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## Calling a Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post-*Starkey*

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## NOTES

### Calling a Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post-*Starkey*

#### *I. Introduction*

Imagine George, an affable college freshman and newly minted fraternity pledge. As part of his initiation ritual, George's brothers require him to take a leisurely stroll down the university quad and sorority row—naked. Consequently, campus police arrest George, and a zealous local prosecutor charges him with indecent exposure under state law, which, unbeknownst to George, requires him to register as a sex offender if convicted.<sup>1</sup> After his conviction, George is required to register for ten years.<sup>2</sup> As part of his registration duties, George may not live near a school, park, or playground. He must report his whereabouts to local law enforcement regularly, and his driver's license bears the label "sex offender." Shortly after George's conviction, the legislature extends the period in which he must register from ten to twenty years.

Some might balk at the propriety of criminalizing George's seemingly innocuous activity. Notwithstanding the reasonableness of anti-streaking policies or sex offender laws generally, many would agree that doubling George's registration period *after* his conviction appears manifestly unfair.<sup>3</sup> However, prior to the Oklahoma Supreme Court's ruling in *Starkey v. Oklahoma Department of Corrections*, such an outcome was permissible in

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1. Although such a prosecution might seem improbable, it is not without precedent. Consider, for example, the now defunct Naked Pumpkin Run in Boulder, Colorado, an annual Halloween tradition that featured hundreds of nighttime runners wearing only pumpkins atop their heads. In 2008, police arrested twelve Pumpkin Run participants under state indecent exposure laws that carry substantial penalties, including the possibility of sex offender registration. Vanessa Miller, *Boulder Police Ready, with Less Severe Penalties, for Naked Pumpkin Run*, COLORADO DAILY (Oct. 1, 2010), [http://www.coloradodaily.com/ci\\_16231119?source%253Dmost\\_viewed.20F88DA3D7D369F5BB70F372987EAE1F.html#](http://www.coloradodaily.com/ci_16231119?source%253Dmost_viewed.20F88DA3D7D369F5BB70F372987EAE1F.html#). Those arrested ultimately avoided sex offender status, but only after fighting authorities in court. *Id.*

2. In Oklahoma, George's fate would likely turn on whether the State could prove he had a "lewd" or "lascivious" intent. *See McKinley v. State*, 1926 OK CR 123, ¶¶ 4-5, 244 P. 208, 208 (finding indecent exposure conviction requires "more than a negligent disregard of the decent proprieties and consideration due to others").

3. In offering the above hypothetical, the author does not intend to trivialize the majority of sex offenses or demean the profound harm they inflict upon victims and society. George's scenario highlights the broad sweep of today's sex offender laws and how legal analysis of these laws should be based on dispassionate reason, not the strong emotional responses that certain sex crimes immediately (and justifiably) evoke.

Oklahoma.<sup>4</sup> The *Starkey* court declared retroactive amendments to the state's sex offender laws violated the Oklahoma Constitution's prohibition on ex post facto laws.<sup>5</sup>

This Note analyzes the rationale of the *Starkey* decision and its implications for sex offender legislation in Oklahoma. This Note argues that the *Starkey* ruling opens the door to Eighth Amendment challenges to sex offender laws, particularly for juvenile sex offenders. It also argues that the ruling provides an opportunity for lawmakers to enact more sensible sex offender regulations, and that it offers a model for other states with similar legislation to emulate. Part II reviews the legal history of the Ex Post Facto Clause and related jurisprudence. Parts III and IV discuss the background of the *Starkey* decision and the court's rationale. Part V analyzes the immediate and long-term implications of the decision.

## *II. The History of the Ex Post Facto Clause and the Legal Backdrop of the Starkey Decision*

### *A. U.S. Supreme Court's Ex Post Facto Jurisprudence*

This Section discusses the history of the Supreme Court's ex post facto jurisprudence, specifically the distinction the Court has drawn between punishment and civil regulatory measures. This Section then discusses how a majority of states have adopted the Court's position that sex offender legislation is not punishment and therefore does not implicate the Ex Post Facto Clause. Finally, this Section explores how Oklahoma's ex post facto jurisprudence mirrored that of the Court prior to the *Starkey* decision.

#### *1. Origins and Early Application*

The Supreme Court first defined the scope and meaning of the Constitution's Ex Post Facto Clause in *Calder v. Bull*.<sup>6</sup> An ex post facto law is any law that (1) punishes an action that, when committed, was lawful; (2) makes a crime more severe than it was when committed; (3) changes or increases the punishment retroactively; or (4) alters the rules of evidence from those in effect when the offense was committed.<sup>7</sup>

The Ex Post Facto Clause addresses particular concerns raised by retroactive legislation. Writing for the Court in *Landgraf v. USI Film*

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4. *Starkey v. Okla. Dep't of Corr.*, 2013 OK 43, 305 P.3d 1004.

5. *Id.* ¶ 79, 305 P.3d at 1030.

6. 3 U.S. (3 Dall.) 386, 390-91 (1798).

7. *Id.* at 390.

*Products*, Justice Stevens explained that legislatures have “unmatched powers” to “sweep away settled expectations suddenly and without individualized consideration.”<sup>8</sup> Because legislative bodies are responsive to political pressures, they “may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.”<sup>9</sup> To prevent “arbitrary and potentially vindictive legislation,” the Ex Post Facto Clause restricts the government’s power to legislate after the fact.<sup>10</sup>

In fleshing out the Ex Post Facto Clause’s protective purpose, the Court’s early jurisprudence helped clarify the clause’s reach. However, these early opinions also raised a pivotal question: What laws, if any, fall outside the ambit of the clause’s blanket prohibition?

## 2. Defining “Punishment”: Punitive vs. Regulatory Laws

Beginning with several cases in the late 1800s, the Supreme Court started to define the scope of the Ex Post Facto Clause. The Court drew a distinction between laws that inflict additional penalties on individuals for past acts and laws that impose restrictions incidental to the exercise of the State’s regulatory power.<sup>11</sup> For example, the Court held that state laws disqualifying convicted felons from practicing medicine or law do not violate the ex post facto prohibition because these laws fall within the State’s power to protect the public by establishing minimum standards of competency and character for certain professions.<sup>12</sup> Under this rubric, the past offense merely evidences the individual’s dubious scruples and propensity for future misconduct.<sup>13</sup> Whether a legislative act is punitive or regulatory is frequently the deciding question in ex post facto challenges and often “extremely difficult and elusive” for courts to determine.<sup>14</sup>

In drawing the line between punitive and regulatory laws, the Supreme Court has adopted the two-part intent-effects test.<sup>15</sup> A court should first consider whether lawmakers manifested either an express or implied intent

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8. 511 U.S. 244, 266-67 (1994) (discussing the history of the Court’s Ex Post Facto jurisprudence).

9. *Id.* at 266.

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

11. *See, e.g., Hawker v. New York*, 170 U.S. 189, 191-92 (1898); *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889).

12. *Hawker*, 170 U.S. at 191-92.

13. *Id.* at 198.

14. *See De Veau v. Braisted*, 363 U.S. 144, 160 (1960); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

15. *United States v. Ward*, 448 U.S. 242, 248-49 (1980).

for the act to be punitive or regulatory.<sup>16</sup> If the legislative intent is to inflict punishment, the analysis ends and the act is deemed punitive.<sup>17</sup> If the legislative intent is nonpunitive or ambiguous, courts consider whether the law is so punitive in purpose or effect to overcome any manifest intent to the contrary.<sup>18</sup> Where it is clear the legislature intended to create a regulatory scheme, the burden is on the challenger to show by “clearest proof” that the statute’s punitive effects outweigh the nonpunitive intent.<sup>19</sup>

In *Kennedy v. Mendoza-Martinez*, the Court set forth seven factors to consider in analyzing the purpose and effect of a legislative act, including: (1) whether the law imposes an “affirmative disability or restraint;”<sup>20</sup> (2) whether it has historically been regarded as punishment;<sup>21</sup> (3) whether its application requires a finding of scienter;<sup>22</sup> (4) “whether it promotes the traditional aims of punishment—retribution and deterrence;”<sup>23</sup> (5) whether it applies to conduct that is already a crime;<sup>24</sup> (6) whether it can advance a legitimate, nonpunitive purpose;<sup>25</sup> and (7) whether it appears “excessive” in relation to the nonpunitive purpose.<sup>26</sup> Because the *Mendoza-Martinez* factors are applicable in multiple constitutional contexts,<sup>27</sup> they are “neither exhaustive nor dispositive . . . but are useful guideposts.”<sup>28</sup>

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16. *Id.* at 248.

17. *Id.* at 248-49 (noting the Court analyzes the act’s purpose and effects only if the legislative intent is nonpunitive).

18. *Id.*

19. *Id.* at 249.

20. 372 U.S. 144, 168 (1963).

