

# REFRAMING THE PUNISHMENT TEST THROUGH MODERN SEX OFFENDER LEGISLATION

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*Modern sex offender registration and notification laws blur the distinction between criminal and civil law. Despite being labeled as civil regulatory schemes, these laws impose severe burdens on personal liberty—burdens that we tend to associate with criminal punishment. In 2003, the U.S. Supreme Court determined that at least one sex offender registration and notification program functioned as a civil remedy rather than a criminal sanction. In upholding the Alaska Sex Offender Registration Act, the Supreme Court held that the burdens imposed by the statute did not impose additional punishment on registered sex offenders and thus did not trigger the constitutional protections reserved for criminal defendants.*

*As sex offender legislation has grown in scope and severity, federal courts have continued to reject challenges brought by registered sex offenders who allege that these programs impose additional punishment. In 2016, however, the Sixth Circuit broke new ground and determined that the requirements set forth in the amendments to the Michigan Sex Offender Registration Act had transformed the scheme from civil to criminal. This Note explores the growing circuit split among federal courts in assessing the nature of sex offender legislation and proposes that courts reframe the current punishment analysis to resolve these inconsistencies.*

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#### INTRODUCTION

In 1979, six-year-old Etan Patz was abducted while walking to his school bus stop two blocks from his home in New York City.<sup>1</sup> In 1981, six-year-old Adam Walsh was kidnapped and murdered after he was abducted from a shopping mall in Florida.<sup>2</sup> In 1989, eleven-year-old Jacob Wetterling was abducted by a masked gunman while riding his bike in St. Joseph, Minnesota.<sup>3</sup> In 1994, seven-year-old Megan Kanka was raped and murdered by her neighbor in Hamilton Township, New Jersey.<sup>4</sup> The common thread that connected these four brutal tragedies was the public belief that the perpetrator in each case had harmed children before.<sup>5</sup>

The brutality of the crimes committed against Etan, Adam, Jacob, and Megan, coupled with the possibility that the childrens' suffering could have been prevented, mobilized both activists and legislators to demand change.<sup>6</sup> In response to growing public outrage and political pressure, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act<sup>7</sup> (the "Wetterling Act") and Megan's Law.<sup>8</sup>

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1. Rick Rojas, *What Happened to Etan Patz?: Unraveling a Nearly 40-Year-Old Case*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/nyregion/what-happened-to-etan-patz.html> [https://perma.cc/82FP-LDVK].

2. Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 50, 58 (Richard G. Wright ed., 2d ed. 2015).

3. *Id.* at 57.

4. *Id.*

5. *See id.* at 57–58.

6. *See* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION* 44 (2017).

7. Pub. L. No. 103-322, tit. XVII, 108 Stat. 2038 (1994) (repealed 2006).

8. Pub. L. No. 104-145, 110 Stat. 1345 (1996) (repealed 2006).

Together, these laws required states to implement registration and notification programs to monitor convicted “sex offenders.”<sup>9</sup>

To comply with the federal requirements, states were obligated to collect and manage personal information from people qualifying as sex offenders under the statute and disclose the presence of registrants<sup>10</sup> to members of the community.<sup>11</sup> Inherent in the political discourse supporting sex offender legislation was the notion that parents should have the right to know if their neighbors pose a danger to their children.<sup>12</sup> By compiling registrants’ information and notifying community members of their presence, Congress and compliant states sought to provide comfort to parents and prevent future crimes against children.<sup>13</sup>

Following the implementation of sex offender registration and notification (SORN) programs in the states, registrants began to challenge the schemes as additional forms of criminal punishment in violation of the U.S. Constitution.<sup>14</sup> In 2003,<sup>15</sup> the U.S. Supreme Court in *Smith v. Doe*<sup>16</sup> upheld Alaska’s SORN law on the grounds that it did not, expressly or in effect, punish those subject to its requirements.<sup>17</sup> This Note will refer to the state laws challenged prior to *Smith* and the Alaskan statute at issue in *Smith* as “first-generation” SORN laws.

In the years following the Supreme Court’s decision, Congress and state legislatures amended existing SORN programs by increasing registration requirements and expanding the scope of community notification.<sup>18</sup> With the growth of sex offender legislation, registrants launched a second round of challenges, alleging that the more burdensome and expansive laws were distinguishable from first-generation laws and had become criminal in nature.<sup>19</sup> This Note will refer to these amendments as “modern” SORN laws.

Until 2016, it appeared that any challenges brought against both first-generation and modern SORN laws were foreclosed by *Smith*, no matter how dissimilar they were to the original Alaskan statute considered by the Court.<sup>20</sup> Almost universally, federal courts rejected arguments brought by registrants

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9. See WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 55–56 (2009).

10. This Note will refer to persons required to register as sex offenders in their respective federal, state, and local jurisdictions as “registrants.”

11. See PERLIN & CUCOLO, *supra* note 6, at 43–44.

12. See 140 CONG. REC. 21,557 (1994) (statement of Rep. Smith) (“Had Megan’s grieving parents known that their neighbor was a dangerous person, they would have taken steps to protect their precious child. Megan’s parents had a right to know.”); 140 CONG. REC. 19,545 (1994) (statement of Sen. Gorton) (“The families in these communities and these innocent victims had a right to know that dangerous sexual predators were in their midst.”).

13. See LOGAN, *supra* note 9, at 56.

14. See *infra* Part II.B.1.

15. See *infra* Part II.B.1.

16. 538 U.S. 84 (2003).

17. *Id.* at 85.

18. See *infra* Part II.C.

19. See *infra* Part III.

20. See *infra* Part III.A.

based on the same justification used by the Supreme Court in *Smith*—SORN laws are civil in nature.<sup>21</sup>

In 2016, however, the Sixth Circuit approached the punishment question differently.<sup>22</sup> In its unprecedented decision *Does #1–5 v. Snyder*,<sup>23</sup> the Sixth Circuit determined that SORN regimes can impose additional forms of punishment through broad and overly burdensome provisions.<sup>24</sup> Paving a new course for federal courts, the Sixth Circuit drew a distinction between the Alaskan statute at issue in *Smith* and modern SORN laws.<sup>25</sup> Today, a minority of federal courts have followed the Sixth Circuit's lead in determining that some modern SORN programs go too far and function to punish sex offenders in their pursuit of safety.<sup>26</sup>

This Note explores the emerging circuit split by analyzing how federal courts have inconsistently interpreted *Smith* and unpredictably applied the Court's analysis to modern SORN laws. Part I provides a brief explanation of the criminal-civil distinction and the constitutional implications of the criminal designation. Part II examines the history of SORN laws by looking at first-generation programs and modern regimes and the constitutional challenges raised in response to both. Part III explores the circuit split stemming from the varied applications of the relevant punishment analysis. Part IV proposes alterations to the current test that could resolve the inconsistencies among federal courts and preserve the constitutional protections afforded to criminal defendants.

## I. THE PUNISHMENT QUESTION

Sex offender registration and notification schemes are frequently challenged as forms of criminal punishment in violation of the constitutional provisions that protect criminal defendants.<sup>27</sup> Before addressing these challenges, this Note explores the distinctions between criminal and civil law and the constitutional repercussions of that divide. Part I.A explores the differences between criminal penalties and civil remedies and how the dichotomous relationship between the two types of sanctions can be difficult to preserve. Part I.B outlines the test devised by the Supreme Court to determine whether a measure is considered a civil remedy or a criminal penalty. Part I.C explains why the criminal and civil labels matter by analyzing the constitutional protections reserved only for criminal defendants.

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21. *See infra* Part III.A.

22. *See infra* Part III.B.

23. 834 F.3d 696 (6th Cir. 2016).

24. *See infra* Part III.B.1.

25. *See infra* Part III.B.1.

26. *See infra* Part III.B.2.

27. *See infra* Parts II.B, III.

### A. *The Criminal-Civil Distinction*

Criminal and civil law are traditionally understood as two distinct areas of law within the American legal system.<sup>28</sup> Law students are taught to take this dichotomy for granted, as the law school curriculum is divided neatly into criminal and civil categories.<sup>29</sup> After all, the two areas of law utilize different courts, rules of procedure, burdens of proof, rules of discovery, and investigatory practices.<sup>30</sup>

The division between criminal and civil law is further emphasized by distinct categories of sanctions.<sup>31</sup> Criminal law subjects wrongdoers to “criminal penalties,” which traditionally include arrest, prosecution, and incarceration.<sup>32</sup> Civil law, alternatively, subjects wrongdoers to “civil remedies,” such as injunctive relief, monetary damages, and specific performance.<sup>33</sup> These conventional paradigms stem from the belief that the purposes of the two areas of the law are, or should be, different: criminal law is supposed to punish and civil law is supposed to compensate.<sup>34</sup> Despite this traditional distinction, however, laws frequently function to accomplish both aims.<sup>35</sup>

In achieving both purposes, some sanctions may appear to function as both criminal penalties and civil remedies. But the division of laws into one of these two categories remains a threshold matter of constitutional importance.<sup>36</sup> Thus, the Supreme Court has determined that where a law is labeled a civil remedy but functions to punish wrongdoers, the law must be given a criminal designation.<sup>37</sup> The process of determining whether a statute

28. See *Hicks v. Feiock*, 485 U.S. 624, 636–37 (1988) (“The States have long been able to plan their own procedures around the traditional distinction between civil and criminal remedies.”); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991) (“[T]his basic division has been a hallmark of English and American jurisprudence for hundreds of years.”).

29. Cheh, *supra* note 28, at 1325.

30. *Id.*

31. *Id.* at 1332–33.

32. *Id.*; Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1803–04 (1992).

33. See Cheh, *supra* note 28, at 1333.

34. Mann, *supra* note 32, at 1796; see *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (“If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.”).

35. See Mann, *supra* note 32, at 1797–98; Gregory Y. Porter, Note, *Uncivil Punishment: The Supreme Court’s Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 517–19 (1997); see also *United States v. Halper*, 490 U.S. 435, 447 (1989) (“It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.”).

36. See *infra* Part I.C.

37. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886). In light of this holding, this Note uses the words “criminal,” “punitive,” and “penal” interchangeably. This Note also uses the words “civil,” “regulatory,” and “nonpunitive” interchangeably.

imposes such a punishment, transforming it from a civil remedy to a criminal penalty, has been termed the “punishment question.”<sup>38</sup>

Using the concept of punishment to demarcate the criminal-civil divide has proven to be more challenging than the seemingly dichotomous legal world would tend to suggest. First, punishment is “an imprecise concept with meanings that vary depending on the purpose for which the concept is defined.”<sup>39</sup> As illustrative of this imprecision, *Merriam-Webster* defines “punishment” as “the act of punishing”<sup>40</sup> and “to punish” as “to impose a penalty on for a fault, offense, or violation.”<sup>41</sup> Second, the Court itself has acknowledged that punishment plays a role in both civil and criminal law. In *United States v. Halper*,<sup>42</sup> the Court recognized that the “notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.”<sup>43</sup>

Answering the punishment question has been further complicated by the Court’s borderline “unintelligible” case law on the issue.<sup>44</sup> In determining whether a sanction is civil or criminal, the Court has devised several, sometimes inconsistent, tests.<sup>45</sup> For example, in one variation of the punishment test, Justice Felix Frankfurter looked solely at the expressed intent of Congress in enacting a statute that withheld salaries of certain government employees.<sup>46</sup> Reasoning that “presumed motive cannot supplant expressed legislative judgment,” Justice Frankfurter concluded that the statute was not punitive because Congress had excluded “any condemnation for which the presumed punishment was a sanction.”<sup>47</sup> In another formulation, the Court applied the “rational relation” test to the termination of social security benefits of an immigrant deported for membership in the Communist Party.<sup>48</sup> Under this approach, the Court determined that the sanction was nonpunitive because the termination bore a “rational connection to the purposes of the legislation of which it is a part.”<sup>49</sup>

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38. Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1280 (1998).

