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LUSTER V. STATE AND *STARKEY V. OKLAHOMA*: MODERN SCARLET LETTER REGULATIONS AND THE COURTS' COLD SHOULDER

ABSTRACT

Sex offenders face a unique set of consequences that extend beyond their pronounced sentence. These consequences carry heavy social implications and inflict public humiliation. The malleability of sex offender registration laws, and the legislature's ability to extend the consequences as it sees fit, creates a difficult and potentially unfair situation for past offenders. The Ex Post Facto Clause of the United States Constitution does not allow retroactive punishment. However, this only applies to punitive law. The Supreme Court has provided a test, often called the "intent-effect" test, to determine if retroactive consequences are punitive. In *Luster v. State ex rel. Department of Corrections* and *Starkey v. Oklahoma Department of Corrections*, the Oklahoma Supreme Court analyzed the punitive intent and effect of Oklahoma's retroactive registration laws and concluded that the laws were in violation of the Ex Post Facto Clause. No other state in the Tenth Circuit has yet provided an adequate analysis of the punitive effect of its registration requirements.

This Comment argues that the Tenth Circuit states should follow the Oklahoma Supreme Court's example by carefully examining the punitive effect of each state's respective sex offender registration requirements. *Luster* and *Starkey* have shown that these laws may be unconstitutional. The rule of law under the Constitution favors predictability, and if legislatures are allowed to retroactively change the registration requirements, offenders will be kept in lifelong fear that their sentence may be extended at any time on the whim of the legislature. Therefore, each state court must be vigilant to ensure that the punitive effect of its laws is not excessive in relation to the nonpunitive intent of its legislature.

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INTRODUCTION

Everyone makes mistakes. Each mistake comes with consequences. Craig Reynolds, a Texas resident, has learned that some mistakes lead to unrelenting consequences.[1] Reynolds was convicted of a sex crime in 1990, before Texas had a requirement for sex offender registration.[2] One year later, Texas passed S.B. No. 259 establishing a registration requirement and consequences for failing to apply.[3] This amendment only applied to those convicted after September 1991.[4] Just six years later, after Reynolds had already served his five-year sentence, Texas enacted S.B. 875 requiring all sexual offenders convicted after 1970 to register if they were incarcerated or under supervision at the time the amendment was

1. Emily DePrang, *Criminal Court Punts on 'Retroactive Punishment' Question*, TEX. OBSERVER (Mar. 31, 2014, 12:59 PM), http://www.texasobserver.org/texas-court-criminal-appeals-retroactive-civil-penalties.
2. *Id.*
3. Sexual Offender Registration Program, S. 259, 72d Leg., Reg. Sess. (Tex. 1991).
4. *Id.*

passed.[5] Reynolds narrowly escaped this statute as he was no longer incarcerated, on probation, or on parole.[6] The striking blow, however, came in 2005 in the form of H.B. No. 867 requiring all sex offenders convicted after 1970, regardless of incarceration or supervision, to apply for sex offender registration.[7] Reynolds had been a free man for a decade, lived a clean life, and now he would be required to apply for public registration and endure its accompanying humiliation.[8] Is it fair to keep sex offenders, like Reynolds, in fear that the legislature may increase their registration requirements as it sees fit?

The United States Constitution explicitly prohibits ex post facto laws.[9] An ex post facto law is "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."[10] At first glance, it would seem that an amendment like that affecting Reynolds would clearly be retroactive and in violation of the Ex Post Facto Clause. However, "it has long been recognized . . . that the constitutional prohibition on *ex post facto* laws applies only to penal statutes . . . ."[11] The question then is what can properly be considered a penal law? The majority of courts, when hearing the issue of sex offender registration amendments and their retroactive application, have held the laws are civil and nonpunitive.[12] However, after *Smith v. Doe*,[13] a recent landmark Supreme Court case addressing this question, many courts have held sex offender registration laws invalid as punitive and in violation of the Ex Post Facto Clause.[14] This Comment examines the Tenth Circuit states' varying interpretations of this question. Nearly all of the Tenth Circuit states have found the law to be nonpunitive; however, Oklahoma did the most thorough analysis and held that the law did have a punitive effect. Following Oklahoma's lead, this Comment argues that each state's offenders should only be held to the registration requirements in effect at the time he or she pled or was found guilty.

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5. Sex Offender Registration Program, TEX. CODE CRIM. P. art. 62.02(d), *amended by* S. 875, 75th Leg., Reg. Sess. (Tex. 1997); DePrang, *supra* note 1.

6. DePrang, *supra* note 1.

7. Sex Offender Registration Requirements, TEX. CODE CRIM. P. art. 62.002(a), *enacted by* H. 867, 79th Leg., Reg. Sess. (Tex. 2005); DePrang *supra* note 1.

8. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991) (explaining the shaming techniques used to punish offenders in the late 1600s including: forcing the accused to wear degrading signs, forcing the accused to confess in public, or branding the accused as permanent labeling); DePrang, *supra* note 1.

9. U.S. CONST. art. I, § 9, cl. 3.

10. Cummings v. Missouri, 71 U.S. 277, 325–26 (1866).

11. Collins v. Youngblood, 497 U.S. 37, 41 (1990).

12. *See* William M. Howard, Annotation, *Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions*, 63 A.L.R. 6th 351 (2011).

13. 538 U.S. 84 (2003).

14. Howard, *supra* note 12, §§ 3–4; *see also Smith*, 538 U.S. at 92 (describing the proper analysis to determine if a law is civil and nonpunitive, or punitive either in intent or effect).

Part I of this Comment provides a summary of the U.S. Supreme Court's ex post facto analysis of sex offender registration statutes. It then explains how the various state courts in the Tenth Circuit have applied this analysis and come to varying conclusions. Part II explores the analysis of two recent Oklahoma Supreme Court cases: *Starkey v. Oklahoma Department of Corrections*[15] and *Luster v. State ex rel. Department of Corrections*.[16] This Part shows how the Oklahoma Supreme Court applied the same test from *Smith* but came to a different conclusion. Part III describes the failure of the Tenth Circuit states to give a consistent and reliable answer to past sex offenders seeking relief. This part also shows the various consequences of sex offender registration in each state. Since law should be predictable,[17] Part III concludes by providing an argument for what the Tenth Circuit states should do to avoid the injustice of leaving offenders in fear of the legislature increasing their sentence.

I. BACKGROUND

To clarify the reason for the courts' confusion as to the punitive nature of sex offender registration laws, Subpart A will summarize the analysis given in the landmark Supreme Court case *Smith v. Doe*. Subparts B through E will give a detailed description of the subsequent confusion put upon the state courts in applying the proper test. Specifically, these Subparts will address Colorado, New Mexico, Utah, and Wyoming's varying interpretations and applications of the *Smith* case. Kansas has not yet addressed this question in any published opinion.[18]

A. Smith v. Doe: *Determining Punitive Intent and Effect*

In 1994, Megan Kanka, a seven-year-old girl in New Jersey, was assaulted and murdered by her neighbor, Jesse Timmedequas.[19] Unknown to the family, the neighbor had been previously convicted of sex crimes against children.[20] Megan's parents explained that if they had known their neighbor was a sex offender, their daughter would not have died.[21] This event stirred politicians and public activists to support "a change in the laws that [previously] allowed sex offenders and child molesters to live in secrecy amongst their potential victims."[22] In 1994, New

15. 305 P.3d 1004 (Okla. 2013).

16. 315 P.3d 386 (Okla. 2013).

17. EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS: A MULTILATERALIST METHOD 52 (2001) (explaining that "any choice of law system should be as predictable as possible" so that citizens "know how the law governs their behavior so that they can conform their behavior to the law").

18. *See* State v. Donaldson, 331 P.3d 833 (Kan. Ct. App. 2014) (per curiam) (unpublished table decision).

19. Mary K. Evans, Megan's Law: Citizens' Perceptions of Sex Offender Community Notification in Nebraska 5–7 (Aug., 2007) (unpublished M.A. thesis, Graduate College of the University of Nebraska) (on file with the University of Nebraska Library system).

20. *Id.* at 6.

