil or criminal in nature and portions of the statute are found in the penal law.⁸² He also mentioned the lost first factor, stating that while the regulatory purpose should be afforded weight, it would be “it would be naive to look no further, given pervasive attitudes toward sex offenders” since the “Ex Post Facto Clause was meant to prevent ‘arbitrary and potentially vindictive legislation.’”⁸³ What tipped the scale for Justice Souter, in a case where he saw the punitive factors as roughly equal to the civil factors, was the presumption of constitutionality afforded to state laws. This paper will later discuss what will be termed the “Souter Approach.” By looking at the twin historical aims of the Ex Post Facto Clause, it is quite likely that many state laws promulgated under SORNA would be unconstitutional using the Souter analysis.

The three dissenters, Justices Stevens, Ginsberg and Breyer each found that the punitive effect of the law outweighed any civil purpose.

*b. Stogner v. California*⁸⁴

In 1993, California enacted a criminal statute permitting prosecution for sex-related child abuse where the prior limitations period had expired if the new prosecution began within one year of a victim’s report to police. In 1998, Stogner was indicted for sex-related child abuse committed between 1955 and 1973. At the time those crimes were allegedly committed, the limitations period was three years. Stogner argued that the new law violated the Ex Post Facto

⁸¹ *Id.* at 107-08

⁸² “The Act does not expressly designate the requirements imposed as ‘civil,’ a fact that itself makes this different from our past cases, which have relied heavily on the legislature’s stated label in finding a civil intent. *Id.*”

⁸³ *Id.* at 108-09 (quoting Weaver, 450 U.S. at 29). Justice Souter also found that the statute imposed a substantial burden. “While the Court accepts the State’s explanation that the Act simply makes public information available in a new way, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.” *Id.* at 109.

⁸⁴ *Stogner v. California*, 539 U.S. 607 (2003).

Clause, as it forbids revival of a previously time-barred prosecution. The Supreme Court agreed.⁸⁵

In contrast to *Smith*, in *Stogner* the Court began its analysis with an elongated explanation of the twin historical aims of the Ex Post Facto Clause. The Court stated, “[f]irst, the new statute threatens the kinds of harm that, in this Court’s view, the Ex Post Facto Clause seeks to avoid. Long ago Justice Chase pointed out that the Clause protects liberty by preventing governments from enacting statutes with ‘manifestly unjust and oppressive’ retroactive effects.”⁸⁶ The Court continued, “a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both ‘arbitrary and potentially vindictive legislation,’ and erosion of the separation of powers” and also the potential for “‘violent acts which might grow out of the feelings of the moment.’”⁸⁷

To be certain, *Stogner* differs from *Smith* in that it deals with an expressly criminal provision, not a law that is arguably civil in nature. However, this distinction should only change the application of the law, as in what test to apply, not the foundation or framework in which to apply the test. Nevertheless, as these two cases show, when analyzing sex offender registry legislation the Court omits this portion of the analysis.

It is also important to note that Justice Kennedy dissented and filed opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. These are the same members of the Court that helped to form the majority opinion in *Smith*. In their dissent, stated of the foundational factors, “[w]hile the principle of unfairness helps explain and shape the Clause’s scope, it is not a doctrine unto itself, invalidating laws under the Ex Post Facto Clause by its own

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

force.”⁸⁸ Overall, the majority of the Court did not disagree on this point. However, when compared to *Smith*’s majority and dissent, it is clear that the majority in *Stogner* did use the historical purpose of the Clause as a lens by which to discern the purpose and effect of legislation, even when a state claims to the contrary.

2. *Analysis in a Vacuum: Following Smith and Stogner*

It is interesting, in dealing with an Ex Post Facto challenge to legislation that targets a very unpopular group, the Court would abandon even the recitation of the first historical factor. These factors were mentioned in Respondent’s Brief and in Amicus Briefs in support of the Respondent, as well as in *Stogner* during the same term; therefore, it was not that the Court was unaware of their prior significance.⁸⁹

It could be argued that the Court would reach the same conclusion regardless of lip service given to the historical factors. In many of the cases where the historical factors were recited, the Court nevertheless found that the law did not violate the Ex Post Facto Clause. They are certainly not dispositive, but do create a frame for application of the factors and tests. Additionally, protecting public safety *is* a legitimate state regulatory goal. Requiring registration of convicted offenders who pose a danger to the public is well within the states power. However, state laws under SORNA go much further than that.