39. *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir. 1997).

40. *Punishment*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/punishment> [https://perma.cc/ML72-UR2B] (last visited Nov. 12, 2019).

41. *Punish*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/punish> [https://perma.cc/KXL2-R9YM] (last visited Nov. 12, 2019).

42. 490 U.S. 435 (1989).

43. *Id.* at 448.

44. Logan, *supra* note 38, at 1280.

45. *Id.* at 1281. Compare *Hudson v. United States*, 522 U.S. 93, 100–02 (1997) (holding that a sanction is not punitive solely because it furthers a traditional aim of punishment), with *Halper*, 490 U.S. at 448–49 (holding that a sanction is punitive where it serves the traditional aims of punishment including retribution and deterrence).

46. *United States v. Lovett*, 328 U.S. 303, 325–26 (1946) (Frankfurter, J., concurring); see also Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1671 (1980).

47. *Lovett*, 328 U.S. at 326.

48. See *Flemming v. Nestor*, 363 U.S. 603, 605 (1960); see also Foscarinis, *supra* note 46, at 1673–74.

49. *Nestor*, 363 U.S. at 617.

Applying different variations of the punishment test, the Court has determined that the revocation of citizenship<sup>50</sup> and the extension of incarceration<sup>51</sup> both constitute forms of punishment, while the revocation of a medical license,<sup>52</sup> prohibition of work as a union official,<sup>53</sup> termination of social security benefits,<sup>54</sup> and involuntary confinement of certain sex offenders are not forms of punishment.<sup>55</sup> Given the confusion surrounding the proper punishment analysis, lower courts frequently attempted to demarcate the parameters of punishment by comparing the sanction before them to ones previously addressed by the Court.<sup>56</sup>

### B. Answering the Punishment Question

Despite the Supreme Court's historical inconsistency in applying a standard punishment test, modern Court decisions that consider the punishment question regularly rely on a two-part analysis called the "intent-effects test."<sup>57</sup> The first step of the test, originally articulated in *United States v. Ward*,<sup>58</sup> requires a court to ascertain the legislature's explicit or implicit preference to designate the law as civil or criminal.<sup>59</sup> The second step of the analysis, which is only necessary where the legislature intends for the law to be civil,<sup>60</sup> requires the court to determine whether the sanction is punitive in its effects on those subject to it.<sup>61</sup>

To determine a legislature's intention, a court considers the text and structure of the statute authorizing the sanction.<sup>62</sup> The location of a law's codification in a civil or criminal code<sup>63</sup> and even the title of the statute can be helpful in ascertaining intent<sup>64</sup> but are not alone dispositive.<sup>65</sup> Instead, the

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50. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165–66 (1963); *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

51. See *Miller v. Florida*, 482 U.S. 423, 434–35 (1987).

52. See *Hawker v. New York*, 170 U.S. 189, 200 (1898).

53. See *De Veau v. Braisted*, 363 U.S. 144, 160 (1960).

54. See *Nestor*, 363 U.S. at 619.

55. See *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997).

56. See *E. B. v. Verniero*, 119 F.3d 1077, 1101 (3d Cir. 1997) ("The only examples the case law suggests of effects sufficiently onerous are deprivation of one's United States citizenship that leaves one a 'stateless person' and a complete deprivation of personal freedom (i.e., incarceration.); *Artway v. Attorney Gen.*, 81 F.3d 1235, 1266 (3d Cir. 1996) ("The caselaw does not tell us where the line falls that divides permissible from impermissible effects, but we know the 'matter of degree' is somewhere between imprisonment and revocation of citizenship on the one hand, and loss of a profession or benefits on the other.");

57. See, e.g., *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Seling v. Young*, 531 U.S. 250, 262 (2001); *Hendricks*, 521 U.S. at 361–65; *United States v. Ursery*, 518 U.S. 267, 277–78 (1996).

58. 448 U.S. 242 (1980).

59. *Id.* at 248.

60. *Smith*, 538 U.S. at 92.

61. *Ward*, 448 U.S. at 248.

62. See *Hendricks*, 521 U.S. at 361 ("The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.'" (quoting *Allen v. Illinois*, 478 U.S. 364, 368 (1986))).

63. See *Smith*, 538 U.S. at 94–95; *Hendricks*, 521 U.S. at 361.

64. See *United States v. Ursery*, 518 U.S. 267, 288 (1996).

65. See *Smith*, 538 U.S. at 94.

court must determine whether the legislature, “in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.”<sup>66</sup> If the court determines that the legislature intended to impose punishment, its analysis is complete and the law is criminal.<sup>67</sup> If, instead, the court determines that the legislature intended the law to be civil, it will then consider whether the law is so punitive in its effects as to negate the legislature’s preference.<sup>68</sup>

The second step of the analysis involves a high degree of deference to the legislature’s purported intent.<sup>69</sup> The court will only reject the government’s intention if the party challenging the statute provides “the clearest proof” that the statutory scheme functions as a punitive sanction.<sup>70</sup> Without conclusive evidence that the law is punitive, the court must answer the punishment question in the negative.<sup>71</sup>

To ascertain whether a measure’s effects function to punish, the court considers seven factors originally compiled in *Kennedy v. Mendoza-Martinez*<sup>72</sup> that are commonly referred to as the *Mendoza-Martinez* factors.<sup>73</sup> The factors include: (1) whether the sanction affirmatively disables or restrains those subject to it; (2) whether the sanction has been historically regarded as a punishment; (3) whether the sanction was imposed only on a finding of scienter; (4) whether the sanction’s operation promotes the traditional aims of punishment: retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether the sanction has a rational connection to a nonpunitive purpose; and (7) whether the sanction appears excessive in relation to the nonpunitive purpose.<sup>74</sup> Although the factors are intended to serve as helpful guideposts in the effects analysis, the Supreme Court has warned that they are “neither exhaustive nor dispositive.”<sup>75</sup>

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66. *Ward*, 448 U.S. at 248.

67. *See Smith*, 538 U.S. at 92.

68. *Hendricks*, 521 U.S. at 361.

69. *Id.*

70. *Id.* (quoting *Ward*, 448 U.S. at 248–49).

71. *See Smith*, 538 U.S. at 92 (noting that “‘only the clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty” (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997))).

72. 372 U.S. 144 (1963).

73. *See, e.g., Smith*, 538 U.S. at 97.

74. *Mendoza-Martinez*, 372 U.S. at 168–69.

75. *United States v. Ward*, 448 U.S. 242, 249 (1980). Because the *Mendoza-Martinez* factors can be manipulated or disregarded, they are frequently criticized as virtually meaningless. Logan, *supra* note 38, at 1282; *see Smith*, 538 U.S. at 113 (Stevens, J., dissenting in part and concurring in part) (describing the effects test as one of the multifactor tests that the U.S. Supreme Court “manipulate[s]” in “wholly dissimilar cases”); *Bell v. Wolfish*, 441 U.S. 520, 565 (1979) (Marshall, J., dissenting) (finding that the Court’s reformulation of the test “lacks any real content”).

C. *The Constitutional Implications of the Answer*

A court's answer to the punishment question has significant legal consequences for those subject to the relevant sanction.<sup>76</sup> When a court determines that a law functions as a criminal penalty, the law must comply with the constitutional protections reserved for criminal defendants.<sup>77</sup> The U.S. Constitution explicitly protects persons in a "criminal case" from self-incrimination<sup>78</sup> and reserves for criminal defendants the rights to a speedy trial, impartial jury, defense counsel, and confrontation.<sup>79</sup> Additionally, the Court has interpreted other constitutional protections as triggered exclusively in the criminal context such as the rights found in the Double Jeopardy Clause,<sup>80</sup> the Excessive Fines Clause,<sup>81</sup> the Bill of Attainder Clause,<sup>82</sup> the Cruel and Unusual Punishment Clause,<sup>83</sup> and the Ex Post Facto Clause.<sup>84</sup>

The constitutional protections afforded in criminal cases make the effects analysis of the punishment test particularly important.<sup>85</sup> Given the procedural and substantive rights that are reserved solely for criminal defendants, penal sanctions undoubtedly impose greater costs than civil remedies.<sup>86</sup> These additional costs may create incentives for legislatures to avoid enacting "criminal sanctions."<sup>87</sup> As a result, there exists the possibility that legislatures may structure punitive measures as civil remedies to avoid paying such costs.<sup>88</sup> Chief Justice Earl Warren expressed caution about blindly following the labels provided by legislatures, stating, "[h]ow simple would be the tasks of constitutional adjudication and of law generally if

76. See Logan, *supra* note 38, at 1280.

77. See Porter, *supra* note 35, at 518.

78. U.S. CONST. amend. V.

79. *Id.* amend. VI.

80. *Id.* amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."); see *Helvering v. Mitchell*, 303 U.S. 391, 398–99 (1938) ("Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable.").

81. U.S. CONST. amend. VIII; see *Austin v. United States*, 509 U.S. 602, 610 (1993) ("[T]he question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment.").

82. U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1; see *United States v. Brown*, 381 U.S. 437, 447 (1965) ("[T]he Bill of Attainder Clause . . . was instead to be read in light of the evil the Framers had sought to bar: legislative punishment.").

83. U.S. CONST. amend. VIII; see *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.").

84. U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1; see *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them.").

85. See Logan, *supra* note 38, at 1288.

86. *Id.* at 1289.

87. *Id.* at 1288–89.

88. *Id.*

specific problems could be solved by inspection of the labels pasted on them!”<sup>89</sup>

## II. THE RISE OF SEX OFFENDER REGISTRATION AND NOTIFICATION SCHEMES

Since the inception of registration and notification programs, opponents of sex offender legislation have argued that the regimes function as criminal penalties despite their civil labels. Part II.A provides a brief history of first-generation federal, state, and local SORN schemes. Part II.B explores the initial judicial challenges brought against these laws as punitive measures in violation of the constitutional protections afforded to criminal defendants. Part II.C outlines the more expansive modern federal, state, and local SORN laws enacted after the Court’s decision in *Smith v. Doe*.

