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Fall 9-1-2008

## Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?

Emily A. White

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### Recommended Citation

Emily A. White, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 Wash. & Lee L. Rev. 1783 (2008).

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# Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?

Emily A. White\*

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Around an accused, however degenerate, legal procedure and prescribed rules provide a cloak of dignity and self-esteem. That is the solemn and deliberate regard of liberal democracy for the humblest of its citizens. The price for consistency with an ideal of the basic worth of each individual may sometimes be paid grudgingly, but in the long run it is deemed a pittance for the benefits conferred, the values expressed.<sup>1</sup>

### I. Introduction

When Congress approved the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act),<sup>2</sup> it unified the existing state-run sex offender registration systems.<sup>3</sup> The law is just one of many state and federal statutes targeting sex offenders who have already been convicted and punished of a crime.<sup>4</sup> As brutal sex crimes against children have gained increasing national press during the last decade, the legislative response to sex offenders has increased markedly.<sup>5</sup> For offenders, seemingly no redemption exists. For years after serving their sentences, some will be constantly tracked by the government, as well as the general public, and forbidden from living, working, or even standing in certain areas.<sup>6</sup> The internet has made the effects of these regulations even more pronounced.<sup>7</sup> As a result of this recent increase in

1. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 192 (1937).

2. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 102, 120 Stat. 587, 590 (codified in scattered sections of 42 U.S.C. and 18 U.S.C.).

3. *Id.* at 590.

4. For an overview of these state and federal laws, see Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 85–87 (2006).

5. See Meghan Towers, Note, *Protectionism, Punishment and Pariahs: Sex Offenders and Residence Restrictions*, 15 J.L. & POL'Y 291, 292–93 (2007) (detailing several states' recent legislative responses to this national attention, with particular focus on sex-offender zoning restrictions); Manuel Roig-Franzia, *Miami Beach Mayor Seeks to Exclude Sex Offenders*, WASH. POST, Apr. 25, 2005, at A03 (considering the effect that the high profile media coverage of Jessica Lunsford and Sarah Lunde's murders had on the public and politics).

6. See Shajnfeld & Krueger, *supra* note 4, at 85–87 (discussing the residency restrictions placed upon convicted and released sex offenders); Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. 483, 483–84 (2007) (describing recently enacted work and loitering sex offender statutes).

7. Websites designed to track sex offenders abound. For an example, see [www.familywatchdog.us](http://www.familywatchdog.us) (allowing users to type in an address to provide them with a map or an aerial photograph displaying the home and work addresses for all sex offenders within a five mile radius of that address, a picture of each offender, and lists of their convictions). There also have been reports of vigilante behavior made possible by such websites. One study found that

legislation, some have begun to examine the constitutionality, ethics, and science of America's arguably emotional response to the threat sex offenders pose.<sup>8</sup> This Note joins this critical examination by exploring the constitutionality of the federal prosecution of sex offenders who traveled in interstate commerce prior to the enactment of the Adam Walsh Act for failure to register as a sex offender pursuant to the Act. In the rush to protect children, has America forsaken its fundamental commitment to the maxim *nullum crimen sine lege* ("no crime without law")?<sup>9</sup>

In October 2006, shortly after Congress enacted the Adam Walsh Act, the Department of Justice launched its largest effort to catch fugitive sex offenders—Operation *Falcon III*.<sup>10</sup> Within six days, authorities arrested 1,659 fugitive sex offenders, including 971 wanted for failure to register as sex offenders.<sup>11</sup> U.S. Attorneys soon prosecuted for failure to register pursuant to the Adam Walsh Act many of these offenders who were convicted of their sex offenses and traveled in interstate commerce prior to the Act's enactment. These prosecutions raise serious constitutional issues.<sup>12</sup> Defendants charged pursuant to the Act's registration provisions have alleged violations of the Non-Delegation Doctrine, Ex Post Facto Clause, Substantive and Procedural Due Process guarantees of the Fifth Amendment, and Commerce Clause. This Note considers the prosecutions' ex post facto implications. To contextualize the

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out of the 942 sex offenders in Washington State subject to community notification, there were thirty-three reported incidents of harassment of the offender or his family. See Shajnfeld & Krueger, *supra* note 4, at 92 (detailing several incidents of vigilantism targeting sex offenders).

8. See Richard Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. CRIM. & CIV. CONFINEMENT 17, 19–21 (2008) (assessing the reasons behind the growth of sex offender post-incarceration controls and their efficacy); Sarah Tofte & Jamie Fellner, *No Easy Answers: Sex Offender Laws in the US*, 19 HUM. RTS. WATCH 1 (2007) (providing an overview and critique of United States federal, state, and local laws that impose post-incarceration restrictions upon sex offenders).

9. *Nullum crimen sine lege, nulla poena sine lege*. "No crime without law, no punishment without law." Hall, *supra* note 1, at 165. The German jurist, Anselm Feuerbach, is most frequently credited with creating the maxim's phrasing. Feuerbach contended that the primary goal of punishment must be deterrence by threat; therefore, strict adherence to statutes and rejection of retroactive penal laws were necessary in order to deter future criminal behavior effectively. See *id.* at 169–70; Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals* 3 n.1 (Santa Clara Univ. Sch. Of Law Legal Studies Research Papers Series, Working Paper No. 07-47, 2007), available at <http://ssrn.com/abstract=1056562> (discussing the origin of the maxim).

10. See Wright, *supra* note 8, at 35–36 (describing the origin and purpose of the Department of Justice's Operation *Falcon III*).

11. *Id.*

12. For an example of these arguments, see *United States v. Madera*, 474 F. Supp. 2d 1257 (M.D. Fla. 2007).

enactment of the Adam Walsh Act, Part II briefly describes contemporary post-incarceration restrictions imposed upon convicted sex offenders. Part III then explains the legislative history of the Adam Walsh Act. Part IV of this Note asserts the continuing importance of *nullum crimen sine lege* and the associated principle of legality and their embodiment in Ex Post Facto Clause jurisprudence. Ultimately, in Part V, this Note concludes that the federal prosecution of sex offenders, who were convicted and had traveled in interstate commerce prior to the enactment of the Adam Walsh Act and the Attorney General's interim rule, violates the Ex Post Facto Clause and, perhaps more importantly, its underlying maxim that remains fundamental to American liberty—*nullum crimen sine lege*.

## II. Overview of Post-Incarceration Restrictions of Sex Offenders

Sex crimes are considered among the most heinous crimes, especially when they involve children.<sup>13</sup> In the United States, a majority of victims of sex crimes are under the age of eighteen.<sup>14</sup> Besides the obvious physical trauma suffered by these young victims, they suffer long-term psychological injuries.<sup>15</sup> In addition, the general public seems to believe that the recidivism rate for sex crimes is higher than other crimes.<sup>16</sup> These realities and perceptions, combined with high-profile news coverage of child abductions and assault, have garnered substantial political attention and triggered a wave of legislation.<sup>17</sup>

Sex-offender registries are the most common form of control exerted over sex offenders post-incarceration.<sup>18</sup> Legislators first widely proposed the

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13. See Janis F. Bremer, *Juveniles, Rehabilitation, and Sex Offenses: Changing Laws and Changing Treatment*, 29 WM. MITCHELL L. REV. 1343, 1346 (2003) ("A sexual offense in our society is generally seen as the most heinous of crimes, particularly if the victim is a child.").

14. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS 24 (1997) (determining that the majority of sexual assault victims in 1995 were under eighteen years old).

15. See Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1206 (1998) (asserting that studies indicate that victims of sexual offenses are more likely to develop post-traumatic stress disorder).

16. See Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 349 (2007) (stating that contrary to popular public opinion, the recidivism rate for sex crimes is not worse than the recidivism rates for other crimes).

17. See Wright, *supra* note 8, at 19–21 (describing the general pattern leading up to the imposition of sex offender post-incarceration restrictions: horrific sexual murder of a child, extensive national media coverage, and then legislative response).

18. See Towers, *supra* note 5, at 295 ("Registry requirements are the most common form

implementation of these registries in response to two high-profile cases of abduction, sexual assault, and murder.<sup>19</sup> Eleven-year-old Jacob Wetterling was abducted at gunpoint and presumed murdered in 1989.<sup>20</sup> In 1994, seven-year-old Megan Kanka was sexually assaulted and murdered by a neighbor who, unbeknownst to her parents, had been convicted of sexually assaulting children.<sup>21</sup> These crimes led to the enactment of mandatory sex-offender registration statutes and community notification requirements in many states.<sup>22</sup> Congress first responded with the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Jacob Wetterling Act), conditioning a state's federal funding on its enactment of a sex offender registration statute.<sup>23</sup> This Act provided that "the first time a sex offender knowingly fails to register [the failure shall be] deemed a misdemeanor with a potential jail sentence of up to one year imprisonment."<sup>24</sup> By 1996, every state and the District of Columbia had created some form of a sex offender registration statute and public notification system, commonly known as a "Megan's Law."<sup>25</sup>

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of control exercised over paroled sex offenders.").

19. See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 325–26 (2006) ("Registration of sex offenders and community notification statutes gained prominence following tragic circumstances that befell two children . . . Jacob Wetterling . . . and seven-year-old Megan Kanka.").

20. *Id.*

21. *Id.* at 326.

22. *Id.* While these crimes were perpetrated by strangers to the victims, the majority of sex crimes involving children are committed by family members and friends. See Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1107 (1997) (noting that "[b]etween seventy-five and eighty-five percent of child sexual abuse is committed by relatives and friends") (quoting Bonnie Steinbock, *Megan's Law: Community Notification of Release of Sex Offenders—A Policy Perspective*, 14 CRIM. JUST. ETHICS Summer/Fall 1995, at 4–5). This is just one fact that has led some commentators to assert that registration laws do not target those most likely to sexually assault a child and, therefore, provide the public with a false sense of security.

23. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, 42 U.S.C. § 14071 (2000); see also *Smith v. Doe*, 538 U.S. 84, 89–90 (2002) ("In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act . . . which conditions certain federal law enforcement funding on States' adoption of sex offender registration laws and sets minimum standards for state programs.").

24. *United States v. Patterson*, No. 8:07CR159, 2007 WL 2904099, at \*2 (D. Neb. Sept. 21, 2007).

25. See *Smith*, 538 U.S. at 90 ("By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law."). "The procedures differ from state to state, but common elements include the release of personal information such as names, addresses, criminal history and even photographs to neighbors, schools and any party that expresses an interest in the information." Towers, *supra* note 5, at 297.