21. *Id.*

22. *Id.*

Jersey passed a law, nicknamed "Megan's Law," meant to inform the public about the presence of convicted sex offenders.[23] By 1996, every state had enacted its own version of Megan's Law, creating several different registration programs across the nation.[24] Alaska's version, the Alaska Sex Offender Registration Act (the Act), was the Supreme Court's main concern in the *Smith* case.

Smith involved two anonymous respondents (Doe I and Doe II).[25] Doe I and Doe II were both convicted of sexual abuse of a minor.[26] After being released from prison in 1990, they entered rehabilitative programs, which they both completed.[27] Aggravated sex offenders in Alaska, such as the respondents in *Smith*, were required to register for life under Alaska Statute 12.63.010.[28] Even though the statute was passed after Doe I and Doe II were convicted, it applied to them both retroactively.[29] The parties brought this action seeking for the Act to be held void under the Ex Post Facto Clause.[30]

The Supreme Court separated its analysis into two parts: (1) to "ascertain whether the legislature meant the statute to establish 'civil' proceedings," and if so (2) to "examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[31] If the Court had found that the legislature meant the statute to be punitive, there would be no need for further analysis.[32] The Court "ordinarily defer[s] to the legislature's stated intent,"[33] and "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[34]

The Court easily determined that the legislature intended the Act to be nonpunitive by reading directly from its language: "'[S]ex offenders pose a high risk of reoffending,' and . . . 'protecting the public from sex offenders' [is] the 'primary governmental interest'"[35] Likewise, the Court explained that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to

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23. *Id.*
24. Smith v. Doe, 538 U.S. 84, 90 (2003).
25. *Id.* at 91.
26. *Id.*
27. *Id.*
28. ALASKA STAT. § 12.63.010(d)(2) (2008), *invalidated as applied by* Doe v. State, 189 P.3d 999 (Alaska 2008).
29. *Smith*, 538 U.S. at 91.
30. *Id.* at 91–92.
31. *Id.* at 92 (alteration in original) (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)) (internal quotation marks omitted).
32. *Id.*
33. *Id.* (quoting *Hendricks*, 521 U.S. at 361) (internal quotation marks omitted).
34. *Id.* (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)) (internal quotation marks omitted).
35. *Id.* at 93 (quoting Act of May 12, 1994, 1994 Alaska Sess. Laws ch. 41, §§ 1(1)–(2)).

protect the public from harm."[36] Justice Kennedy, writing for the majority, struggled to show how the statute was meant to be nonpunitive when it accomplished the same goals as Alaska's criminal law, and it was partially codified within Alaska's criminal procedure.[37] With the issue hastily disposed of, the Court quickly moved on from the legislature's intent to the actual punitive effect of the statute.[38]

The Court analyzed the punitive effect of the Alaska statute using seven factors established in *Kennedy v. Mendoza–Martinez*.[39] These factors include:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, [and] whether it appears excessive in relation to the alternative purpose assigned . . . .[40]

Justice Kennedy started by explaining that registration is "of fairly recent origin," and thus cannot have historically or traditionally been regarded as punishment.[41] Even so, Justice Kennedy again struggled to clearly separate the consequences of online public disclosure from the public shaming historically cast upon those committing the same sexual crimes.[42] Next, Justice Kennedy refused to accept the Ninth Circuit's logical argument that offender registration created an affirmative disability and restraint both in employment and housing.[43] Justice Kennedy conceded that the court of appeal's argument had force, but he argued that offenders are "free to move where they wish and to live and work as other citizens."[44] A closer look at housing and employment consequences in more recent times suggests this statement from 2003 may no longer be accurate.[45]

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36. *Id.* (alterations in original) (quoting *Hendricks*, 521 U.S. at 361) (internal quotation marks omitted).

37. *Id.*

38. *Id.* at 95.

39. *Id.* at 97; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

40. *Mendoza-Martinez*, 372 U.S. at 168–69 (footnotes omitted).

41. *Smith*, 538 U.S. at 97 (quoting Doe v. Otte, 259 F.3d 979, 989 (9th Cir. 2001), *rev'd sub nom.* Smith v. Doe, 538 U.S. 84 (2003)) (internal quotation mark omitted).

42. *Id.* at 97–99 (describing registration online as simply an easier way to search criminal history, and humorously adding that the "[w]eb site does not provide the public with means to shame the offender by, say, posting comments underneath his record").

43. *Id.* at 100.

44. *Id.* at 101.

45. *See infra* Part III.A (discussing housing and employment issues arising from offender registration).

The Court continued by admitting that offender registration deters future crime, which is a purpose of punishment.[46] However, Justice Kennedy felt that labeling a law as criminal just because it shared a similar purpose with criminal law—deterrence—would "undermine the Government's ability to engage in effective regulation."[47] The Court quickly transitioned into explaining that the court of appeals was wrong to say the Act's obligations were retributive.[48] The Ninth Circuit argued that the Act imposed a requirement based on "the extent of the wrongdoing, not by the extent of the risk posed."[49] However, Justice Kennedy rejected this reasoning, explaining that the length of reporting requirements was "reasonably related to the danger of recidivism" and therefore consistent with the regulatory and nonpunitive goals.[50] It seems that Justice Kennedy focused on the intent of the Act's requirements while avoiding the question of whether the effect of the registration requirements fulfilled retributive goals.

The Court considered the registration requirements' connection to a nonpunitive purpose to be one of the most significant factors.[51] It concluded that the registration served the purpose of public safety, and the court of appeals readily agreed.[52] The court of appeals alternatively argued that the requirement was overly broad because it applies "to all convicted sex offenders without regard to their future dangerousness."[53] However, Justice Kennedy felt this was unpersuasive in that sex offenders are dangerous "as a class."[54] The Court then explained that the dangers of recidivism justified the length of the reporting requirement, making it not excessive in relation to the nonpunitive goal of public safety.[55]

Justice Souter, in a concurring opinion, writes that for him "this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil characterization of the Act, but also see considerable evidence pointing the other way."[56] Justice Souter conceded that public safety should be given serious weight in the analysis, but then stated, "[I]t would be naive to look no further, given pervasive attitudes toward sex offenders."[57] He goes on to explain how widespread dissemination of offenders' names humiliates and ostracizes offenders and

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46. *Smith*, 538 U.S. at 102.
47. *Id.* (quoting Hudson v. United States, 522 U.S. 93, 105 (1997)) (internal quotation mark omitted).
48. *Id.*
49. *Id.* (quoting Doe v. Otte, 259 F.3d 979, 990 (9th Cir. 2001), *rev'd sub nom.* Smith v. Doe, 538 U.S. 84) (internal quotation mark omitted).
50. *Id.*
51. *Id.*
52. *Id.* at 103.
53. *Id.* (citing *Doe v. Otte*, 259 F.3d at 991–92, *rev'd sub nom.*, Smith v. Doe, 538 U.S. 84).
54. *Id.*
55. *Id.*
56. *Id.* at 107 (Souter, J., concurring).
57. *Id.* at 108–09.