### A. First-Generation SORN Laws

Following a series of high-profile child abductions and murders in the 1980s and 1990s,<sup>90</sup> state legislatures began to implement registration and notification systems in an attempt to monitor sex offenders.<sup>91</sup> In the aftermath of these murders, described as “hysteria,”<sup>92</sup> the public formed the belief that in all of these crimes “the person who did it had a sexual motive.”<sup>93</sup> And in response, the government’s message was clear: “if you dare to prey on our children, the law will follow you wherever you go, state to state, town to town.”<sup>94</sup>

Inspired by state programs and growing public outrage,<sup>95</sup> Congress passed the Wetterling Act in 1994.<sup>96</sup> The Wetterling Act required each state to create a sex offender registry<sup>97</sup> and outlined the minimum standards for implementation of the registration programs.<sup>98</sup> To encourage widespread adoption, Congress conditioned 10 percent of states’ federal funding for criminal justice programs on compliance with the statute’s requirements.<sup>99</sup>

89. *Trop v. Dulles*, 356 U.S. 86, 94 (1958).

90. See LOGAN, *supra* note 9, at 49–54.

91. See Terry & Ackerman, *supra* note 2, at 50.

92. *In the Dark: SI E6; Stranger Danger*, APM REP. 6:50–7:22, <https://www.apmreports.org/story/2016/10/04/in-the-dark-6> [<https://perma.cc/9WDT-2XCK>] (last visited Nov. 12, 2019).

93. *Id.*

94. Clintonlibrary42, *President Clinton Signing Megan’s Law*, YOUTUBE (Nov. 1, 2012), [https://www.youtube.com/watch?v=2Nfp\\_K9s2M](https://www.youtube.com/watch?v=2Nfp_K9s2M) [<https://perma.cc/8RH5-9HM6>].

95. See ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 14–16 (2006).

96. Pub. L. No. 103-322, tit. XVII, 108 Stat. 2038 (1994) (repealed 2006).

97. Terry & Ackerman, *supra* note 2, at 57.

98. See Megan’s Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 Fed. Reg. 572, 575 (Jan. 5, 1999) (instructing the states to interpret the Wetterling Act as “a floor for state programs, not a ceiling”).

99. 42 U.S.C. § 14071(f) (repealed 2006); see LOGAN, *supra* note 9, at 58.

The Wetterling Act applied to persons (1) convicted of certain crimes against minors,<sup>100</sup> (2) convicted of a “sexually violent offense,”<sup>101</sup> or (3) designated a “sexually violent predator.”<sup>102</sup> A “sexually violent predator” was defined in the statute as a person “convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.”<sup>103</sup> Persons convicted of specified crimes against minors or sexually violent offenses were required to register for ten years.<sup>104</sup> Alternatively, persons designated as sexually violent predators were required to register until the sentencing court determined that the registrant no longer met the designation’s definition.<sup>105</sup> The Wetterling Act further mandated that states impose a criminal penalty on registrants who knowingly failed to register, but it did not specify the degree of such penalty.<sup>106</sup>

In 1996, Congress passed Megan’s Law in response to criticism that the implemented registration programs had not gone far enough.<sup>107</sup> Megan’s Law amended the Wetterling Act to require—rather than permit—community notification of registration information.<sup>108</sup> Despite this direction from Congress, states retained discretion over which registrants were subject to community notification and how to disseminate their information.<sup>109</sup>

Congress supplemented the federal registration and notification requirements with the enactment of the Pam Lychner Sexual Offender Tracking and Identification Act of 1996<sup>110</sup> (the “Lychner Act”). The Lychner Act established a federal database of sex offenders, which was to be operated by the Federal Bureau of Investigation (FBI) and made available to state officials.<sup>111</sup> This central database was intended to facilitate information

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100. § 14071(a)(3)(A). Offenses included “(i) kidnapping of a minor, except by a parent; (ii) false imprisonment of a minor, except by a parent; (iii) criminal sexual conduct toward a minor; (iv) solicitation of a minor to engage in sexual conduct; (v) use of a minor in a sexual performance; (vi) solicitation of a minor to practice prostitution; (vii) any conduct that by its nature is a sexual offense against a minor; or (viii) an attempt to commit an offense described in any of [the] clauses.” *Id.*

101. *Id.* § 14071(a)(3)(B). Offenses included aggravated sexual abuse, sexual abuse, or “an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse.” *Id.*

102. *Id.* § 14071(a)(3)(C).

103. *Id.*

104. *Id.* § 14071(b)(6)(A).

105. *Id.* § 14071(b)(6)(B).

106. *Id.* § 14071(c).

107. See LOGAN, *supra* note 9, at 58; Terry & Ackerman, *supra* note 2, at 57. When President Bill Clinton signed the bill into law, he remarked: “From now on, every State in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people’s rights, but today America proclaims there is no greater right than a parent’s right to raise a child in safety and love.” Remarks on Signing Megan’s Law and an Exchange with Reporters, 1 PUB. PAPERS 763 (May 17, 1996).

108. 42 U.S.C. § 14071(d) (amending the language of the law to read “shall” instead of “may”); Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008).

109. See LOGAN, *supra* note 9, at 61.

110. Pub. L. No. 104-236, 110 Stat. 3093 (repealed 2006).

111. Terry & Ackerman, *supra* note 2, at 58.

sharing among states in order to effectively monitor registrants traveling across state lines.<sup>112</sup> Unlike the Wetterling Act and Megan's Law, which relied on states to implement the provisions, the Lychner Act authorized the FBI to register applicable sex offenders and disclose registration information necessary to protect the public.<sup>113</sup> Thus, the Lychner Act allowed the federal government to circumvent noncompliant states by requiring registrants residing in states that had not yet established a "minimally sufficient" SORN program to register in the national database.<sup>114</sup>

The Lychner Act also included new categories of registrants that were required to register for life.<sup>115</sup> In addition to persons determined to be sexually violent predators,<sup>116</sup> the Lychner Act required persons convicted of two or more of the specified crimes against minors or sexually violent offenses<sup>117</sup> and persons convicted of aggravated sexual abuse to register for life.<sup>118</sup>

With overwhelming public support,<sup>119</sup> all fifty states implemented registration and notification regimes in compliance with the Wetterling Act and Megan's Law.<sup>120</sup> Each state was also free to build upon the minimum federal requirements and, for the most part,<sup>121</sup> states chose to do so.<sup>122</sup> For example, states broadened the number and scope of offenses triggering registration<sup>123</sup> and increased the duration of the registration period.<sup>124</sup> States chose to apply the provisions retroactively to people who had committed their crimes before the implementation of the program.<sup>125</sup> And various states opted for more active notification methods such as hosting meetings in communities where registrants live, issuing leaflets, and requiring registrants to personally notify neighbors of their presence.<sup>126</sup>

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112. Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 349 (1998).

113. 42 U.S.C. § 14072(c), (f)(1).

114. *Id.* § 14072(c).

115. *Id.* § 14072(d)(2).

116. *Id.* § 14071(a)(3)(B).

117. *Id.* § 14072(d)(2)(A).

118. *Id.* § 14072(d)(2)(B).

119. See Kabat, *supra* note 112, at 334–35.

120. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 316–17 (2001).

121. Several states, including Montana and Kansas, refused to expand on the federal SORN requirements and struck down amendments to include adult consensual sodomy as a qualifying offense. LOGAN, *supra* note 9, at 80.

122. See *id.* at 66–79.

123. *Id.* Logan provides examples of additional offenses added by the states including public urination, posting an obscene bumper sticker or writing, and seduction. *Id.*

124. *Id.* at 69.

125. *Id.* at 71.

126. *Id.* at 78.

## B. Judicial Challenges to First-Generation SORN Laws

### 1. Lower Court Challenges

As state sex offender laws were implemented across the country, registrants began challenging first-generation laws as additional forms of punishment in violation of their constitutional rights as criminal defendants.<sup>127</sup> Many of the initial challenges included allegations that the regimes functioned as criminal penalties in violation of the Ex Post Facto Clause,<sup>128</sup> the Double Jeopardy Clause,<sup>129</sup> the Bill of Attainder Clause,<sup>130</sup> and the Cruel and Unusual Punishment Clause.<sup>131</sup>

In answering the punishment question with respect to state SORN regimes, most circuit courts applied a version of the intent-effects test discussed in Part I.B.<sup>132</sup> Although each state's regime varied in scope and severity, lower courts consistently found that SORN schemes were nonpunitive, both in their intention and application.<sup>133</sup>

Nonetheless, several district courts originally struck down community notification programs on the grounds that they effectively punished registrants.<sup>134</sup> For example, in 1996, Judge Denny Chin of the Southern District of New York struck down the notification provisions of the New York State Sex Offender Registration Act in *Doe v. Pataki*.<sup>135</sup> The law provided for different levels of community notification, assigned pursuant to

127. See Mary K. Evans et al., *Sex Offender Registration and Community Notification*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 2, at 142, 151. Although many of the initial challenges against first-generation SORN regimes were brought in state court and alleged state constitutional violations, this Note looks exclusively at federal challenges raising the punishment question under the U.S. Constitution.

128. See, e.g., *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997).

129. See, e.g., *E. B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

130. See, e.g., *Artway v. Attorney Gen.*, 81 F.3d 1235 (3d Cir. 1996).

131. See, e.g., *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1996).

132. See *Moore v. Avoyelles Corr. Ctr.*, 253 F.3d 870, 872 (5th Cir. 2001); *Femedeer v. Haun*, 227 F.3d 1244, 1248–49 (10th Cir. 2000); *Cutshall v. Sundquist*, 193 F.3d 466, 473 (6th Cir. 1999); *Russell v. Gregoire*, 124 F.3d 1079, 1084 (9th Cir. 1997); *Pataki*, 120 F.3d at 1274. *But see Artway*, 81 F.3d at 1263 (applying a test that considered the legislature's subjective purpose, the objective purpose as indicated by the proportionality and history of the measure, and the effects of the law).

133. See, e.g., *Moore*, 253 F.3d at 873; *Femedeer*, 227 F.3d at 1253; *Cutshall*, 193 F.3d at 477; *Russell*, 124 F.3d at 1093; *Pataki*, 120 F.3d at 1285; *E. B.*, 119 F.3d at 1111; *Artway*, 81 F.3d at 1267; *Byron M. v. City of Whittier*, 46 F. Supp. 2d 1032, 1036 (C.D. Cal. 1998); *Roe v. Farwell*, 999 F. Supp. 174, 193 (D. Mass. 1998); *Lanni v. Engler*, 994 F. Supp. 849, 854–55 (E.D. Mich. 1998); *Doe v. Kelley*, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); *Weld*, 954 F. Supp. at 436.

134. *Roe v. Office of Adult Prob.*, 938 F. Supp. 1080, 1093 (D. Conn. 1996) (finding that the punitive effects of the notification scheme were not “merely incidental” to the nonpunitive purpose), *vacated*, 125 F.3d 47 (2d Cir. 1997); *Doe v. Gregoire*, 960 F. Supp. 1478, 1486 (W.D. Wash. 1997) (holding that the public notification provisions were punitive in nature), *rev'd sub nom. Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Doe v. Pataki*, 919 F. Supp. 691, 701 (S.D.N.Y. 1996) (finding that the public notification provisions were punitive), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997).