With no overall purpose or history to consider, it is easy to see how a multifactor test, where a rational relationship to a legitimate state goal is the most important factor, could be skewed to suit any popular cause of the day.⁹⁰ For example, consider the most important factor,

⁸⁸ Id. at 637. quoting Carmell, at 533, n. 23, 120 S.Ct. 1620.

⁸⁹ They were also mentioned in Justice Souter’s concurring opinion.

⁹⁰ The factors include: Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.⁹⁰

whether the regulation serves an alternative legitimate regulatory purpose. When considered only in light of the assumed state purpose of protecting citizens against prior sex offenders, it may be unclear whether residency restrictions or posting information electronically is necessarily punitive. However, as Justice Souter stated in his concurrence, “[e]nsuring public safety is, of course, a fundamental regulatory goal, and this objective should be given serious weight in the analyses. But, at the same time, it would be naive to look no further, given pervasive attitudes toward sex offenders.” The historical goal of protecting individuals from the effects of public whims of the day would bring this factor into sharper focus and force the Court to look outside of the text of the legislation in order to discern its true purpose and effect.

For another example, consider the seventh *Martinez-Mendoza* factor, whether the legislation seems excessive in relation to the goal. Absent any historical context, it may seem reasonable not to require narrow tailoring in excess of statutory requirements, after all, SORNA and subsequent sex offender registries require a conviction of a sex offense before placing someone on the list. In *Smith v. Doe* the Court came to a similar conclusion. However, mindful of the historic purpose of the Ex Post Facto Clause and public outrage against sex offenders, it may seem more vindictive to require lifetime registration or listing on a public registry under the title of ‘Convicted Sex Offender.’

This is especially so when considering the extent of state laws promulgated under SORNA. For example, wide breadths of offenders are caught up in the laws. Even offenders who are verified by doctors or specialists as no longer being a danger are not removed, nor can they petition for removal. This is not in line with a regulatory scheme that has a singular goal of protecting the public. If experts testify that certain individuals are no longer dangerous, there is no public good in keeping them on the list. Additionally, as previously mentioned, there is a lack of

evidence that residency or working restrictions contained in most legislation promulgated under SORNA actually does anything to help recidivism rates or public safety— in fact these very restrictions can create dangerous situations where prior offenders are clumped together. This was particularly so in Miami Dade County. There living restrictions were such that over eighty sex offenders were forced to live under a bridge for a period of time because there was no place in the county where they could legally live under the sex offender laws.⁹¹ Furthermore, sex offenders are faced with lifetime reporting restrictions analogous to probation or parole. Finally, as mentioned above, the similarity between the websites and public shaming, which was punitive, should not be overlooked.

The aforementioned facts in conjunction with the documented punitive effects of the law—ostracism, evictions, harassment, violence, intrusiveness, and restricted movement—strongly suggest something more than “civil regulation” is going on.⁹² As Justice Souter stated in his Smith concurrence,

While the Court accepts the State's explanation that the Act simply makes public information available in a new way, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.⁹³

The historical aim of the Clause draws attention to these results.

⁹¹ Greg Allen, *Sex Offenders Forced to Live Under Bridge*, NPR (May 20, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=104150499>.

⁹² *Unjust and Ineffective*, ECONOMIST, Aug. 6, 2009, available at <http://www.economist.com/node/14164614>.

⁹³ Smith, 538 U.S. at 109.

3. *Subsequent Appellate Court Decisions*

Federal appellate court cases dealing with Ex Post Facto challenges to SORNA have been equally void of these factors.⁹⁴ Many are simply conclusory in their analysis. Consider, for example *United States v. Young*, in which the Fifth Circuit stated, “[w]ith SORNA, Congress expressly sought to ‘establish[] a comprehensive national system for the registration of [sex] offenders’ in order ‘to protect the public from sex offenders and offenders against children.’ This express language indicates that Congress sought to create a civil remedy. Therefore, *Young* must present the ‘clearest proof’ that either the purpose or the effect of the regulation is in fact so punitive as to negate its civil intent. This he cannot do.”⁹⁵ The Seventh Circuit, in *United States v. Dixon*, dismissed the issue in a similar fashion stating, “*Dixon* does not, and in light of *Smith v.*

