CRIMINAL LAW — SEX OFFENDER REGISTRATION — NINTH CIRCUIT HOLDS THAT RETROACTIVE APPLICATION OF SORNA TO JUVENILE VIOLATES EX POST FACTO CLAUSE. — *United States v. Juvenile Male*, 581 F.3d 977 (9th Cir. 2009).

Since the 1990s, spurred by several highly publicized sex crimes against children, Congress and state legislatures have implemented registration laws for convicted sex offenders, many of which have resulted in the creation of public internet databases containing offenders' criminal histories and other personal information.[1] In 2003, the Supreme Court held in *Smith v. Doe*[2] that the application of a state sex offender registration law to adults convicted prior to its enactment was not retroactive punishment violating the Ex Post Facto Clause of the Constitution,[3] but rather was a valid regulatory measure aimed at public safety.[4] Recently, however, in *United States v. Juvenile Male*,[5] the Ninth Circuit held that the retroactive application of the Federal Sex Offender Registration and Notification Act[6] (SORNA) to former juvenile delinquents was punitive and hence constitutionally impermissible. Though the opinion is based on sound policy concerns about the wisdom of juvenile sex offender registration laws, it does not sit comfortably with Supreme Court precedent: *Juvenile Male* relies on an overly restrictive reading of *Smith* and oversteps the boundaries of the Supreme Court's ex post facto inquiry. The issues the opinion raises, however, make clear the need for legislative action to ameliorate SORNA's overly aggressive approach to juvenile offenders.

In 2006, Congress enacted SORNA, which requires sex offenders to register in their jurisdiction of residence[7] and to provide a variety of information, such as their photograph, address, and criminal history,[8] for the public to access online.[9] The requirements also apply to juveniles aged fourteen or older who have committed offenses comparable to or more severe than aggravated sexual abuse.[10] Congress delegated to the Attorney General the power to determine how SORNA would

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[1] *See* Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 371–73 (2009).

[2] 538 U.S. 84 (2003). *Smith* overruled a Ninth Circuit decision, *Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001), authored by Judge Reinhardt.

[3] U.S. CONST. art. 1, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

[4] *Smith*, 538 U.S. at 105–06.

[5] 581 F.3d 977 (9th Cir. 2009).

[6] 42 U.S.C. §§ 16901–16962 (2006).

[7] *Id.* § 16913(a).

[8] *Id.* § 16914.

[9] *Id.* § 16918(a). The length of time for which offenders must maintain their online registration is tiered based on the severity of the prior conviction. *Id.* §§ 16911(2)–(4), 16915.

[10] *Id.* § 16911(8).

apply to offenders convicted prior to its enactment.[11] In 2007, the Attorney General issued a regulation stating that SORNA applied retroactively.[12]

In 2005, at age fifteen, defendant S.E. pled "true" to sexual acts that would constitute aggravated sexual abuse if committed by an adult.[13] Under the procedures of the Federal Juvenile Delinquency Act[14] (FJDA), the district court sentenced him to two years confinement at a juvenile facility.[15] The FJDA requires that juvenile records be "safeguarded from disclosure to unauthorized persons"[16] and that "neither the name nor picture" of the juvenile be made public in connection with the proceeding.[17] Accordingly, S.E.'s proceedings were closed to the public.[18] In 2007, having failed to participate in a prerelease job search, authorities sentenced S.E. to an additional six months of confinement and ordered him to register as a sex offender under SORNA.[19] He appealed, arguing that SORNA's retroactive application to juveniles violated the Ex Post Facto Clause.[20]

The Ninth Circuit vacated the registration order.[21] Writing for a unanimous panel, Judge Reinhardt[22] began by noting that the ex post facto inquiry depended on whether SORNA's juvenile requirements were punitive or civil.[23] This distinction turned first on whether the legislature intended to impose punishment — if so, the retroactive measure per se violates the Ex Post Facto Clause.[24] Because S.E. had conceded that Congress's intent in enacting SORNA was not punitive, however, the court did not address this issue.[25] The second step was to examine whether SORNA was nevertheless impermissibly punitive in its effects. Four factors from *Kennedy v. Mendoza-Martinez*[26] guided this analysis: (1) whether the measure imposes an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it promotes the aims of punishment, particularly ret-

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11 *Id.* § 16913(d).