135. *Pataki*, 919 F. Supp. at 701.

a registrant's designated risk.<sup>136</sup> In addition, the law created a "900" telephone number service that members of the public could call, provide identifying information about the suspected registrant, and, after personally identifying themselves, receive information about the registrant in question.<sup>137</sup> Judge Chin struck down these provisions for five reasons: (1) the public dissemination of one's wrongdoing was a form of punishment dating back to "biblical times"; (2) notification sought to deter criminal conduct, a traditional goal of punishment; (3) the dissemination of information placed a public stigma on registrants that could create "personal and professional" disabilities or restraints; (4) notification was triggered by the conviction of a crime; and (5) the negative effects of community notification, including public ostracization, threats of physical violence, and job loss, far exceeded the benefits of such provisions.<sup>138</sup> Judge Chin's decision and others like it were ultimately rejected by the circuit courts.<sup>139</sup>

Focusing on the legislature's "objective manifestations,"<sup>140</sup> the majority of circuit courts ascertained legislative intent by considering the language of the SORN statute,<sup>141</sup> the legislature's stated purpose,<sup>142</sup> and the overall design of the scheme.<sup>143</sup> The lower courts consistently determined that state legislatures did not intend for SORN laws to punish registered sex offenders.<sup>144</sup>

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136. *Id.* at 695–96. The personal information of "low" risk registrants was not disclosed outside of law enforcement agencies. *Id.* at 695. The information of "moderate" risk registrants was disclosed to "vulnerable populations" but limited to a registrant's approximate address, photograph, and background information. *Id.* The information of "high" risk registrants was similarly disseminated to vulnerable populations and also included the registrant's exact address. *Id.* at 695–96.

137. *Id.* at 696.

138. *Id.* at 701.

139. *See generally* *Roe v. Office of Adult Prob.*, 125 F.3d 47 (2d Cir. 1997); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997).

140. *Pataki*, 120 F.3d at 1277.

141. *See, e.g., Russell*, 124 F.3d at 1087.

142. *See, e.g., Moore v. Avoyelles Corr. Ctr.*, 253 F.3d 870, 872 (5th Cir. 2001) (highlighting that the law's stated purpose was to protect the public); *Femedeer v. Haun*, 227 F.3d 1244, 1249 (10th Cir. 2000) (finding that the law's stated purpose, to "apprehend[] offenders," was civil); *Office of Adult Prob.*, 125 F.3d at 54 (focusing on the individualized clinical assessments as an indication of the legislature's remedial intent); *Artway v. Attorney Gen.*, 81 F.3d 1235, 1264 (3d Cir. 1996); *Byron M. v. City of Whittier*, 46 F. Supp. 2d 1032, 1035 (C.D. Cal. 1998) (focusing on the legislature's stated purpose of "assuring public protection" through notification); *Roe v. Farwell*, 999 F. Supp. 174, 185 (D. Mass. 1998) (relying on the legislature's stated purpose to provide law enforcement with additional information to prevent sex crimes); *Doe v. Weld*, 954 F. Supp. 425, 433 (D. Mass. 1996).

143. *See, e.g., Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (concluding that the law's limited data collection and community notification only when "necessary to protect the public" indicated the legislature's civil intent); *Russell*, 124 F.3d at 1087–88 (finding the limited collection of information through mail-in notices demonstrated an intention to monitor registrants, not punish them); *Lanni v. Engler*, 994 F. Supp. 849, 853 (E.D. Mich. 1998) (noting that the limited dissemination of information to persons living in the same zip code as the registrant was indicative of the law's civil purpose).

144. *See, e.g., Moore*, 253 F.3d at 872; *Femedeer*, 227 F.3d at 1249; *Cutshall*, 193 F.3d at 474; *Russell*, 124 F.3d at 1087–88; *E. B.*, 119 F.3d at 1097; *Artway*, 81 F.3d at 1264; *Byron M.*,

Lower courts also found that first-generation laws were not punitive in their application to registrants. Applying the *Mendoza-Martinez* factors, the courts found that both the registration and notification components were regulatory in their effects.<sup>145</sup> Viewing these laws as analogous to the registration systems used in other civil programs, various courts upheld the registration components of state SORN laws.<sup>146</sup> Similarly, lower courts rejected challenges to the laws' notification components and found that the programs did not resemble traditional forms of punishment.<sup>147</sup>

## 2. *Smith v. Doe*

On March 5, 2003, the Supreme Court weighed in on the constitutionality of sex offender registration and notification regimes.<sup>148</sup> In *Smith v. Doe*, the Court answered the punishment question in the negative, concluding that the Alaska Sex Offender Registration Act (ASORA) was not punitive in its intent or effect on required registrants.<sup>149</sup>

In 1994, Alaska implemented its registration and notification program in compliance with both the Wetterling Act and Megan's Law.<sup>150</sup> ASORA expanded the baseline federal requirements by increasing the duration of registration;<sup>151</sup> registrants convicted of a single sex offense were required to register for fifteen years and registrants convicted of two and more sex offenses were required to register for life.<sup>152</sup> Although ASORA did not specifically authorize a method of public disclosure, Alaskan law enforcement created an online database of nonconfidential registrant information and made it available to the public.<sup>153</sup>

Like the lower courts, the Supreme Court applied the intent-effects analysis articulated in *Ward*.<sup>154</sup> In ascertaining the legislature's intent, the Court relied primarily on the text of the statute.<sup>155</sup> The Court found that the legislature's explicit inclusion of the law's purpose, "protecting the public

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46 F. Supp. 2d at 1035; *Farwell*, 999 F. Supp. at 185; *Lanni*, 994 F. Supp. at 853; *Weld*, 954 F. Supp. at 433.

145. See, e.g., *Moore*, 253 F.3d at 872; *Femedeer*, 227 F.3d at 1250–53; *Cutshall*, 193 F.3d at 474–75; *Russell*, 124 F.3d at 1089–92; *Pataki*, 120 F.3d at 1280–84; *Lanni*, 994 F. Supp. at 854; *Weld*, 954 F. Supp. at 434–35.

146. See, e.g., *Russell*, 124 F.3d at 1089; *Farwell*, 999 F. Supp. at 186.

147. See, e.g., *Femedeer*, 227 F.3d at 1250–53; *Cutshall*, 193 F.3d at 475; *Office of Adult Prob.*, 125 F.3d at 55; *Farwell*, 999 F. Supp. at 190; *Lanni*, 994 F. Supp. at 854.

148. See generally *Smith v. Doe*, 538 U.S. 84 (2003).

149. *Id.* Following the U.S. Supreme Court's decision in *Smith*, however, the Alaska Supreme Court determined that ASORA violated the Alaska state constitution when applied retroactively as the effects of law were punitive on registrants. *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008).

150. 1994 Alaska Sess. Laws Ch. 41.

151. Persons convicted of a single sex offense were required to provide written notice of their information annually for fifteen years, and all persons convicted of two or more sex offenses were required register for life. *Id.*

152. 1994 Alaska Sess. Laws Ch. 41 § 12.63.020(a)(1)–(2).

153. *Smith*, 538 U.S. at 91.

154. *Id.* at 92.

155. *Id.* at 93.

from sex offenders,” was indicative of its civil intention.<sup>156</sup> The Court rejected arguments that ASORA’s codification in the criminal procedure code<sup>157</sup> and the state’s policy of alerting registrants of their duty to register at criminal sentencing were dispositive of the legislature’s criminal preference.<sup>158</sup>

In his concurring opinion, Justice David Souter challenged this position and stated that the legislature’s intent was not “clearly civil.”<sup>159</sup> Finding ASORA to be a “close case,”<sup>160</sup> Justice Souter highlighted the legislature’s failure to explicitly label the law as civil and the inclusion of the criminal components already discussed by the majority.<sup>161</sup> Justice Souter, along with Justices Ginsburg and Breyer in their dissent,<sup>162</sup> advocated for a new test: where the legislature’s intention is unclear, the heightened burden on the challenger to prove the law’s punitive effects by the “clearest proof” should be disregarded.<sup>163</sup>

In its analysis of ASORA’s effects, the majority limited its review to the following *Mendoza-Martinez* factors: (1) history and tradition as punishment, (2) affirmative disability or restraint, (3) promotion of the traditional aims of punishment, (4) rational connection to a nonpunitive purpose, and (5) excessiveness with respect to that nonpunitive purpose.<sup>164</sup> The Court reasoned that the remaining factors—whether the sanction requires a finding of scienter and whether the behavior to which the sanction applies is already a crime—were not relevant to its analysis.<sup>165</sup>

In assessing the first *Mendoza-Martinez* factor, the Court rejected the challenger’s comparisons of ASORA to other traditional forms of punishment.<sup>166</sup> Given the relatively recent inception of these schemes, the Court found that neither the registration nor the notification component could be considered “traditional.”<sup>167</sup> The Court determined that the programs could not be considered forms of public shaming because that punishment

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156. *Id.*

157. *Id.* at 95.

158. *Id.* at 95–96.

159. *Id.* at 107 (Souter, J., concurring).

160. *Id.*

161. *Id.* at 107–08.

162. *Id.* at 115 (Ginsburg, J., dissenting).

163. *Id.* at 107 (Souter, J., concurring).

164. *Id.* at 97 (majority opinion). Justice John Paul Stevens proposed a new test for determining whether a measure is punitive. Under his formulation, a law is punitive if: (1) it is imposed on everyone who commits a crime, (2) it is not imposed on anyone else, and (3) it severely impairs a person’s liberty. *Id.* at 112. (Stevens, J., dissenting in part and concurring in part).

165. *Id.* at 105 (majority opinion). The Court acknowledged that although ASORA’s requirements were triggered by the commission of a crime, usually an indication of a sanction’s punitiveness, the criminal element was necessary to accomplish the law’s nonpunitive aim of reducing recidivism. *Id.*

166. *Id.* at 98.

167. *Id.* at 97.

historically required face-to-face humiliation.<sup>168</sup> Similarly, the schemes were not analogous to banishment because banishment required physical expulsion from society.<sup>169</sup> The Court rejected arguments that the internet notification component resembled public shaming and emphasized that the purpose of public disclosure is “to inform the public for its own safety, not to humiliate the offender.”<sup>170</sup> The Court instead analogized ASORA to the publication of criminal records, a common civil practice not intended to punish criminals.<sup>171</sup>

Considering the second *Mendoza-Martinez* factor, affirmative disability or restraint, the Court concluded that ASORA’s restrictive effects were “minor and indirect.”<sup>172</sup> First, the Court noted that ASORA did not impose any physical restraint on registrants and thus did not resemble imprisonment.<sup>173</sup> Second, the Court determined that ASORA did not involve any active supervision of registrants and thus did not function like probation or parole.<sup>174</sup> The Court noted that ASORA did not require in-person reporting to law enforcement but rather provided only for written registration.<sup>175</sup> In response to registrants’ argument that the public’s reaction to ASORA created affirmative restraints on personal liberty, the Court held that these restrictions stemmed from their crimes, not from the registration and notification obligations.<sup>176</sup>

In considering the third *Mendoza-Martinez* factor, whether ASORA promoted the traditional aims of punishment, the Court concluded that the presence of a deterrent purpose was not dispositive of the law’s punitive nature.<sup>177</sup> Acknowledging that civil laws frequently deter crime without imposing punishment, the Court declined to give this factor much weight.<sup>178</sup> Further, the Court rejected the Ninth Circuit’s holding that ASORA was retributive.<sup>179</sup> Although the duration of registration outlined in ASORA was based on the type and frequency of conviction, rather than an assessment of a registrant’s current dangerousness, the Court determined that past convictions were rationally related to a registrant’s risk of recidivism.<sup>180</sup>

In assessing the fourth and fifth *Mendoza-Martinez* factors, the Court determined that ASORA was rationally connected to its nonpunitive purpose and was not excessive in furtherance of that regulatory purpose.<sup>181</sup>

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168. *Id.* at 99 (“In contrast to colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.”).