⁹⁴ The Ninth Circuit, in *United States v. Juvenile Male*, 590 F.3d 924, 938 (9th Cir. 2010) cert. granted, judgment vacated, 131 S. Ct. 2860, 180 L. Ed. 2d 811 (U.S. 2011), did consider these factors, as stated below. However, this case was vacated. “As we do so, we are aware both of the Supreme Court’s decision in *Doe*, and of the inflamed public sentiment against sex offenders that served as the historical backdrop for SORNA’s passage. Justice Souter, concurring in *Doe*, saw the question of Alaska’s legislative intent as a close one. He explained: It would be naive to look no further [than to the regulatory goal of public safety], given pervasive attitudes toward sex offenders. The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law’s stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones. SORNA’s legislative history suggests that precisely such a retributive aim contributed to its passage—and more overtly than in the “close case” of *Doe*. Unlike Alaska’s statute, which contained no legislative purpose statement and was passed pursuant to legislative findings that focused solely on public safety, SORNA’s legislative purpose statement reveals an additional goal: to respond to the heinous crimes committed by sex offenders. SORNA was enacted “[i]n order to protect the public from sex offenders and offenders against children, and *in response to the vicious attacks by violent predators against the victims listed below*” The statute subsequently lists seventeen individual victims and details the crimes that were committed against them, strongly suggesting that the motivation behind SORNA’s passage was not only to protect public safety in the future but also to “revisit past crimes.” Senator Grassley’s floor statement similarly reflects a retributive sentiment that colored the legislative proceedings: “Child sex offenders are the most heinous of all criminals. I can honestly tell you that I would just as soon lock up all the child molesters and child pornography makers and murderers in this country and throw away the key.” The purpose of the Ex Post Facto Clause is to prevent the passage of “potentially vindictive legislation.” SORNA’s legislative text and history contain substantial warning signs that its aim, while principally regulatory, to be sure, is also in some measure punitive.” *Id.*

⁹⁵ *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009).

Doe, could not successfully, challenge the registration requirement itself as an Ex Post Facto law. The requirement is regulatory rather than punitive.”⁹⁶

It is probable that the attorneys in these cases, who raised several issues on appeal, did not carefully craft or focus on their Ex Post Facto analysis, and the Fifth Circuit stated as much in *Young*.⁹⁷ As SORNA, and post SORNA state legislation, contains additional requirements not present in ASORA, such as the requirement that individuals report in person to update the registry, it is not automatically clear that the analysis would or should be the same. It is also possible that these courts saw the “clearest proof” as an impossible burden to overcome in light of *Smith v. Doe*.

4. *A High Burden To Bear: Showing “Clearest Proof”*

In light of the recent trend of cases increasing the “clearest proof” burden when considering whether legislation that is expressly or implicitly civil has a punitive effect, it is unclear what a defendant would have to show in order to reach this burden. Initially case history suggested that the Court intended a lighter touch when applying the “clearest proof” standard. However, after *Smith v. Doe*, appellate courts have treated a legislative statement of a civil purpose as dispositive. The Supreme Court has not taken up this issue since *Smith*, so it is unclear whether or not new state laws promulgated under SORNA would meet this burden.

B. Inaction as Continuing Criminal Action

As at least one scholar has already pointed out, the Seventh Circuit along with a dissent in *Carr v. United States* may have announced an expansion of what it means to commit a continuing offense.⁹⁸ This would have the effect of taking failure to register according to laws such as

⁹⁶ *United States v. Dixon*, 551 F.3d 578, 584 (7th Cir. 2008) rev'd and remanded sub nom. *Carr v. United States*, 130 S. Ct. 2229, 176 L. Ed. 2d 1152 (U.S. 2010).

⁹⁷ *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009).

⁹⁸ Corey Rayburn Yung, *The Disappearing Ex Post Facto Clause: From Substantive Bulwark to Procedural Nuisance*, 61 SYRACUSE L. REV. 447, 451 (2011).

SORNA out of the realm of the Ex Post Facto Clause by labeling it as a continuing offense. While it is not clear that this will be expanded or picked up by other circuits or by a majority of the Supreme Court, it would greatly change the analysis. This is discussed briefly below.