During that year, Congress amended the Jacob Wetterling Act to include a federal Megan's Law.<sup>26</sup> This amendment made two important changes. First, it removed the requirement that states treat registry data as private information.<sup>27</sup> Second, it mandated that state law enforcement agencies release sex offender registry information necessary to protect the public.<sup>28</sup> This second requirement attached to all offenders required to register for offenses involving minors and those convicted of violent sexual offenses.<sup>29</sup> Congress also directed the FBI to create a national database of registered sex offenders and to release relevant information to the public when necessary.<sup>30</sup> In 2005, the Senate passed the Dru Sjodin National Sex Offender Public Database Act of 2005, essentially creating a publicly accessible national sex offender registry.<sup>31</sup> Eventually, this legislation would become part of the Adam Walsh Act.<sup>32</sup>

Megan's Laws have won the approval of the Supreme Court. In *Smith v. Doe*,<sup>33</sup> the plaintiff asserted that Alaska's sex offender registration and notification statute, requiring sex offenders convicted prior to its enactment to register or face criminal sanctions, violated the ex post facto prohibition under the United States and Alaskan Constitutions.<sup>34</sup> Citing the legitimate,

26. Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009 (July 21, 1997).

27. *Id.*

28. *Id.*

29. *Id.*

30. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093, 3093-94 (2000).

31. See Carpenter, *supra* note 19, at 326 ("[I]n 2005, Congress moved one step closer to the creation of a national sex offender registry with the Senate passage of the Dru Sjodin National Sex Offender Public Database Act of 2005."). Congress named the Act after a young woman who was sexually assaulted and murdered in 2003. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102, 102 Stat. 587, 590 (codified in scattered sections of 42 U.S.C. and 18 U.S.C.) ("Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.").

32. Congress incorporated the legislation into the Adam Walsh Act as the Dru Sjodin National Sex Offender Public website. The Act provides:

[E]ach jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user.

Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 118, 120 Stat. 587, 596 (codified in scattered sections of 42 U.S.C. and 18 U.S.C.).

33. See *Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (upholding Alaska's sex offender registry law that required sex offenders convicted prior to the registry's enactment to register in the face of an Ex Post Facto Clause challenge).

34. *Id.* at 91.

nonpunitive purpose behind Alaska's statute, the Court found that such a registration requirement does not "impose punitive restraints in violation of the *Ex Post Facto* Clause."<sup>35</sup> On the same day, the Court issued its opinion in *Connecticut Department of Public Safety v. Doe*.<sup>36</sup> In that case, the Court concluded that the Fourteenth Amendment's guarantee of procedural due process did not require Connecticut to conduct pre-registration hearings to determine the dangerousness of potential sex offender registrants.<sup>37</sup>

Residence restrictions controlling where sex offenders may reside after incarceration have also gained popularity in recent years.<sup>38</sup> In the last decade, twenty-eight states and many cities passed residency restrictions.<sup>39</sup> Generally, these restrictions prohibit sex offenders from living within set distances from schools, daycares, playgrounds, parks, and other locations children frequent.<sup>40</sup> Residency restrictions have not yet been scrutinized by the Supreme Court, but have gained some approval at the federal appellate level.<sup>41</sup>

In the past year, some states have also established sex offender work and loitering restrictions. For example, in April 2007, Georgia enacted legislation prohibiting sex offenders from loitering within one thousand feet

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35. *Id.* at 102.

36. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (upholding Connecticut's sex offender registration law which based its registration requirement on certain specified sex offenses rather than with regard to the potential registrant's degree of dangerousness to the community).

37. *Id.*

38. *See Wright, supra* note 8, at 42 ("Dozens, if not hundreds of cities and towns have passed or introduced legislation that makes it illegal for a sex offender to live within 1000–2500 feet of a school, park, day care, bus stop or other places where children congregate."). The legislation imposes these restrictions on an entire class of offenders "without any individual assessment of the offender, no prospective, empirically driven gauge of their future dangerousness, nor is there any venue for sex offenders to appeal these limitations." *Id.* For examples of state residency restrictions, see ARK. CODE ANN. § 5-14-128 (2006), CAL. PENAL CODE § 3003.5 (West 2000 & Supp. 2008).

39. *See Wendy Koch, Sex-Offender Residency Laws Get Second Look*, USA TODAY, Feb. 25, 2007, at A1 (summarizing post-incarceration restrictions imposed by states upon convicted sex offenders). The following states have residency restrictions: Alabama, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia. *Id.*

40. *See Towers, supra* note 5, at 302 ("The most common form of these restrictions limits sex offenders from residing within specified distances from schools, day care centers, playgrounds, parks and other places where children congregate.").

41. *See Doe v. Miller*, 405 F.3d 700, 723 (8th Cir. 2005) (upholding Iowa's sex offender residency restriction statute against *ex post facto*, procedural due process, and fundamental rights challenges).



of any child care facility, school, church or "area where minors congregate" and working for any employer located "within 1000 feet of a child care facility, school, or church."<sup>42</sup> Notably, however, the Georgia Supreme Court struck down the statute in November 2007 as a violation of the takings clauses of the Georgia and U.S. Constitutions.<sup>43</sup> Alabama, Delaware, Idaho, Michigan, and Tennessee have also enacted loitering and working restrictions for sex offenders.<sup>44</sup>

Twenty-three states have also implemented electronic monitoring systems, utilizing global positioning software (GPS), to provide information to probation and parole officials regarding the location of sex offenders.<sup>45</sup> In theory, this electronic tracking enforces prohibitions against sex offenders entering certain restricted zones (for example, day care centers, schools, and play grounds) by providing government officials the details of their whereabouts at all times.<sup>46</sup> California, for instance, in November 2006 imposed GPS monitoring upon on all sex offenders for life.<sup>47</sup>

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42. GA. CODE ANN. § 42-1-15 (Supp. 2008). For an examination of these relatively new restrictions targeting sex offenders, see Bains, *supra* note 6.

43. See *Mann v. Ga. Dep't of Corrections*, 653 S.E.2d 740, 745–46 (Ga. 2007) (finding that the statute constituted an impermissible taking without adequate compensation as applied to a sex offender who was forced to move out of his home after a child care center opened within a restricted zone, but that it did not constitute a taking with respect to his ownership interest in a restaurant).

44. ALA. CODE § 15-20-26 (Supp. 2007) (providing that sex offenders may not reside or work within two thousand feet of a school or child care facility and they may not loiter or work within five hundred feet of a school, playground, park or athletic facility); DEL. CODE. ANN. tit. 11, § 1112(a) (2007) (providing that sex offenders may not live or loiter within five hundred feet of school property); IDAHO CODE ANN. § 18–8329 (2006) (providing that sex offenders may not loiter on school property or be in or on any conveyance owned or used by a school to transport students); MICH. COMP. LAWS. §§ 28.733–28.753 (2006) (providing that sex offenders may neither work nor loiter within one thousand feet of school property with some limited exceptions); TENN. CODE. ANN. § 40-39-211 (2006) (providing that sex offenders may neither reside nor work within one thousand feet of any school, child care facility, public park, playground, or public athletic field).

45. See Wright, *supra* note 8, at 36–38 (discussing the GPS monitoring systems many states have enacted); Wendy Koch, *More Sex Offenders Tracked by Satellite*, USA TODAY, June 6, 2006, at A3 (summarizing various states' GPS monitoring systems for sex offenders).

46. See Wright, *supra* note 8, at 36 (describing how states' GPS monitoring of sex offenders enforces exclusionary zone statutes).

47. CAL. PENAL CODE § 3004 (West 2000 & Supp. 2008).

### III. *The Adam Walsh Act*

On July 27, 1981, Adam Walsh was abducted from a mall.<sup>48</sup> He was found murdered two weeks later.<sup>49</sup> His father, John Walsh, went on to host the hit television program *America's Most Wanted* and lobby Congress for federal legislation aimed at tracking violent criminals after their release from prison.<sup>50</sup> His efforts culminated on the twenty-fifth anniversary of Adam's disappearance, July 27, 2006, when President George W. Bush signed into law the Adam Walsh Act.<sup>51</sup> It has been hailed by some as the "most comprehensive child crimes and protection bill in our Nation's history"<sup>52</sup> and described by others as a modern day federal "scarlet letter."<sup>53</sup>

The Act creates minimum requirements for state sex offender registration and notification, dictating the duration of registration requirements, the information that state registrations must contain, the extent of community notification, and the procedures for sharing the collected information.<sup>54</sup> The Act's legislative history states that it created "a new Federal crime" as a result of which, "[s]ex offenders who fail to comply will face felony criminal prosecution."<sup>55</sup> Using a host of funding reductions and grant programs to induce compliance, the statute provides that participating states have until July 2009 to implement the statute's requirements.<sup>56</sup> In addition, the Act allows the Attorney General two years to develop and provide software that enables

48. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 2, 120 Stat. 587, 589 (codified in scattered sections of 42 U.S.C. and 18 U.S.C.).

49. *Id.*

50. *Id.*

51. *Id.*

52. 152 CONG. REC. S8012 (2006) (statement of Sen. Hatch).

53. Kyle O'Dowd, *The Scarlet Letter of the Law: The Adam Walsh Child Protection and Safety Act of 2006*, CHAMPION, Nov. 30, 2006, at 59.

54. *See id.* (detailing the core provisions of the Adam Walsh Act's sex-offender registration requirements). The Act has a host of other significant provisions and applications. For example, it provides statutory authority for the civil commitment of sex offenders after incarceration who are deemed sexually dangerous. *Id.* at 61. It amends the Federal Rules of Evidence by requiring that "child pornography remain in the custody of the government or court and prohibits reproduction by defense counsel as long as reasonable access is provided." *Id.* Some have argued this means that the law prejudices the crucial question in child pornography cases, because the images in question are presumed to be child pornography before any court or jury has determined they are. For a description of this argument, see Adam Liptak, *Locking up the Crucial Evidence and Crippling the Defense*, N.Y. TIMES, Apr. 9, 2007, at A10.

55. H.R. REP. NO. 109-218, at 21, 26 (2005).

56. *See O'Dowd, supra* note 53, at 60 (describing the funding reductions and financial grants Congress employed in the Act to induce states to comply).

participating states to create and maintain the required online registries and notification programs.<sup>57</sup>

Title I of the Act contains the Sex Offender Registration and Notification Act (SORNA).<sup>58</sup> SORNA makes it a federal felony, punishable by up to ten years in prison, for a sex offender to travel in interstate commerce and knowingly fail to register or update his registration in the state in which he lives, works, or attends school.<sup>59</sup> Prior to July 2006, "federal prosecution for failure to register was limited to the misdemeanor offense contained in Title 42" punishable by up to one year imprisonment.<sup>60</sup> SORNA delegated to the Attorney General the authority to determine the applicability of its requirements to sex offenders convicted before July 26, 2006.<sup>61</sup> The Attorney General did not exercise that power until February 28, 2007.<sup>62</sup> On that date he issued an interim rule stating that SORNA's registration requirements apply to those sex offenders convicted prior to July 26, 2006.<sup>63</sup>

To date, twelve courts have determined that SORNA prosecutions of individuals who were convicted and traveled in interstate commerce prior to either its enactment or the Attorney General's interim rule are unconstitutional as violations of the Ex Post Facto Clause.<sup>64</sup> Four district courts have skirted the

57. *See id.* (discussing the adoption and utilization of software for state maintained online registries and notification programs). States have one year from the date of the software's availability or three years from the law's enactment to comply, whichever occurs later; until then, or if a state chooses not to participate, the state's existing registry and sex offender laws will continue to govern. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 124, 120 Stat. 587, 598 (codified in scattered sections of 42 U.S.C. and 18 U.S.C.).