21. *Id.*

22. *Id.* Scienter is a mental state in which one has knowledge that one’s action, statement, etc., is wrong, deceptive, or illegal: often used as a standard of guilt. BLACK’S LAW DICTIONARY 1463 (9th ed. 2009).

23. *Mendoza-Martinez*, 372 U.S. at 168.

24. *Id.*

25. *Id.* at 168-69.

26. *Id.* at 169.

27. Whether an act is punitive or regulatory is relevant for several constitutional challenges, including cruel and unusual punishment. *See infra* Part V.B.

28. *Smith v. Doe*, 538 U.S. 84, 97 (2003) (internal quotation marks omitted) (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997); *United States v. Ward*, 448 U.S. 242, 249 (1980)).

### 3. Upholding Retroactive Sex Offender Laws as Civil Regulatory Schemes

The Court first applied the intent-effects test and the *Mendoza-Martinez* factors to a state sex offender law in *Kansas v. Hendricks*.<sup>29</sup> In 1994, the Kansas legislature passed the Kansas Offender Registration Act (Kansas Act), which permitted the indefinite involuntary commitment of “sexually violent predators,” defined as persons convicted or charged with sexually violent offenses and who suffered from a “mental abnormality” or “personality disorder” that made them likely to commit “predatory acts of sexual violence.”<sup>30</sup> The petitioner, Hendricks, was incarcerated for sexually molesting children and was slated for release from prison shortly after the legislation’s passage.<sup>31</sup> After the state used the Kansas Act to commit Hendricks indefinitely, he challenged the law on ex post facto grounds.<sup>32</sup>

Reversing the Kansas Supreme Court’s decision invalidating the Kansas Act, the U.S. Supreme Court held that the civil commitment law was nonpunitive.<sup>33</sup> This removed an “essential prerequisite” for Hendricks’ ex post facto claim.<sup>34</sup> After conducting the first step of the inquiry and concluding the manifest intent behind the law was nonpunitive, the Court considered the Kansas Act’s effects.<sup>35</sup> Applying several of the *Mendoza-Martinez* factors, the Court noted that, although the law clearly imposed an “affirmative restraint,” detention was not dispositive, and the law was consistent with the historically recognized practice of confining the “dangerously mentally ill.”<sup>36</sup> Additionally, the commitment law did not promote either retribution or deterrence.<sup>37</sup> The Kansas Act did not advance retribution because it did not assign blame for past criminal conduct; instead it used such conduct as evidence of “future dangerousness.”<sup>38</sup> The fact that a finding of scienter, or criminal intent, was not required to commit an individual under the Act also indicated the legislation was not

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29. 521 U.S. 346, 361-63 (1997).

30. *Id.* at 350-52.

31. *Id.* at 350.

32. *Id.* Hendricks also challenged his commitment on substantive due process and double jeopardy grounds. *Id.*

33. *Id.* at 368-69.

34. *Id.* at 369.

35. *Id.* at 361-62.

36. *Id.* at 362-63.

37. *Id.* at 361-62.

38. *Id.* at 362.

retributive.<sup>39</sup> Likewise, the law did not promote deterrence because it applied to individuals who, because of a mental abnormality or personality disorder, could not control their sexually violent impulses and were therefore undeterred by the prospect of confinement.<sup>40</sup> Because the legislature's nonpunitive intent outweighed the act's punitive effects, the Court concluded the law did not impose punishment.<sup>41</sup>

In *Smith v. Doe*, the Court again rejected an ex post facto challenge to a state sex offender law, this time upholding Alaska's Sex Offender Registration and Notification Act (Alaska Act).<sup>42</sup> Passed in 1994, the Alaska Act required sex offenders to register with the state and provide a variety of information, including: their name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, vehicle information, and post-conviction treatment history.<sup>43</sup> The law required offenders convicted of a single, nonaggravated offense to update and verify this information every year for fifteen years.<sup>44</sup> Sex offenders convicted of multiple sex offenses or aggravated offenses, such as those involving children, were required to verify their information every three months for life.<sup>45</sup> Pursuant to the law, the Alaska Department of Public Safety maintained a database of sex offender information, including photographs of offenders, which the state made available to the public.<sup>46</sup>

Finding the registration and notification provisions of the law were retroactive, the Court held that the provisions applied to sex offenders convicted prior to the law's passage.<sup>47</sup> Two sex offenders convicted of sexually abusing minors before the Act's passage challenged the law on ex post facto grounds.<sup>48</sup> The United States District Court for the District of Alaska granted the offenders summary judgment, and the Ninth Circuit affirmed.<sup>49</sup>

The Supreme Court reversed, holding the Alaska Act was nonpunitive and therefore could not violate the Ex Post Facto Clause.<sup>50</sup> Writing for the

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39. *Id.*

40. *Id.* at 362-63.

41. *See id.* at 368-69.

42. *Smith v. Doe*, 538 U.S. 84, 105-06 (2003).

43. *Id.* at 89-90.

44. *Id.*

45. *Id.* at 90.

46. *Id.* at 90-91.

47. *Id.* at 90.

48. *Id.* at 91.

49. *Id.* at 91-92.

50. *Id.* at 105-06.

majority, Justice Kennedy affirmed the lower courts' finding that the Alaska Legislature's intent was to create a "civil, nonpunitive regime."<sup>51</sup> Analyzing the effects of the law, Kennedy focused on the "most relevant" of the *Mendoza-Martinez* factors: (1) whether sex offender registration has been historically regarded as punishment; (2) whether it "imposes an affirmative disability or restraint . . . [; (3) whether it] promotes the traditional aims of punishment . . . [; (4) whether it] has a rational connection to a nonpunitive purpose . . . [; and (5) whether it] is excessive with respect to this [nonpunitive] purpose."<sup>52</sup>

The *Smith* majority held that public dissemination of sex offender information was a relatively recent development and did not resemble colonial forms of punishment, such as shaming or branding.<sup>53</sup> The registration requirement did not impose an affirmative disability or restraint because it did not restrict an offender's ability to move residences or change jobs, and was distinguishable from supervised release or probation.<sup>54</sup> Further, registration did not promote the traditional aims of punishment; although registration had a deterrent effect, this was true of virtually all regulatory schemes.<sup>55</sup> The registration requirement did not promote retribution because, while the registration requirement was linked to prior criminal activity, the offense was evidence of the offender's present dangerousness.<sup>56</sup> Finally, the law advanced the nonpunitive purpose of alerting the public of dangerous sex offenders in the community.<sup>57</sup> The registration requirement reasonably advanced this nonpunitive purpose and was not excessive given the "frightening and high" rate of sex offender recidivism.<sup>58</sup> For these reasons, the Court determined the law was nonpunitive and retroactive application of the registration requirement did not violate the Ex Post Facto Clause.<sup>59</sup>

Dissenting, Justice Stevens argued the law failed the Court's two-pronged ex post facto analysis.<sup>60</sup> Stevens looked to the act's purpose and

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51. *Id.* at 96.

52. *Id.* at 97.

53. *Id.* at 97-99.

54. *Id.* at 100-02.

55. *Id.* at 102.

56. *Id.*

57. *Id.* at 102-03.

58. *Id.* at 102 (citing *McKune v. Lile*, 536 U.S. 24, 34 (2002)). Studies have largely debunked the notion that sex offenders pose a high threat of recidivism. See *infra* note 208 and accompanying text.

59. *Smith*, 538 U.S. at 105-06.

60. *Id.* at 110-14 (Stevens, J., dissenting).



effects, which he determined were punitive in nature.<sup>61</sup> Registration and public dissemination of sex offender information imposed “significant affirmative obligations” and severely stigmatized offenders.<sup>62</sup> Moreover, the law applied to *all* individuals convicted of sex offenses and *only* to those individuals.<sup>63</sup> Unlike other instances where the Court had upheld civil sanctions for past criminal activity (e.g., statutes disqualifying felons from certain vocations), a prior criminal conviction was a “sufficient and . . . necessary condition for the sanction.”<sup>64</sup> Because the statute “severely impairs [an offender’s] liberty,” Stevens wrote, retroactive application of the statute imposed punishment proscribed by the Ex Post Facto Clause.<sup>65</sup>

Also dissenting, Justices Ginsburg and Breyer found the Alaska Act ultimately failed the effects prong of the test because it was “excessive[] in relation to its nonpunitive objective.”<sup>66</sup> The statute was overinclusive because it applied with equal force to all sex offenders regardless of the danger the individual offender posed to the community.<sup>67</sup> The statute made no provision for “rehabilitation or . . . physical incapacitation.”<sup>68</sup> As such, offenders who could prove they posed no threat of recidivism could not relieve themselves of their reporting obligations.<sup>69</sup>

Additionally, Ginsburg and Breyer doubted the nonpunitive intent of the Alaska Legislature.<sup>70</sup> They echoed Justice Souter’s concurring opinion in which he observed, “when a legislature uses prior convictions to impose burdens that outpace the law’s stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.”<sup>71</sup>

Ultimately, the dissent’s concerns notwithstanding, the Court determined sex offender registration laws were nonpunitive.