169. *Id.* at 98.

170. *Id.* at 99.

171. *Id.*

172. *Id.* at 101.

173. *Id.* at 100.

174. *Id.* at 101.

175. *Id.*

176. *Id.*

177. *Id.* at 102.

178. *See id.*

179. *Id.*

180. *Id.*

181. *Id.* at 102–03.

Identifying public safety as ASORA's nonpunitive goal,<sup>182</sup> the Court emphasized that the connection between the law's ends and means was the most significant factor in its punishment analysis.<sup>183</sup> The majority highlighted the notification component, finding that alerting community members to the presence of sex offenders was rationally related to public safety.<sup>184</sup> Concluding that ASORA was not excessive in its promotion of safety, the Court rejected registrants' arguments that the law's lack of individualized assessment and wide dissemination rendered it punitive.<sup>185</sup> The Court clarified, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance."<sup>186</sup>

In dissent, Justice Ginsburg argued that although ASORA was not identical to traditional forms of punishment, its effects sufficiently resembled parole or probation and historical shaming punishments.<sup>187</sup> Because registration requires frequent reporting to law enforcement, Justice Ginsburg argued, the registration component functions like supervised release or parole.<sup>188</sup> Justice Ginsburg concluded that the notification component resembled public shaming because it required the state to affix a negative label to the registrant and publicize that label to the community.<sup>189</sup>

Justice Ginsburg further rejected the majority's conclusion on the grounds that ASORA "notably exceed[ed]" the purpose of public safety by applying to all convicted sex offenders without regard to their current dangerousness.<sup>190</sup> By basing duration of registration on conviction rather than a registrant's actual risk of recidivism, ASORA went beyond the scope of public safety. Most important to Justice Ginsburg's analysis was the fact that ASORA did not account for the possibility of rehabilitation and offered registrants no ability to petition the court for relief.<sup>191</sup>

### C. Modern SORN Laws

Following the Court's decision in *Smith*, Congress passed the Adam Walsh Child Protection and Safety Act of 2006<sup>192</sup> (AWA), which replaced the Wetterling Act and Megan's Law and provided more expansive baseline guidelines for state SORN schemes.<sup>193</sup> Title I of the AWA, containing the Sex Offender Registration and Notification Act<sup>194</sup> (SORNA), details the

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182. *Id.*

183. *Id.* at 102.

184. *Id.* at 103.

185. *See id.*

186. *Id.*

187. *Id.* at 115–16 (Ginsburg, J., dissenting).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 117.

192. Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of the U.S.C.).

193. *See* LOGAN, *supra* note 9, at 62–65.

194. Pub. L. No. 109-248, 120 Stat. 590 (2006) (codified as amended in scattered sections of the U.S.C.).

federal standards for applicable jurisdictions.<sup>195</sup> As with the prior federal legislative scheme, states are obligated to “substantially implement” the new requirements or lose 10 percent of their federal funding for crime prevention.<sup>196</sup>

SORNA differs from its predecessors in several important ways. First, SORNA broadens the scope of existing SORN regimes through the addition of qualifying crimes and offenses.<sup>197</sup> In redefining the term “sex offense,” Congress made SORNA applicable to all persons convicted of a criminal offense involving a sexual act or sexual contact with another person.<sup>198</sup> SORNA further increases the pool of registrants by adding new crimes to the definition of a “specified offense against a minor.”<sup>199</sup> In addition to the crimes previously detailed in the Wetterling Act, SORNA includes offenses related to video voyeurism, child pornography, and “criminal sexual conduct involving a minor or the use of the Internet to facilitate or attempt such conduct.”<sup>200</sup>

SORNA also imposes harsher reporting obligations on registrants by increasing the duration of registration and the frequency of reporting,<sup>201</sup> requiring the collection and disclosure of additional personal information,<sup>202</sup> and mandating in-person verification of information.<sup>203</sup> SORNA bases the duration of registration and frequency of reporting on a registrant’s tier level within a three-tier classification system.<sup>204</sup> However, a person’s tier is tied only to their original conviction, without regard to any individualized assessment of current dangerousness.<sup>205</sup> Once a registrant is assigned a tier level, that designation is final and unreviewable.<sup>206</sup>

Under the federal requirements, tier I registrants are required to register for fifteen years and verify their information annually.<sup>207</sup> Tier II registrants are required to register for twenty-five years and verify their information every six months.<sup>208</sup> Tier III registrants are required to register for life and verify their information every three months.<sup>209</sup> Under this new system, all

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195. 34 U.S.C. § 20901 (Supp. 2017).

196. *Id.* § 20927.

197. PERLIN & CUCOLO, *supra* note 6, at 45.

198. 34 U.S.C. § 20911(5). SORNA does not apply to offenses involving consensual sexual conduct “if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if victim was at least 13 years old and the offender was not more than 4 years older than the victim.” *Id.* § 20911(5)(C).

199. *Id.* § 20911(5)(A).

200. *Id.* § 20911(7)(F)–(H).

201. *Id.* §§ 20915, 20918.

202. *Id.* §§ 20914, 20920.

203. *Id.* § 20918.

204. *Id.* §§ 20915, 20918.

205. PERLIN & CUCOLO, *supra* note 6, at 45.

206. 34 U.S.C. § 20915.

207. *Id.* §§ 20915, 20918.

208. *Id.*

209. *Id.*

registrants must report to their local enforcement agency in person and allow their jurisdiction to take a current photograph.<sup>210</sup>

In 2008, Congress supplemented the federal requirements with the Keeping the Internet Devoid of Sexual Predators Act of 2008<sup>211</sup> (the “KIDS Act”) to address the issue of online safety.<sup>212</sup> The KIDS Act requires all jurisdictions to collect the “internet identifiers” of registrants during the registration process.<sup>213</sup> The KIDS Act, however, does not require community notification of such information.<sup>214</sup> In 2016, Congress passed the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders,<sup>215</sup> which requires jurisdictions to mandate that registrants provide notice twenty-one days prior to intended international travel.<sup>216</sup> The law also required the State Department, the Department of Justice, and the Department of Homeland Security to develop and implement a plan to mark the U.S. passports of “covered sex offenders” with unique identifiers.<sup>217</sup>

Unlike the overwhelming support shown for the Wetterling Act and Megan’s Law,<sup>218</sup> SORNA and its amendments have been met with resistance from the states.<sup>219</sup> As of November 2019, only eighteen states had substantially implemented SORNA’s standards.<sup>220</sup> Noncompliant states have cited the program’s financial burdens and lack of public safety benefits as reasons for not implementing the new requirements.<sup>221</sup>

Despite the lack of universal support for SORNA, some states have continued to expand SORN schemes beyond the original guidelines in the Wetterling Act and Megan’s Law.<sup>222</sup> In addition to the state variations discussed in Part II.A, states continue to go beyond the minimum requirements with the expansion of residency restrictions and GPS monitoring programs.

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210. *Id.* § 20918.

211. Pub. L. No. 110-400, 122 Stat. 4224 (codified as amended in scattered sections of 34 U.S.C.).

212. *Legislative History of Federal Sex Offender Registration and Notification*, SMART, <https://www.smart.gov/legislation.htm> [<https://perma.cc/G38Y-MYWZ>] (last visited Nov. 12, 2019).

213. *Id.*

214. *Id.*

215. Pub. L. No. 114-119, 130 Stat. 15 (2016) (codified as amended in scattered sections of the U.S.C.).

216. *Id.*

217. *See* 22 U.S.C. § 212b (Supp. 2016); 34 U.S.C. § 21507 (Supp. 2017); *see also* *Passports and International Megan’s Law*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/News/passports/passports-and-international-megans-law.html> [<https://perma.cc/HAV7-4FXS>] (last visited Nov. 12, 2019).

218. *See supra* Part II.A.

219. Evans et al., *supra* note 127, at 146.

220. *See SORNA Implementation Status*, SMART, <https://smart.gov/sorna-map.htm> [<https://perma.cc/BK25-KFXW>] (last visited Nov. 12, 2019).

221. Evans et al., *supra* note 127, at 147.

222. LOGAN, *supra* note 9, at 66–78.

As of July 2019, thirty-four states had supplemented their SORN laws with residency restrictions.<sup>223</sup> Residency restrictions allow communities to prohibit a registrant from living, working, or traveling within a specified proximity to designated places.<sup>224</sup> Depending on the severity of the restriction, registrants may be prohibited from living within 100 to 3000 feet of a designated area.<sup>225</sup> These areas typically include places where minors congregate such as schools, parks, playgrounds, places of worship, and public athletic fields.<sup>226</sup> In some cases, designated areas can include broader locations such as “adult group homes.”<sup>227</sup>

States have also expanded their SORN regimes by implementing GPS programs to electronically monitor the location of designated registrants.<sup>228</sup> Enforcement agencies use GPS technology to both restrict where registrants may travel and conduct surveillance on their locations.<sup>229</sup> An increasing number of states are progressing from passive monitoring, which allows law enforcement to retroactively assess a registrant’s whereabouts, to active tracking, which provides law enforcement with near-real-time data.<sup>230</sup> For example, the Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act authorizes the Tennessee Bureau of Investigation to use GPS technology to both report a registrant’s location once a day and track a registrant’s whereabouts in real time.<sup>231</sup>

### III. THE CIRCUIT SPLIT OVER MODERN SORN LAWS

Since SORNA’s enactment and states’ compliance with or supplementation of the new federal standards, required registrants have initiated a second round of constitutional challenges in the federal courts. In this new series of actions, registrants argue that the harsher SORN laws are distinguishable from the first-generation laws previously considered.<sup>232</sup> By including more burdensome restrictions and broader notification provisions,

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223. See *Residency Restriction by State (For Persons Required to Register as Sex Offenders)*, FLA. ACTION COMMITTEE (July 11, 2019), <https://floridaactioncommittee.org/residency-restrictions-by-state-for-persons-required-to-register-as-sex-offenders> [https://perma.cc/CR4M-DBYX]. This number does not include local residency restrictions.

224. PERLIN & CUCOLO, *supra* note 6, at 66–78.

225. *Id.* at 57.

226. See, e.g., *Doe v. Gwyn*, No. 3:17-CV-504, 2018 WL 1957788, at \*8 (E.D. Tenn. Apr. 25, 2018); *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951, 954 (E.D. Wis. 2017).

227. See, e.g., *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086, 1091 (D. Minn. 2018).

228. See PERLIN & CUCOLO, *supra* note 6, at 61.

229. Michelle L. Meloy, *You Can Run but You Cannot Hide: GPS and Electronic Surveillance of Sex Offenders*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 2, at 165, 166.

230. *Id.* at 175.

231. *Doe v. Bredesen*, 507 F.3d 998, 1001 (6th Cir. 2007).