58. 42 U.S.C.A. § 16901 (West 2006 & Supp. I 2007).

59. 18 U.S.C.A. § 2250 (West 2006 & Supp. I 2007).

60. *United States v. Smith*, 481 F. Supp. 2d 846, 848 (E.D. Mich. 2007).

61. 42 U.S.C.A. § 16913(d) (Supp. 2008).

62. 28 C.F.R. § 72.3 (2007).

63. *Id.* The ruling, however, does not address SORNA's applicability to those individuals who traveled in interstate commerce prior to its enactment. *Id.*

64. *See United States v. Aldrich*, No. 8:07CR158, 2008 WL 427483, at \*5 (D. Neb. Feb. 14, 2008) (dismissing the indictment as a violation of the Ex Post Facto Clause); *United States v. Kent*, No. 7-00226-CG, 2008 WL 360624, at \*6 (S.D. Ala. Feb. 8, 2008) (same); *United States v. Howell*, No. CR07-2013-MWB, 2008 WL 313200, at \*12 (N.D. Iowa Feb. 1, 2008) (same); *United States v. Terwilliger*, No. 07CR1254 BTM, 2008 WL 50075, at \*3 (S.D. Cal. Jan. 3, 2008) (same); *United States v. Bonner*, No. 07-00264-KD, 2007 WL 4372887, at \*2 (S.D. Ala. Dec. 11, 2007) (same); *United States v. Rich*, No. 07-00274-01-CR-W-HFS, 2007 WL 4292394, at \*3 (W.D. Mo. Dec. 5, 2007) (same); *United States v. Wilson*, No. 2:06-cr-867 TC, 2007 WL 3046290, at \*3 (D. Utah Oct. 16, 2007) (same); *United States v. Gill*, 520 F. Supp. 2d 1341, 1349 (D. Utah 2007) (same); *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*4 (W.D. Okla. Sept. 21, 2007) (same); *United States v. Cole*, No. 07-cr-30062-DRH, 2007 WL 2714111, at \*3 (S.D. Ill. Sept. 17, 2007) (same); *United States v. Stinson*, 507 F. Supp. 2d 560, 570 (S.D. W. Va. 2007) (finding the defendant not guilty because

constitutional issues altogether by asserting that the defendants were under no federal obligation to register because at the time they allegedly violated SORNA, the Attorney General had not issued his interim ruling making the Act applicable to sex offenders convicted prior to July 26, 2006.<sup>65</sup> The remaining courts (fourteen) that have considered the issue have determined that the retroactive application of SORNA to individuals who were convicted and traveled in interstate commerce prior to its enactment or the interim rule does not violate the Ex Post Facto Clause.<sup>66</sup> To date, no federal court of appeals has ruled on a constitutional challenge to the Act.

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his prosecution constituted a violation of the Ex Post Facto Clause); *United States v. Sallee*, No. CR-07-152-L, 2007 WL 3283739, at \*3 (W.D. Okla. Aug. 13, 2007) (dismissing the indictment as a violation of the Ex Post Facto Clause); *United States v. Muzio*, No. 4:07CR179, 2007 WL 2159462, at \*7 (E.D. Mo. July 26, 2007) (same); *United States v. Smith*, 481 F. Supp. 2d 846, 854 (E.D. Mich. 2007) (same).

65. For courts that dismissed the indictment because at the time of the defendant's arrest the Attorney General had not explicitly made SORNA applicable to sex offenders convicted prior to its enactment, see *United States v. Patterson*, No. 8:07CR159, 2007 WL 2904099, at \*8 (D. Neb. Sept. 21, 2007); *United States v. Dillenbeck*, No.4:07-CR-213-RBH, 2007 WL 2684838, at \*3 (D. S.C. Sept. 7, 2007); *United States v. Heriot*, No. 3:07-323, 2007 WL 2199516, at \*2 (D. S.C. July 27, 2007); *United States v. Smith*, No.2:07-00082, 2007 WL 1725329, at \*5 (S.D. W.Va. June 13, 2007); *United States v. Kapp*, 487 F. Supp. 2d 536, 543 (M.D. Pa. 2007).

66. For courts that concluded there was no violation of the Ex Post Facto Clause or the procedural due process rights to notice and fair warning, see *United States v. Bartlett*, No.08-20006, 2008 WL 440828, at \*2 (W.D. Ark. Feb. 13, 2008); *United States v. Hester*, No. 1:07-CR-376, 2008 WL 351677, at \*2 (N.D.N.Y. Feb. 7, 2008); *United States v. Hacker*, No. 8:07CR243, 2008 WL 312689, at \*3 (D. Neb. Feb. 1, 2008); *United States v. LeTourneau*, 534 F. Supp. 2d 718, 722 (S.D. Tex. 2008); *United States v. Phasung Lu Baccam*, No. 07-30008, 2008 WL 110867, at \*2 (W.D. Ark. Jan. 8, 2008); *United States v. Dixon*, No. 3:07-CR-72(01)RM, 2007 WL 4553720, at \*3 (N.D. Ind. Dec. 18, 2007); *United States v. Elliott*, No. 07-14059-CR, 2007 WL 4365599, at \*6 (S.D. Fla. Dec. 13, 2007); *United States v. Adkins*, No. 1:07-CR-59, 2007 WL 4335457, at \*7 (N.D. Ind. Dec. 7, 2007); *United States v. Cardenas*, No. 07-801808-CR, 2007 WL 4245913, at \*11 (S.D. Fla. Nov. 29, 2007); *United States v. Carr*, No. 1:07-CR-73, 2007 WL 3256600, at \*3 (N.D. Ind. Nov. 2, 2007); *United States v. Pitts*, No. 07-157-A, 2007 WL 3353423, at \*6 (M.D. La. Nov. 7, 2007); *United States v. Lovejoy*, 516 F. Supp. 2d 1032, 1037-38 (D. N.D. 2007); *United States v. Beasley*, No. 1:07-CR-115-TCB, 2007 WL 3489999, at \*3 (N.D. Ga. Oct. 10, 2007); *United States v. May*, No. 4:07-cr-00164-JEG, 2007 WL 2790388, at \*5 (S.D. Iowa Sept. 24, 2007); *United States v. Mitchell*, No. 07-CR-20012, 2007 WL 2609784, at \*2 (W.D. Ark. Sept. 6, 2007); *United States v. Kelton*, No. 5:07-30-OC-10GRJ, 2007 WL 2572204, at \*2 (M.D. Fla. Sept. 5, 2007); *United States v. Bennett*, No. 07CR20040, 2007 WL 2461696, at \*2 (W.D. Ark. Aug. 27, 2007); *United States v. Hulén*, No. 07-30004, 2007 WL 2343885, at \*2 (W.D. Ark. Aug. 15, 2007); *United States v. Sawn*, No. 6:0700020, 2007 WL 2344980, at \*2 (W.D. Va. Aug. 15, 2007); *United States v. Torres*, No. 07-50035, 2007 WL 2343884, at \*2 (W.D. Ark. Aug. 15, 2007); *United States v. Gonzales*, No. 5:0727-RS, 2007 WL 2298004, at \*10 (N.D. Fla. Aug. 9, 2007); *United States v. Marcantonio*, No. 07-60011, 2007 WL 2230773, at \*3 (W.D. Ark. July 31, 2007); *United States v. Roberts*, No. 6:07-CR-70031, 2007 WL 2155750, at \*2 (W.D. Va. July 27, 2007); *United States v. Mason*, 510 F. Supp. 2d 923, 929-30 (M.D. Fla. 2007); *United States v. Hinen*, 487 F.

#### IV. *Nullum Crimen Sine Lege and the Continuing Need for its Protection*

*Nullum crimen sine lege, nulla poena sine lege.* "No crime without law, no punishment without law."<sup>67</sup> Despite the Latin maxim's apparent simplicity, devotion to the principle it sets forth constitutes the characteristic that most differentiates a free society from one controlled by a totalitarian regime.<sup>68</sup> The exact origins of the principle *nullum crimen sine lege* remain contested.<sup>69</sup> Some assert a British origin, stemming from principles enunciated in the Magna Carta.<sup>70</sup> Others insist the principle grew out of the French Revolution and its introduction of the idea of the "Law-State" rather than the "Administrative State."<sup>71</sup> Regardless, undoubtedly by the end of the eighteenth century, Europe and Britain had widely embraced the principle.<sup>72</sup>

Once Europe had accepted it, the notion traveled to the American colonies, finding its first clear expression in the Declaration of Rights written

Supp. 2d 747, 753–57 (W.D. Va. 2007); *United States v. Markel*, No. 06-20004, 2007 WL 1100416, at \*2 (W.D. Ark. Apr. 11, 2007); *United States v. Manning*, No. 06-20055, 2007 WL 624037, at \*2 (W.D. Ark. Feb. 23, 2007); *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481, at \*5 (W.D. Okla. Feb. 7, 2007); *United States v. Madera*, 474 F. Supp. 2d 1257, 1265 (M.D. Fla. 2007).

67. For a history of *nullum crimen sine lege* from Roman times to modern day, see Hall, *supra* note 1, at 165–72. Hall writes that this maxim has several distinct meanings:

Employed as *nullum crimen sine lege*, the prohibition is that no conduct shall be held criminal unless it is specifically described in the behavior-circumstance element of a penal statute. In addition, *nullum poena sine lege* has been understood to include the rule that penal statutes must be strictly construed. A final, important signification of the rule is that penal laws shall not be given retroactive effect.

*Id.* at 165.

68. See Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385, 385–86 (1987) (describing the continuing importance of preserving the *nullum crimen sine lege* principle in American criminal law).

69. See generally Stefan Glaser, *Nullum Crimen Sine Lege*, 24 J. COMP. LEGIS. & INT'L L. 29 (1942) (describing the origins of *nullum crimen sine lege* and the controversy that remains).

70. *Id.*

71. *Id.* at 30.