"bears some resemblance to shaming punishments that were used earlier in our history."[58] He finally concludes, "What tips the scale for me is the presumption of constitutionality normally accorded a State's law."[59] Lastly, Justice Stevens in a strong dissent states, "No matter how often the Court may repeat and manipulate multifactor tests . . . it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and no one else* as a result of their convictions are not part of their punishment."[60]

Importantly, the *Smith* case only applied specifically to Alaska's registration requirement. Therefore, state supreme courts were given discretion to apply the Court's standards to their respective state registration statutes. Many states took this opportunity to discontinue the retroactive application of sex offender registrations in their jurisdiction.[61]

B. Colorado's Interpretation

Colorado's reaction to challenges of sex offender registration laws can be summarized with four seminal cases: *Jamison v. People*,[62] *People v. Tuffo*,[63] *People v. Sowell*,[64] and *People v. Durapau*.[65] These cases are all from the Colorado Court of Appeals; the Colorado Supreme Court has not yet taken the opportunity to clarify the issue. These cases show that Colorado, like the United States Supreme Court, has based its decisions on fear of recidivism rather than what would be just and fair.[66] In fact, studies have shown that sexual criminals tend to have the lowest recidivism rates amongst other criminals.[67] Still, stories like Megan Kanka's cause lawmakers to fear dangerous recidivists. While reading these sub-

58. *Id.* at 109.
59. *Id.* at 110.
60. *Id.* at 113 (Stevens, J., dissenting).
61. *See* Howard, *supra* note 12, § 4 (citing cases that have held offender registrations invalid under ex post facto analyses).
62. 988 P.2d 177 (Colo. App. 1999).
63. 209 P.3d 1226 (Colo. App. 2009).
64. 327 P.3d 273 (Colo. App. 2011).
65. 280 P.3d 42 (Colo. App. 2011).
66. *See* Kelsey Eagan, Casenote, *Forfeiting Sex Offenders' Constitutional Rights Due to the Stigma of Their Crimes?:* State v. Trosclair, 59 LOY. L. REV. 267, 267 (2013) (explaining how social stigma and fear of recidivism have caused the courts to turn a blind eye to offenders' constitutional rights).
67. *See* Johnna Preble, *The Shame Game: Montana's Right to Privacy for Level 1 Sex Offenders*, 75 MONT. L. REV. 297, 308–09 (2014) ("[S]ex offenders really do not recidivate more than other types of criminals. In 2002, researchers Langan and Levin found that within a three-year period recidivism rates were as follows: burglary, 76%; robbery, 70.2%; drug offenses, 66.7%; and rape, 46%." (footnote omitted)); *see also* Stephanie N.K. Robbins, Comment, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 216 (2010) ("Sex offender registration and notification laws are based on the faulty assumption that sex offenders are more likely to recidivate than other offenders."). *But see* Roger Przybylski, *Chapter 5: Adult Sex Offender Recidivism*, OFF. JUST. PROGRAMS, http://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html#top (last visited Jan. 31, 2015) (acknowledging that many sex offenses go underreported).

parts, it is helpful to consider whether all criminals should have to register.

In *Jamison*, Mark Jamison had been convicted of sexual assault and sentenced to twenty-five years in 1988, six years before Colorado's Megan's Law became effective.[68] In 1994, C.R.S. § 18-3-412.5(1) was passed, requiring all convicted sex offenders released after 1991 to register with local law enforcement.[69] The Colorado Court of Appeals concluded that "the intent of the statute is remedial and not punitive."[70] The court did not consider whether the effect of the statute is in any way punitive.[71] In fact, the court merely concluded, with no supporting evidence, that the statute "does not disadvantage [the] plaintiff."[72] Being that his twenty-five years would have been fulfilled in 2013, Mr. Jamison is certainly disadvantaged now.[73] However, the court analyzed the constitutionality of a potentially ex post facto law merely by guessing at the legislature's implied intent.

Around a decade later, the court came out with its decision in *Tuffo*. Jason Tuffo pled guilty to a misdemeanor sexual assault, and if the court were to consider him a sexually violent predator, he would have had to register for life.[74] The court again simply concluded, with no analysis, that the law in no way disadvantaged Mr. Tuffo after the fact.[75] The court stated, "the registration and notification requirements established in the SVP statute are intended to protect the community rather than punish the offender."[76] Once again, the court remained silent as to the actual punitive, retroactive effect of these laws.

Two years later, the Colorado Court of Appeals heard *People v. Sowell*. Monty Sowell pled guilty to sexual assault on a child by one in a position of trust.[77] The plea agreement contained nothing regarding registration, and offenders were allowed at the time to "petition after a waiting period to discontinue the [registration] requirement."[78] Mr. Sowell did his time on probation, registered as a sex offender, and then petitioned in 2009 to discontinue registration.[79] Unfortunately, in 2001 (two years after he was completely released from supervision), the General Assembly changed the statute precluding these petitions and requiring

68. Jamison v. People, 988 P.2d 177, 179 (Colo. App. 1999).
69. *Id.*
70. *Id.* at 180.
71. *See id.* at 179.
72. *Id.* at 180.
73. *Id.*; *see* discussion *infra* Part III.A regarding the negative consequences of sex offender registration on employment and housing.
74. People v. Tuffo, 209 P.3d 1226, 1228 (Colo. App. 2009).
75. *Id.* at 1230.
76. *Id.*
77. People v. Sowell, 327 P.3d 273, 274 (Colo. App. 2011).
78. *Id.*
79. *Id.*

Sowell to register for life.[80] This statute was applied to Sowell retroactively, and as such, was at least potentially in violation of the Ex Post Facto Clause. Even so, eight years after the Supreme Court released its holding in *Smith*, the court of appeals still made no findings regarding the punitive effects of the registration statute. In fact, this court simply stated that the statute was constitutional under the holdings of *Jamison* and *Tuffo*, cases decided with no reference to the Supreme Court's analysis.[81]

Finally, the most recent Colorado case to address retroactive registration laws is *People v. Durapau*. Damon Durapau was charged with sexual assault but found not guilty by reason of insanity.[82] When Durapau was charged, there was no requirement that the court order the Defendant to register as an offender.[83] This changed with the addition of the word "shall" to C.R.S. 16-8-118(2)(a) in 2005, which required the court to order that Durapau register as a sex offender upon his release.[84] Finally, this court looked to the Supreme Court's analysis in *Smith* to determine if the 2005 amendment violated the Ex Post Facto Clause.[85] The court quoted the General Assembly, *Smith*, and the three cases discussed above as evidence that the legislature intended the statute to be a nonpunitive law geared toward public safety.[86] The court then concluded that the statute's amendment did not violate the Ex Post Facto Clause without any reference to its punitive effect.[87]

In these cases, the Colorado courts' analyses have been incomplete because they have failed to consider the punitive effect of retributive registration requirements. These retroactive laws share common goals of punishment: deterrence and retribution. Likewise, it is conceivable that each state's registration procedures would historically have been considered punishment. Without considering these factors, the Colorado courts leave this constitutional interpretation to speculation about the legislature's intent.

C. New Mexico's Interpretation

New Mexico's application of the *Smith* analysis can be summed up under two landmark cases from the Court of Appeals of New Mexico: *State v. Druktenis*[88] and *ACLU of New Mexico v. City of Albuquerque*.[89] New Mexico, unlike Colorado, eventually applied the *Smith* test's puni-

80. *Id.*
81. *Id.* at 277.
82. People v. Durapau, 280 P.3d 42, 45 (Colo. App. 2011).
83. *Id.*
84. *Id.*
85. *Id.* at 48.
86. *Id.* at 48–49.
87. *Id.* at 49.
88. 86 P.3d 1050 (N.M. Ct. App. 2004).
89. 137 P.3d 1215 (N.M. Ct. App. 2006).

tive intent and effect factors. The tone of the conclusions and opinions in *Druktenis*, however, suggests the court may have felt conflicted about its conclusion.

Druktenis was the first case to properly apply the *Smith* analysis in New Mexico. Sean Druktenis pled guilty in 1998 to sex offenses that did not require him to register with local authorities at the time.[90] One year later, New Mexico amended its law, the Sex Offender Registration and Notification Act (SORNA), to retroactively apply to Druktenis.[91] Druktenis filed a motion to avoid applying for an exemption because it was in violation of the Ex Post Facto Clause.[92] The court laid out the *Smith* and *Mendoza-Martinez* factors and applied the Supreme Court's intent/effect test.[93]

The court of appeals first proclaimed that they "have no doubt that our Legislature's intent in enacting SORNA was to enact a civil, remedial, regulatory, nonpunitive law."[94] The court arrived at this conclusion by making cursory statements about six of the seven *Smith* factors without applying any facts to their analysis:

> [T]hese conclusions are obvious: the provisions of SORNA do not involve affirmative disability or restraint; have not historically been regarded as punishment; do not come into play only on a finding of scienter; only incidentally, if at all, promote traditional aims of retribution and deterrence; and have a rationally connected, nonpunitive purpose. In our view, that SORNA applies only to behavior that is already criminal is not a significant factor.[95]

The court then struggled with whether SORNA's requirements were excessive as they relate to the purpose of public safety.[96] The court cited *E.B. v. Verniero*[97] and *Russell v. Gregoire*[98] to show that offender registration has extreme consequences regarding employment and housing opportunities.[99]

After wading through the consequences of offender registration, the court came to the final conclusion that "[v]irtually all federal circuits and state jurisdictions considering this issue have rejected the argument that retroactive application of sex offender statute registration and notifica-

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90. *Druktenis*, 86 P.3d at 1054.
91. *Id.*
92. *Id.* at 1055.
93. *Id.* at 1059–61.
94. *Id.* at 1060.
95. *Id.*
96. *Id.* at 1060–62.
97. 119 F.3d 1077, 1102 (3d Cir. 1997) (describing the harsh realities of the consequences sex offenders suffer with family, housing, and employment); *see* discussion *infra* Part III.A.
98. 124 F.3d 1079, 1092 (9th Cir. 1997) (conceding that registration requirements can have serious consequences through "humiliation, public opprobrium, ostracism, and the loss of job opportunities").
99. *Druktenis*, 86 P.3d at 1061.

tion requirements violates constitutional ex post facto prohibitions."[100] The court seemed unwilling to disavow precedent despite reservations about the potential injustice of retroactive application.