232. See, e.g., *Shaw v. Patton*, 823 F.3d 556, 570 (10th Cir. 2016) (The registrant argued that Oklahoma’s residency restriction was more burdensome than the Alaskan statute.); *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1054–55 (9th Cir. 2012) (The registrant argued that the Nevada SORN law was distinguishable from the Alaskan statute because it provided for active notification.).

registrants contend that modern SORN laws have become forms of criminal punishment in violation of the U.S. Constitution.<sup>233</sup> Part III.A outlines the punishment analysis applied by the majority of courts. Part III.B then explores the analyses applied by a minority of courts that strike down punitive SORN schemes.

#### A. *The Nonpunitive Majority*

Despite the broader and more restrictive obligations imposed by modern SORN laws, the majority of federal courts have rejected registrants' arguments that these schemes are punitive.<sup>234</sup> Instead, courts have frequently upheld SORNA's guidelines<sup>235</sup> and state and local SORN regimes as nonpunitive regulatory measures.<sup>236</sup> In rendering their decisions, courts consistently rely on the same justifications, including: (1) that *Smith* has foreclosed a punitive finding, (2) that the challenged law is analogous to a

233. See, e.g., *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 797 (Jan. 7, 2019) (No. 18-386) (mem.); *Doe v. Miami-Dade County*, 846 F.3d 1180 (11th Cir. 2017); *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016); *Shaw*, 823 F.3d 556; *Riley v. Corbett*, 622 F. App'x 93 (3d Cir. 2015); *Doe v. Cuomo*, 755 F.3d 105 (2d Cir. 2014); *King v. McCraw*, 559 F. App'x 278 (5th Cir. 2014); *United States v. Elk Shoulder*, 738 F.3d 948 (9th Cir. 2013); *United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013); *United States v. Parks*, 698 F.3d 1 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599 (6th Cir. 2012); *ACLU of Nev.*, 670 F.3d 1046; *United States v. W. B. H.*, 664 F.3d 848 (11th Cir. 2011); *United States v. Wass*, No. 7:18-CR-45-BO, 2018 WL 3341180 (E.D.N.C. July 6, 2018), *appeal docketed*, No. 18-4547 (4th Cir. Aug. 3, 2018); *Doe v. Gwyn*, No. 3:17-CV-504, 2018 WL 1957788 (E.D. Tenn. Apr. 25, 2018); *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086 (D. Minn. 2018); *Millard v. Rankin*, 265 F. Supp. 3d 1211 (D. Colo. 2017), *appeal docketed*, No. 17-1333 (10th Cir. Sept. 21, 2017); *United States v. Morgan*, 255 F. Supp. 3d 221 (D.D.C. 2017); *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951 (E.D. Wis. 2017); *Brown v. Montoya*, 45 F. Supp. 3d 1294 (D.N.M. 2014).

234. See, e.g., *Vasquez*, 895 F.3d 515; *Shaw*, 823 F.3d 556; *Riley*, 622 F. App'x 93; *Cuomo*, 755 F.3d 105; *King*, 559 F. App'x 278; *Elk Shoulder*, 738 F.3d 948; *Under Seal*, 709 F.3d 257; *Parks*, 698 F.3d 1; *Felts*, 674 F.3d 599; *ACLU of Nev.*, 670 F.3d 1046; *W. B. H.*, 664 F.3d 848; *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011); *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010); *United States v. Young*, 585 F.3d 199 (5th Cir. 2009); *United States v. Lawrance*, 548 F.3d 1329 (10th Cir. 2008); *Hall v. Attorney Gen.*, 266 F. App'x 355 (5th Cir. 2008); *Bredesen*, 507 F.3d 998; *United States v. Cotton*, 760 F. Supp. 2d 116 (D.D.C. 2011).

235. See, e.g., *Under Seal*, 709 F.3d at 263; *Parks*, 698 F.3d at 6; *Leach*, 639 F.3d at 773; *United States v. George*, 625 F.3d 1124, 1131 (9th Cir. 2010); *United States v. Shenandoah*, 595 F.3d 151, 158-59 (3d Cir. 2010); *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir. 2010); *Young*, 585 F.3d at 204; *United States v. Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009); *United States v. Hinckley*, 550 F.3d 926, 936 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 919 (8th Cir. 2008); *Morgan*, 255 F. Supp. 3d at 234.

236. See, e.g., *Shaw*, 823 F.3d at 577 (upholding Oklahoma's SORN law); *Cuomo*, 755 F.3d at 111-12 (upholding New York's SORN law); *ACLU of Nev.*, 670 F.3d at 1058 (upholding Nevada's sex offender registration statute); *Anderson v. Holder*, 647 F.3d 1165, 1173 (D.C. Cir. 2011) (upholding the District of Columbia's SORN law); *Houston v. Williams*, 547 F.3d 1357, 1364 (11th Cir. 2008) (upholding Florida's sex offender registration statute); *Virnieks v. Smith*, 521 F.3d 707, 720 (7th Cir. 2008) (upholding Wisconsin's sex offender registration statute); *Bredesen*, 507 F.3d at 1008 (upholding the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006) (upholding Arkansas's SORN law); *Hatton v. Bonner*, 356 F.3d 955, 967 (9th Cir. 2004) (upholding California's sex offender registration statute).

SORN law previously upheld as civil, and (3) that the challenged law is analogous to an existing civil remedy.

### 1. Bound by *Smith v. Doe*

Courts in the majority frequently interpret *Smith* to stand for the proposition that all sex offender legislation is civil in nature.<sup>237</sup> Instead of reviewing the provisions of the challenged SORN law and considering the effects of those provisions on registrants, these courts have held that *Smith* effectively forecloses any finding that SORN laws punish registrants.<sup>238</sup> As an example, in *Herrera v. Williams*,<sup>239</sup> the Tenth Circuit held that New Mexico's SORN regime was a regulatory scheme.<sup>240</sup> Citing to *Smith*, the court concluded that "sex offender registry laws do not fall within the purview of the ex post facto clause because they impose only *civil* burdens and do not implicate *criminal* punishments."<sup>241</sup> Instead of reviewing the specific provisions of New Mexico's sex offender legislation, the court simply concluded that there was no evidence "tending to establish the New Mexico statute is in any way different" than the Alaskan statute in *Smith*.<sup>242</sup>

In the same vein, the Seventh Circuit in *Steward v. Folz*<sup>243</sup> determined that a court need only review legislative intent when conducting the punishment analysis for sex offender legislation because *Smith* foreclosed a finding that the law's effects could function to punish registrants.<sup>244</sup> Without discussing the particular obligations imposed by Indiana's Sex Offender Registration Act, the court found, through citation to *Smith*, "that sex offender registration statutes do not violate the *ex post facto* clause if their aims are not punitive."<sup>245</sup> Because the legislature had intended the law to be nonpunitive, the court concluded that its analysis was complete and the law was civil.<sup>246</sup>

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237. See, e.g., *Hall*, 266 F. App'x at 356 ("Retroactive application of laws requiring sex-offender registration and notification do not violate the Ex Post Facto Clause."); *Bredesen*, 507 F.3d at 1004; *Steward v. Folz*, 190 F. App'x 476, 478 (7th Cir. 2006); *Herrera v. Williams*, 99 F. App'x 188, 190 (10th Cir. 2004).

238. See, e.g., *Holland v. Governor of Ga.*, No. 18-13445, 2019 WL 3716396, at \*2 (11th Cir. Aug. 7, 2019) ("Section 42-1-12(e)(3) does not violate the *Ex Post Facto* Clause because, like the registration statutes that have been upheld by both the Supreme Court and this Court, it imposes a civil regulatory regime rather than punishment."); *Does 1-134 v. Wasden*, No. 16-cv-00429, 2019 WL 1508037, at \*7 (D. Idaho Apr. 5, 2019) ("The *Smith* Court expressly rejected the notion that the harms Plaintiffs allege, such as social ostracization and difficulties finding housing or employment, are so punitive as to negate the civil intent of sexual offender registration statutes."), *appeal docketed*, No. 19-35391 (9th Cir. May 6, 2019); *Norris v. Indiana*, No. 1:16-cv-03059, 2016 WL 7188230, at \*2 (S.D. Ind. Dec. 12, 2016) (holding that the amendments to Indiana's Sexually Violent Predator program were not punitive and noting that "[w]hether a comprehensive registration regime targeting only sex offenders is penal . . . is not an open question" (quoting *Leach*, 639 F.3d at 773)).

239. 99 F. App'x 188 (10th Cir. 2004).

240. *Id.* at 190.

241. *Id.*

242. *Id.*

243. 190 F. App'x 476 (7th Cir. 2006).

244. *Id.* at 478.

245. *Id.*

246. *Id.*

## 2. Analogous to Civil SORN Laws

Courts in the majority have also dismissed challenges to modern SORN laws by comparing them to the Alaskan statute at issue in *Smith* and concluding that they are indistinguishable.<sup>247</sup> Similarly, courts have found that, even where distinctions exist, the additional obligations imposed by modern SORN laws do not meaningfully alter the Supreme Court's punishment analysis.<sup>248</sup> Applying this approach, the Eleventh Circuit in *United States v. W. B. H.*<sup>249</sup> upheld SORNA on the grounds that, although the standards imposed more expansive and harsher burdens on registrants, the relationship between SORNA's regulatory purpose and the means used to achieve that purpose were not "materially different" from those found in *Smith*.<sup>250</sup> Unlike the registrant in *Smith*, however, the registrant in *W. B. H.* was convicted as a youthful offender.<sup>251</sup> Although the court conceded that youthful offenders may have lower recidivism rates than adult offenders, that fact, the court concluded, "does not mean registration requirements covering younger sex offenders are excessive."<sup>252</sup> Instead, the court focused on the similarities between SORNA and ASORA, pointing out that both schemes grouped registrants in categories by conviction rather than through individual assessment of dangerousness and applied different reporting requirements depending on categorical placement.<sup>253</sup>

The Ninth Circuit in *Clark v. Ryan*<sup>254</sup> similarly upheld Arizona's SORN program despite acknowledging that increasing internet use created new threats to registrants' liberty.<sup>255</sup> The registrant argued that these threats,

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247. See, e.g., *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018), cert. denied, 139 S. Ct. 797 (Jan. 7, 2019) (No. 18-386) (mem.); *Riley v. Corbett*, 622 F. App'x 93, 95 (3d Cir. 2015) (holding that Pennsylvania's Megan's Law was not materially different from ASORA); *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012) (noting that Alaska's statute contained a "nearly identical registration requirement" to that in SORNA); *Brown v. Montoya*, 45 F. Supp. 3d 1294, 1301 (D.N.M. 2014) (finding New Mexico's regime to be "virtually indistinguishable" from the Alaskan statute).

248. See, e.g., *ACLU of Nev. v. Mastro*, 670 F.3d 1046, 1055–56 (9th Cir. 2012) ("Active dissemination of an individual's sex offender status does not alter the Court's core reasoning . . ."); *United States v. Cotton*, 760 F. Supp. 2d 116, 137–38 (D.D.C. 2011) ("SORNA's penalty provision and reporting requirements may be more onerous than the Alaska statute at issue in *Smith*, but these differences cannot establish by 'clearest proof' that SORNA's overall regulatory scheme is punitive."); *Prynne v. Northam*, No. 1:19-CV-329, 2019 WL 3860197, at \*6 (E.D. Va. Aug. 16, 2019) ("Plaintiff lastly complains of what she describes as the 'web of reporting requirements.' These include blood sampling and fingerprinting, short time periods within which to report changes in information, and frequent, potentially embarrassing routine reporting. As noted above, many courts have looked at these or similar requirements and found that they are not punitive. . . . While they may be onerous for some, the registration requirements are merely portions of a remedial statutory regime and the sort of inconvenience that attends any registration regime.").