72. *Id.* However, Professor Jerome Hall wrote:

*Nullum crimen sine lege* was never literally followed. As regards juveniles, vagabonds, mendicants, persons without visible means of support, and others, only a distortion of words can deduce a merely formal requirement that there be an act (*crimen*). There is a long tradition regarding vagabonds and mendicants in English law; hardly ever has the treatment of them and of other special classes accorded with otherwise rigorous insistence upon specific definition of criminality.

Hall, *supra* note 1, at 182.

by the First Continental Congress in Philadelphia in October 1774.<sup>73</sup> The Founders later incorporated it into the United States Constitution on March 4, 1789: "No bill of attainder, or *ex post facto* law, shall be passed."<sup>74</sup> Its addition prevents the legislative branches of the federal and state governments from adopting retroactive legislation.<sup>75</sup> It is one of the few powers that the Constitution expressly denies the states. James Madison wrote: "[E]*x post facto* laws . . . are contrary to the first principles of the social compact and to every principle of sound legislation."<sup>76</sup> Another founding father, Alexander Hamilton, asserted that violations of the maxim are "the favourite and most formidable instruments of tyranny."<sup>77</sup> In pursuit of individual liberty, the Founders designed a government of "laws, and not of men";<sup>78</sup> the American constitutional experiment was grounded in a commitment to the rule of law in order to preserve inalienable individual rights. *Nullum crimen sine lege* and the associated principle of legality<sup>79</sup> lie at the heart of that commitment and pursuit. The Supreme Court thus declared that the "deeply rooted"<sup>80</sup> and "centuries older than our Republic"<sup>81</sup> "presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen."<sup>82</sup> This presumption acts as a limit on the "sovereign's ability to use its law making power to modify bargains it has made with its

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73. Glaser, *supra* note 69, at 29.

74. U.S. CONST. art. 1, § 9, cl. 3; Glaser, *supra* note 69, at 29.

75. See U.S. CONST. art. 1 § 10, cl. 1 ("No state shall . . . pass any . . . *ex post facto* Law."); Van Schaack, *supra* note 9, at 1–2 (describing the significance of the *nullum crimen sine lege* principle and the Ex Post Facto Clause in United States law).

76. THE FEDERALIST NO. 44, at 278–79 (James Madison) (Clinton Rossiter ed., 2003).

77. THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

78. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

79. The legality principle includes:

[T]he modern abolition of common law penal doctrines, the modern prohibition of the judicial creation of penal rules, special rules for the construction of penal statutes, the constitutional prohibition of *ex post facto* penal laws, the due process bar of retroactive application of criminal rules, and the due process invalidation of vague criminal statutes.

Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 337 (2005).

80. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994).

81. *Id.*

82. *Lynce v. Mathis*, 519 U.S. 433, 439 (1997). Some commentators have argued that the writings of the Founders, the location of the clause in Article I, and the considerable constitutional text devoted to the subject of retroactive lawmaking (both Ex Post Facto Clauses and the Contracts Clauses) suggest that the retroactive prohibition was "central to the constitutional bargain." Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 492–94 (2003).

subjects."<sup>83</sup> According to Justice Marshall, the prohibition against ex post facto laws guarantees that legislation give fair warning of its effect and allow individuals to rely on its meaning until explicitly changed.<sup>84</sup> This prohibition also guards against the arbitrary exercise of government power and "potentially vindictive legislation."<sup>85</sup>

Today, the principle means that "criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity."<sup>86</sup> In a nation that guarantees each individual certain inalienable rights, one such right must include the right to know what acts are allowed or prohibited.<sup>87</sup> To this end, legality has given rise to three principles of statutory interpretation.<sup>88</sup> First, legislatures should draft criminal statutes with precision (the principle of specificity).<sup>89</sup> Second, judges should construe criminal statutes strictly.<sup>90</sup> And third, judges should resolve ambiguities arising from the interpretation of criminal statutes in favor of the accused (the principle of lenity).<sup>91</sup>

Legality continues to serve several important purposes: legitimize the rule of law,<sup>92</sup> limit the arbitrary use of government power,<sup>93</sup> and affirm the worth of the individual.<sup>94</sup> Part of law's legitimacy derives from its perceived fairness. Laws that violate the principle of legality undermine the rule of law's

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83. *Lynce*, 519 U.S. at 440.

84. *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981).

85. *Robinson*, *supra* note 79, at 336.

86. *Id.* at 336.

87. *See* Glaser, *supra* note 69, at 34 ("It is the undeniable right of every man to know what acts are allowed and what forbidden, what acts the law considers useful, what harmful and what indifferent.").

88. *See* Van Schaack, *supra* note 9, at 3 (discussing legality's origins and its associated legislative and interpretative principles).

89. *Id.* at 4.

90. *Id.*

91. *Id.*

92. *See id.* (arguing that *nullum crimen sine lege* speaks to the legitimacy of the rule of law by providing a check on all powers of government).

93. *See* Glaser, *supra* note 69, at 34 (asserting that the maxim "protects against the discretion of the judge and arbitrary acts committed in the name of justice"); *see also* Malloy v. South Carolina, 237 U.S. 180, 183 (1915) (declaring that the constitutional prohibition against retroactive laws was "intended to secure substantial personal rights against arbitrary and oppressive legislative action . . .").

94. *See* Glaser, *supra* note 69, at 37 (arguing that the *nullum crimen sine lege* protects the "importance and the imperishable value of the autonomy and liberty of the individual"); Hall, *supra* note 1, at 192 (stating that *nullum crimen sine lege* affirms "the significance and ineffable worth of the individual human being").

legitimacy because it is simply and intuitively "unjust what was legal when done should be subsequently held criminal, that what was punishable by a minor sanction when committed should later be punished more severely."<sup>95</sup> Legality also ensures fairness in the rule of law by guaranteeing that "[w]hat is actually done is the ultimate basis for judgment"—that no vengeful post hoc rationalization may deprive any individual of his liberty.<sup>96</sup> For the same reasons, *nullum crimen sine lege* also fundamentally legitimizes the rule of law by limiting the arbitrary exertion of government power over individuals.<sup>97</sup> Simply put, legality provides for the stable and consistent application of the rule of law.<sup>98</sup>

In so protecting against tyranny, the principle of legality also preserves individual liberty and affirms "the significance and ineffable worth of the individual human being."<sup>99</sup> Legality ensures that no person, especially the all-powerful state, may dominate any other human being and that due process will be employed and notice of a legal prohibition given before any individual can be punished.<sup>100</sup> "[F]reedom of the individual, would be, in fact illusory, if we were to abolish the requirement that offences and punishments be determined by law. Nobody could be certain of the future."<sup>101</sup> And in such a situation, the law could and would likely be applied unequally and inconsistently—or at the very least, there would exist no guarantee of equal and consistent application. Moreover, people would live without the power to exercise their autonomy to make decisions rationally calculated based on the legal consequences of their behavior. As a result, legality has become "the first principle of American criminal law jurisprudence[.]" overriding all other criminal law doctrines even though it may lead to the dangerous and morally culpable avoiding punishment.<sup>102</sup>

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95. Hall, *supra* note 1, at 171.

96. *Id.* at 184.

97. See Van Schaak, *supra* note 9, at 1 (arguing that *nullum crimen sine lege* protects citizens from arbitrary state action, thereby legitimizing the rule of law).

98. See Glaser, *supra* note 69, at 35 (asserting that *nullum crimen sine lege* constitutes a fundamental basis for a democratic state by assuring individuals of "equality before the law and of the stability of justice").

99. Hall, *supra* note 1, at 192 (stating that the principle of legality means that "[e]ven the all-powerful state, indeed, especially the all-powerful state, must use the regular channels of due process before any individual can be punished").

100. *Id.*

101. Glaser, *supra* note 69, at 34.

102. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.01[A], at 39 (3d ed. 2001) (citations omitted).



Yet, despite the principle's impressive resume, one does not have to look far back in history to see what a government that has forsaken legality looks like. Authoritarian regimes discard *nullum crimen sine lege*, subordinating the rights of individuals, for the sake of the "community" and preservation of a political ideology.<sup>103</sup> Almost overnight, behavior once legal becomes "socially dangerous" and criminally punishable. The United States Court of Appeals for the Second Circuit declared that "[p]erhaps the most dramatic example of a vindictive law unconstrained by any *ex post facto* prohibition occurred in pre-World War II Germany."<sup>104</sup> Just after someone burned down the Reichstag in 1933 Berlin, the Nazis increased the punishment for arson from imprisonment to death; the accused individual was soon executed pursuant to the new law.<sup>105</sup> As part of its quest for ideological monopoly, the Nazi Party made its disregard of the legality principle formal when it revised the German Code on June 28, 1935:

Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act.<sup>106</sup>

Similarly, Soviet leaders in 1926 amended the Russian Penal Code to define a crime as "any socially dangerous act or omission which threatens the foundations of the Soviet political structure and that system of law which has been established by the Workers' and Peasants' Government for the period of transition to a communist structure."<sup>107</sup> Because both of these statutes provided such broad definitions of criminal behavior, virtually any act proved punishable as long as those in power deemed the act "deserving of penalty" or "socially dangerous." Both of these laws consequently paved the way for state-run persecutions of literally millions in "accordance with the law."

Society's commitment to the *nullum crimen sine lege* principle has also been tested by some of the most egregious to confront humankind.<sup>108</sup> The cynic

103. See Hall, *supra* note 1, at 188 ("Authoritarian political theory[']s . . . attack upon *nulla poena* consists in stressing the paramount importance of the Community in order to justify subordination of the individual.").

104. United States v. Kilkenny, 493 F.3d 122, 126 (2d Cir. 2007).

105. *Id.*

106. Hall, *supra* note 1, at 175 n.43 (quoting the German Act of June 28, 1935).

107. Allen, *supra* note 68, at 386 n.2 (quoting the Russian Penal Code of 1926, R.S.F.S.R. PENAL CODE, Art. II-6).

108. Defendants in both the Nuremberg and Tokyo International Military Tribunals asserted:

may argue that this is so because it is the last resort of criminals who have committed such heinous acts that there exists no other possible defense, calling it the "criminal's Magna Carta."<sup>109</sup> If this is true, it would not be surprising to see this defense raised in the face of some of the most vicious crimes with which America has to grapple: Sex crimes against children. Others posit that it is at times like these—when confronted with horrible injustice—that the legal system must provide the most justice. It is for this reason that America today when confronted with heinous crimes against its most vulnerable citizens—children—must rise to meet the challenge that threatens one of its most fundamental legal principles. We must remember that *nullum crimen sine lege*—the Magna Carta of the free—constitutes "one of the most important safeguards against the worst of all oppressions—that oppression which hides itself under the mask of justice."<sup>110</sup>

#### V. Adam Walsh Act—A Quintessentially Ex Post Facto Law

##### A. Ex Post Facto Jurisprudence

The quintessential ex post facto law criminally punishes conduct that was lawful when committed or retroactively increases punishment for criminal conduct.<sup>111</sup> After limiting the ex post facto prohibition to criminal laws, Justice

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A fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 122 (1992). Ultimately, however, equity compelled the rejection of this defense "even though rigid positivistic application of the 'principles of legality' as understood in the post-1800 Continental European positivist legal tradition gave validity to this argument." *Id.* at 132. Legality continues to be an ongoing point of controversy in prosecutions under international criminal law and procedure. For a discussion of this debate, see Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657 (1996).