#### *B. Oklahoma’s Ex Post Facto Jurisprudence Pre-Starkey*

Prior to the decision in *Starkey*, Oklahoma’s ex post facto jurisprudence regarding sex offender registration laws reflected the Supreme Court’s

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61. *Id.*

62. *Id.* at 111.

63. *Id.* at 113.

64. *Id.* at 112.

65. *Id.* at 113-14.

66. *Id.* at 116 (Ginsburg, J., dissenting).

67. *Id.*

68. *Id.* at 117.

69. *Id.*

70. *Id.*

71. *Id.* at 109 (Souter, J., concurring).

holding in *Smith*.<sup>72</sup> In *Freeman v. Henry*, the Oklahoma Court of Civil Appeals rejected an ex post facto challenge to the state's registration act.<sup>73</sup> The plaintiff in *Freeman* was convicted of sex offenses in 1982 and 1985, prior to passage of the State Registration Act.<sup>74</sup> He argued retroactive application of the statute violated the prohibitions against ex post facto laws in the United States and Oklahoma Constitutions.<sup>75</sup> Citing *Smith*, the Court of Civil Appeals found the registration act was a "civil regulatory scheme which [did] not violate the ex post facto proscriptions of either the United States or Oklahoma Constitutions."<sup>76</sup> Accordingly, the court affirmed the trial court's dismissal of the plaintiff's claim.<sup>77</sup>

The Court of Civil Appeals heard a similar challenge to the registration act a year later in *Reimers v. State ex rel. Department of Corrections*.<sup>78</sup> The plaintiff in *Reimers* had previously pled guilty to indecent exposure and received a five-year suspended sentence.<sup>79</sup> After completing his sentence in 1997, the plaintiff registered as a sex offender for two years, as required by the law in effect at the time.<sup>80</sup> Subsequent amendments to the statute greatly increased the registration period and imposed restrictions on where convicted sex offenders, such as the plaintiff, could live.<sup>81</sup> The plaintiff argued the amendments were unconstitutional, as applied to him, on ex post facto grounds.<sup>82</sup> Avoiding the broader constitutional issue, the court "recast" the plaintiff's argument, finding the legislature did not intend the amendments to apply retroactively and ordering the Department of Corrections (DOC) to remove the plaintiff from the registry.<sup>83</sup> In so doing, the *Reimers* court effectively punted on the underlying constitutional question.

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72. See *Freeman v. Henry*, 2010 OK CIV APP 134, 245 P.3d 1258.

73. *Id.* ¶ 11, 245 P.3d at 1259.

74. *Id.* ¶ 2, 245 P.3d at 1259.

75. *Id.* ¶ 4, 245 P.3d at 1259. The U.S. Constitution states that "[n]o Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. 1, § 9, cl. 3. Similarly, the Oklahoma Constitution states that "[n]o bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed." OKLA. CONST. art. 2, § 15.

76. *Freeman*, ¶¶ 10-11, 245 P.3d at 1260 (finding the registration act did not impose an "affirmative restraint").

77. *Id.* ¶ 11, 245 P.3d at 1260.

78. 2011 OK CIV APP 83, 257 P.3d 416.

79. *Id.* ¶ 7, 257 P.3d at 418.

80. *Id.* ¶¶ 8-9, 257 P.3d at 418.

81. *Id.* ¶¶ 10-11, 257 P.3d at 418.

82. *Id.* ¶ 17, 257 P.3d at 419.

83. *Id.* ¶¶ 29, 32-33, 257 P.3d at 420-21.

As the *Freeman* decision demonstrates, Oklahoma's pre-*Starkey* sex offender jurisprudence tracked closely with that of the United States Supreme Court in *Smith*. Oklahoma courts rejected ex post facto challenges to the state's registration act based on a finding that the act was nonpunitive, and therefore, retroactive application of the statute was permissible.<sup>84</sup>

### C. Other States' Jurisprudence Regarding Sex Offenders and Ex Post Facto Challenges

Similar to Oklahoma courts, most state courts have rejected ex post facto challenges to sex offender registration laws, finding such laws nonpunitive in nature.<sup>85</sup> Many of these courts cite *Smith* approvingly as the touchstone for analyzing the constitutionality of sex offender legislation.<sup>86</sup> Such courts tend to emphasize the nonpunitive public safety interest behind registration laws and how provisions, such as residency restrictions, reasonably advance this nonpunitive interest.<sup>87</sup> Likewise, on the federal level, appellate courts are unanimous in toeing the *Smith* line.<sup>88</sup> Indeed, since the Supreme Court reversed the Ninth Circuit in *Smith*, no federal court of appeals has upheld an ex post facto challenge to sex offender registration laws.<sup>89</sup> Armed with the *Smith* decision and its reasoning, a majority of state and federal courts have dismissed ex post facto claims.

Nevertheless, a small but growing number of states have broken from this consensus. State courts in Alaska, Indiana, Kentucky, Maine, Maryland, Massachusetts, New Jersey, and Ohio have all declared the retroactive application of such amendments unconstitutional.<sup>90</sup>

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84. *Freeman v. Henry*, 2010 OK CIV APP 134, ¶¶ 10-11, 245 P.3d 1258, 1260.

85. *See, e.g., In re Justin B.*, 747 S.E.2d 774, 783 (S.C. 2013) (ruling that electronic monitoring of convicted sex offenders was nonpunitive as it was part of state's civil regulatory scheme); *Crawford v. State*, 92 So. 3d 168, 179 (Ala. Crim. App. 2011) (finding the retroactive application of residency restriction was not punitive).

86. *See, e.g., In re Justin B.*, 747 S.E.2d at 783; *Crawford*, 92 So. 3d at 179.

87. *E.g., City of S. Milwaukee v. Kester*, 2013 WI App 50, ¶ 30, 830 N.W.2d 710, 720-21 (finding the city "did not have to enact the best measure to reach its aims, only a reasonable one").

88. *United States v. Felts*, 674 F.3d 599, 605-06 (6th Cir. 2012) (noting "unanimous consensus among the circuits that SORNA does not violate the Ex Post Facto Clause").

89. *Id.* (internal citations omitted). *But see United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2009) (holding retroactive application of federal registration law to juvenile sex offenders violated Ex Post Facto Clause) *vacated on mootness grounds*, 131 S.Ct. 2860 (2011).

90. *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 143 (Md. 2013); *Riley v. N.J. State Parole Bd.*, 32 A.3d 190, 197-98 (N.J. Super. Ct. App. Div. 2011); *Wallace v.*

Additionally, an appellate court in California found an amendment to the state registration law imposing a residency restriction was punitive, though that case is pending review by the California Supreme Court.<sup>91</sup> In overturning these laws, several courts have focused on the seventh *Mendoza-Martinez* factor—“whether . . . [the statute] appears ‘excessive’ in relation to the [nonpunitive purpose].”<sup>92</sup> For these courts, the absence of individualized risk assessment (i.e., a method of distinguishing between offenders based on the threat they pose) is an important factor that tends to render retroactive operation of sex offender laws excessive.<sup>93</sup> Other courts have emphasized the first *Mendoza-Martinez* factor—affirmative disability or restraint—and have found measures such as electronic monitoring and residency restrictions impose substantial limitations on an offender’s freedom of movement.<sup>94</sup> Still others have focused on the second *Mendoza-Martinez* factor—similarity to traditional forms of punishment—and have found aspects of sex offender laws resemble traditional punishments such as banishment or shaming.<sup>95</sup>

Courts upholding *ex post facto* challenges have dealt with the *Smith* decision differently. Some have tried to distinguish the Court’s holding in *Smith*, avoiding direct conflict with the decision. For example, the New Jersey Court of Appeals in *Riley v. New Jersey State Parole Board* found the adverse effects from the state’s electronic monitoring law were “substantially more severe” than the effects of “the registration and notification provisions of Megan’s Law [that] the Court upheld in *Smith*.”<sup>96</sup> The New Jersey court noted that electronic monitoring entailed constant supervision of the sex offender’s movements, which was not true of the registration and notification provisions at issue in *Smith*.<sup>97</sup>

However, other courts have taken a different tack. Instead of basing their rulings on a violation of the *Ex Post Facto* Clause of the federal

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State, 905 N.E.2d 371, 384 (Ind. 2009); *Commonwealth v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009); *State v. Letalien*, 2009 ME 130, ¶ 63, 985 A.2d 4, 26; *Commonwealth v. Cory*, 911 N.E.2d 187, 197 (Mass. 2009); *State v. Strickland*, 2009-Ohio-5424, No. 2008-L-034, 2009 WL 3255305, at \*\*8-9; *Doe v. State*, 189 P.3d 999, 1006-1019 (Ala. 2008).

91. *People v. Mosley*, 116 Cal. Rptr. 3d 321, 337-38 (Cal. Ct. App. 2010), *cert. granted*, 247 P.3d 515 (Cal. 2011).