249. 664 F.3d 848 (11th Cir. 2011).

250. *Id.* at 859–60.

251. *Id.* at 860.

252. *Id.*

253. *Id.* at 859.

254. 836 F.3d 1013 (9th Cir. 2016).

255. *Id.* at 1017.

which were not considered in *Smith*—namely cyberstalking and cyberharassment—made Arizona’s SORN law sufficiently analogous to public shaming; the law required registrants to provide their online identifiers and this “website identification w[ould] likely facilitate harassment.”<sup>256</sup> The court found that although “[i]nternet use had indeed increased since the Supreme Court decided *Smith* in 2003, the Court specifically considered the vast ‘geographic reach of the Internet’ in its decision.”<sup>257</sup>

### 3. Analogous to Civil Remedies

Courts in the majority also compare SORN regimes to other civil sanctions that have been upheld by the Supreme Court. For example, the Second Circuit in *Doe v. Cuomo*<sup>258</sup> rejected a challenge to the New York Sex Offender Registration Act on the grounds that the Supreme Court had previously upheld the “‘termination of financial support[] and loss of livelihood,’ both of which . . . represent ‘far heavier burdens.’”<sup>259</sup> Without referencing them explicitly, the court referred to the Supreme Court’s decisions in *Flemming v. Nestor*,<sup>260</sup> in which the Court held that the termination of social security benefits was nonpunitive,<sup>261</sup> and *Hawker v. New York*,<sup>262</sup> in which the Court held that the prevention of convicted felons from practicing medicine was regulatory.<sup>263</sup> The Second Circuit reasoned that because those sanctions were more burdensome than sex offender registration and notification obligations, the New York Sex Offender Registration Act was nonpunitive.<sup>264</sup>

Similarly, the Eighth Circuit in *Doe v. Miller*<sup>265</sup> upheld an Iowa residency restriction after comparing it to civil sanctions previously upheld by the Supreme Court.<sup>266</sup> Reversing the district court, the Eighth Circuit found that the residency restriction was not excessive in relation to its nonpunitive purpose despite the fact that it applied to all registrants without an individualized assessment of their current dangerousness.<sup>267</sup> The court supported its holding by referencing the Supreme Court’s decisions in *Hawker* and *De Veau v. Braisted*,<sup>268</sup> both of which upheld restrictions that were imposed on classes of offenders without individualized assessment.<sup>269</sup> The court concluded that because the Supreme Court had previously upheld

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256. *Id.*

257. *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 99 (2003)).

258. 755 F.3d 105 (2d Cir. 2014).

259. *Id.* at 112 (quoting *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997)).

260. 363 U.S. 603 (1960).

261. *See generally id.*

262. 170 U.S. 189 (1898).

263. *See generally id.*

264. *Cuomo*, 755 F.3d at 112.

265. 405 F.3d 700 (8th Cir. 2005).

266. *Id.* at 721–22.

267. *Id.* at 721.

268. 363 U.S. 144 (1960).

269. *Miller*, 405 F.3d at 721.

schemes that did not employ individualized assessments, Iowa's residency restriction was not excessive and did not violate the Ex Post Facto Clause.<sup>270</sup>

### B. *The Punitive Minority*

As federal, state, and local SORN laws have expanded in scope and intensity, some federal courts have responded by reconstructing the punishment analysis to find that modern SORN laws cross the threshold of criminal punishment. Part III.B.1 explains the Sixth Circuit's decision that began this movement and Part III.B.2 details how other federal courts have used the Sixth Circuit's analysis to alter the punishment test.

#### 1. *Does #1–5 v. Snyder*

On August 25, 2016, the tide of nonpunitive holdings across federal courts began to turn when the Sixth Circuit struck down the amendments to the Michigan Sex Offender Registration Act (MSORA). In *Does #1–5 v. Snyder*, the Sixth Circuit held that the amendments to MSORA violated the Ex Post Facto Clause because they were punitive in their effects on registrants.<sup>271</sup>

More burdensome than the Alaskan statute at issue in *Smith*, MSORA prohibited registrants from living, working, or loitering within 1000 feet of a school; divided registrants into three tiers based solely on conviction without regard to current dangerousness; and required in-person reporting of minor changes such as the creation or alteration of internet identifiers.<sup>272</sup> The court characterized these burdensome amendments as a movement towards a “byzantine code governing in minute detail the lives of the state's sex offenders.”<sup>273</sup> The court concluded that these additional provisions effectively increased the punishment on registered sex offenders.<sup>274</sup>

Adhering to the test devised by the Supreme Court in *Smith*,<sup>275</sup> the Sixth Circuit analyzed both the intent of the enacting legislature and the effects of the legislation.<sup>276</sup> Although the law contained features that could suggest a punitive intent—“e.g., SORA is triggered solely by criminal offenses and the registration requirement is recorded on the judgment; registration is handled by criminal justice agencies like the police; SORA imposes criminal sanctions; and it is codified in Chapter 28 of the Michigan Code, a chapter that deals with police-related laws”—the court determined that these features were similar to those in *Smith* and declined to find that the law's intent was punitive.<sup>277</sup>

In conducting its effects analysis, the court limited its review to the five *Mendoza-Martinez* factors considered by the *Smith* Court as the most

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270. *Id.* at 723.

271. *Does #1–5 v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016).

272. *Id.*

273. *Id.* at 697.

274. *Id.* at 706.

275. *See supra* Part II.B.2.

276. *Snyder*, 834 F.3d at 706.

277. *Id.* at 701.

relevant to SORN regimes.<sup>278</sup> The Sixth Circuit considered whether MSORA resembled a historical or traditional form of punishment, imposed an affirmative disability or restraint, promoted the traditional aims of punishment, bore a rational connection to a nonpunitive purpose, and was excessive with respect to its nonpunitive purpose.<sup>279</sup>

Considering the first factor, the court determined that MSORA's amendments resembled historical forms of punishment<sup>280</sup>: residency restrictions mirrored banishment,<sup>281</sup> the publication of tier designations resembled public shaming,<sup>282</sup> and the combination of the residency restriction and in-person reporting requirement functioned like probation or parole.<sup>283</sup> The court compared MSORA's residency restriction to banishment but conceded that the statute did not make registrants "dead in law [and] entirely cut off from society," as William Blackstone had described the traditional punishment.<sup>284</sup> Although the residency restriction did not forbid registrants from physically entering the designated areas,<sup>285</sup> the court nonetheless concluded that the burdensome geographical restrictions "forced [registrants] to tailor much of their lives around these school zones."<sup>286</sup>

The court analogized MSORA's notification of tier classifications to public shaming, finding that the notification of nonpublic information functioned to shame registrants.<sup>287</sup> Unlike the Alaskan statute in *Smith*, which limited disclosure to public information,<sup>288</sup> MSORA authorized the publication of a registrant's tier classification.<sup>289</sup> Although tier assignments were based on a registrant's conviction, which is ultimately public information, the court concluded that "the ignominy under [MSORA] flows not only from the past offense, but also from the statute itself."<sup>290</sup>

The court compared MSORA's residency restriction and in-person reporting requirements to parole and probation.<sup>291</sup> Unlike the statute in *Smith*, which placed no limitations on where a registrant could work or live and required only mail-in registration,<sup>292</sup> MSORA subjected registrants to various geographical restrictions and required registrants to verify their information in person.<sup>293</sup> The court reasoned that, although the degree of

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278. *Id.*

279. *Id.*

280. *Id.* at 701–03.

281. *Id.* at 702–03.

282. *Id.* at 703.

283. *Id.*

284. *Id.* at 701 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*132).

285. *Id.*

286. *Id.* at 702.

287. *Id.*

288. *Smith v. Doe*, 538 U.S. 84, 98 (2003) ("[T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.").

289. *Snyder*, 834 F.3d at 702–03.

290. *Id.* at 703.

291. *Id.*

292. *Smith*, 538 U.S. at 101.

293. *Snyder*, 834 F.3d at 703.

individual supervision was less severe than parole, MSORA's requirements had a "great deal in common" with the traditional form of punishment.<sup>294</sup>

Looking to the second *Mendoza-Martinez* factor, affirmative restraint or disability, the court determined that the geographical restrictions and in-person reporting requirements functioned as "direct restraints on personal conduct."<sup>295</sup> The court emphasized that although these provisions did not place registrants in physical handcuffs, "these irons are always in the background" as failure to comply with the provisions could result in imprisonment.<sup>296</sup>

Considering the third *Mendoza-Martinez* factor, whether the law promotes the traditional aims of punishment, the court found MSORA's advancement of punitive aims to be insignificant.<sup>297</sup> As the Supreme Court iterated in *Smith*, civil laws can further the goals of punishment without rendering them punitive in nature.<sup>298</sup> The Sixth Circuit determined that although MSORA advanced the traditional aims of punishment including incapacitation, retribution, and deterrence, the factor should be afforded little weight.<sup>299</sup>

Under the fourth and fifth factors, the law's rational connection to a nonpunitive purpose and the excessiveness of that connection, the court determined that the legislature's goal of reducing the rate of recidivism was only loosely related to the amended provisions.<sup>300</sup> In reaching this conclusion, the court referenced the legislature's lack of statistical evidence supporting the law's positive effects.<sup>301</sup> The court focused instead on a study provided by the registrants, which demonstrated that SORN laws actually increase the risk of recidivism.<sup>302</sup> The court concluded that given the indirect relationship between MSORA and its purportedly nonpunitive aim, MSORA was excessive when compared to the minimally positive benefits of its effects.<sup>303</sup>

Looking at all five factors together, the court determined that the effects of the amendments were "different from and more troubling" than the effects of the statutory scheme considered in *Smith*.<sup>304</sup> In reaching its decision, the Sixth Circuit refused to view *Smith* as a "blank check" for states to expand sex offender legislation.<sup>305</sup> In holding that MSORA violated the Ex Post Facto Clause, the court warned, "as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice."<sup>306</sup>

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294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 704.

298. *See id.*

299. *Id.*

300. *Id.* at 704–05.

301. *Id.*

302. *Id.*

303. *Id.* at 705.

304. *Id.*

305. *Id.*

306. *Id.* at 706.

## 2. Lower Courts Follow *Snyder*'s Lead

In the wake of the Sixth Circuit's decision in *Snyder*, a minority of federal courts have altered the existing punishment analysis to find that modern SORN laws can, in their effects, punish registrants.<sup>307</sup> First, minority courts perform independent analyses of the challenged laws rather than rely solely on *Smith*, analogous SORN laws, or other civil sanctions. Second, minority courts look to the effects of the punishment rather than the act itself when analyzing the "historical form of punishment" prong. Lastly, minority courts consider nonphysical restrictions when determining whether a SORN law imposes affirmative restraints or disabilities.