109. See Glaser, *supra* note 69, at 34 (noting a popular critique of *nullum crimen sine lege* principle).

110. *Id.* at 37.

111. See *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (explaining that the clause prohibits imposing "a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed") (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325–26 (1867)).

Chase, in *Calder v. Bull*,<sup>112</sup> set forth four types of laws forbidden by the Ex Post Facto Clause:

1st. Every law that makes an action, done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2nd. Every law that *aggravates a crime*, or makes it greater than it was, when committed. 3rd. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*. All these, and similar laws, are manifestly *unjust* and *oppressive*.<sup>113</sup>

In *Weaver v. Graham*,<sup>114</sup> Justice Marshall enunciated two factors for the determination of whether a criminal law is ex post facto.<sup>115</sup> First, the law must be retrospective, meaning that it applies to events that occurred prior to its enactment by altering the legal consequences of such events.<sup>116</sup> Second, it must disadvantage the offender.<sup>117</sup> Ultimately, relief under the Ex Post Facto Clause is not about "an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increased the punishment beyond what was prescribed when the crime was consummated."<sup>118</sup> For this

112. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (concluding that the Constitution's ex post facto prohibition only applies to criminal laws).

113. *Id.* at 390–91.

114. *Weaver v. Graham*, 450 U.S. 24, 35–36 (1981) (finding that a Florida statute reducing the amount of time deducted from a convicted prisoner's sentence for obedience and good conduct in prison was unconstitutional as an ex post facto law as applied to the petitioner who committed his crime before the statute's enactment). In *Weaver*, the petitioner challenged a Florida statute, which decreased the amount of time deducted from his prison sentence for obedience and good conduct. *Id.* at 25. When the petitioner committed his crime and the trial court sentenced him, Florida provided a specific formula for deducting time from the sentences of every prisoner for good conduct. *Id.* at 26. Two years after sentencing, the Florida legislature repealed the formula, replacing it with a new formula that provided smaller deductions for good behavior. *Id.* Florida applied the new formula to all prisoners, including those, like the petitioner, whose offenses conspired prior to the new formula's enactment. *Id.* at 27. As a result of the new formula, petitioner asserted his required time in prison would be extended "by over 2 years, or approximately 14 percent of his original 15-year sentence." *Id.* The Court concluded that the new formula made the punishment for crimes previously committed more onerous and, thereby, violated the Ex Post Facto Clause. *Id.* at 36.

115. *Id.* at 29.

116. *Id.*; cf. *Johnson v. United States*, 529 U.S. 694, 699 (2000) (finding that to violate the Ex Post Facto Clause the change in a criminal law must be imposed retroactively; a prospective increase in the punishment imposed for previously criminalized conduct or criminalization of previously lawful behavior does not violate the Clause).

117. *Weaver*, 450 U.S. at 29.

118. *Id.* at 30.

reason, a statute that changes penal provisions "violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."<sup>119</sup> When a court engages in an *ex post facto* analysis, it should be concerned solely "with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred."<sup>120</sup> It is the "effect, not the form, of the law that determines whether it is *ex post facto*."<sup>121</sup> The Constitution "'intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."<sup>122</sup> The *Weaver* majority concluded that the retroactive application of Florida's reduction in "good time credits" for prisoners violated the Ex Post Facto Clause because it effectively increased some prisoners required time in prison for crimes they had already committed.<sup>123</sup>

In *United States v. Ward*,<sup>124</sup> the Supreme Court announced a two-part test for determining whether a claim is criminal rather than civil, and thus whether it is prohibited by the Ex Post Facto Clause.<sup>125</sup> First, a court must "determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."<sup>126</sup> Second, where Congress appears to have intended to establish a civil penalty, a court must further determine "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention[.]" accepting "'only the clearest proof . . . to establish the unconstitutionality of a statute on such a ground."<sup>127</sup>

In reviewing a law for an Ex Post Facto Clause violation, the next stage of the analysis turns on whether the law's retroactive change can be regarded as punitive. A change in the law that does not constitute punishment or merely makes a procedural alteration without increasing the level of punishment does not violate the Ex Post Facto Clause.<sup>128</sup> To make this determination, the

119. *Id.* at 30–31.

120. *Id.* at 30 n.13.

121. *Id.* at 31.

122. *Id.* at 31 n.15 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

123. *Id.* at 33.

124. *United States v. Ward*, 448 U.S. 242, 254–55 (1980) (determining that penalties imposed by the Federal Water Pollution Control Act are civil and do not trigger the constitutional protections guaranteed to criminal defendants).

125. *Id.* at 248–49.

126. *Id.* at 248.

127. *Id.* at 248–49 (quoting *Flemming v. Nester*, 363 U.S. 603, 617 (1960)).

128. *See Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (finding that Kansas's statute providing for the civil commitment of sex offenders deemed to be a continuing danger did not constitute punishment and thus did not run afoul of the Ex Post Facto Clause); *Dobbert v.*

Supreme Court relies on seven factors it first set forth in *Kennedy v. Mendoza-Martinez*.<sup>129</sup> In that case, the Court used the factors to determine whether a sanction constituted punishment with regard to the double jeopardy prohibition.<sup>130</sup> These factors have since migrated into the Court's *ex post facto* jurisprudence and have also been used by the Court to analyze punishment in the Bill of Attainder and the Sixth and Eighth Amendments contexts.<sup>131</sup> These factors include whether (1) the sanction imposes an affirmative disability or restraint; (2) the sanction has been historically deemed a punishment; (3) the sanction requires a finding of scienter; (4) the sanction promotes the traditional aims of punishment (such as retribution and deterrence); (5) the behavior to which it applies is already a criminal offense; (6) an alternative purpose to which the sanction may rationally be connected is assignable for it; and (7) the sanction appears excessive in comparison to the alternative purpose assigned.<sup>132</sup>

The Supreme Court applied these factors in *Kansas v. Hendricks*,<sup>133</sup> concluding that civil commitment after serving a prison sentence—but before perpetrating or even attempting another criminal act—does not necessarily violate the *Ex Post Facto* Clause.<sup>134</sup> The Court found that Kansas's civil commitment and the associated restriction of rights (including loss of privacy, involuntary commitment, and loss of liberty) of a sex offender who remains likely to commit sexual violence due to a "mental abnormality or personality disorder" did not constitute punishment.<sup>135</sup> The majority based this finding on the fact that the statute's purpose was the treatment of dangerous sex offenders and the protection of society and that the statute's process was civil rather than criminal.<sup>136</sup>

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Florida, 432 U.S. 282, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.").

129. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165–66 (1963) (concluding that statutes depriving an American of his citizenship for leaving the United States at a time of war in order to avoid the draft are unconstitutional because they impose punitive sanctions while failing to afford the procedural rights guaranteed by the Fifth and Sixth Amendments).

130. *Id.* at 168–69.

131. *Smith v. Doe*, 538 U.S. 84, 97 (2002).

132. *Kennedy*, 372 U.S. at 168–69.

133. See *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (upholding a Kansas statute that provided for the involuntary civil commitment of a sex offender who, because of a "mental abnormality or personality disorder," remains likely to engage in sexual violence).

134. *Id.*

135. *Id.*

136. *Id.* at 368–70.

Most recently, in *Smith v. Doe*,<sup>137</sup> the Supreme Court considered the constitutionality of Alaska's Sex Offender Registration Act (SORA).<sup>138</sup> SORA required individuals convicted of sex crimes to register as sex offenders, including those who had been convicted before its enactment, so that the Alaska Department of Public Safety could maintain a central registry of sex offenders and make some of this information available to the public.<sup>139</sup> A sex offender who knowingly failed to register was subject to criminal prosecution.<sup>140</sup> Two sex offenders convicted before passage of SORA brought suit arguing that the application of SORA's registration requirements to them violated the Ex Post Facto Clause.<sup>141</sup> Ultimately, the Court found that the statute's mandated registration was a civil procedure and not a criminal sanction; therefore, SORA did not violate the Ex Post Facto Clause.<sup>142</sup>

First, applying *Ward*, the Court said it must determine whether the legislature meant to create civil proceedings.<sup>143</sup> "If the intention of the legislature was to impose punishment, that ends the inquiry."<sup>144</sup> On the other hand, if Alaska's legislature intended to enact a civil, nonpunitive regulatory scheme, the Court must then decide if SORA is "so punitive in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"<sup>145</sup>

In this analysis, the Court emphasized that the Alaska legislature had expressed the objective of SORA in the statutory text itself—to protect the public against sex offenders, who pose a high risk of reoffending.<sup>146</sup> Citing *Hendricks*, the Court observed that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a "legitimate nonpunitive governmental objective and has been historically so regarded."<sup>147</sup> In addition to stated nonpunitive objectives, the Court asserted that other attributes of the statute, "such as the manner of its codification or the enforcement procedures it

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137. See *Smith v. Doe*, 538 U.S. 84, 105–06 (2002) (upholding Alaska's sex offender registry law that required sex offenders convicted prior to the registry's enactment to register in the face of an Ex Post Facto Clause challenge).

138. *Id.* at 90.

139. *Id.* at 90–91.

140. *Id.* at 90.

141. *Id.* at 91.

142. *Id.* at 105–06.

143. *Id.* at 92.

144. *Id.*

145. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980))).

146. *Id.* at 93.

147. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).

establishes, are probative of the legislature's intent."<sup>148</sup> Although the Alaska legislature had codified SORA's provisions in the state's criminal code, this label was not dispositive as to legislative intent and could not transform a civil remedy into a criminal one.<sup>149</sup> Moreover, "[b]y contemplating 'distinctly civil procedures,' the legislature 'indicate[d] clearly that it intended a civil, not a criminal sanction.'"<sup>150</sup> The Court consequently concluded that in passing SORA the legislature had not intended to create a punitive regime, but rather a civil scheme.<sup>151</sup>

The Court then turned its attention to the effects of SORA, using the *Mendoza-Martinez* factors as a "useful framework[.]" though noting that they were "neither exhaustive nor dispositive."<sup>152</sup> The *Smith* majority relied primarily on five of the *Mendoza-Martinez* factors in its analysis: "[W]hether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose."<sup>153</sup> Given these factors, the Court found no punitive effect that outweighed the legislature's nonpunitive intent.<sup>154</sup> Although SORA might appear similar to colonial shaming punishments, the Court reasoned that SORA was different because those colonial punishments involved far more than the collection and distribution of already publicly available information.<sup>155</sup> SORA's registration requirement also imposed no physical or affirmative restraint on the offender; despite the registration requirement, sex offenders remained free to pursue jobs or change residences.<sup>156</sup> The mere presence of a deterrent effect or invocation of the criminal process did not necessarily render a statute criminal.<sup>157</sup> The Court did note, however, that timely and adequate notice, while not rendering the statute criminal, "is important, [because SORA's] scheme is enforced by criminal penalties."<sup>158</sup> The Court additionally emphasized that SORA aimed to

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148. *Id.* at 94.