92. *E.g.*, *Wallace*, 905 N.E.2d at 383 (citations omitted).

93. *Id.* (“Of course if the registration and disclosure are not tied to a finding that the safety of the public is threatened, there is an implication that the Act is excessive.”).

94. *E.g.*, *Riley*, 32 A.3d at 199; *Baker*, 295 S.W.3d at 446-47.

95. *Doe*, 62 A.3d at 140-42; *Baker*, 295 S.W.3d at 444-45.

96. *Riley*, 32 A.3d at 199.

97. *Id.* at 199-200.

constitution, these courts have relied on similarly worded prohibitions in their respective state constitutions, thereby striking down retroactive amendments to sex offender legislation on state-law grounds.<sup>98</sup> The Alaska Supreme Court was among the first to take this approach after the Supreme Court's decision in *Smith*.<sup>99</sup> Indiana and Maryland have followed suit.<sup>100</sup> This approach is effective because *Smith* is only binding precedent as to the federal Ex Post Facto Clause; it is not controlling on similar state prohibitions, even if they are identical in verbiage.<sup>101</sup> State courts using this approach have found the federal constitution establishes minimum protections, which states may increase.<sup>102</sup> For instance, the Maryland Supreme Court has adopted a more robust ex post facto prohibition while expressly acknowledging the U.S. Supreme Court has narrowed the scope of the federal Ex Post Facto Clause.<sup>103</sup>

Although an increasing number of states have found aspects of state sex offender laws unconstitutional on ex post facto grounds, most state and federal courts remain closely aligned with the *Smith* Court. It is against this backdrop that the Oklahoma Supreme Court decided *Starkey*, ultimately aligning Oklahoma with the minority of states that have departed from the *Smith* decision.

#### *D. The Statutory Development of Oklahoma's Sex Offender Regulatory Scheme*

To fully understand the *Starkey* decision, it is necessary to consider not just the relevant case law, but also the pertinent statutory provisions and their development over time. After 1998, the Oklahoma Legislature enacted a series of amendments to the state's registration act. Two such amendments are particularly important to the *Starkey* decision. In 2004, the Oklahoma Legislature passed an amendment "requir[ing] registration to be 10 years from the date of completion of the sentence," which was defined as "the day an offender completes all incarceration, probation, and parole

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98. *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 143 (Md. 2013); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); *Doe v. State*, 189 P.3d 999, 1006-19 (Alaska 2008).

99. *Doe*, 189 P.3d at 1006-19.

100. *Doe*, 62 A.3d at 129-30; *Wallace*, 905 N.E.2d at 384.

101. *See, e.g., Doe*, 62 A.3d at 131.

102. *See Doe*, 189 P.3d at 1004-07.

103. *Doe*, 62 A.3d at 133.

pertaining to the sentence.”<sup>104</sup> Also significant was a 2007 amendment that created a three-tiered risk assessment system, modeled off of federal law, which categorized sex offenders in the state based on the danger they posed to the community.<sup>105</sup> Pursuant to this amendment, the Oklahoma Department of Corrections created a committee tasked with developing a sex offender screening tool to classify offenders into three groups:

1. Level One (low): a designated range of points on the sex offender screening tool indicating that the person poses a low danger to the community and will not likely engage in criminal sexual conduct;
2. Level Two (moderate): a designated range of points on the sex offender screening tool indicating that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct; and
3. Level Three (high): a designated range of points on the sex offender screening tool indicating that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.<sup>106</sup>

The proposed screening tool called for a numeric, point-based system in which the original offense served as the basis for the minimum risk level.<sup>107</sup> The offender was then assigned points based on a variety of risk factors.<sup>108</sup> In another amendment, the legislature set the registration periods for the three levels: a Level One offender must register for fifteen years at the conclusion of the sentence, a Level Two offender must register for twenty-five years, and a Level Three offender or someone classified as a “habitual or aggravated sex offender” must register for life.<sup>109</sup> The system allowed offenders to challenge their risk assessment level, and the DOC committee or a court could change the assigned risk level if it did not accurately reflect the danger the offender posed to the community.<sup>110</sup>

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104. *Starkey v. Okla. Dep’t of Corr.*, 2013 OK 43, ¶ 33, 305 P.3d 1004, 1017 (internal quotation marks omitted). Prior to the 2004 amendment, the registration clock began when the court imposed the sentence. *Id.*

105. *Id.* ¶ 4, 305 P.3d at 1010.

106. *Id.* (quoting 57 OKLA. STAT. § 582.5 (Supp. 2007)).

107. *Id.*

108. *Id.*

109. *Id.* ¶ 5, 305 P.3d at 1010.

110. *Id.* ¶ 6, 305 P.3d at 1010.

However, subsequent amendments to the registration act in 2009 abandoned the point-based risk assessment.<sup>111</sup> Instead of using a variety of factors to classify offenders, the original offense became the sole basis for the risk level assigned.<sup>112</sup> Additionally, the DOC or a court could only *increase* an offender's risk level, effectively barring offenders from challenging and reducing their risk level assignments.<sup>113</sup>

The retroactive application of the 2004 and 2007 amendments was the impetus for Starkey's lawsuit.<sup>114</sup> Accordingly, these amendments are essential in setting the scene for the *Starkey* decision.

### *III. Starkey v. Oklahoma Department of Corrections*

#### *A. Facts & Procedural Background*

In 1998, James M. Starkey, Sr. pled no contest in Texas district court to a charge of sexual assault on a minor child.<sup>115</sup> The victim was fifteen years old.<sup>116</sup> In accepting Starkey's plea, the Texas trial court entered a deferred adjudication requiring that he serve sixty days in county jail, pay a \$4000 fine, pay restitution, perform 320 hours of community service, and be placed under community supervision for ten years.<sup>117</sup>

Although Starkey's precise offense under Texas law is unclear, the equivalent statute for sexual assault in Oklahoma is "Lewd or Indecent Proposals or Acts to Child Under 16,"<sup>118</sup> which prohibits a list of

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111. *Id.* ¶ 7, 305 P.3d at 1010. In an October 2013 legislative interim study hearing discussing Oklahoma's sex offender classification system, Assistant Attorney General John Hadden explained that the individualized risk assessment was scrapped because it would require due process hearings for everyone on the registry. *Sex Offender Classification and Registration: Hearing on Interim Study 13-028 Before the H. Comm. On the Judiciary*, 2013 Leg., 54th Sess. (Okla. 2013), <http://okhouse.gov/Documents/InterimStudies/2013/Audio%2013-028%2018-8-2013.mp3> (statement of Assistant Attorney General John Hadden at 1:16:00).

112. *Starkey*, ¶ 7, 305 P.3d at 1010.

113. *Id.*

114. *See infra* Part IV.

115. *Starkey*, ¶ 1, 305 P.3d at 1008.

116. *Id.* However, the court noted that a district court document identified two victims, both presumably fifteen years of age. *Id.* ¶ 1 n.1, 305 P.3d at 1008 n.1.

117. *Id.* ¶ 1, 305 P.3d at 1009. As a condition of his community supervision, Starkey was required to register as a sex offender in Texas. *Id.*

118. *Id.*

inappropriate sexual activity involving minors.<sup>119</sup> Violation of the statute is a felony and punishable by imprisonment of up to twenty years.<sup>120</sup>

Starkey moved to Oklahoma in 1998 and registered as a sex offender pursuant to the Oklahoma Registration Act.<sup>121</sup> Although an amended version of the statute went into effect in 1998, both the prior and amended versions of the statute provided that the law “shall apply to any person who . . . enters this state on or after September 1, 1993, and who has received a deferred judgment for a crime or attempted crime which, if committed or attempted in this state,” is proscribed by title 21, section 1123 of the Oklahoma Statutes.<sup>122</sup> The law required any person convicted of a sex offense in another jurisdiction on or after November 1, 1989, to register for ten years after the commission of the crime.<sup>123</sup> Thus, under the 1998 version of the registration act, Starkey was required to register as a sex offender in Oklahoma for ten years.<sup>124</sup>

In 2008, just prior to the end of Starkey’s ten-year registration period, the DOC classified Starkey as a Level Three sex offender, extending his registration period to life.<sup>125</sup> Starkey filed suit in 2009, requesting that the district court find that he had served his ten years on the registry, and discharge him from any further obligation to register as a sex offender and, alternatively, to reduce his risk level to Level One.<sup>126</sup>

Starkey filed a motion for summary judgment based on three arguments: First, he was not required to register under Oklahoma law at the time of his deferred adjudication in Texas.<sup>127</sup> Second, the DOC risk assignment violated his procedural due process rights because he was denied an opportunity to challenge the classification.<sup>128</sup> Third, having fulfilled his original registration requirement of ten years, the trial court should remove him from the state sex offender list.<sup>129</sup> In response, the DOC argued that Starkey’s procedural due process rights were not violated because no hearing was necessary to determine his risk level (as it was based solely on

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119. 21 OKLA. STAT. § 1123 (Supp. 2013).