1. *Carr v. United States*⁹⁹

In *Carr v. United States*, the Court held that both interstate travel and failure to register must happen after the imposition of SORNA.¹⁰⁰ This was the argument set forth by Carr, and therefore the Court did not reach the merits of whether SORNA violated the Ex Post Facto Clause.¹⁰¹ However, the Seventh Circuit treatment of the Ex Post Facto Clause, as affirmed by the dissent, warrants review.

Judge Posner, writing for the Seventh Circuit panel, rejected defendant's claim that the Ex Post Facto Clause was violated when he was prosecuted for failure to register.¹⁰² Judge Posner asserted what amounts to a new rule stating, "as long as at least one of the acts took place [after the enactment of the statute], the clause does not apply."¹⁰³ Thus, the Court found that even though "elements of [the defendant's] crime occurred before the Sex Offender Registration and Notification Act was made applicable to him [that] does not make the application of the Act to his failure to register violate the Ex Post Facto clause."¹⁰⁴ Therefore, the Seventh Circuit held

⁹⁹ *Carr v. United States*, 130 S.Ct. 2229 (2010).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *United States v. Dixon (Carr I)*, 551 F.3d 578 (7th Cir. 2008), rev'd and remanded, 130 S. Ct. 2229 (2010). Carr's case was consolidated with another similar case on Appeal.

¹⁰³ *Id.* at 584-85. The Court made this statement when discussing Dixon's case, but since SORNA as applied to Dixon was found to violate the Ex Post Facto Clause, it is clear that the court was addressing Carr at this point. See also Corey Rayburn Yung, *The Disappearing Ex Post Facto Clause: From Substantive Bulwark to Procedural Nuisance*, 61 SYRACUSE L. REV. 447, 456 (2011) for a more expansive treatment of this case.

¹⁰⁴ *Id.* at 585; See also Corey Rayburn Yung, *The Disappearing Ex Post Facto Clause: From Substantive Bulwark to Procedural Nuisance*, 61 SYRACUSE L. REV. 447, 451 (2011).

that the *failure* to act by not registering was a “continuing act with a continuing duty that constituted a new act after SORNA went into effect.”¹⁰⁵

The new analysis does seem to make some sense in the absence of prior Court treatment, but “such an idea is strongly at odds with decades of case law regarding ongoing offenses. In its opinion, the Seventh Circuit cited two cases for the proposition that failure to register is [a] continuing offense.” However,

[b]oth were cases dealing with criminal conspiracies involving organized crime. The rationale for the charges to be construed in such cases as continuing is tied to the nature of conspiracies. . . . This is in sharp contrast to SORNA cases where the act charged is only an omission with a corresponding duty that might predate the enactment of the statute by over a decade. In the SORNA cases, a defendant is de facto a criminal the moment the law goes into effect (or some reasonable period of time afterwards). There is no need for the defendant to do anything else in order to be prosecuted for failure to register.¹⁰⁶

Accepting this theory, it would be acceptable for states or the federal government to place future restrictions on anyone who was previously convicted of an offense. No matter how punitive the restriction may be, it would not run afoul of the Ex Post Facto Clause because failure to follow the new restriction would constitute an continuing offense. As an extreme example, consider a state law requiring reporting whenever a person previously convicted of drunk driving was to get into their car. The failure to report would be a continuing offense, and not subject to any Ex Post Facto challenge.

¹⁰⁵ Corey Rayburn Yung, *The Disappearing Ex Post Facto Clause: From Substantive Bulwark to Procedural Nuisance*, 61 SYRACUSE L. REV. 447, 451 (2011).

¹⁰⁶ *Id.* Rayburn also noted that, “Moreover, the Supreme Court, in *United States v. Toussie*, stated clearly that “[continuing] offenses are not to be implied except in limited circumstances.” Further, the Court instructed lower courts that they should not identify an element of a crime as being continuing “unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.” Neither the Seventh Circuit nor district court in *Husted* cited any legislative support or special circumstances for a finding that the crime of failure to register in SORNA included a continuing offense element.” *Id.* at 452.