149. *Id.*

150. *Id.* at 96 (quoting *United States v. Ursery*, 518 U.S. 267, 289 (1996)).

151. *Id.*

152. *Id.* at 97 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)).

153. *Id.*

154. *Id.* at 102.

155. *Id.* at 98.

156. *Id.* at 100.

157. *Id.* at 96, 102.

158. *Id.* at 96.

promote and protect public safety—a legitimate, nonpunitive purpose.<sup>159</sup> And, the manner in which the state executed SORA was rationally connected to that purpose.<sup>160</sup> The Court concluded that SORA did not exceed its nonpunitive purpose.<sup>161</sup> It reasoned that although SORA was potentially overinclusive because it did not make individual determinations of future dangerousness, Alaska had rationally decided that all convicted sex offenders demonstrated a significant risk of recidivism.<sup>162</sup>

### B. SORNA Prosecutions Violate the Ex Post Facto Clause

After *Smith*, it is clear that the application of a registration requirement in and of itself to sex offenders convicted prior to the enactment of such a requirement does not violate the Ex Post Facto Clause.<sup>163</sup> As a result, several district courts have upheld indictments under the Adam Walsh Act for failure to register and traveling in interstate commerce prior to the Act's enactment.<sup>164</sup> These courts reason that "[t]he contours of the statutory scheme at issue in *Smith* are nearly indistinguishable from" SORNA and therefore, the application of the Adam Walsh Act to defendants who failed to register and traveled in interstate commerce prior to its enactment does not violate the Ex Post Facto Clause.<sup>165</sup> Courts upholding these indictments conclude that SORNA, like SORA, is a civil regulatory scheme not subject to the Constitution's ex post facto prohibition. Certainly, Alaska's SORA and the Adam Walsh Act's SORNA do share common features: Both require sex offenders who were convicted prior to the law's passage to register.

But this is where the similarity between *Smith* and the challenges to the Adam Walsh Act prosecutions end. The Supreme Court in *Smith* did not address the criminal sanctions attached to a failure to register as a sex offender.<sup>166</sup> The plaintiffs in *Smith* were not facing prosecution as criminal

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159. *Id.* at 102–03.

160. *Id.* at 104–05.

161. *Id.* at 104.

162. *Id.*

163. See *United States v. Gill*, 520 F. Supp. 2d 1341, 1344–45 (D. Utah 2007) (finding that because the registration statute at issue in *Smith* is functionally indistinguishable from SORNA, the defendant's claim that the application of SORNA's registration requirement to sex offenders convicted prior to SORNA's enactment violates the Ex Post Facto Clause must fail).

164. For an example of such a court, see *United States v. Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007).

165. *Id.* at 755.

166. *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3 n.7 (W.D. Okla.



defendants for failure to register. Instead, the Court addressed the issue of "whether the registration itself—and the resulting publication of that information—constituted punishment."<sup>167</sup> "Without considering the criminal punishment for failing to register, the Court determined that the registration requirement only 'create[d] a civil, nonpunitive regime,' and consequently that 'retroactive application does not violate the *Ex Post Facto* clause.'<sup>168</sup> In contrast, the criminal sanctions under SORNA "occur if [a] person required to register fails to do so; the act of failing to register is the criminal act, and so it is the timing of that act, not the timing of the qualifying conviction, that raises *Ex Post Facto* Clause concerns."<sup>169</sup> The Supreme Court in *Smith* thus did not reach the fundamental issue at hand: Whether the government may establish increased criminal sanctions in the criminal provisions of the statutory code and apply them to a person who failed to perform the act required by law before the law's effective date.<sup>170</sup> The *Smith* Court acknowledged, however, that SORA imposed "criminal penalties" for failure to register and, therefore, that timely and adequate "notice is important" to the registration scheme.<sup>171</sup>

Under the *Weaver* analysis, to fall within the *ex post facto* prohibition, a criminal law must be retrospective—apply to behavior occurring prior to enactment—and it must disadvantage the offender targeted by it, by changing the definition of criminal conduct or increasing the punishment for the conduct.<sup>172</sup> Prosecutors' construction of SORNA so as to apply its registration requirements to previously convicted sex offenders who traveled in interstate commerce prior to its enactment "is clearly retrospective since it seeks to capture travel that occurred prior to SORNA's enactment."<sup>173</sup> Not a single district court, including those that

Sept. 21, 2007).

167. *Id.*

168. *United States v. Wilson*, No. 2:06-cr-867 TC, 2007 WL 3046290, at \*2 (D. Utah Oct. 16, 2007) (quoting *Smith v. Doe*, 538 U.S. 84, 96, 106 (2003)).

169. *United States v. Muzio*, No. 4:07-CR-179, 2007 WL 2159462, at \*6 (E.D. Mo. July 26, 2007).

170. *See United States v. Smith*, 481 F. Supp. 2d 846, 853 (E.D. Mich. 2007) ("The Supreme Court did not reach the question in the instant case—i.e. whether the Government can create enhanced criminal penalties (§ 2250), in the criminal provisions of the legislative code, and apply them to an individual who traveled in interstate commerce before the effective date of the Act.").

171. *Smith v. Doe*, 538 U.S. 84, 96 (2003).

172. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (discussing the elements that must be present for a statute to fall within the *ex post facto* prohibition of the Constitution).

173. *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3 (W.D. Okla. Sept. 21, 2007).

approve these prosecutions, dispute that SORNA increased the federal punishment for failure to register as a sex offender.<sup>174</sup> SORNA clearly increased the criminal liability by a factor of ten—from a misdemeanor with up to one year imprisonment under the Jacob Wetterling Act<sup>175</sup> to a federal felony with up to ten years' imprisonment.<sup>176</sup> "Subjecting a defendant who traveled in interstate commerce prior to the effective date of SORNA to a ten-fold increase in punishment clearly 'disadvantage[s] the offender affected by it.'"<sup>177</sup> This is surely the very kind of increase in punishment for conduct already consummated that the Framers hoped to prohibit by incorporating *nullum crimen sine lege* into the Constitution through the Ex Post Facto Clause.

Some courts, recognizing that to interpret SORNA as prosecutors suggest would render it retroactive and unconstitutional, have employed the rule that statutes should be interpreted, if possible, so as to avoid unconstitutionality. The Supreme Court has said that "a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication."<sup>178</sup> Accordingly, these courts assert that Congress's use of a verb tense is significant, and in SORNA "Congress used the present tense 'travels' rather than the past-tense 'traveled' or past-participle 'has traveled.'"<sup>179</sup> This verb choice suggests that Congress wished to capture future interstate travel rather than travel that occurred prior to SORNA's passage.<sup>180</sup>

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174. *United States v. Gill*, 520 F. Supp. 2d 1341, 1349 (D. Utah 2007)

175. *See* 42 U.S.C. § 14072(i) (2000) ("A person who . . . knowingly fails to register in any State in which the person resides, is employed . . . or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than one year.").

176. *See* 18 U.S.C.A. § 2250(a) (West 2006 & Supp. I 2007) ("Whoever . . . knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.").

177. *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3 (W.D. Okla. Sept. 21, 2007) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

178. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3 (1926)); *see also* *United States v. Smith*, 481 F. Supp. 2d 846, 851 (E.D. Mich. 2007) (applying the *Fernandez-Vargas* rule of statutory construction regarding retroactivity to the Adam Walsh Act).

179. *Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3; *see also* *Smith*, 481 F. Supp. 2d at 850–51 (concluding that Congress's use of the present tense "travels" rather than the past-tense "traveled" is significant).

180. *Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3. In contrast, other courts, recognizing the same principle, have concluded that the statute was permissibly retroactive on the day Congress enacted it. *See, e.g., United States v. Madera*, 474 F. Supp. 2d 1257, 1262 (M.D. Fla. 2007) (determining that Congress made SORNA effectively retroactive the day it passed the statute). These courts reason that in deciding whether a particular statute acts

Other courts have relied on the rule of lenity (which has its roots in the *nullum crimen* principle). According to this principle of statutory interpretation, when choosing between two legitimate readings of a criminal law, one harsher than the other, a court must select "the harsher only when Congress has spoken in clear and definite language."<sup>181</sup> Because "[t]he 'clear and definite' language here, if anything, required the Attorney General to act to make SORNA applicable" to defendants who were convicted of sex offenses and traveled in interstate commerce prior to enactment, courts must conclude that until the Attorney General's February 2007 interim rule SORNA simply did not apply to these defendants.<sup>182</sup> As a result, there is no statutory basis for prosecuting them under the Act and their indictments should be dismissed.<sup>183</sup>

In response, some prosecutors have argued that this particular category of sex offenders' failure to register is a "continuing offense and thus the timing of interstate travel is irrelevant."<sup>184</sup> Therefore, they argue, SORNA does not criminalize behavior that occurred prior to enactment and so does not run afoul of the Ex Post Facto Clause.<sup>185</sup> However, rather than being a continuing crime, the "offense proscribed by § 2250 is complete 'on the 11th day after the defendant travels in interstate commerce from one jurisdiction to another, and fails to register after 10 days.'"<sup>186</sup> In addition, Congress's choice of "travels," rather than "traveled" means "that Congress intended to punish a sex offender's failure to register *in connection with* the individual's interstate travel."<sup>187</sup>

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retroactively, one must consider whether it impairs rights an individual possessed when he acted, imposes new duties upon actions already completed, and enhances a person's liability for past conduct. *Id.* In addition, the decision "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001)). These courts reasoned that given the fact that these defendants knew that under state law they were required to notify their current state of residence before moving and their new state of residence upon arriving, they were on fair notice that they had to register pursuant to SORNA. *Id.* For the same reasons, these courts have concluded that SORNA imposed no new duties upon these defendants and did not impair any rights they possessed when they moved in interstate commerce and failed to register prior to SORNA's enactment. *Id.* Consequently, Congress intended SORNA to act retroactively from the moment it was enacted. *Id.*

181. *United States v. Gill*, 520 F. Supp. 2d 1341, 1349 (D. Utah 2007) (quoting *Pasquantino v. United States*, 544 U.S. 349, 383 (2005)).