12 *See* 28 C.F.R. § 72.3 (2009).

13 *Juvenile Male*, 581 F.3d at 979. The "non-consensual sexual acts" began when S.E. was thirteen and the victim was ten, and continued for two years. *Id.*

14 18 U.S.C. §§ 5031–5042 (2006).

15 *Juvenile Male*, 581 F.3d at 980.

16 18 U.S.C. § 5038(a).

17 *Id.* § 5038(e).

18 *Juvenile Male*, 581 F.3d at 986 n.9.

19 *Id.* at 980.

20 *Id.*

21 *Id.* at 993–94.

22 Judge Reinhardt was joined by Judges Tashima and McKeown.

23 *See Juvenile Male*, 581 F.3d at 981–82.

24 *See id.* at 982.

25 *Id.*

26 372 U.S. 144 (1963).

ribution and deterrence; and (4) whether it appears excessive in relation to its nonpunitive purpose.[27] The Supreme Court has emphasized that "only the clearest proof" of a law's punitive effects "will suffice to . . . transform what has been denominated a civil remedy into a criminal penalty."[28]

Judge Reinhardt first examined whether SORNA imposed a significant affirmative disability on juveniles. He reasoned that in *Smith*, the Court did not consider public notification a disability because adult convictions are already a matter of public record.[29] For juveniles, however, "the precise opposite is true."[30] Given the tradition of confidentiality in juvenile proceedings, SORNA did not "merely provide for further public access to information already available"; it publicized information "that would otherwise permanently remain confidential."[31] Offenders who previously pled true to juvenile offenses under an assurance of confidentiality would now have their lives "dramatically disrupted" by public exposure of the offense.[32] Judge Reinhardt also noted that, unlike the state statute in *Smith*, SORNA required quarterly in-person reporting.[33] The court thus concluded that SORNA imposed a burdensome disability on juveniles, which "weigh[ed] heavily" in support of a punitive classification.[34]

Judge Reinhardt next considered whether juvenile sex offender registration was a historical means of punishment, noting that such laws are of relatively recent origin and that the *Smith* Court had rejected analogies to "shaming" punishments.[35] He observed that juveniles have historically been exempted from public criminal trials "in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation,"[36] but nonetheless granted that this factor did not point strongly in the punitive direction.[37]

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[27] *Juvenile Male*, 581 F.3d at 983 (citing *Kennedy*, 372 U.S. at 168–69). Two other factors advanced in *Kennedy* were whether the law is triggered only on a finding of scienter and whether the behavior to which the law applies is already a crime. *Id.* Judge Reinhardt agreed with the Supreme Court in *Smith*, however, that these two factors are not helpful in assessing sex offender laws that, by their very nature, are predicated on past criminal convictions. *Id.* at 983 n.6.

[28] *Id.* at 982 (quoting Smith v. Doe, 538 U.S. 84, 92 (2003)).

[29] *See id.* at 985–86.

[30] *Id.* at 986 ("It is clear that a large-scale release of juvenile records of the magnitude authorized by SORNA . . . was prohibited under federal law . . . prior to the passage of SORNA . . . .").

[31] *Id.* at 987.

[32] *Id.* (noting that public notification subjects offenders to "humiliation and ignominy" and "jeopardizes the ability of such individuals to obtain employment, housing, and education").

[33] *Id.* at 987–88.

[34] *Id.* at 988.

[35] *Id.* (citing Smith v. Doe, 538 U.S. 84, 98–99 (2003)).

[36] *Id.* at 989 (quoting United States v. Doe, 94 F.3d 532, 536 (9th Cir. 1996)) (internal quotation mark omitted).

[37] *Id.*

To determine whether SORNA promotes traditional aims of punishment, Judge Reinhardt examined whether it was enacted to serve retributive purposes. Citing legislative history, he argued that SORNA was at least partially intended to further retributive ends[38] and that SORNA, "while principally regulatory, to be sure, [was] also in some measure punitive."[39]

Finally, Judge Reinhardt asked whether SORNA's requirements were excessive in relation to the statute's nonpunitive purpose.[40] He observed that the regulatory purpose of sex offender registries is to protect public safety by decreasing recidivism.[41] Citing recent studies, however, he noted that juveniles pose a substantially lower risk of recidivating than adults,[42] which made the law appear excessive.[43] Still, remaining mindful that the inquiry was only whether the law was reasonable in relation to its regulatory purpose, he decided "not [to] give much weight either way to this factor."[44]

Taking all the factors together, the court was "fully persuaded" that SORNA's effects on juveniles were punitive.[45] It thus held that SORNA's retroactive application to S.E. violated the Ex Post Facto Clause.