120. *Id.* § 1123(A)(5).

121. *See Starkey*, ¶ 2, 305 P.3d at 1009.

122. *Id.* (citing 57 OKLA. STAT. § 582 (Supp. 1998); 57 OKLA. STAT. § 582 (Supp. 1997)).

123. *Id.* ¶ 3, 305 P.3d at 1009.

124. *Id.* ¶ 8, 305 P.3d at 1010.

125. *Id.* The DOC assigned Starkey his risk level without a hearing. *Id.*

126. *Id.* (noting that Starkey filed his petition “just months before the effective date of the 2009 amendment extinguishing his right to have his level assignment reduced”).

127. *Id.* ¶ 9, 305 P.3d at 1010-11.

128. *Id.*

129. *Id.* ¶¶ 8-9, 305 P.3d 1010-11.



the original offense and required no other finding of fact).<sup>130</sup> The DOC also argued a retroactive application of the registration act was not a violation of the ex post facto prohibitions of the United States and Oklahoma Constitutions, because the intent of the registration act was to create a “civil regulatory scheme” rather than impose punishment.<sup>131</sup>

Side-stepping the ex post facto issue, the trial court found that the registration act should not be retroactively applied to Starkey.<sup>132</sup> Further, the applicable law was the version of the registration act in effect in 1998, which was when Starkey pled no contest to sexually assaulting a minor child in Texas.<sup>133</sup> Under the 1998 version of the registration act, offenders were only required to register for ten years.<sup>134</sup> Finding Starkey had fulfilled his obligation and should have been removed from the registry sometime in 2008, the trial court granted his motion for summary judgment on May 10, 2011.<sup>135</sup>

The DOC appealed the trial court’s ruling to the Oklahoma Supreme Court and requested “a published opinion establishing binding precedent” that the registration act should be applied retroactively and that such application does not violate due process or the prohibition against ex post facto laws.<sup>136</sup> Conversely, Starkey asked that the court find the registration act should only be applied prospectively, and, in the alternative, that retroactive application of the registration act is a violation of the Ex Post Facto Clause.<sup>137</sup>

### *B. Issues on Appeal*

On appeal, and reviewing the trial court’s ruling de novo, the Oklahoma Supreme Court considered three issues: (1) whether amendments to the registration act should be applied retroactively, (2) whether the registration act was punitive, instead of regulatory, and therefore subject to ex post facto analysis, and (3) whether amendments to the registration act, as applied to Starkey, violated the Ex Post Facto Clause.<sup>138</sup>

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130. *Id.* ¶ 14, 305 P.3d at 1012.

131. *Id.* ¶ 15, 305 P.3d at 1012.

132. *Id.* ¶ 16, 305 P.3d at 1013.

133. *Id.*

134. *Id.* ¶ 3, 305 P.3d at 1009.

135. *Id.* ¶ 16, 305 P.3d at 1013.

136. *Id.* ¶ 18, 305 P.3d at 1013.

137. *Id.*

138. *See id.* ¶¶ 17-18, 305 P.3d at 1013.

### C. Holding

Affirming in part and reversing in part, the Supreme Court held that (1) the level assignment system established in the 2007 amendments applied prospectively and did not apply to Starkey, but the 2004 amendment requiring offenders to register for ten years after the end of their sentence did apply retroactively;<sup>139</sup> (2) the registration act was punitive and subject to ex post facto analysis;<sup>140</sup> and (3) the retroactive application of the 2004 amendment to Starkey was a violation of the Ex Post Facto Clause of the Oklahoma Constitution.<sup>141</sup>

### IV. Decision and Rationale

As an initial matter, the court addressed which amendments to the registration act should apply retroactively to Starkey. The amendments at issue included the 2007 amendment creating three risk levels for offenders, as well as the 2004 amendment changing the start of the mandatory registration period from the date of conviction to when the offender completed his sentence.<sup>142</sup>

The court determined the 2007 amendment and its risk-level system should not apply retroactively and that the DOC improperly applied it to Starkey.<sup>143</sup> The court recognized Oklahoma law's strong presumption against retroactive legislation.<sup>144</sup> To overcome this presumption, the legislature must expressly declare its intent that the legislation apply retroactively, or it must be necessarily implied from the statute's language.<sup>145</sup> Noting the 2007 amendment's prospective language, the court found the legislature intended the amendment to function prospectively.<sup>146</sup> Consequently, because Starkey committed his offense in 1998—nine years

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139. *Id.* ¶¶ 32-33, 305 P.3d at 1016-17.

140. *Id.* ¶¶ 76-77, 305 P.3d at 1030.

141. *Id.* ¶ 81, 305 P.3d at 1031.

142. *Id.* ¶¶ 4, 33, 305 P.3d at 1010, 1017.

143. *See id.* ¶ 82, 305 P.3d at 1031.

144. *Id.* ¶ 23, 305 P.3d at 1014 (citing *Wickham v. Gulf Oil Corp.*, 1981 OK 8, ¶ 14, 623 P.2d 613, 616-17).

145. *Id.* ¶¶ 23-24, 305 P.3d at 1014 (citing *Good v. Keel*, 1911 OK 264, ¶ 3, 116 P. 777, 777-78).

146. *Id.* ¶¶ 29, 32, 305 P.3d at 1015-16. The amendment “appl[ies] the level assignments to a person ‘who *will be* subject to the provisions of the Sex Offenders Registration Act.’” *Id.* (alteration in original).

before the amendment took effect—the DOC should not have assigned Starkey a risk level.<sup>147</sup>

As for the 2004 amendment, the court held that retroactive application was implicit in the amendment’s language.<sup>148</sup> Unlike the 2007 amendment, the 2004 amendment contained no prospective language.<sup>149</sup> By altering the act’s language so that the ten-year registration period began after completion of the sentence, “[t]he Legislature must have known” that the change would affect individuals convicted of an offense or who received a deferred sentence before 2004.<sup>150</sup> Thus, the court determined the 2004 amendment applied retroactively to Starkey.<sup>151</sup> As a practical matter, this change doubled Starkey’s registration period—instead of ending in 2008, it would end in 2018.<sup>152</sup>

Finding the 2004 amendment applied retroactively to Starkey and that the DOC retroactively applied the 2007 level system to Starkey, the court analyzed whether such retroactive application violated the *ex post facto* prohibition of the Oklahoma Constitution.<sup>153</sup> The court began its analysis with Article 2 of the Oklahoma Constitution, which provides that “[n]o . . . *ex post facto* law . . . shall ever be passed.”<sup>154</sup> The court held that the *Ex Post Facto* Clause is essential to protecting individual liberty and that such a restriction on legislative power is necessary to shield the people from “those sudden and strong passions to which men are exposed.”<sup>155</sup> The court noted, however, that the *ex post facto* prohibition only applies to penal laws, and therefore, the decisive question was whether the provisions of the registration act are “punitive or . . . merely regulatory.”<sup>156</sup> To answer this question, the court employed the “intent-effects test” and the *Mendoza-Martinez* factors used by the *Smith* court.<sup>157</sup> Applying this test, the court considered whether the intent of the legislative body was to enact a punitive

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147. *Id.* ¶¶ 28, 82, 305 P.3d at 1015, 1031.

148. *Id.* ¶¶ 33-34, 305 P.3d at 1017.

149. *Id.* Notably, the 2004 provision does not contain any forward-looking language, such as “will be.” *See, e.g., supra* note 146 and accompanying text.

150. *Id.* ¶ 34, 305 P.3d at 1017.

151. *Id.* ¶ 81, 305 P.3d at 1030-31.

152. *Id.* ¶ 33, 305 P.3d at 1017.

153. *Id.* ¶¶ 35-37, 305 P.3d at 1017-18.

154. *Id.* ¶ 37, 305 P.3d at 1018 (alteration in original) (quoting OKLA. CONST. art. II, § 15).

155. *Id.* ¶ 38, 305 P.3d at 1018-19 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810)).

156. *Id.* ¶ 39, 305 P.3d at 1019.

157. *Id.* ¶¶ 40-41, 305 P.3d at 1019-20 (internal quotation marks omitted).

or civil measure and whether the effects of the legislation are so punitive as to override any civil intent.<sup>158</sup>

The court determined that the Oklahoma legislature's intent in enacting the original registration act was unclear.<sup>159</sup> The act ostensibly advanced a civil purpose of safeguarding the public from repeat sex offenders by allowing law enforcement officers to identify offenders and by alerting the public of such offenders.<sup>160</sup> Although this purpose pointed to a civil intent, the court also found "considerable evidence of a punitive effect."<sup>161</sup> Therefore, the court concluded the legislative intent was not clearly established and proceeded to the second prong of the test.<sup>162</sup>

The court found the effects-prong of the test to be dispositive.<sup>163</sup> Even accepting that the intent of the registration act was civil, the court determined that it was so punitive in effect as to outweigh any civil intent.<sup>164</sup> The court noted that it was not bound to the U.S. Supreme Court's application of the *Mendoza-Martinez* factors in *Smith* because Starkey's claim implicated the Oklahoma—not the federal—Constitution.<sup>165</sup> Following similar cases in Alaska and Maryland, the court held that the federal constitution created a "floor of constitutional rights" whereas the "state constitutions provide[d] the ceiling."<sup>166</sup> Accordingly, the court conducted its own independent review of the registration act using the seven *Mendoza-Martinez* factors.