ACLU of New Mexico was a similar case brought by a civil rights group challenging the constitutionality of New Mexico's SORNA.[101] The various claims included violations of the Ex Post Facto Clause, double jeopardy, and cruel and unusual punishment.[102] The court did not examine the effect factors from *Mendoza-Martinez*. Rather, the court merely concluded that because *Smith* and *Druktenis* found these laws to be nonpunitive, it would follow suit and find SORNA constitutional under all claims.[103] Like Colorado, New Mexico has yet to properly apply the constitutionality of its Megan's Law under the Supreme Court's analysis. Therefore, sex offenders are left with an unpredictable answer and no protection from retroactive punishments.

D. Utah Application

The Utah Court of Appeals has not yet decided a case using the *Smith* analysis. Even so, it is helpful to examine how the court has treated claims of unconstitutionality of Utah's Megan's Law. Utah's views can be seen through a summary of its most recent case in this matter, *State v. Trotter*.[104] *Trotter* remains Utah's guiding authority for this issue.

Kenneth Trotter pled guilty to having unlawful sexual conduct with a minor.[105] Later, he attempted to withdraw this plea because he was not advised or informed that he would be required to register as a sex offender.[106] Because this is the closest case on the matter to reach the Utah Supreme Court, it is clear that it has yet to hear an issue of ex post facto concern. Even so, the court used *Smith* to conclude, "[T]he registration requirement is intended to act not as a criminal punishment but as a prophylactic civil remedy."[107] Like other states in the Tenth Circuit, the Utah Supreme Court gave no analysis of whether the punitive effect of the registration statute negates the legislature's intent to deem it civil.

E. Wyoming Application

Wyoming has only had opportunity to hear one case on the issue of retroactive sex offender registration requirements. *Kammerer v. State*[108] involved an offender with a second-degree sexual assault charge from

100. *Druktenis*, 86 P.3d at 1062.
101. ACLU of N.M. v. City of Albuquerque, 137 P.3d 1215, 1220 (N.M. Ct. App. 2006).
102. *Id.* at 1221.
103. *Id.* at 1222.
104. 330 P.3d 1267 (Utah 2014).
105. *Id.* at 1269.
106. *Id.*
107. *Id.* at 1276. The court only used the *Smith* case in passing in a "see, e.g." citation.
108. 322 P.3d 827 (Wyo. 2014).

1993 in New Jersey.[109] Ronald Kammerer subsequently moved to Wyoming, and he was charged with failing to register in 2012.[110] Kammerer filed a motion to dismiss complaining that the registration laws were in violation of the Ex Post Facto Clause. Like most state courts, the Supreme Court of Wyoming quickly determined that the legislature intended the registration requirements to be nonpunitive.[111] Despite this quick conclusion, the court's opinion has a separate heading for "Punitive Effect" and gives a detailed analysis of the potentially punitive effects of Wyoming's registration requirements, concluding that the law was nonpunitive.[112]

Despite an analysis of the punitive effects, the Wyoming Supreme Court's opinion remained overly conclusive. For example, when discussing the "traditional aims of punishment," the court provides no further analysis than a direct quotation from the *Smith* opinion: "As in *Smith*, we find that the classification of offenders based on their crimes is not indicative of retributive intent."[113] In analyzing the "historically regarded as punishment" factor, the court deferred to the Third Circuit Court of Appeals and concluded: "We are in agreement with the analysis of these courts."[114] These conclusions would be acceptable only if identical statutes were in question. No progress can be gained by merely agreeing to another court's analysis when the law in question in those courts bares no relation to the law currently at issue in each state.

II. OKLAHOMA APPLICATION

The Oklahoma application of the *Smith* analysis is the most detailed and thoughtful of any Tenth Circuit state. This is illustrated in two Oklahoma Supreme Court cases: *Starkey v. Oklahoma Department of Corrections* and *Luster v. State ex rel. Department of Corrections*. Both cases were split decisions, but they ultimately concluded that Oklahoma's Megan's Law was excessive and unconstitutional as ex post facto punishment.[115]

A. Luster v. State ex rel. Department of Corrections

Christopher Luster pled guilty to sexual assault in April 1992 in Texas.[116] Luster then moved to Oklahoma and began registering with Oklahoma authorities in 2003.[117] At that time, Oklahoma's Megan's Law

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109. *Id.* at 830.
110. *Id.*
111. *Id.* at 834.
112. *Id.* at 834–39.
113. *Id.* at 837–38.
114. *Id.* at 834–36.
115. Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1030 (Okla. 2013) 2013; Luster v. State ex rel. Dep't of Corr., 315 P.3d 386, 391 (Okla. 2013).
116. *Luster*, 315 P.3d at 387.
117. *Id.*

would have required Luster to register for ten years.[118] In 2007, Oklahoma's Megan's Law was amended, requiring offenders like Luster to register for life.[119] In 2011, Luster petitioned the court and asked that he either be taken off the registry or, alternatively, that he only be required to register for the previously applicable ten years.[120] This case was then consolidated with several other plaintiffs who had filed similar actions.[121] "Luster requested the court issue an order finding . . . each consolidated plaintiff be required to register under the provisions of [SORNA] in effect at the time he or she pled guilty or was convicted . . . ."[122]

Eventually, the petition was granted and the Oklahoma Department of Corrections appealed.[123] In the interim, the *Starkey* case had been decided.[124] The court referred to *Starkey* saying that the requirements "which were enacted after Starkey entered Oklahoma were to be applied prospectively and not retroactively."[125] Interestingly, the same Justices, Justice Winchester and Justice Taylor, dissented in both cases.[126] In *Luster*, the dissent merely stated that they dissent for the same reasons each dissented in *Starkey*.[127] For this purpose, this Comment will focus on the analysis given in *Starkey* as it applies in both cases.

B. Starkey v. Oklahoma Department of Corrections

James Starkey's sex offender registration period was increased retroactively by a statute similar to those previously mentioned.[128] Starkey was charged with sexual assault upon a minor in Texas for an act that occurred in 1997.[129] Starkey moved to Oklahoma in 1998, and under the law at the time should have only been required to register for ten years.[130] This time was extended from an amendment to Oklahoma's Megan's Law in 1998.[131]

One of the most prominent differences in Oklahoma's Megan's Law from that of other states like Colorado is the existence of level designations, which create registration requirements dependent on the level of

118. *Id.*
119. *Id.*
120. *Id.* at 388.
121. *Id.* at 387.
122. *Id.* at 389.
123. *Id.* at 388–89.
124. *Id.* at 390–91.
125. *Id.* at 390.
126. *Id.* at 391 (Winchester & Taylor, JJ., dissenting); Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1032 (Okla. 2013) (Taylor & Winchester, JJ., dissenting).
127. *Luster*, 315 P.3d at 387 (Taylor, J., dissenting).
128. *Starkey*, 305 P.3d at 1008.
129. *Id.*
130. *Id.*
131. *Id.* at 1009.

future risk each offender poses to the public.[132] The Supreme Court of Oklahoma explained those designations as follows:

> 1. Level one (low): a designated range of points on the sex offender screening tool indicating that the person poses a low danger to the community and will not likely engage in criminal sexual conduct;
>
> 2. Level two (moderate): a designated range of points on the sex offender screening tool indicating that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct; and
>
> 3. Level three (high): a designated range of points on the sex offender screening tool indicating that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.[133]

Level 3 offenders were required to register for life.[134] One year before Starkey's registration period would have expired, he was assigned a level 3 risk assessment and required to register for life.[135] The trial court held that the retroactive application of the law was unconstitutional, and the Department of Corrections appealed the judgment.[136]

The court first explained that the Ex Post Facto Clause was included in the body of the U.S. Constitution adopted in 1787 rather than putting it through the amendment process.[137] The court contended that this suggests the clause was "fundamental to the protection of individual liberty."[138] Additionally, the court quoted Justice Marshall saying "the *Ex Post Facto* Clause not only ensures that individuals have 'fair warning' about the effect of criminal statutes, but also 'restricts governmental power by restraining arbitrary and potentially vindictive legislation.'"[139] The court then transitioned into a deep analysis of the *Smith* and *Mendoza-Martinez* factors, which they call the "intent-effects" test.[140] The court added, "How we apply the 'intent-effects' test is not governed by how the federal courts have independently applied the same test under the United States Constitution as long as our interpretation is at least as protective as the federal interpretation."[141]

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132. *Id.* at 1010.
133. *Id.* (citing OKLA. STAT. tit. 57, § 582.5(C)(1)–(3) (2014)).
134. *Id.* (citing OKLA. STAT. tit. 57, § 583(C)–(D) (2014)).
135. *Id.*
136. *Id.* at 1013.
137. *Id.* at 1018.
138. *Id.* at 1018–19.
139. *Id.* at 1019 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 (1994)) (internal quotation marks omitted) (examining Justice Stevens's analysis of the Ex Post Facto Clause, which quotes Justice Marshall's opinion in *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981)).
140. *Id.* at 1021.
141. *Id.*

The court found that, like the Alaska version of Megan's Law in *Smith*, the legislative purpose in enacting Oklahoma's SORNA was civil: to identify sex offenders and alert the public when necessary.[142] It then went on to argue, "Although there is evidence pointing to a civil intent, there is considerable evidence of a punitive effect."[143] Finally, a state court realized the potential for the actual effect of these laws to be unconstitutional. The court then proceeded to analyze the seven *Mendoza-Martinez* factors to determine if there was enough proof to override the legislative intent, which deemed the law civil in order to transform it into a penalty.[144]

1. Affirmative Disability or Restraint

Unlike Alaska's version of SORNA, Oklahoma's SORNA requires registrants to apply "in person."[145] The court explained that the *Smith* Court had emphasized the lack of an "in-person" requirement as the reason Alaska's SORNA did not create an affirmative restraint.[146] The court also mentioned that Oklahoma has restrictions on where sex offenders may live.[147] In addition, Oklahoma sex offenders are required to renew their license or identification every year when normal residents do so every four years.[148] Lastly, the court discussed the "profound humiliation and community-wide ostracism" these afflicted registrants face, which was acknowledged in the dissents of *Smith* and *E.B. Verniero*.[149] Thus, the court found that SORNA "impose[d] substantial disabilities on registrants."[150]

2. Historically Regarded as a Punishment

Unlike *Smith*, the Oklahoma court looked to the historical practice of public shaming to show registration was traditionally a punishment.[151] The court compared the branding of "Sex Offender" on each registrants drivers license as their "scarlet letter" since they have to show this ID in day-to-day transactions.[152] The court also discussed how the state's housing restrictions closely resembled the community ousting that was traditionally practiced upon sexual offenders.[153] In sum, the court found that

142. *Id.* at 1020.
143. *Id.*
144. *Id.*
145. *Id.* 1021–22.
146. *Id.*
147. *Id.* at 1023 (providing the many housing restraints on sex offenders in Oklahoma).
148. *Id.*
149. *Id.* at 1024 (quoting Smith v. Doe, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting)) (internal quotation mark omitted); *see also* E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997).
150. *Starkey*, 305 P.3d at 1025.
151. *Id.*
152. *Id.* (internal quotation marks omitted).
153. *Id.* at 1026 (concluding that housing restrictions are "regarded in our history and traditions as punishment" (quoting Commonwealth v. Baker, 295 S.W.3d 437, 444 (Ky. 2009)) (internal quotation marks omitted)).

these consequences were "at least analogous . . . . to the traditional punishment of banishment."[154]

3. Comes Into Play Only on a Finding of Scienter

Some SORNA crimes, like statutory rape, do not require a finding of scienter.[155] This is because "it is not a defense that a defendant did not know the victim was under the age of consent."[156] Even so, because courts have considered this to be little proof of punitive effect, the Oklahoma Supreme Court, like in *Smith*, found that this factor "should be given little weight in our analysis."[157]

4. Traditional Aims of Punishment: Retribution and Deterrence

Here, the court again discussed how humiliation and housing restrictions assist in deterrence.[158] The court additionally explained that the registration times are based on the statute the offender was convicted of rather than their individual risk of recidivism.[159] The court maintained that this designation is retributive in nature, focusing on past actions rather than future risk, which supported the conclusion that SORNA has a punitive effect.[160]

5. The Behavior is Already a Crime

Like *Smith*, the Oklahoma court struggled with the awkward application of this factor because SORNA is only triggered when a crime is committed.[161] However, this is exactly the punitive characteristic the factor was created to prevent, and the court rightly concluded: "[T]he fact that [SORNA] applies only to behavior that is already a crime supports the conclusion this . . . factor has a punitive effect."[162]

6. Rational Connection to a Nonpunitive Purpose

Concededly, there is an obvious nonpunitive purpose behind sex offender registration, and the Oklahoma Supreme Court admitted this.[163] The goal of identifying dangerous sexual predators and alerting the public to avoid dangers of recidivism advances the civil purpose of public

154. *Id.*
155. *Id.*
156. *Id.* at 1026–27.
157. *Id.* at 1027.
158. *Id.*
159. *Id.* at 1028.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

safety.[164] While this factor weighed in favor of constitutionality, the five factors favoring a punitive effect persuaded the court.[165]

7. Excessiveness

The court admitted yet again the importance of protecting the public from the risk of recidivism.[166] Even so, "[t]his non-punitive objective, while undeniably important, will not serve to render a statute so broad and sweeping as to be non-punitive."[167] The court described how, without any individual determination of Starkey's danger to the community, he was required to remain on the registry for life.[168] This was done leaving no chance of petitioning to be removed from the registry, a life sentence, no matter how rehabilitated Starkey may become.[169] The court then concluded with Justice Ginsburg's dissent in *Smith*, "What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose. . . . The Act applies to all convicted sex offenders, without regard to their future dangerousness."[170] In sum, the court found that this factor suggests the law has a punitive effect.[171]

The court concluded that "there is clear proof that the effect of the retroactive application of [SORNA's] registration is punitive and outweighs its non-punitive purpose."[172] The court did not attempt to say that all sex offender registry laws were unconstitutional, but it limited its finding to retroactive applications of these Megan's Laws in unfairly humiliating and ousting past offenders.[173]

C. Dissenting Opinions

Justice Taylor wrote a dissenting opinion in *Starkey* suggesting that registration is merely "one of the many, many unpleasant lifetime civil consequences of being convicted of a felony."[174] What he failed to consider is that none of those other felonies require offender registration. Therefore, it is different in practice and effect and should be analyzed differently.