182. *Id.*

183. *Id.*

184. *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3 (W.D. Okla. Sept. 21, 2007).

185. *Id.*

186. *Id.* (quoting *United States v. Smith*, 481 F. Supp. 2d 846, 852 (E.D. Mich. 2007)).

187. *United States v. Wilson*, No. 2:06-cr-867 TC, 2007 WL 3046290, at \*2 (D. Utah Oct. 16, 2007).

Traveling in interstate commerce "is necessarily an element which can and must be completed in order to prosecute under SORNA, [thus] the crime cannot be continuous."<sup>188</sup>

*C. Even If Smith v. Doe Is Applicable, the Adam Walsh Act  
Prosecutions Fall Short*

Despite the fact that *Smith v. Doe* appears inapplicable to the ex post facto analysis of the Adam Walsh Act, some courts have applied its framework.<sup>189</sup> Even applying this framework, however, SORNA's increase in possible punishment by nine years for failure to register remains punitive and in violation of the Ex Post Facto Clause. The first step in the *Smith* analysis lies in determining whether Congress in passing SORNA meant to create civil proceedings rather than punitive measures.<sup>190</sup> A court must evaluate whether Congress indicated either expressly or impliedly a preference for one label, either civil or criminal, over the other.<sup>191</sup> If Congress clearly intended SORNA to impose punishment on those already convicted of a crime, then it violates the Ex Post Facto Clause.<sup>192</sup> In *United States v. Smith*,<sup>193</sup> the Federal District Court for the Eastern District of Michigan noted that the Supreme Court concluded in *Smith v. Doe* that the Alaska legislature chose the civil label for its registration requirement.<sup>194</sup> In contrast, Congress in the Adam Walsh Act chose the criminal label for the felony failure to register by placing it in Title 18 of the Federal Code: Crimes and Criminal Procedure.<sup>195</sup> Significantly, Congress had placed the federal misdemeanor of failure to register as a sex offender in

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188. *Id.*

189. See *United States v. Smith*, 481 F. Supp. 2d 846, 852–53 (E.D. Mich. 2007) (concluding that *Smith v. Doe* is inapplicable, but using the *Smith* framework nonetheless to reason that SORNA's application to the defendant violated the Ex Post Facto Clause); *United States v. Madera*, 474 F. Supp. 2d 1257, 1263 (M.D. Fla. 2007) (using the Supreme Court's analysis in *Smith v. Doe* to support its conclusion that SORNA's application to the defendant who traveled in interstate commerce prior to its enactment did not violate the Ex Post Facto Clause).

190. See *Smith v. Doe*, 538 U.S. 84, 92 (2003) ("We must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.'" (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997))).

191. *Id.* at 93.

192. *Id.* at 92.

193. See *United States v. Smith*, 481 F. Supp. 2d 846, 854 (E.D. Mich. 2007) (dismissing the indictment as a violation of the Ex Post Facto Clause).

194. *Id.* at 852–53.

195. *Id.* at 853.

compliance with the Jacob Wetterling Act<sup>196</sup> in Title 42 of the Federal Code: Public Health and Welfare.<sup>197</sup> This section also contained a felony penalty for up to ten years in prison for a second violation of the Wetterling Act.<sup>198</sup> "Thus, Congress could and did decide to place that felony offense in Title 42: Public Health and Welfare."<sup>199</sup> The court in *United States v. Smith* consequently concluded that SORNA's "codification in the criminal code evidences Congress' [sic] intention to more severely punish a first offender, a critical factor, in the *ex post facto* analysis."<sup>200</sup> The Supreme Court in *Smith v. Doe* concluded, however, that the fact that Alaska's registration provisions were partly codified in the criminal procedure code was not dispositive.<sup>201</sup> "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one."<sup>202</sup> Of course, it is important to note that the Court in *Smith v. Doe* considered whether a registration requirement's placement in both the civil and criminal procedure codes was significant; whereas, in this situation, courts must determine whether the placement of the felony for failure to register solely in the criminal code is significant.

District courts that have approved the prosecutions of individuals who traveled in interstate commerce prior to SORNA's enactment concentrate on Congress's asserted nonpunitive purpose. They rely upon *Smith v. Doe*'s conclusion that "'an imposition of restrictive measures on sex offenders adjudged to be dangerous 'is a legitimate nonpunitive governmental objective and has been historically so regarded'."<sup>203</sup> These courts contend that Congress stated its nonpunitive purpose in Adam Walsh's opening stanza: "'In order to protect the public from sex offenders and offenders against children . . . , Congress in this chapter establishes a comprehensive national system for the registration of [sex] offenders."<sup>204</sup> Courts affirming these indictments find no desire by Congress on the face of the statutory scheme to exact punishment against sex offenders; rather, "Congress acted in a manner to ensure that sex offenders comply with the range of pre-existing civil requirements that existed

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196. 42 U.S.C. § 14072(1) (2000).

197. *Smith*, 481 F. Supp. at 853.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Smith v. Doe*, 538 U.S. 84, 94 (2003).

202. *Id.*

203. *United States v. Madera*, 474 F. Supp. 2d 1257, 1263 (M.D. Fla. 2007) (quoting *Smith*, 538 U.S. at 93).

204. *Id.* (quoting 42 U.S.C.A. § 16901 (West 2006 & Supp. I 2007)).

in every state at the time of SORNA's passage."<sup>205</sup> Moreover, the majority of the Act was codified in Title 42, with only the felony failure to register section provided in Title 18.<sup>206</sup> Although all of this may provide evidence of Congress's nonpunitive purpose behind creating a unified national sex offender registry via SORNA, this does not explain Congress's intention behind increasing the punishment for failing to register in compliance with federal law from a one year misdemeanor to a ten year felony. Such a drastic increase in punishment evidences an intent to enhance the punishment for the same crime, a quintessentially punitive purpose.

If it was Congress's intention to enact a regulatory scheme that is civil and nonpunitive, a court must further determine whether "the statutory scheme [is] so punitive either in purpose or effect as to negate [Congress's] intention' to deem it 'civil.'"<sup>207</sup> In *Smith v. Doe*, the Supreme Court relied on the factors it enunciated in *Kennedy v. Mendoza-Martinez* to determine that Alaska's registration requirement was effectively nonpunitive in nature.<sup>208</sup> However, these factors applied in the context of SORNA's imposition of a ten year term of imprisonment for failure to register demonstrate an essentially punitive nature. While the *Smith v. Doe* majority concluded that registration does not constitute a traditional means of punishing,<sup>209</sup> it did not consider whether imprisonment for failing to register prior to the enactment of a registration statute constituted traditional punishment. American government, since colonial times, has sought to induce compliance with the law, deter future wrongdoers, and punish lawbreakers by imposing prison sentences.<sup>210</sup> So while SORNA's ten year prison sentence may be part of a larger civil scheme, the sentence itself remains a traditional means of punishing violators of the law.

The Supreme Court in *Smith v. Doe* also considered whether Alaska's registration requirement imposed "an 'affirmative disability or restraint.'"<sup>211</sup> The Court reasoned that Alaska's imposition of a registration obligation upon sex offenders convicted prior to the obligation's enactment "imposes no

205. *United States v. Hinen*, 487 F. Supp. 2d 747, 755–56 (W.D. Va. 2007).

206. *Id.* at 756.

207. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

208. *Smith v. Doe*, 538 U.S. 84, 97 (2003).

209. *Id.*

210. See Andrea E. Yang, *Historical Criminal Punishments, Punitive Aims and Un-"Civil" Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights* 75 U. CIN. L. REV. 1299, 1307–17 (2007) (tracing and describing the various forms of punishment used by the American government from colonial times to present day).

211. *Smith*, 538 U.S. at 99 (citations omitted).

physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint"<sup>212</sup> because it "does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences."<sup>213</sup> Likewise, neither does SORNA's imposition of a duty to register in and of itself deprive sex offenders of their ability move freely, switch jobs, or change residences. However, the imposition of a prison sentence of up to ten years for failure to fulfill this registration obligation clearly imposes the "paradigmatic affirmative disability or restraint"<sup>214</sup>—or imprisonment. Offenders subject to SORNA's punishment are not "free to move where they wish and to live and work as other citizens, with no other supervision[.]" factors the Court found compelling in its conclusion that Alaska's registration requirement did not impose an affirmative disability or restraint.<sup>215</sup> The Court specifically noted, moreover, that:

A sex offender who fails to comply with the reporting requirement may be subjected to a *criminal prosecution* for that failure, but any prosecution is a proceeding separate from the individual's original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion.<sup>216</sup>

The Court in its analysis separated the registration requirement from the criminal penalty for failure to comply with it.<sup>217</sup> Thus, one must evaluate the criminal sanctions for failure to register apart from the nonpunitive registration scheme; it is entirely possible to have, as the Court explicitly stated, "a criminal prosecution" for failure to comply with a nonpunitive, regulatory scheme. The nonpunitive, regulatory nature of the reporting requirement is not affected by the criminal nature of the prosecution for failure to comply. It seems to follow then that neither is the criminal nature of the prosecution for failure to comply somehow diminished or changed into a civil proceeding merely because of the nonpunitive nature of the reporting requirement. As one federal district court recently asserted:

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212. *Id.* at 100.

213. *Id.*

214. *Id.*

215. *Id.* at 101.

216. *Id.* at 101–02 (emphasis added).

217. *United States v. Howell*, No. CR07-2013-MWB, 2008 WL 313200, at \*11 (N.D. Iowa Feb. 1, 2008) (noting that the Supreme Court in *Smith* clearly recognized that the issue presented by the criminal prosecutions of individuals who traveled in interstate commerce prior to SORNA's enactment was beyond the scope of its decision).

The Government's attempt to hide the enhanced penalties in § 2250 [felony for failure to register] under the greater "civil" purpose of SORNA runs afoul of the longstanding rule that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."<sup>218</sup>

The *Smith* Court also considered whether a sex offender registration requirement promotes the traditional aims of punishment.<sup>219</sup> In determining whether a particular practice constitutes punishment, the Court concentrated on two possible traditional aims of punishment—retribution and deterrence.<sup>220</sup> The Court conceded that Alaska's registration requirement may act as a deterrent, one traditional purpose of punishment; but, the mere presence of a deterrent purpose does not render a sanction criminal.<sup>221</sup> The *Smith* majority also rejected the Ninth Circuit's conclusion that the registration obligations were retributive because the "length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of risk posed."<sup>222</sup> Instead, the Court found that Alaska's statute related the length of the reporting requirement imposed on offenders to the nature of their sex crimes so that the length of the reporting requirement corresponded to the reasonably perceived danger of recidivism associated with the nature of the offenders' crimes.<sup>223</sup> It concluded that such a purpose is consistent with the regulatory objective of Alaska's registration scheme.<sup>224</sup> Similarly, SORNA imposes varying lengths of reporting requirements based upon the nature of the sex offenders' crimes. The statute does not in any way, however, tailor the sentence for failure to register to a perceived threat of recidivism. No matter which category a sex offender falls in under SORNA and thus no matter how long he is required to report to federal authorities, failure to register carries the same penalty—a felony punishable by up to ten years in jail. The penalty is no way correlated to the extent of the recidivism risk posed by the sex offender who has failed to register, but is instead directly connected to the extent of the wrongdoing—failure to register. This suggests that these sentences do have a retributive purpose.