While the Ninth Circuit's decision is based on compelling policy considerations regarding the aims of juvenile justice, *Juvenile Male* relies on an untenable reading of *Smith* and is incompatible with the Court's highly deferential approach to the ex post facto analysis. As the policy concerns raised in the opinion imply, however, SORNA's juvenile provisions are overly aggressive. These ailments can best be relieved not by an ad hoc judicial remedy, but rather by a congressional reassessment of SORNA's overall treatment of juveniles.

The Ninth Circuit's holding relied heavily on the affirmative disability factor from *Kennedy*, emphasizing that for juveniles, an internet registry transforms what is traditionally a confidential proceeding into a publicly available record. To find SORNA's juvenile provisions pu-

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[38] *See id.* at 990. The court noted that SORNA's legislative purpose statement indicated that it was passed partly "in response to" several "vicious attacks" on children. *Id.* (emphasis omitted) (quoting 42 U.S.C. § 16901 (2006)). The court also quoted Senator Grassley's floor statement: "Child sex offenders are the most heinous of all criminals. . . . I would just as soon lock up all [of them] and throw away the key." *Id.* (quoting 152 CONG. REC. S8021 (daily ed. July 20, 2006)).

[39] *Id.*

[40] *See id.*

[41] *Id.* at 990–91.

[42] *Id.* at 991–92 (citing Coal. for Juvenile Justice, Comments in Opposition to Interim Rule RIN 1.105–AB22, at 3 (Apr. 30, 2007), *available at* http://www.juvjustice.org/media/fckeditor/Comments%20on%20Interim%20Rule%20OAG%20Docket%20No%201117.pdf (indicating 5–14% recidivism rate for juveniles compared to 40% for adults)).

[43] *See id.* at 992.

[44] *Id.* at 992–93.

[45] *Id.* at 993.

nitive on these grounds, however, requires reading the *Smith* Court's analysis of this factor as principally dependent on the fact that adults already have public records of conviction — a reading incompatible with both the basic function of public registries and the *Smith* opinion itself. A primary purpose of an internet database is to make information readily available that the average citizen would never have the incentive or means to access herself (even if the information is technically "public").[46] Additionally, the adult registry in *Smith* allowed public access to a great deal of personal information (such as the offender's photograph, address, and place of employment) *not* contained in a record of conviction.[47] As the lower court in *Smith* pointed out, this information accessibility carries effects far beyond those of formal background checks[48] (and clearly is intended to do so, or the registry would serve no purpose). Thus, far from resting exclusively on the fact that adult convictions are already public, the *Smith* Court argued against finding an affirmative disability because registration does not impose restraints as severe as punishments like imprisonment, probation, or supervised release[49] — reasoning that applies equally well to juveniles. Even SORNA's in-person reporting requirement, absent from the state statute at issue in *Smith*, is unlikely to alter this conclusion, since it does not affirmatively "restrain activities sex offenders may pursue,"[50] but only requires periodic information updates.[51]

The Ninth Circuit also failed to take account of the highly deferential nature of the Court's punishment inquiry, whereby a "rational connection to a nonpunitive purpose is a '[m]ost significant' factor in

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[46] *See* Smith v. Doe, 538 U.S. 84, 99 (2003) ("Widespread public access is necessary for the efficacy of the scheme . . . . The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry."); *id.* at 109 (Souter, J., concurring in the judgment) (noting that the objective of public registries "is to send a message that probably would not otherwise be heard"); *see also* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989) ("[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.").

[47] *See Smith*, 538 U.S. at 90–91; HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 47–48 (2007), *available at* http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf ("Community notification thus does not, as some contend, simply make public what is in [sic] already in the public record. Instead, it makes readily accessible additional information that would otherwise be private or difficult to obtain.").