III. LOOKING AHEAD: REACTION TO THE COURTS AND FUTURE IMPLICATIONS

There are at least two potential consequences to the Courts analysis in *Smith v. Doe* and the “new” Ex Post Facto Analysis. First, in order to avoid a serious Ex Post Facto challenge, many states have and will likely continue to label retroactive laws, specifically sex offender laws, as ‘civil’ in order to escape a stricter analysis by the courts. Second, states or the federal government may choose to expand the logic of SORNA to several different areas, some of which have already been suggested by advocacy groups or legal scholars.

A. Be ‘Civil’: Avoiding Ex Post Facto Challenge

Even prior to the Ex Post Facto Clause challenges to sex offender registries in the past decade, it was easier for a civil regulatory law to withstand a challenge than for a criminal provision. As stated previously, the court “must initially ascertain whether the legislature meant the statute to establish ‘civil’ proceedings.”¹⁰⁷ If the court determines that the legislature wanted the statute to carry a criminal label, then they need not continue any further and all applicable Constitutional protections apply. If, however, the court finds that the legislature intended the regulation to be civil it must then determine whether “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention” to deem it “civil.”¹⁰⁸ In order to make this determination, the court uses the aforementioned multi-factor *Martinez-Mendoza* test. Therefore, the legislatures intent, express or implied, that the law have a civil regulatory effect was always given deference. However, in the wake of *Smith v. Doe* and several appellate court decisions, giving sex offender laws a civil label creates a sort of immunity to an Ex Post Facto Challenge at the federal level.

¹⁰⁷ *Id.* at 361.

¹⁰⁸ *Id.* See also *United States v. Ward*, 448 U.S. 242, 248-49 (1980).

This is because of the very high “clearest proof” requirement. Even with the difference between SORNA and ASORA, most federal courts dismissed any Ex Post Facto challenge to SORNA summarily, stating that defendants cannot overcome the burden since SORNA is a civil regulatory scheme. The message to legislators, therefore, is that as long as any law is expressly labeled ‘civil,’ defendants will have a huge hill to climb to show that retroactive application violates the Ex Post Facto clause, regardless of any punitive purpose or effects the legislation may have. For example, in *Smith v. Doe*, several of the factors were recognized as having some possible punitive effect, yet the court found that no factor cut in favor of creating “clearest proof.” Because of this high burden, perceived legislative intent is almost controlling. It could be assumed, and has by almost every federal circuit, that after *Smith v. Doe* even very restrictive laws with a civil legislative intent will not have the necessary punitive purpose or effect to the level of “clearest proof.”

This is made easier by the willingness of the courts to assume a completely civil role for the law even where legislative intent is questionable. For example, in its preamble SORNA states it was enacted “[i]n order to protect the public from sex offenders and offenders against children.”¹⁰⁹ This creates a civil purpose. However, the preamble continues that it was enacted “in response to the vicious attacks by violent predators against the victims listed below”¹¹⁰ The statute then goes on to list seventeen victims of sex crimes and “details the crimes committed against them.”¹¹¹ Therefore, while there is a discernable civil objective, as the Ninth Circuit pointed out, it also seems that the legislation contains a vindictive component, or a desire to pun-

¹⁰⁹ 42 U.S.C. § 16901.

¹¹⁰ *Id.*

¹¹¹ *United States v. Juvenile Male*, 590 F.3d 924, 938 (9th Cir. 2010) *cert. granted, judgment vacated*, 131 S. Ct. 2860 (2011).

ish those who have caused similar harm. Justice Souter and the three dissenting Justices in *Smith v. Doe* came to a similar conclusion about ASORA.

With a blueprint to avoid challenge, complying with the federal Ex Post Facto Clause has become little more than a procedural checkmark when drafting legislation. As long as the legislation contains a discernable civil regulatory purpose, retroactive application will not run afoul of the Ex Post Facto Clause.

B. Expanding ‘Civil’ Regulatory Schemes

Public pressure for stricter regulation, in conjunction with the relative success of sex offender registries in the courts, may create future incentive to expand civil regulatory schemes to the next unpopular group. Law enforcement’s ability to keep and track these databases online makes such regulation more affordable and current data suggest states have already expand registration laws in some circumstances.