In *Kansas v. Hendricks*, the Supreme Court determined that the challenged civil commitment statute for "sexually violent predators" was not "retributive

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218. *United States v. Muzio*, No. 4:07-CR179, 2007 WL 2159462, at \*7 (E.D. Mo. July 26, 2007) (quoting *Burgess v. Salmon*, 97 U.S. 381, 385 (1878)).

219. *Smith v. Doe*, 538 U.S. 84, 97 (2003).

220. *Id.* at 102.

221. *Id.*

222. *Id.* (quoting *Doe I v. Otte*, 259 F.3d 979, 990 (9th Cir. 2001)).

223. *Id.*

224. *Id.*



because it does not affix culpability for prior criminal conduct."<sup>225</sup> On the contrary, civil commitment proceedings admitted evidence of past criminal conduct "'not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior.'"<sup>226</sup> The lack of any requirement of criminal responsibility in the statute also suggested that the legislature was not seeking retribution.<sup>227</sup> Similarly, Alaska's imposition of a registration requirement was not predicated on a "present or repeated violation" of the law or on a separate finding of criminal responsibility.<sup>228</sup> In contrast, SORNA's felony provision does affix culpability and punishment for the criminal conduct of failing to register as a sex offender. SORNA punishes offenders who knowingly fail to register or update their registration, thereby requiring a court to make a finding of criminal responsibility before imposing up to ten years in prison. In this way, SORNA is retributive.

Lastly, the *Smith* Court evaluated the most significant factor in its analysis—the registration requirements' "rational connection to a nonpunitive purpose."<sup>229</sup> In the case of the Alaska act, the legislature had the "legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].'"<sup>230</sup> Although there seems readily apparent a nonpunitive purpose in having a person convicted of a sex offense register with authorities, there does not appear to exist any nonpunitive purpose in placing someone behind bars for nine years longer than had previously been possible. The jail sentence does not alert the public to the risk of sex offenders in their community; rather, it suggests a deterrent and retributive purpose. In addition, the increase in possible jail time under the Adam Walsh Act evidences a desire to increase the deterrent value of the punishment for failure to register so as to coerce more sex offenders into compliance.

The *Smith* Court found the last two "*Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case."<sup>231</sup> It reached this conclusion based on the fact that the obligation SORNA imposed—the duty to register—was "a duty not predicated upon some present

225. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

226. *Id.* (quoting *Allen v. Illinois*, 478 U.S. 364, 371 (1986)).

227. *Id.*

228. *Smith v. Doe*, 538 U.S. 84, 105 (2003).

229. *Id.* at 102.

230. *Id.* at 102–03 (quoting *Doe I v. Otte*, 259 F.3d 979, 991 (9th Cir. 2001)).

231. *Id.* at 105.

or repeated violation."<sup>232</sup> Because SORA's registration requirement was effectively class-based by applying to all convicted sex offenders regardless of their behavior after conviction, the imposition of the registration requirement did not rely on a finding criminal intent—a traditional indicator of criminal punishment.<sup>233</sup> This directly contrasts with SORNA's felony for failure to register. To violate SORNA and become subject to its possible ten year prison sentence, a sex offender must knowingly fail to register.<sup>234</sup> Additionally, it applies to conduct which had already been made a crime. SORNA provides a federal sanction for failure to register as a sex offender as did the Jacob Wetterling Act.<sup>235</sup> Unlike SORA, these two final *Mendoza-Martinez* factors in the SORNA context indicate that its potential prison sentence for failure to register does constitute punishment.

After considering each of the *Mendoza-Martinez* factors, it is clear that SORNA is effectively punitive in nature. Even if one concedes that SORNA is solely a civil scheme, the *Mendoza-Martinez* factors demonstrate its punitive effect outweighs its nonpunitive purpose. The prosecution under SORNA of sex offenders convicted and traveled in interstate commerce prior to enactment therefore violates the Ex Post Facto Clause under the *Smith v. Doe* analysis.

#### D. The Sentencing Guidelines Cases Provide the Proper Analogy

Nearly every year the United States Sentencing Commission issues amendments to the Federal Sentencing Guidelines. As a result, it is not uncommon for a defendant to perpetrate his criminal conduct while one version of the guidelines is in effect, be indicted once a different version has been adopted, and sentenced when yet another version has been put in place. Federal appellate courts have concluded that a federal sentencing court should generally apply the sentencing guidelines in effect at the time of sentencing.<sup>236</sup> These courts recognize that "the application of a new guideline which would result in the imposition of a more severe sentence would constitute a violation of the *ex post facto* clause of the Constitution."<sup>237</sup> Thus, if the district court

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232. *Id.*

233. *Id.*

234. 18 U.S.C.A. § 2250 (a)(3) (West 2006 & Supp. I 2007).

235. *See* 42 U.S.C. § 14071(2)(1) (2000) (providing a federal penalty for failure to register as a sex offender).

236. *United States v. Broderson*, 67 F.3d 452, 456 (2d Cir. 1995) ("A sentencing court generally is required to apply the Guidelines Manual in effect at the time of sentencing.").

237. *United States v. Fones*, 51 F.3d 663, 669 (7th Cir. 1995).

finds that "use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed."<sup>238</sup>

Although the Supreme Court has not issued an opinion on the application of federal Sentencing Guidelines to conduct committed before their enactment, it has considered a similar scenario involving state sentencing guidelines. In *Miller v. Florida*,<sup>239</sup> a unanimous court determined that Florida's application of sentencing guidelines that imposed harsher penalties adopted after a defendant had committed his crime violated the Ex Post Facto Clause.<sup>240</sup> The Court emphasized that the guidelines in effect when the petitioner committed his crime "did not warn him that Florida prescribed a 5½–7-year presumptive sentence for that crime."<sup>241</sup>

The issue presented by the prosecution of sex offenders for failure to register pursuant to SORNA who traveled in interstate commerce prior to its enactment closely resembles the issue presented by changing sentencing guidelines. Prior to the enactment of SORNA, the Jacob Wetterling Act in 1994 made it a misdemeanor to fail to register under a state sexual offender registration program, punishable by up to one year of imprisonment.<sup>242</sup> This law was still in effect when these offenders traveled in interstate commerce and, so they were, at the time they committed this crime, subject only to a possible term of imprisonment of one year. It was only after their criminal conduct was complete—traveling in interstate commerce and failing to register as a sex offender—that the Adam Walsh Act increased the sentence for the same

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238. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (2004).

239. See *Miller v. Florida*, 482 U.S. 423, 435–36 (1987) (concluding that the application of Florida's revised sentencing guidelines to the petitioner, whose crimes occurred prior to the guidelines' enactment, violated the Ex Post Facto Clause). In *Miller*, the petitioner challenged the application of Florida's revised sentencing guidelines to his sentence. *Id.* at 424. At the time he committed his crime, the state's sentencing guidelines resulted in a presumptive sentence of three and a half years to four and a half years of imprisonment. *Id.* By the time of petitioner's sentencing, Florida's revised sentencing guidelines instead provided a presumptive sentence of five and a half to seven years in prison. *Id.* Finding that this change in the sentencing guidelines did not constitute a procedural change, the Court concluded Florida's revised guidelines constituted *ex post facto* laws because they made more onerous petitioner's punishment for crimes he committed before their enactment. *Id.* at 435.

240. *Id.* at 430, 435.

241. *Id.* at 431.

242. See 42 U.S.C. § 14072(i) (2000) ("A person who . . . knowingly fails to register in any State in which the person resides, is employed . . . or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than one year.").

criminal behavior to a possible ten year prison sentence. Therefore, at the time they committed their crime, similar to the defendant in *Miller*, they did not have notice or warning that the government prescribed a ten year sentence rather than the one year sentence that had been in place for over a decade. Just as increases in punishment via the Federal Sentencing Guidelines and state sentencing guidelines after the criminal conduct has been committed are prohibited by the Ex Post Facto Clause, so too should such retroactive increases be prohibited in the Adam Walsh Context.

### VI. Conclusion

The natural urge to protect children has driven national and state lawmakers to place greater post-incarceration restrictions upon those categorized as sex offenders than perhaps any other category of criminals. This passionate public outrage could easily lead to the kind of vindictive legislation the Framers hoped to suppress by incorporating the *nullum crimen sine lege* principle into our system of governance. While the Adam Walsh Act on its face may not appear vindictive, the prosecution of sex offenders for failure to register pursuant to its terms before its enactment certainly does. The law itself does not violate the Ex Post Facto Clause. But the Supreme Court's ex post facto jurisprudence, *Smith v. Doe*, and the sentencing guidelines cases demonstrate that the government's prosecution of individuals who traveled in interstate commerce and failed to register before SORNA's enactment does violate the Constitution, striking at the heart of our nation's commitment to the principle of legality. Finding an ex post facto violation would mean, much to the derision of some lawmakers, that some sex offenders would escape the Act's increased punishment for failure to register. But, that is an outcome our country accepted when it created the Constitution. As Justice Goldberg eloquently responded to a similar complaint: "The compelling answer to this is that the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason."<sup>243</sup>

No politician, however, wins votes campaigning for the protection of convicted sex offenders. Legal norms, like legality, in and of themselves are powerless to limit the arbitrary exercise of power.<sup>244</sup> These norms must receive

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243. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 184 (1963).

244. *See Allen, supra* note 68, at 412 (arguing for the invigoration of the principle of legality in the American legal system).

purposeful and energetic support from the legal community.<sup>245</sup> The commitment to the values of legality uniquely characterizes lawyers.<sup>246</sup> "Without it, the profession has little to profess."<sup>247</sup> The legal community bears the responsibility of fighting to prevent assertions of public safety from becoming a shield for oppression and disintegration of the rights constitutionally guaranteed to all. In that vein, this Note hopes to draw the legal community's attention to the threat that the Adam Walsh Act prosecutions pose to America's fundamental commitment to legality.

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245. *See id.* (arguing for the continuing protection and preservation of the principle of legality by the legal community).

246. *Id.*

247. *Id.*