Justice Winchester then gave a detailed overview of his agreement with the *Smith* case in a dissenting opinion.[175] He explained that registration could not be historically regarded as punishment because it is of

164. *Id.*
165. *Id.* at 1030.
166. *Id.* at 1028.
167. *Id.* at 1028–29.
168. *Id.* at 1029.
169. *Id.*
170. *Id.* at 1029–30 (quoting Smith v. Doe, 538 U.S. 84, 116–17 (2003) (Ginsburg, J., dissenting)) (internal quotation mark omitted).
171. *Id.* at 1030.
172. *Id.*
173. *See id.*
174. *Id.* at 1032 (Taylor, J., dissenting).
175. *Id.* (Winchester, J., dissenting).

recent origin.[176] Still, the majority clearly explained that registration closely resembles the "scarlet letter" punishments in the seventeenth century.[177] Justice Winchester further argued that there is no affirmative disability or restraint because a routine background check would provide the same information as the registry.[178] Even so, the additional effects of the registry were explained by the majority saying, "Anyone at any time and for any reason can find the address and picture of a registered sex offender along with the statute under which the offender was convicted . . . ."[179] Does this fit the bill of a routine background check, or is the registry a new common place for future homeowners to gossip over their potential neighbors?

Justice Winchester admitted that offender registration promotes the traditional aims of punishment, but like the *Smith* Court explained, this factor alone does not make a statute punitive.[180] Justice Winchester agreed with *Smith* that a rational connection to a nonpunitive purpose is one of the most significant factors.[181] The majority admits that this factor weighs in favor of a non-punitive effect; however, the Justices explain that this is not dispositive of the issue.[182] Lastly, Justice Winchester describes the Supreme Court's analysis of excessiveness in relation to a non-punitive purpose providing that the state can regulate convicted sex offenders as a class without individual determinations of dangerousness.[183] The majority explains, in an effort to show the constitution protects individuals, that an individual determination is necessary to allow non-dangerous individuals their constitutional protections.[184] While Justice Winchester's arguments were rebutted by the majority opinion, it is notable that he gave victims of this status the just opportunity of a thorough analysis under *Smith*. The *Starkey* opinion, and the dissenting and concurring Justices in the *Smith* case, suggests that when this level of analysis is performed, it may result in a closer case than presented by other state courts in the Tenth Circuit.

III. A PROPOSAL FOR THE TENTH CIRCUIT

The intent of this Part is to persuade the Tenth Circuit states that now is the time to provide predictability in the law. There will be no shortage of opportunities to hear these issues as the registry continues to

176. *Id.* at 1034.
177. *Id.* at 1025 (majority opinion) (internal quotation marks omitted).
178. *Id.* at 1035 (Winchester, J., dissenting).
179. *Id.* at 1024 (majority opinion).
180. *Id.* at 1035 (Winchester, J., dissenting).
181. *Id.* at 1036.
182. *Id.* at 1028 (majority opinion).
183. *Id.* at 1036 (Winchester, J., dissenting).
184. *Id.* at 1028–29 (majority opinion).

grow.[185] Subpart A provides a detailed analysis of the awful consequences that draconian registration requirements have placed upon their victims. Subpart B describes the importance of predictability in the law. Last, Subpart C is a call to action for the states of the Tenth Circuit to provide victims of retroactive offender registry a constitutionally proper analysis of ex post facto laws.

A. Severe Consequences: Housing and Employment

Wendy Whitaker engaged in oral sex with a fifteen-year-old when she was seventeen.[186] Ten years after her sodomy conviction, she was forced out of her home because it was too close to a child daycare center.[187] Even though she owned her home, a church nearby happened to have a child care system, and she was forced to leave within seventy-two hours.[188] Housing restrictions are a very serious penalty inflicted upon sex offenders who are forced to register. For example, the *New York Times* explains that defense lawyers have put together maps of Manhattan to show that nearly the whole city is off limits to sex offenders.[189] Many of these offenders seek accommodation in homeless shelters because they are unable to find adequate housing.[190] Unfortunately, even homeless shelters have been unable to receive sex offenders because of their proximity to childcare.[191] Many offenders end up as transients or living in encampments of trailers.[192] Carlos Bonilla, a sixty-five year old who has already completed his sentence, like many others in New York, has been kept in the custody of the corrections department because all potential housing arrangements would be in violation of statutory housing restrictions.[193]

Colorado likewise explained the issue with sex offenders and homelessness in a statement in the *Denver Post*.[194] "Rob McCallum, spokesman for the Colorado Judicial Branch, says probation first tries to find housing in the county where the defendant is sentenced, but it is not always possible considering that housing for sex offenders is difficult to

185. *See* Gary Taylor, *Number of Sex Offenders Soars—Experts Unsure of Reasons*, ORLANDO SENTINEL, Feb. 7, 2012, at A1 ("The numbers are growing across the nation . . . . [T]he U.S. has seen a 23 percent overall increase in the number of registered sex offenders . . . .").

186. Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 25 (2012).

187. *Id.*

188. *Id.*

189. Joseph Goldstein, *Housing Rules Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. TIMES, Aug. 22, 2014, at A18.

190. *Id.*

191. *Id.* (explaining that in New York City, only 14 of the 270 shelters can house sex offenders).

192. *Id.*

193. *Id.*

194. Felisa Cardona, *Supervising Sex Offenders: Array of Rules Tests Officials: An Adams on Denver Streets Offers an Example of Challenges Faced by Authorities*, DENVER POST, Nov. 20, 2011, at B-09.

find."[195] The question then arises: is it difficult, or is it impossible? The article continues by saying that registration doesn't accomplish its goal of protecting the public because the "people don't know if [homeless] sex offenders are truly living in the city where they register."[196]

Another Colorado reporter described a recent court order invalidating a 2006 ordinance passed by the city of Englewood, Colorado, restricting living arrangements for sex offenders.[197] "The order states that restrictive 'not in my backyard ordinances' can have a domino effect, eventually forbidding any sex offenders from living anywhere in Colorado."[198] The restriction kept Colorado sex offenders from living within 2,000 feet of any public school or park and within 1,000 feet of any day-care center.[199] Stephen Ryals, a Colorado resident and registered sex offender, and his wife bought a house in Englewood, CO, and were later told Stephen did not have the right to live there.[200] Is this really the civil remedy these past cases were suggesting?

Several southern states have also shown an increase in homelessness of sex offenders. "In 2009, nine homeless sex offenders, who had been ordered to live in the woods near an Atlanta office park after they could not find housing, were then forced to try to find somewhere else to live."[201] A makeshift camp in Miami houses as many as seventy of these offenders.[202] Additionally, some distance markers restricting residency 500 to 2,500 feet from schools "can effectively zone out sex offenders."[203] What's worse, studies show that there is "no correlation" between these restrictions and lowered recidivism.[204] Rather, these infected individuals are left without any chance of rehabilitation.[205]

In New Mexico, reporters explain that "changes will tighten registration requirements and close a loophole for out-of-state sex offenders. . . . [S]ome sex offenders registered in another state did not have to register upon moving to New Mexico."[206] One reporter quoted Regina Chacon of the State Department of Public Safety who said she understands the conflicting feelings about retroactive laws, "You have some-

195. *Id.*
196. *Id.*
197. Yesenia Robles, *A Shift in Residency Rules*, DENVER POST, May 5, 2014, at 4A .
198. *Id.*
199. *Id.*
200. *Id.*
201. Brian Griggs, Note, *Homeless Is Not an Address: States Need to Explore Housing Options for Sex Offenders*, 79 UMKC L. REV. 757, 767 (2011).
202. *Id.* at 767–68 (joking that this community may soon need its own governor).
203. Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1246 (2009).
204. *Id.* at 1245–46 (citing a Colorado and a Minnesota study showing that there is "no correlation between residential proximity to schools or parks and sex offender recidivism").
205. *See id.* at 1244 ("[R]esidency restrictions limit the ability of offenders to reintegrate into society.").
206. *NM Tightens Sex Offender Registration Laws*, ALBUQUERQUE J. (June 28, 2013, 7:11 AM), http://www.abqjournal.com/215689/news/nm-tightens-sex-offender-registration-laws.html.

one who committed a sex crime 30-some years ago and hasn't been in trouble since. Is that fair, to register them now?"[207] Chacon went on, however, to put this off as a collateral consequence of a useful tool.[208]