#### A. Affirmative Disability or Restraint

The court found an affirmative disability or restraint for several reasons.<sup>167</sup> Unlike the registration law at issue in *Smith*, Oklahoma sex offenders must regularly report in-person to local law enforcement.<sup>168</sup> Offenders must report before release from prison, before moving addresses, after changing jobs, and after enrolling as a student.<sup>169</sup> Offenders entering

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158. *Id.* ¶¶ 43-44, 305 P.3d at 1020-21.

159. *See id.* ¶ 44, 305 P.3d at 1020 ("As stated, there is no clear legislative categorization that SORA is a civil law.")

160. *Id.* ¶¶ 42-43, 305 P.3d at 1020.

161. *Id.* ¶ 43, 305 P.3d at 1020.

162. *Id.*

163. *Id.*

164. *See id.* ¶ 77, 305 P.3d at 1030.

165. *Id.* ¶ 45, 305 P.3d at 1021.

166. *Id.* (quoting *Daffin v. State*, 2011 OK 22, ¶ 45 n.20, 251 P.3d 741, 747 n.20).

167. *Id.* ¶¶ 47-57, 305 P.3d at 1021-25.

168. *Id.* ¶¶ 47-50, 305 P.3d at 1021-22.

169. *Id.* ¶ 48, 305 P.3d at 1022.

the state must register if they stay in Oklahoma for longer than five consecutive days.<sup>170</sup> Additionally, the risk-level system requires level one offenders to report annually, level two offenders to report semi-annually, and level three offenders to report every ninety days.<sup>171</sup> The court likened the in-person reporting requirement to the postincarceration supervision of parolees.<sup>172</sup>

Further, the court noted that the law imposes residency restrictions, prohibiting offenders from living within 2000 feet of schools, daycare centers, parks, playgrounds, and other areas where children are often present.<sup>173</sup> Finally, the court stated public disclosure of an offender's personal information subjects him to public stigma and the prospect of vigilante reprisal.<sup>174</sup> Because the registration act requires offenders to report in person, restricts their movements, and subjects them to stigmatization, the court concluded it imposes an affirmative disability or restraint.<sup>175</sup>

#### *B. Sanctions That Have Historically Been Considered Punishment*

The court found the registration act's provisions resemble traditional forms of punishment in two respects. First, the public dissemination of the offender's photograph and personal information resembles the historical punishment of shaming.<sup>176</sup> Although the offender's crime is otherwise publicly available, the court noted that the registration act makes a substantial amount of personally identifiable information available to the public "at any time and for any reason."<sup>177</sup> Moreover, offenders must carry driver's licenses identifying them as sex offenders.<sup>178</sup> Given the frequency in which people must present their licenses on a daily basis (e.g., to pay with a check or credit card, get a job, take out a loan) the label on the driver's license acts as a kind of "scarlet letter," subjecting the offender to shame and ridicule.<sup>179</sup> Second, the residency restriction resembles the traditional punishment of banishment, because it substantially limits where offenders may live, either temporarily or permanently.<sup>180</sup>

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170. *Id.*

171. *Id.*

172. *Id.* ¶ 49, 305 P.3d at 1022-23.

173. *Id.* ¶ 50, 305 P.3d at 1023.

174. *Id.* ¶¶ 53-55, 305 P.3d at 1023-24.

175. *Id.* ¶¶ 47-57, 305 P.3d at 1022-25.

176. *Id.* ¶ 59, 305 P.3d at 1025.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* ¶ 60, 305 P.3d at 1025-26.

### *C. Finding of Scierter*

Because many, but not all, offenses that trigger mandatory registration have a scierter element, the court gave this factor little weight in its analysis.<sup>181</sup>

### *D. Traditional Aims of Punishment—Deterrence and Retribution*

The court found the registration act promotes both of the traditional aims of punishment.<sup>182</sup> The registration act promotes deterrence through the threat of negative consequences, such as the regular reporting requirement and the residency requirement.<sup>183</sup> The law promotes retribution because it determines who must register based solely on the offense committed, not on an individual determination of the risk an offender poses to the community.<sup>184</sup>

### *E. Behavior Is Already a Crime*

In a similar vein, the court recognized that the registration act targets behavior already criminal and reiterated that its provisions trigger based solely on a finding of criminal culpability, not the risk of recidivism.<sup>185</sup> Accordingly, the court found this factor rendered the statute more punitive in nature.<sup>186</sup>

### *F. Rational Connection to Nonpunitive Purpose*

The court acknowledged that the registration act advances a nonpunitive purpose of protecting public safety from sex offenders.<sup>187</sup> The legislature included this purpose in the 1997 amendments to the statute, which incorporated legislative findings.<sup>188</sup>

### *G. Excessiveness*

Even though the registration act ostensibly advances a nonpunitive purpose, the court found that it is excessive in promoting that purpose.<sup>189</sup> The statute does not distinguish between high-risk individuals and those

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181. *Id.* ¶ 62, 305 P.3d at 1026-27.

182. *Id.* ¶¶ 63-67, 305 P.3d at 1027-28.

183. *Id.* ¶ 63, 305 P.3d at 1027.

184. *Id.* ¶ 65, 305 P.3d at 1027.

185. *Id.* ¶ 68, 305 P.3d at 1028.

186. *Id.*

187. *Id.* ¶ 69, 305 P.3d at 1028.

188. *Id.*

189. *Id.* ¶¶ 70-75, 305 P.3d at 1028-30.

who present no threat of recidivism.<sup>190</sup> Aside from a few narrow exceptions, the statute does not permit offenders to challenge their level of classifications or reduce their registration periods.<sup>191</sup> Persons classified as level three offenders are subject to the statute and all its attendant restrictions for life.<sup>192</sup> Given these factors, the court concluded the registration act was excessive in relation to its nonpunitive purpose.<sup>193</sup>

Ultimately, in weighing the *Mendoza-Martinez* factors, the court found that the effects of the registration act are so punitive as to override any civil intent.<sup>194</sup> However, the court was careful to say the registration act was facially valid, but that retroactive changes to the law violated the ex post facto prohibition.<sup>195</sup> The court held that the legislature can substantially extend the registration period and impose onerous burdens on sex offenders as part of their sentences, so long as it does so *prospectively*.<sup>196</sup> The court called the retroactive extension of the registration period “mov[ing] the finish line,” without a hearing or any evidence that the offender posed an increased threat to the community.<sup>197</sup> Based on these findings, the court concluded that the retroactive extension of Starkey’s registration period violated the ex post facto prohibition of the Oklahoma Constitution.<sup>198</sup>

#### V. Post-Starkey Implications and Opportunities

##### A. Starkey Removes Hundreds, if Not Thousands, of Sex Offenders from the Registry and May Signal Greater Scrutiny of State Sex Offender Laws

The immediate effects of the *Starkey* ruling have been swift and significant. Oklahoma sex offenders are able to remove their names from the registry after the Legislature retroactively extended their registration periods. Estimates vary, but anywhere from hundreds to 3000 sex offenders may be eligible for relief under *Starkey*.<sup>199</sup> As of June 26, 2013, there were

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190. *Id.* ¶ 75, 305 P.3d at 1030.

191. *Id.* ¶ 72, 305 P.3d at 1029.

192. *Id.* ¶ 73, 305 P.3d at 1029.

193. *Id.* ¶ 75, 305 P.3d at 1030.

194. *Id.* ¶ 77, 305 P.3d at 1030.

195. *Id.* ¶¶ 78-79, 305 P.3d at 1030.

196. *See id.* ¶ 79, 305 P.3d at 1030.

197. *Id.*

198. *Id.* ¶¶ 76-79, 305 P.3d at 1030.

199. Randy Ellis, *Ramifications of Oklahoma State Supreme Court Sex Offender Ruling Is Still Unfurling*, NEWSOK.COM (July 1, 2013), <http://newsok.com/ramifications-of-oklahoma-state-supreme-court-sex-offender-ruling-is-still-unfurling/article/3857878>.

7704 names on the Oklahoma sex offender list.<sup>200</sup> Thus, almost half the state's registered sex offenders may be removed from the registry because of the decision. This substantial number of offenders raises potential public safety concerns in allowing the offenders to go unmonitored. But for those offenders affected, the decision represents a significant victory.