For example, in response to increasing methamphetamine use and distribution, at least four states created registries for those convicted of its use and sale.¹¹² These laws are mirrors of sex offender registries, and are meant to serve the same purpose—to protect the public from potentially dangerous individuals. However, unlike many sex offenses, possession of methamphetamine is a nonviolent crime. At least one scholar previously made this distinction and, although protesting that such registries create numerous concerns, including creating a class of individuals who are virtually unemployable and homeless, stated that “any Ex Post Facto claims against registries will likely fail” as a result of *Smith v. Doe*.¹¹³

¹¹² <http://www.msnbc.msn.com/id/15971396/#.T4wKmhv3Ek>

¹¹³ Brian A. Loendorf, *Methamphetamine Offender Registries: Are the Rights of Non-Dangerous Offenders Cooked?*, KAN. J.L. & PUB. POL’Y, Spring 2008, at 542, 551.

In Maine, a representative has proposed creating a registry for those convicted of drunk driving offenses.¹¹⁴ At least one scholar has advocated this approach, suggesting that instead of restrictions on living and working areas, drunk drivers should be required to have special license plates placed on their cars to warn those driving around them.¹¹⁵ However, Senator Bill Diamond of Maine, while he supporting sex offender registries because of the nature of the crime, asked, “If we do this, where will we stop?”¹¹⁶ “There are several issues that go with putting somebody’s picture up on a website — serious issues, many, many issues that the legislature needs to explore before passing something like this.”¹¹⁷

While the creation of any such new nation wide registry requirement is far from certain, allowing sweeping, strict, invasive, and retroactive sex offender registries has opened up the floodgate. While U.S. census data varies, in 2006 alone an estimated 1,205,273 individuals were convicted of felony offenses at the state and federal level.¹¹⁸ This does not include most drunk driving offenses, which are often misdemeanors. The possibility that so many Americans could be subject to retroactive registration laws is concerning, considering myriad of difficulties convicted sex offenders have faced.

At this point, it is not clear that there is sufficient public support or funding for these additional measures. However, in looking at the recent Ex Post Facto challenges to sex offender registration legislation it is unlikely that the Clause would provide any protection to possible vindictive civil legislation already enacted or proposed.

¹¹⁴ <http://bangordailynews.com/2011/04/03/politics/drunken-driver-website-proposal-stirs-debate/>

¹¹⁵ Michael J. Watson, *Carnage on Our Nation's Highways: A Proposal for Applying the Statutory Scheme of Megan's Law to Drunk-Driving Legislation*, 39 RUTGERS L.J. 459 (2008)

¹¹⁶ <http://bangordailynews.com/2011/04/03/politics/drunken-driver-website-proposal-stirs-debate/>

¹¹⁷ Id.

¹¹⁸ <http://www.census.gov/compendia/statab/2011/tables/11s0343.pdf>

IV. POTENTIAL SOLUTIONS

This section will consider alternative solutions to overreaching state and federal legislation. First, this portion will discuss potential remedies under the Ex Post Facto Clauses of state constitutions. Second, this note suggests a middle ground, entitled the ‘Souter Approach’ for his concurrence in *Smith v. Doe*, where civil regulatory laws are examined in light of the twin historical aims. Finally, although not a solution to the Ex Post Facto analysis issue, this note will discuss how some public pressures are working to pull back, or at least reconsider some of the country’s strictest laws.

A. Remedies Under State Constitutions

Although failing in federal courts, at least two ex post facto challenges to sex offender registry laws under the ex post facto clauses of state constitutions were successful. In *Wallace v. State*, the Supreme Court of Indiana found that the states sex offender registry law could not be applied retroactively as it violated the states ex post facto clause.¹¹⁹

In *Wallace*, the court considered whether the Indiana Sex Offender Registration Act (“Act”), which required “defendants convicted of sex and certain other offenses to register with local law enforcement agencies and to disclose detailed personal information, some of which is not otherwise public” constituted “retroactive punishment forbidden by the Ex Post Facto Clause contained in the Indiana Constitution because it applies to a defendant who committed his offense before the statutes were enacted.”¹²⁰ Several post-SORNA amendments to the Act made it more invasive and restrictive than ASORA. For example, a 2008 amendment required the disclosure of “any electronic mail address, instant messaging username, electronic chat room

¹¹⁹ *Wallace v. State*, 905 N.E.2d 371, 373 (Ind. 2009).