Courts in the minority have revised the punishment analysis by conducting independent *Mendoza-Martinez* analyses even where there is relevant precedent considering similar SORN laws.<sup>308</sup> Unlike many courts in the majority, these courts lay out the provisions of the challenged SORN law and perform a punishment analysis based on the cumulative effects of that particular scheme rather than deferring to factually similar cases.

The decision of the District of Minnesota in *Evenstad v. City of West St. Paul*<sup>309</sup> is illustrative. In this case, the registrant moved for a preliminary injunction against a city ordinance that prohibited registered sex offenders from residing within 1200 feet of schools, day care centers, and group homes.<sup>310</sup> These restrictions were estimated to cover approximately 90 percent of the city.<sup>311</sup> The court acknowledged that there were two Eighth Circuit cases on point, both of which considered residency restrictions, but declined to find that they were binding.<sup>312</sup> Instead, the court reviewed the provisions of the challenged ordinance and went through the *Mendoza-Martinez* factors, acknowledging the similarities and differences between the ordinance and the residency restrictions of the other two cases.<sup>313</sup> In considering the affirmative restraints imposed by the ordinance, the District of Minnesota highlighted that the ordinance was broader than the other two residency restrictions in three crucial ways: "it is intended to protect more

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307. See, e.g., *Doe v. Miami-Dade County*, 846 F.3d 1180 (11th Cir. 2017); *United States v. Wass*, No. 7:18-CR-45-BO, 2018 WL 3341180 (E.D.N.C. July 6, 2018), *appeal docketed*, No. 18-4547 (4th Cir. Aug. 3, 2018); *Doe v. Gwyn*, No. 3:17-CV-504, 2018 WL 1957788 (E.D. Tenn. Apr. 25, 2018); *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086 (D. Minn. 2018); *Millard v. Rankin*, 265 F. Supp. 3d 1211 (D. Colo. 2017), *appeal docketed*, No. 17-1333 (10th Cir. Sept. 21, 2017); *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951 (E.D. Wis. 2017).

308. See, e.g., *Wass*, 2018 WL 3341180, at \*4 (conducting an independent analysis of SORNA despite acknowledging that other courts had found *Smith* "forceful when finding that SORNA's retroactive registration requirements are also constitutional"); *Millard*, 265 F. Supp. 3d at 1225 (performing an independent analysis of Colorado's SORN law after finding that the court in *Shaw v. Patton*, a case upholding Colorado's program as nonpunitive, only considered the requirements that applied to the registrant challenging the law).

309. 306 F. Supp. 3d 1086 (D. Minn. 2018).

310. *Id.* at 1091.

311. *Id.*

312. *Id.* at 1094 (discussing *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) and *Weems v. Little Rock Police Department*, 453 F.3d 1010 (8th Cir. 2006)).

313. *Id.* at 1096–1100.

than just minors, it restricts offenders who victimized adults without an individualized case-by-case assessment, and it restricts residency near group homes.”<sup>314</sup> In granting the injunction, the court concluded that these additional restrictions, “outside the traditional operation of these sorts of statutes,” resulted in a SORN program that was “more reminiscent of [a] complete ban.”<sup>315</sup> After conducting an independent analysis of the cumulative effects of the ordinance, the court determined that the ordinance had gone further than the residency restrictions considered in precedent and these additional restraints altered the outcome of the punishment analysis.<sup>316</sup>

Courts in the minority have also altered the punishment analysis by changing the focus of the “historical form of punishment” inquiry. Instead of comparing the acts of punishment alone, minority courts look to the effects of both traditional forms of punishment and modern SORN laws to determine whether they are analogous.<sup>317</sup> For example, in *United States v. Wass*,<sup>318</sup> the Eastern District of North Carolina accepted a registrant’s challenge to SORNA as a violation of the Ex Post Facto Clause and agreed that the federal legislation functioned to punish.<sup>319</sup> In its decision, the court determined that SORNA’s notification component “made it a tool of public shame, which has been a consistent mechanism for punishment in human history.”<sup>320</sup> In differentiating SORNA from the Alaskan statute in *Smith*, the court focused on the public’s reception of notification, rather than its actual dissemination: “the purpose of the notification here is to elicit a reaction from the public who is notified, and that reaction is punitive in nature.”<sup>321</sup> The court further emphasized, “[a] punitive scheme does not become a non-punitive one just because those who bear the burdens deserve to be punished.”<sup>322</sup>

Similarly, in *Millard v. Rankin*,<sup>323</sup> the District of Colorado struck down the Colorado Sex Offender Registration Act, finding that its in-person reporting provisions resembled parole or probation.<sup>324</sup> The court focused primarily on the statute’s requirement of in-person reporting of “‘all e-mail addresses, instant-messaging identities, or chat room identities prior to using the address of identity,’” as well as any changes of such addresses or identities.”<sup>325</sup> The court concluded that in allowing law enforcement to

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314. *Id.* at 1097.

315. *Id.* at 1100.

316. *Id.*

317. See, e.g., *United States v. Wass*, No. 7:18-CR-45-BO, 2018 WL 3341180, at \*5 (E.D.N.C. July 6, 2018), *appeal docketed*, No. 18-4547 (4th Cir. Aug. 3, 2018); *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1229 (D. Colo. 2017), *appeal docketed*, No. 17-1333 (10th Cir. Sept. 21, 2017).

318. No. 7:18-CR-45-BO, 2018 WL 3341180 (E.D.N.C. July 6, 2018), *appeal docketed*, No. 18-4547 (4th Cir. Aug. 3, 2018).

319. *Id.* at \*5.

320. *Id.*

321. *Id.*

322. *Id.*

323. 265 F. Supp. 3d 1211 (D. Colo. 2017), *appeal docketed*, No. 17-1333 (10th Cir. Sept. 21, 2017).

324. *Id.* at 1228.

325. *Id.*

“monitor private aspects of a registered sex offender’s life,” the law imposed burdens similar to those imposed on parolees.<sup>326</sup>

Finally, minority courts have modified the punishment analysis by considering both physical and nonphysical restrictions when assessing the “affirmative restraint or disability” prong of the *Mendoza-Martinez* test.<sup>327</sup> Consistent with the Sixth Circuit’s analysis in *Snyder*, minority courts have determined that modern sex offender laws, particularly in-person reporting requirements, can be punitive because they impose affirmative restraints on registrants’ liberty. Notably, in *Millard*’s review of the affirmative restraints imposed by the Colorado Sex Offender Registration Act, the District of Colorado highlighted that the law required in-person registration at the registrant’s local law enforcement agency, a requirement not considered in *Smith*.<sup>328</sup> In determining that the restraints imposed by in-person reporting requirements were far greater than those imposed by the written registration mandated in *Smith*,<sup>329</sup> the court concluded,

Having to report to law enforcement every time one moves, as well as at regular time intervals, is hardly a “minor or indirect” restraint, especially when failure to do so is punishable as a crime and also may subject the registrant to in-person home visits and public humiliation by over-zealous, malicious, or at least insensitive law enforcement personnel.<sup>330</sup>

#### IV. THE PUNISHMENT QUESTION AND MODERN SORN LAWS

The inconsistencies across federal courts in applying the punishment analysis to modern SORN laws highlight existing flaws in the punishment test. Particularly in cases involving sex offender legislation, the majority of courts have shifted the focus of the punishment test away from the actual *effects* of the challenged practice on those subject to its sanctions. Instead, majority courts look primarily to the type of law in question, grouping all SORN laws together and categorizing them as civil regulatory programs. This approach fails to consider how additional burdens and obligations imposed by modern SORN laws, such as residency restrictions, in-person reporting requirements, and GPS tracking, can alter the punishment analysis. This Part lays out three proposed alterations to the punishment test with the aim of eliminating inconsistency in the categorization of civil and criminal measures and preserving the constitutional rights available only in the criminal context.

First, the punishment test should require that courts perform an independent assessment of the challenged law if the law is distinct from sanctions considered in precedential cases. As discussed in Part III.A, the

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326. *Id.*

327. *See, e.g., Doe v. Miami-Dade County*, 846 F.3d 1180, 1186 (11th Cir. 2017); *Doe v. Gwyn*, No. 3:17-CV-504, 2018 WL 1957788, at \*8 (E.D. Tenn. Apr. 25, 2018); *Millard*, 265 F. Supp. 3d at 1229; *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951, 960 (E.D. Wis. 2017).

328. *Millard*, 265 F. Supp. 3d at 1229.

329. *Id.* at 1229.

330. *Id.*

majority of federal courts rely on precedent without regard to how modern SORN laws have created additional restraints on registrants' liberty. Because SORN laws have expanded in scope and severity over time and can vary dramatically from state to state, courts must perform independent analyses of challenged laws to account for the varying degrees of intrusion and restraint on the rights of registrants. As indicated in the *Snyder* decision, the addition of SORN provisions, such as residency restrictions and in-person reporting requirements, can transform a nonpunitive law into a punitive one.<sup>331</sup> It is thus imperative that courts consider each law independently and review all of the provisions together to determine the law's effects on required registrants.

Second, the "historical form of punishment" prong should be revised to remove the requirement of long-standing use and should focus on how closely the effects of the challenged practice resemble the effects of traditional forms of punishment. As applied in *Smith*, the comparison of a challenged law to traditional forms of punishment distorts the focus of the punishment analysis. First, the Court in *Smith* interpreted this factor to require the long-standing use of the practice in question. In the case of SORN laws, this inquiry will always work against registrants as registration and notification programs have only been in existence since the 1980s.<sup>332</sup> As technology continues to evolve at unprecedented rates and provide for more intrusive methods of monitoring, it is dubious to require the long-term use of a practice before finding that it has the effect of punishing someone. Second, the *Smith* Court applied this factor too narrowly, requiring a near-perfect match to the traditional form of punishment. By requiring that the law provide for face-to-face humiliation to resemble shaming or physical expulsion from society to resemble banishment, the Court distorted the purpose of the punishment test: to determine whether the effects of the challenged measure are punitive. Courts must instead consider how closely the *effects* of, for example, in-person reporting requirements resemble the *effects* of parole and probation in order to determine more accurately whether the challenged law functions to punish.

Lastly, the "affirmative disability or restraint" inquiry should require consideration of both physical and nonphysical restrictions. Particularly in the context of sex offender legislation, review of the nonphysical restraints placed on registrants is vital to fully assess the punitive nature of the burdens imposed. Courts must consider how modern laws, notably those containing residency restrictions, in-person reporting requirements, and GPS tracking provisions, affect registrants' freedom even when they are not physically restrained.

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331. *See supra* Part III.B.1.

332. *See supra* Part II.A.

## CONCLUSION

The expansion of sex offender legislation over the last ten years and the legal challenges waged in response highlight the difficulty of affixing civil or criminal labels to laws. It is not surprising then that federal courts, in grappling with the existing punishment test, have disagreed on how to properly demarcate the distinction between civil regulation and criminal punishment—particularly as legislatures continue to push the limits of the civil-criminal divide. This emerging circuit split emphasizes the need for the Supreme Court to clarify the punishment test and affirm the constitutional protections reserved for all people, even those society has deemed least deserving of protection.