The *Starkey* decision has also sparked a series of subsequent rulings limiting the operation of the state's sex offender legislation.<sup>201</sup> Notably, in *Osburn v. Oklahoma Department of Corrections*, the Oklahoma Supreme Court ordered a man convicted of indecent exposure to be removed from the sex offender registry because at the time of his conviction, indecent exposure did not trigger mandatory registration.<sup>202</sup> Reiterating *Starkey*, the court held that the provisions of the registration act and its numerous amendments have a punitive effect that outweighs their nonpunitive purpose.<sup>203</sup> The court determined that retroactive application of the registration act to new types of offenses violates the Oklahoma Constitution's Ex Post Facto Clause.<sup>204</sup> *Osburn* is significant in that it further limits the legislature's ability to retroactively expand the scope of the registration act.

Additionally, the Oklahoma Supreme Court's decision in *Hendricks v. Jones ex rel. State ex rel. Oklahoma Department of Corrections* suggests the court may be willing to more closely scrutinize sex offender laws generally, not just on ex post facto grounds.<sup>205</sup> In *Hendricks*, the court held as unconstitutional an amendment to the registration act that required offenders entering the state to register for offenses committed before November 1, 1989 but that did not require Oklahoma offenders to do so.<sup>206</sup> The court held this distinction was arbitrary and violated the Equal

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200. Randy Ellis, *Oklahoma Supreme Court Ruling May Result in Removal of Hundreds of Names from Sex Offender Registry*, NEWSOK.COM (June 26, 2013), <http://newsok.com/oklahoma-supreme-court-ruling-may-result-in-removal-of-hundreds-of-names-from-sex-offender-registry/article/3856402>.

201. See *Cerniglia v. Okla. Dep't of Corr.*, 2013 OK 81, ¶¶ 4-7, No. 109568, 2013 WL 5470632, at \*2 (reiterating that the risk-level system must be applied prospectively and female defendant's level assignment must therefore be overturned); see also *Bollin v. Jones ex rel. State ex rel. Okla. Dep't of Corr.*, 2013 OK 72, ¶¶ 15-16, No. 108819, 2013 WL 5204134, at \*5; *Luster v. State ex rel. Dep't of Corr.*, 2013 OK 97, ¶¶ 14-17, 315 P.3d 386, 390-91; *Osburn v. Okla. Dep't of Corr.*, 2013 OK 89, ¶ 11, 313 P.3d 926, 929-30.

202. *Osburn*, ¶¶ 1, 11, 313 P.3d at 927, 930.

203. *Id.* ¶ 11, 313 P.3d at 929.

204. See *id.*

205. 2013 OK 71, ¶ 17, No. 108797, 2013 WL 5201235, at \*5.

206. *Id.* ¶¶ 14-15, 2013 WL 5201235, at \*4.



Protection Clauses of the Oklahoma and federal constitutions under a rational basis review.<sup>207</sup>

The recent spike in sex-offender-related cases indicates the Oklahoma Supreme Court may be increasingly skeptical of the state's sex offender regulations. Before the *Starkey* decision, the court had heard a total of ten cases involving sex offenders.<sup>208</sup> In the six months after *Starkey*, the court had already ruled in eight such cases, and in those cases, it uniformly ruled in favor of sex-offender plaintiffs.<sup>209</sup> Therefore, one immediate consequence of the *Starkey* decision appears to be greater judicial scrutiny of the state's sex offender legislation and the likelihood of future litigation.

*B. Starkey Opens the Door to Eighth Amendment Challenges of the Registration Act, Particularly for Juvenile Offenders*

Indeed, *Starkey* may unlock future constitutional challenges to the registration act on Eighth Amendment grounds, though Oklahoma's Eighth Amendment jurisprudence indicates that such claims may not be successful. Previously, such a challenge would have necessarily failed in Oklahoma because sex offender registration requirements (as well as residency and occupational restrictions and other measures) were considered regulatory and nonpunitive.<sup>210</sup> This is because in order for punishment to be "cruel and unusual," it must first be *punishment*.<sup>211</sup>

Many states have quickly disposed of sex offenders' challenges along these lines for the same reason they have denied ex post facto claims.<sup>212</sup> For

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207. *Id.*

208. *In re* Adoption of G.D.J., 2011 OK 77, 261 P.3d 1159; *In re* A.L.F., 2010 OK 59, 237 P.3d 217; *Skrapka v. Bonner*, 2008 OK 30, 187 P.3d 202; *In re* Adoption of M.J.S., 2007 OK 44, 162 P.3d 211; *In re* M.B., 2006 OK 63, 145 P.3d 1040; *In re* Baby Girl L., 2002 OK 9, 51 P.3d 544; *S.W. v. Duncan*, 2001 OK 39, 24 P.3d 846; *Towne v. Hubbard*, 2000 OK 30, 3 P.3d 154; *Transp. Inf. Servs. v. State ex rel. Okla. Dept. of Corr.*, 1998 OK 108, 970 P.2d 166.

209. *See* *Bollin v. Jones ex rel. State ex rel. Okla. Dep't of Corr.*, 2013 OK 72, ¶ 16, No. 108819, 2013 WL 5204134, at \*5; *Burk v. State ex rel. Dep't of Corr.*, 2013 OK 80, ¶¶ 11-12, No. 108301, 2013 WL 5476403, at \*2; *Butler v. Jones ex rel. State ex rel. Okla. Dep't of Corr.*, 2013 OK 105, ¶ 17, 321 P.3d 161, 168; *Cerniglia v. Okla. Dep't of Corr.*, 2013 OK 81, ¶ 7, No. 109568, 2013 WL 5470623, at \*2; *Hendricks v. Jones ex rel. State ex rel. Okla. Dep't of Corr.*, 2013 OK 71, ¶ 17, No. 108797, 2013 WL 5201235, at \*5; *Luster v. State ex rel. Dep't of Corr.*, 2013 OK 97, ¶ 17, 315 P.3d 386, 391; *Ransdell v. State ex rel. Okla. Dep't of Corr.*, 2013 OK 106, ¶ 1, 322 P.3d 1064, 1064.

210. *See supra* Part II.3.B.

211. *See* *Rainer v. State*, 690 S.E.2d 827, 828 (Ga. 2010).

212. *See, e.g., id.* at 829; *accord* *State v. Eighth Jud. Dist. Ct. (In re Logan D.)*, 306 P.3d 369, 388 (Nev. 2013).

instance, in *Rainer v. State*, the Georgia Supreme Court held that “[i]n light of this determination that such registry requirements are not punitive, it follows that the [registry requirement under Georgia] law is not a cruel and unusual punishment in violation of the Eighth Amendment.”<sup>213</sup> The Georgia court also noted that “factors used in determining whether law is punishment for ex post facto purposes have their earlier origins in cases under the Sixth and Eighth Amendments.”<sup>214</sup> In holding that the registration act is punitive, *Starkey* allows Oklahoma courts to conduct a substantive inquiry as to whether the state’s sex offender laws impose cruel and unusual punishment.

Whether such an Eighth Amendment challenge could succeed, however, is unclear. Although Oklahoma’s cruel and unusual punishment jurisprudence is scant, in *Malicoat v. State*, the Oklahoma Court of Criminal Appeals identified several factors courts consider when deciding Eighth Amendment challenges. These factors include whether the punishment is “proportionate to the offense, offends contemporary standards of decency, . . . has legitimate punishment objectives[,]” and avoids “unnecessary and wanton infliction of pain.”<sup>215</sup>

In light of these factors, challenging sex offender registration laws on cruel and unusual punishment grounds is problematic for several reasons. First, sex offenders are naturally unsympathetic and often among the most vilified classes of people in society.<sup>216</sup> A cruel and unusual punishment inquiry is fundamentally a proportionality test, asking whether the punishment fits the crime.<sup>217</sup> As such, the principal question is whether the punishment is grossly excessive compared to the severity of the offense.<sup>218</sup> Some have argued that community notification provisions provoke vigilante

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213. *Rainer*, 690 S.E.2d at 828 (alterations in original) (citations omitted) (internal quotation marks omitted).

214. *Id.* (citations omitted) (internal quotation marks omitted).

215. *Malicoat v. State*, 2006 OK CR 25, ¶ 6, 137 P.3d 1234, 1236-37.

216. Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2012).

217. *Graham v. Florida*, 560 U.S. 48, 59 (2010) (noting the prohibition against cruel and unusual punishment includes a “narrow” proportionality standard).

218. *Id.* In contrast, in the ex post facto analysis, the excessiveness of the law in relation to its nonpunitive purpose is but one factor among many in deciding whether the law is punitive in nature. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

violence, which may constitute cruel and unusual punishment.<sup>219</sup> However, courts have repeatedly found that the public has a compelling interest in implementing sex offender registration laws.<sup>220</sup>

For example, in *State v. Mossman*, the Kansas Supreme Court rejected a sex offender's Eighth Amendment challenge, holding that lifetime postrelease supervision of sex offenders advanced "legitimate penological goals such as deterrence, incapacitation, and rehabilitation."<sup>221</sup> The *Mossman* court found that society has "a penological interest in punishing those who commit sex offenses against minors because they present a special problem and danger to society and their actions produce particularly devastating effects on victims, including physical and psychological harm."<sup>222</sup> The court also noted the "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class."<sup>223</sup> Although these concerns have relatively little empirical support,<sup>224</sup> persistent popular fears about recidivism will likely hinder cruel and unusual challenges to registration laws.