¹²⁰ *Id.*

username, or social networking web site username that a sex offender uses or intends to use.”¹²¹ It also required that the offender consent to searches of his or her computer at any time and agree to install software monitoring his or her internet use. Furthermore, an offender was required to “at all times keep in his or her possession a valid driver's license or identification card,” and was subject to criminal charges for failure to do so.¹²² Finally, the latest version of the Act made it “an offense for sexually violent predators and certain subcategories of sex and violent offenders . . . to live within one thousand feet of a school, youth program center, or public park, or living within one mile of the residence of the victim of the offender's sex offense.”¹²³ While these factors were absent in *Smith v. Doe*, they are common provisions of most sex offender registration laws today.

The court declined to assume that Indiana’s Ex Post Facto Clause was exactly analogous to the federal clause, but did apply the “intent-effects” test promulgated by the federal courts, including the seven *Martinez-Mendoza* factors. Unlike the majority in *Smith v. Doe*, the court did not determine that the statute had a non-punitive intent, as it has several criminal provisions, and did not require Wallace to show that the statute was punitive in its effects by the “clearest proof.” Instead, the court carefully weighed each of the factors and ultimately determined that the statute, as applied retroactively to Wallace, violated the Ex Post Facto Clause of the state constitution.

Some differences in *Wallace* as compared to *Smith v. Doe* are as follows: As for the first factor, whether the sanction involved an affirmative disability or restraint, the court concluded that several provisions were very restrictive. For example, it required an offender to update registration information within 72 hours or carry valid governmental identification at all times under

¹²¹ IND. CODE § 11–8–8–8 (Supp. 2008). *Wallace v. State*, 905 N.E.2d 371, 375-76 (Ind. 2009).

¹²² *Id.*

¹²³ Ind.Code § 35–42–4–11 (2006). *See also Wallace*, 905 N.E.2d at 377.

threat of prosecution. When analyzing the second factor, whether the sanction has traditionally been seen as a form of punishment, the court agreed with arguments put forth in *Smith*: 1) that public registries that list individuals as “sex offenders” are analogous to public shaming and 2) that the reporting requirements are analogous to probation and parole.

Perhaps the most important difference was with respect to what the court considered the most important factor. In *Wallace*, the court found that the law did have a legitimate regulatory purpose, agreeing with the Court in *Smith v. Doe*. However, in *Wallace* the court stated that this was not the most important factor. The most important factor was number seven, whether the law was excessive in relation to that purpose. As to the laws breadth the court stated, “[i]n this jurisdiction the Act makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk.”¹²⁴ Therefore, the law was excessive in relation to the legitimate purpose.

This difference is important because how it changes the analysis. The Supreme Court placing the most weight on the presence of a legitimate state purpose is analogous to requiring only rational basis review for an Ex Post Facto challenge of a ‘civil’ law. In contrast, the Indiana Supreme Court, by placing more weight on whether the law is excessive in relation to the given purpose is equivalent to requiring intermediate scrutiny. In this way, the Supreme Court gave many legislators free reign to legislate retroactively as long the regulation was ‘civil’ and there was a legitimate purpose. However, Indiana requires not only a legitimate purpose, but also a law tailored to reach that purpose and thus provides much greater protection. Several other states, like Indiana, consider the seventh *Martinez-Mendoza* factor to be the most important and there-

¹²⁴ *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009)

fore review of retroactive sex offender registration laws under state constitutions could provide an alternative source of relief.¹²⁵

The Maine Supreme Court came to a similar conclusion in *State v. Letalien*,¹²⁶ however other states have not chosen to follow this path.¹²⁷ Some scholars argue that invalidating retroactive application of state sex offender registry laws violates public policy and therefore states should adopt a balancing test to weigh the issue.¹²⁸ It remains unclear what other states will chose to do.¹²⁹

B. The Souter Approach

Justice Souter's approach in *Smith v. Doe* was preferable to the majorities in two ways. First, it resurrected the traditional historical aim of protecting unpopular individuals from vindictive legislation and used this as a foundation for the analysis. Second, Justice Souter would not require the "clearest proof" of punitive effects or purpose where, as in many sex offender registration laws, the actual legislative intent is not clear.