In 2012, a Utah reporter discussed the State's willingness to allow a sex offender to escape the ill effects of registration.[209] The article quotes Representative Jack Draxler saying, "I am trying to bring some opportunity for redemption from someone who's really paid the price and tried to get their life back in order."[210] Is the jail sentence and corresponding probation time not paying the price enough? Another Utah reporter described the lack of a housing requirement in 2006.[211] He quotes Jeremy Shaw, a supervisor from the Department of Corrections, explaining that "an offender's residence proximity to places where children congregate has no correlation to reoffending. . . . A person can't live next to a school, but a pedophile can go stand in front of a school."[212] The difficulty in finding adequate housing has changed drastically "from 2003 when the *Smith v. Doe* Court commented, 'The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.'"[213]

Lack of housing is not the only negative effect from registration. Many sex offenders also suffer from a lack of employment opportunities.[214] *9News* in Colorado followed a story of an anonymous sex offender they called Brent.[215] Brent was a highly paid employee of Lockheed Martin when an undercover police officer contacted him pretending to be a thirteen-year-old and thereafter arrested him for "criminal intent of sexual assault."[216] Brent was fired from Lockheed after he was arrest-

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207. Julia M. Dendinger, *New Mexico Explains Sex Offender Registration Guidelines*, BACKGROUND INVESTIGATOR (Feb. 2009), http://icioffshore.com/news/fulltext/News.asp?FTID=963&Title=New%20Mexico%20Explains%20Sex%20Offender%20Registration%20Guidelines (internal quotation marks omitted).

208. *See id.*

209. Ladd Brubaker, *Bill Allowing Some Sex Offender Off Register Early Approved*, DESERET NEWS (Jan. 25, 2012), http://www.deseretnews.com/article/700218666/Bill-allowing-some-sex-offender-off-register-early-approved.html.

210. *Id.* (internal quotation marks omitted).

211. Alan Choate, *Housing Restrictions for Sex Offenders*, DAILY HERALD (Sept. 20, 2006), http://www.heraldextra.com/news/local/housing-restrictions-for-sex-offenders/article_dd2ba905-b6f9-53d9-8926-998b69d296ce.html.

212. *Id.* (alteration in original) (quoting Jeremy Shaw, a supervisor in the Utah Department of Corrections adult probation and parole division) (internal quotation mark omitted).

213. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1115 (2012) ("Changing jobs or relocating residences at will is no longer an option under super-registration schemes.").

214. Jacob Frumkin, Note and Comment, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J.L. & POL'Y 313, 321 (2008) (considering the Catch-22 of requiring registration of employment and housing when it is "difficult, if not impossible, for sex offenders to find a home or an employer.").

215. Kevin Torres, *Inside the Life of a Registered Sex Offender*, 9NEWS (Feb. 22, 2014, 10:19 PM), http://archive.9news.com/rss/article/378732/222/Inside-the-life-of-a-registered-sex-offender.

216. *Id.*

ed.[217] The article explains, "Employers wouldn't consider Brent, neighbors turned on him and bills piled up."[218] It goes on to explain that Brent's actual sentence "pales in comparison to the personal sentence he deals with every day."[219] This sentence isn't imposed on any other criminals: not murderers, not thieves, and not domestic abusers.

In Utah, a reporter for the *Deseret News* quoted a defense attorney describing registration as "the modern-day scarlet letter."[220] The reporter added that it inhibits past offenders from trying to assimilate into society as it "hinders their ability to find housing and jobs."[221] Indeed, the article concludes that the excessive requirements "force offenders to go underground."[222] An Oklahoma news station describes the enormous relief felt by a past offender when he was told he would no longer have to register.[223] The report called the man Dave, and explained that he slept with a fourteen-year-old girl he thought was seventeen when he was also seventeen.[224] Dave served diligently on the registry for nineteen years, he lived with his mother upon release from prison because of housing restrictions, and he struggled to find a good job.[225] Dave also "has never been able to take his kids to the park or attend their activities at school."[226] When Dave started his time on the registry, he was told he would have to be registered for ten years, but in year seven he received a letter saying he would have to register for life.[227] Dave cried with joy when Oklahoma laws were amended and he learned he would be freed from his scarlet letter.[228]

The consequences facing these "habitual offenders" far exceed the civil, nonpunitive purpose the courts say these laws serve. Each offender deserves an opportunity to be assessed for individual danger of recidivism before enduring these penalties. Likewise, each offender has a right to live free of the undying fear that they may be retroactively restrained from living their lives.

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217. *See id.*
218. *Id.*
219. *Id.*
220. Dennis Romboy & Lucinda Dillon Kinkead, *Does Sex Offender Registry Really Work?* DESERET NEWS (Mar. 19, 2008, 12:22 AM), http://www.deseretnews.com/article/695262647/Does-sex-offender-registry-really-work.html (internal quotation mark omitted).
221. *Id.*
222. *Id.*
223. Lori Fullbright, *Oklahoma Removes 2,400 Registered Sex Offenders After Supreme Court Ruling*, NEWS ON 6 (May 8, 2014, 7:19 AM), http://www.newson6.com/story/25469795/oklahoma-removes-2400-registered-sex-offenders-after-supreme-court-ruling.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*

B. Predictability in the Law

"If individuals can predict what the law will require of them, then, in principle, they are on notice and have the opportunity to conform their behavior to the law's demands."[229] Individual sex offenders are discouraged from attempting rehabilitation if at any point in the process they could be required to remove themselves from safe housing and comfortable jobs as a class. "Individuals need to know how the law governs their behavior so that they can conform their behavior to the law."[230] In order to provide an incentive for offenders to obtain counseling, avoid recidivism, and assimilate back into society, they must be given a predictable alternative to pursue.

Thomas Lundmark, Professor of Law at the University of Munster, Germany, writes that predictability may be in direct opposition to individual liberty.[231] He explains, "Opponents of predictability would say that it comes at the cost of individual justice."[232] The critics' problem with predictability is that unbending law applies commonly to all regardless of individual guilt. However, sex offenders suffer the opposite dilemma in retroactively applied registration regimes. After serving a sentence properly applied by a court of the United States, the unpredictability of registry laws leaves offenders in lifelong fear of a prolonged sentence.[233] The state can increase registration periods, create new housing restrictions, and impose more harsh employment limitations. Applying laws in a predictable manner need not be rigid. The courts can provide a predictable method of analysis that can be applied individually to avoid the cost of giving up individual justice.

"Among the many values that [the law] can secure, none is more important than legal certainty. . . ."[234] Predictability allows offenders to "know where they stand . . . free to plan and lead their lives as they please . . . [w]ithin the confines of their established duties to others."[235] The ability for individuals in society to know where they stand and what they can do while avoiding government intervention is "a signal virtue of civilized societies."[236] Therefore, the only way to create a fair and just

229. Lawrence B. Solum, *Indeterminacy*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 479, 487 (Dennis Patterson ed., 2d ed. 2010) (quoting Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 582 (1993)) (internal quotation mark omitted).

230. FRUEHWALD, *supra* note 17, at 52.

231. THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW 122 (2012).

232. *Id.*

233. *See supra* Part III.A.

234. NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 16 (2005).

235. THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 20 (2014) (alteration in original) (quoting MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 41 (2003)) (internal quotation marks omitted).

236. MACCORMICK, *supra* note 234, at 12.

rule of law is to provide predictability and security and stand by it. Most importantly, "[i]n order for governmental actions and judicial decisions to be predictable so as to enable citizens to plan and lead their lives in accordance with the law, the law must be prospective. It must not impose *a posteriori* or *ex post facto* legal consequences."[237] Society teaches this value early on: we cannot change the rules in the middle of a game. The Government's ability to change the law to retroactively apply to sex offenders who have successfully assimilated back into normal life is precisely the unpredictability that these authors and theorists have criticized. While flexibility in the law may be important, "the more flexibility we permit, the less predictability we enjoy."[238]

C. A Call to Action in the Tenth Circuit

The purpose of judicial review is "to take vague constitutional generalities and give them a specific content appropriate to the times and circumstances by balancing the different considerations of social welfare involved."[239] The goal of the judiciary is to interpret the laws. "The goal of interpretation is to achieve the social goal of law."[240] It is not this Comment's purpose to persuade the Tenth Circuit that sex offender registries are per se unconstitutional. Rather, its purpose is to persuade the Tenth Circuit states that it is a closer call than can be determined through seven unsubstantiated and cursory conclusions.[241] Specifically, this comment asks courts to apply the *Smith* factors in a substantive analytical method that accounts for the realities of the lives of registered sex offenders. The effect of each state's Megan's Law must be given its individual and substantive constitutional analysis to determine if its actual retroactive effect is overtly punitive. The Oklahoma Supreme Court's analysis may not hold true for all states' statutory schemes, but it certainly showed the level of analysis that should occur. The negative consequences described above suggest it is time to balance the considerations of social welfare with the constitutional rights of sex offenders that me be violated by each Tenth Circuit state's SORNA laws.