The general implausibility of Eighth Amendment challenges aside, one context in which Oklahoma courts may entertain a cruel and unusual challenge to the registration act is in the case of juvenile sex offenders—and they would not be the first courts to do so. In a largely unprecedented decision, the Ohio Supreme Court held in *In re C.P.* that lifelong registration and notification requirements on juvenile sex offenders tried in juvenile court were cruel and unusual, and in violation of the Ohio

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219. See Alex B. Eyssen, Comment, *Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from "Megan's Law"*, 33 ST. MARY'S L.J. 101, 131 (2001).

220. See, e.g., *Smith v. Doe*, 538 U.S. 84, 97-99 (2003).

221. 281 P.3d 153, 161 (Kan. 2012). Although the plaintiff in *Mossman* was sentenced to lifetime post-release supervision, others have noted the similarities between supervision and mandatory registration. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1116 (2012).

222. *Mossman*, 281 P.3d at 160 (quoting *State v. Wade*, 757 N.W.2d 618, 626 (Iowa 2008)) (internal quotation marks omitted).

223. *Id.*

224. See, e.g., Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 50 (2005) ("[R]ecent studies have found that sexual offense recidivism rates are lower than commonly believed." (citing R.K. Hanson & M.T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 348-62 (1998); Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, BUREAU JUST. STAT. 1, 34 (2003)).

Constitution.<sup>225</sup> In analyzing the proportionality of lifetime registration, the Ohio court focused on the profound impact of registration on juvenile offenders.<sup>226</sup>

The court also found that registration requirements prevent juvenile offenders from reentering society as productive members of the community, because they enter the workforce with a publicized label of “sex offender,” which precludes employment in education, health care, or the military.<sup>227</sup> As one Nevada Supreme Court justice noted, juvenile sex offenders have substantially lower recidivism rates compared to adult offenders and are more likely to respond to counseling and other forms of treatment than adults.<sup>228</sup> These findings are supported by empirical studies finding juvenile offenders pose little risk of recidivism.<sup>229</sup>

By classifying Oklahoma’s registration act as a form of punishment, the Oklahoma Supreme Court has opened the door to Eighth Amendment challenges to the state’s sex offender laws. Although such challenges are generally unlikely to succeed, Oklahoma courts might entertain them in the context of juvenile offenders given the public policy interests at stake.

### C. *Starkey Provides an Opportunity for Sounder Sex Offender Policies*

In addition to opening up possible legal challenges, *Starkey* greatly limits the Oklahoma Legislature’s ability to pass retroactive amendments to the state’s registration act. As a practical matter, however, the ruling does nothing to prevent the Legislature from extending registration periods or imposing additional restrictions on sex offenders *so long as* those provisions apply prospectively. But this option may be undesirable to

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225. *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶¶ 25-29.

226. *Id.* ¶¶ 44-46 (“For juveniles, the length of the punishment is extraordinary, and it is imposed at an age at which the character of the offender is not yet fixed. . . . For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. . . . While not a harsh penalty to a career criminal used to serving time in a penitentiary, a lifetime or even 25-year requirement of community notification means everything to a juvenile. It will define his adult life before it has a chance to truly begin.”).

227. *Id.* ¶ 55 (citing Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 33, 48-49 (2008)).

228. *See State v. Eighth Jud. Dist. Ct. (In re Logan D.)*, 306 P.3d 369, 391-92 (Nev. 2013) (Cherry, J., dissenting).

229. *See* Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 CRIMINOLOGY & PUB. POL’Y 507, 511-12, 529 (2007) (arguing fears of juvenile sex offender recidivism are exaggerated).

policymakers who want a comprehensive regulatory scheme that gives amendments retroactive effect.

One possible solution is to incorporate an individualized risk assessment into the statute as envisioned by the original drafters of the 2007 amendment, which created the risk-level categories. Rather than base the registration period solely on the criminal offense, each offender's registration duties would be based on a scientific determination of his risk to society. Moreover, the statute could provide opportunities for sex offenders to present evidence of rehabilitation in order to be removed from the registry. Such a solution would address many of the *Starkey* court's concerns regarding the third and seventh *Mendoza-Martinez* factors (retribution and excessiveness to nonpunitive purpose). To pass judicial muster, some have argued that legislatures must unpack their sex offender regulatory schemes so that they more reasonably advance the goals of promoting public safety.<sup>230</sup> Such efforts may entail dramatically scaling back burdens on sex offenders who pose little real threat to the community.<sup>231</sup> Granted, those efforts would undoubtedly face stiff public opposition, given societal opinions of sex offenders.

Nevertheless, *Starkey* provides an opportunity for state lawmakers to create a more effective and just sex offender regulatory scheme based not on unsubstantiated fear, but instead on scientific evidence. Recent developments suggest that lawmakers may be attempting to do just that. Lawmakers in the Oklahoma House of Representatives met in October of 2013 to conduct an inquiry into the state's registration system to determine whether it is, in fact, protecting the public.<sup>232</sup> There appears to be growing concern among law enforcement and lawmakers that the state's offense-based level system wastes police resources on registrants who pose little threat to the community.<sup>233</sup> The legislature has yet to act, however, to meaningfully improve the state's sex offender laws in the wake of the *Starkey* decision.

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230. See Carpenter & Beverlin, *supra* note 221, at 1117-22 (arguing that "excessive legislation" renders registration schemes overly broad and ineffective in advancing legitimate public safety interests).

231. *Id.*; see also Cucolo & Perlin, *supra* note 216, at 1-2,28-32.

232. *Sex Offender Classification and Registration: Hearing on Interim Study 13-028 Before the H. Comm. on the Judiciary*, 2013 Leg., 54th Sess. (Okla. 2013), <http://okhouse.gov/Documents/InterimStudies/2013/Audio%2013-028%2018-8-2013.mp3>.

233. *Id.* (statements of Representative Skye McNeil at 32:34 and 36:18, Representative Emily Virgin at 31:36 and 57:45, Detective Ron Collett at 27:41, and Dr. Rick Kishur at 1:00:00).

*D. Revisiting Smith and Why Other States Should Follow Starkey's Lead*

In terms of judicial reform, overturning *Smith* may be unnecessary. The efforts of a minority of states (now including Oklahoma), demonstrate that states may avoid *Smith's* effect by overruling retroactive amendments on state-law grounds or by distinguishing the facts in *Smith* from today's more onerous registration schemes.<sup>234</sup> The residency restriction is perhaps the most striking distinction. Courts ought to adopt a more realistic appreciation of the residency restriction's effects and its similarity to the traditional punishment of banishment. Expanded residency restrictions effectively "freeze out" offenders from huge swaths of inhabited communities.<sup>235</sup> A study in Oklahoma City, for instance, determined that the 2000-foot protected zone around schools, playgrounds, parks and childcare facilities left less than sixteen percent of the city legally inhabitable by sex offenders.<sup>236</sup> Some have argued that residency restrictions actually increase recidivism by removing offenders from family and other support systems.<sup>237</sup> Given the considerable burden that residency restrictions impose, a more honest application of the intent-effects analysis should lead courts to arrive at decisions similar to *Starkey*.

*VI. Conclusion*

The *Starkey* decision dramatically alters the operation of sex offender legislation in Oklahoma and places Oklahoma in the same camp as a minority of states that have found retroactive amendments to registration laws unconstitutional on ex post facto grounds. The decision correctly identifies the significant burdens that Oklahoma's current registration act imposes on sex offenders and the stark absence of individualized risk assessment for sex offenders. Although some lawmakers may see the decision as a set back to their regulatory aims, the ruling provides an

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234. See, e.g., *supra* notes 96-103 and accompanying text.

235. See Carpenter & Beverlin, *supra* note 221, at 1096-98; Michelle Olson, *Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois Under the Ex Post Facto Clause*, 5 NW. J. L. & SOC. POL'Y 403, 423-26 (2010).

236. Sean Murphy, *Experts Say Sex Offender Zones Problematic*, NEWSOK.com (Nov. 9, 2006), <http://newsok.com/experts-say-sex-offender-zones-problematic/article/2969161>.

237. Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1268-70 (2009); Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, in SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 64 (Richard Wright ed., 2d ed. 2009) (citing various studies concluding residency restrictions may, in fact, be counterproductive).

opportunity for enacting a more effective and just regulatory scheme. Moreover, the decision provides a model for other states with similar registration laws to emulate. For these reasons, the *Starkey* decision is a significant development in Oklahoma's ex post facto jurisprudence.

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