This would leave room for states to legislate to protect the public, while protecting those with prior offenses from being wrapped up in more restrictive laws. As Justice Souter found the Alaska statute in *Smith* to be a close call, this would likely mean that for him, most laws promulgated under SORNA would violate the Ex Post Facto Clause if applied retroactively.

C. Indications of a Change in Public Opinion

There are also some examples, although far and few between, of public dissatisfaction with laws that go too far. While these could serve to quell the continuing wave of retroactive sex

¹²⁵ *Id.*

¹²⁶ *State v. Letalien*, 2009 ME 130, 985 A.2d 4, 7.

¹²⁷ Connecticut, Texas for example.

¹²⁸ See, e.g., Lauren Wille, *Maine's Sex Offender Registry and the Ex Post Facto Clause: An Examination of the Law Court's Unwillingness to Use Independent Constitutional Analysis in State v. Letalien*, 63 ME. L. REV. 367, 368 (2010)

¹²⁹ *State v. Letalien*, 2009 ME 130, 985 A.2d 4, 7.

offender laws, it remains the point that individuals are subject to public whims, whether positive or not, which is specifically what the framers intended the Ex Post Facto Clause to protect individuals against.

1. *Current Examples*

In 2010, sex offender laws in Miami Dade County were so restrictive in their residence requirements that the only place in the county that a convicted offender could reside was under a highway bridge.¹³⁰ Several local and national news stations covered the story, which caused considerable public discontent. At one point over eighty sex offenders were living under the bridge and used the bridge as their permanent address for purpose of the sex offender registries. This, arguably, created a much more dangerous situation than was present before the registration requirements. Eventually the state was forced to enact more uniform legislation with much less restrictive residency requirements, thus allowing all of the offenders living under the bridge to find permanent residences within the county.

2. *Predicting Future Behavior*

Future public opinion could change in one of two ways. First, as the sex offender registries continue to grow, often including several non-violent offenders, it is likely that more and more people will identify not only with the fear of a sexual assault but with a particular offender who is on the list. People who once feared their sons and daughters would be assaulted may find their children subject to the same laws that they supported twenty years prior. For example, several stories of college age offenders who were caught with a few items of child pornography on their computers has lead some to question the effects of registration laws. As these laws affect more individuals the attitude may change from “not-in-my-back-yard” to maybe we have gone

¹³⁰ Greg Allen, *Sex Offenders Forced to Live Under Bridge*, NPR (May 20, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=104150499>.

too far. At the very least, this might encourage states to narrowly tailor their laws, targeting the most violent offenders or those most likely to reoffend, instead of grouping a large variety of sex offenses together under one scheme. Second, as budgets continue to shrink, keeping track of offenders may become a substantial burden for local law enforcement agencies.

CONCLUSION

While the goal of preventing vindictive legislation aimed at unpopular groups surfaced in the very first Ex Post Facto Clause case,¹³¹ most federal courts have abandoned it in the rash of recent cases testing the constitutionality of retroactive sex offender registry laws. Increasing deference to laws with a ‘civil’ label combined with the absence of this foundational guiding principle has often made it impossible for advocates to show even the most severe SORNA-like legislation violates the Ex Post Facto Clause.

The court’s Ex Post Facto analysis of SORNA and subsequent state laws are flawed in two ways. First, when court’s analyze sex offender registration laws under the Ex Post Facto Clause absent the historical aims, the multifactor test is essentially performed in a vacuum and becomes extremely subjective. Second, the court’s increased deference to ‘civil’ regulatory laws has made it nearly impossible for advocates to show that a ‘civil’ law has a ‘criminal’ purpose or effect.

There are solutions to quell this trend. At least one state has found its version of SORNA to violate the Ex Post Facto clause of the state constitution. Alternatively, Justice Souter’s concurrence in *Smith v. Doe* could provide an alternative analytical framework. No matter the solution, it is important 1) to recognize that the Court’s Ex Post Facto analysis has changed in regard to sex offender registration laws and 2) for the courts to reinsert the historical goal of protecting unpopular groups from vindictive legislation into its Ex Post Facto analysis.

¹³¹ *Calder v. Bull*, 3 U.S. 386, 389, 1 L. Ed. 648 (1798).