The most important social concern voiced by the courts in the Tenth Circuit is public safety.[242] The concern is that sex offenders are more likely than other criminals to commit similar crimes: the fear of recidivism. This fear, however, is unwarranted.[243] First, these statistics are run

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237. LUC B. TREMBLAY, THE RULE OF LAW, JUSTICE, AND INTERPRETATION 150 (1997).

238. JEFFREY F. BEATTY & SUSAN S. SAMUELSON, ESSENTIALS OF BUSINESS LAW 78 (2d ed. 2005).

239. CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 276 (Rev. ed. 1994).

240. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW, at xv (Sari Bashi, trans., 2005).

241. *See supra* Part I.C (discussing New Mexico's fact-empty conclusions in analyzing the punitive effect of its SORNA laws).

242. *See, e.g.*, Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1028–30 (Okla. 2013).

243. *See CBI Sex Offender Registry Facts*, COLO. BUREAU INVESTIGATION, https://www.colorado.gov/apps/cdps/sor/faq.jsf (last visited Nov. 9, 2014) (stating that most sex offenders have no documented criminal history); *see also Sex and Kidnap Offender Notification and*

with sex offenders as a class without accounting for what specific crime was committed or what individual level of risk the offender poses to society.[244] One study of sex offenders shows "that while 36.2% of the sexual offenders generally recidivated, only 13.7% sexually recidivated and 14.3% violently recidivated."[245] Another study found that other crimes had significantly higher recidivism rates, as rapists were rearrested for general recidivism (within three years) at a much lower rate (46%) than those convicted of burglary (76%), robbery (70.2%), and drug offenses (66.7%).[246] Yet none of these other crimes require offenders to register. While public safety is a valid nonpunitive purpose, the only way to justify its registration requirement is to apply it to all criminal activity as all recidivate. Still, some sex offenders pose more of a threat of recidivism than others. This leads to the next suggestion: a detailed level designation, like Oklahoma's system, to give some separation between violent and habitual offenders, and one-time offenders who can be rehabilitated.

Oklahoma divides its offenders into three categories: low, moderate, and high risk.[247] These levels are not based solely on the crime committed, but rather on the individual risk each offender poses to the community.[248] The length of time that a person is required to remain on the registry increases according to individual risk of recidivism.[249] This system addresses Justice Ginsburg's worries in the *Smith* dissent that SORNA applies to offenders without an individualized determination of their future dangerousness.[250] Rather, each individual would be designated a level according to several factors: the crime committed, the number and seriousness of past offenses, and the mental state of the defendant. Additionally, offenders who have proven they can assimilate back into society should be allowed a chance to petition to lower their level designation after some specified period of time.[251]

Compare this to the Colorado Bureau of Investigation, which sets the duration of its registry requirements according to the statute violated.[252] For example, a Class 1, 2, or 3 felony requires twenty years of reg-

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Registration, UTAH DEP'T CORR., http://www.communitynotification.com/cap_office_disclaimer.php?office=54438 (last visited Nov. 9, 2014) (explaining that being on the registry list "does not imply listed individuals will commit a specific type of crime in the future").

244. *See* Eagan, *supra* note 66, at 267–68.

245. LISA WILLIAMS-TAYLOR, INCREASED SURVEILLANCE OF SEX OFFENDERS: IMPACTS ON RECIDIVISM 54 (2012).

246. *See id.* at 53–81.

247. *See Starkey*, 305 P.3d at 1010.

248. *See id.*

249. *Id.*

250. Smith v. Doe, 538 U.S. 84, 116–17 (2003) (Ginsburg, J., dissenting).

251. *See Starkey*, 305 P.3d at 1010 (Starkey made an attempt to decrease his level 3 designation to a level 1 upon completion of his sentence).

252. *See CBI Sex Offender Registry Requirements*, COLO. BUREAU INVESTIGATION, https://www.colorado.gov/apps/cdps/sor/information.jsf (last visited Nov. 9, 2014).

istration, and a Class 4, 5, or 6 felony requires ten years of registration.[253] Colorado does not automatically remove offenders from the list, but requires them to petition to discontinue registration.[254] Each offender lives in fear that the legislature may increase this sentence as it sees fit. Is this predictability in the rule of law, or does it more closely resemble the ex post facto concerns that the founding fathers had in mind?

As in Colorado, Utah sets the registration time period according to the crime committed.[255] For instance: kidnapping, incest, and forcible sexual abuse require ten years; child kidnapping, rape, and aggravated sexual assault require registration for life.[256] This is done without any determination of individual risk of recidivism. The Utah DOC website admits that many of these time periods will extend beyond the supervision legally allowed to the Utah Department of Corrections.[257]

"Once a convict, always a convict" does not comply with the Ex Post Facto Clause of the United States Constitution. The Tenth Circuit states can and should take the time to at least give proper scrutiny to these issues. It is fundamentally unfair to enact a civil registration regime that has punitive effects but is not subject to the same constitutional safeguards as other punitive laws. As such, the Tenth Circuit states must not remain silent on this issue. It is the duty of the courts, with a special responsibility for the quality of justice, to ensure that the legislature does not unconstitutionally deny its citizens their individual liberty.

CONCLUSION

The Ex Post Facto Clause was written with individual liberty as its fundamental purpose.[258] It was designed to protect the country's citizens from unfair and excessive punishment applied retroactively. Modern sex offender registry requirements applied retroactively cannot be justified as constitutional merely because of the legislature's perceived intent. Even if the legislature did intend for registration to be civil and nonpunitive, the effect of each state's Megan's Law is at least potentially punitive in effect. Therefore, refusing to give these laws a proper analysis as laid out

253. *Id.*

254. *Id.*

255. *Utah Laws Regulating Registered Sex Offenders*, UTAH DEP'T CORR., http://corrections.utah.gov/index.php?option=com_content&view=article&id=1062:utah-laws-regulating-registered-sex-offenders&catid=26:sex-offender-registry&Itemid=191 (last visited Nov. 9, 2014).

256. *Id.*

257. *Frequently Asked Questions*, UTAH DEP'T CORR., http://corrections.utah.gov/index.php?option=com_content&view=article&id=888:faqs&catid=2:uncategorised&Itemid=119 (last visited Nov. 9, 2014) (accessed by searching for "registry FAQ" on the Utah DOC website).

258. State v. Letalien, 985 A.2d 4, 13–14 (Me. 2009) (explaining that the Ex Post Facto Clause was "included in the original Constitution and [was] intended by the framers of the Constitution to protect individual liberty").

by the Supreme Court in *Smith* is a contravention of the courts' duties under the common law.

This Comment is not meant to suggest that Oklahoma was correct in its final conclusion that Oklahoma SORNA laws were punitive in effect. Instead, this Comment suggests that the Oklahoma Supreme Court must be applauded for its detailed and just application of the *Smith* intent/effects test. The Tenth Circuit state courts can and should follow suit by giving each SORNA law a fair analysis to determine if denying the individual rights of these offenders is truly nonpunitive in effect. If the laws are upheld, each state must consider the social implications and lessen the punitive effect of these laws through fair level designations.

"The stigma gone, Hester heaved a long, deep sigh, in which the burden of shame and anguish departed from her spirit. O exquisite relief! She had not known the weight, until she felt the freedom!"[259] May those that have offended be given a chance at redemption and an opportunity to feel this peace.

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259. NATHANIEL HAWTHORNE, THE SCARLET LETTER 158 (Brian Harding, ed., Oxford University Press 2007) (1850).

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