[48] For example, public registries may create new employment obstacles for adults because employers may be concerned about *customers'* knowledge of the employee's sex offense. *See* Doe I v. Otte, 259 F.3d 979, 988 (9th Cir. 2001).

[49] *See Smith*, 538 U.S. at 100–02.

[50] *Id.* at 100.

[51] *See* United States v. Benevento, 633 F. Supp. 2d 1170, 1183–84 (D. Nev. 2009) (rejecting the argument that SORNA's in-person reporting requirement carries punitive effects). Moreover, though SORNA may create new effects for former juvenile offenders' employment prospects, the Court has held even occupational debarment to be regulatory. *See* De Veau v. Braisted, 363 U.S. 144, 160 (1960); Hawker v. New York, 170 U.S. 189 (1898).

[the] determination that the statute's effects are not punitive," even if the measure imposes significant burdens.[52] For instance, despite the patent similarities between imprisonment and involuntary civil commitment, the Court has held that civil commitment of sex offenders can be nonpunitive because it is related to the regulatory goal of protecting the public from dangerous persons.[53] Similarly, though public disclosure can be used to further punitive ends, sex offender registries are, at least on their face, designed to disseminate risk information — a regulatory function aimed at public safety.[54] While disclosure of juvenile records certainly reflects an alteration to traditional juvenile justice policy, which seeks to shelter minors from the negative effects of public convictions, this "rational connection" to the regulatory goal of public safety weighs heavily in support of SORNA's validity.[55] Significantly, both the Supreme Court and the Ninth Circuit have demonstrated their unwillingness to find sex offender registries punitive due to adverse public response or offender humiliation, since these effects are not an "integral part of the [regulatory] objective."[56]

While Judge Reinhardt attempted to undermine SORNA's "rational connection" to public safety by arguing that juvenile sex offenders have a far lower recidivism rate than adults, he provided no benchmark for inferring that this fact makes SORNA "excessive" under the Court's approach. Even the cited 5–14% juvenile recidivism rate (compared to 40% for adults)[57] could constitute a threat to public safety. In addition, SORNA is tailored to juveniles fourteen and older who have committed the equivalent of a serious federal sex crime; this

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[52] *Smith*, 538 U.S. at 102 (first alteration in original) (quoting United States v. Ursery, 518 U.S. 267, 290 (1996)); *see also* Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777 n.14 (1994) ("[W]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.'" (quoting United States v. Halper, 490 U.S. 435, 447 n.7 (1989))). The Court uses the same multifactor *Kennedy* analysis in other contexts, such as double jeopardy. *See Smith*, 538 U.S. at 97.

[53] *See* Kansas v. Hendricks, 521 U.S. 346, 360–69 (1997).

[54] *See Smith*, 538 U.S. at 98–99 ("Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. . . . The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender."). The Ninth Circuit compared sex offender registries to "wanted" posters, a measure employed to disseminate information, which has "not been regarded as punishment," though it might cause detriment to an innocent person. Russell v. Gregoire, 124 F.3d 1079, 1092 (9th Cir. 1997).

[55] Though many juvenile offenders pled guilty prior to SORNA's enactment under assurances of confidentiality, a regulatory measure may permissibly alter the consequences of prior guilty pleas. *See, e.g.*, *De Veau*, 363 U.S. at 145–46, 160 (upholding retroactive law barring convicted felons from holding office in waterfront unions, even though it was challenged by a man who pled guilty to larceny decades prior).

[56] *Smith*, 538 U.S. at 99; *see also Russell*, 124 F.3d at 1092 ("We conclude that, considering the entire range of possible community responses . . . , the [public registry's] effect is not so egregious as to prevent us from viewing [it] as regulatory or remedial.").

[57] *See Juvenile Male*, 581 F.3d at 992 (citing Coal. for Juvenile Justice, *supra* note 42, at 3).

group's recidivism could be higher. Furthermore, as evidenced by its holding that individual risk assessment is not a mandatory prerequisite to sex offender registration,[58] the Court has tended to uphold overinclusive safety regulations that will burden many low-risk individuals.[59] Under a standard where "only the clearest proof" renders punitive a measure denominated as civil,[60] and where the legislature gets "the benefit of the doubt in close cases,"[61] these statistical disparities between juveniles and adults seem insufficient to merit a punitive label.

The failure of ex post facto doctrine to address the effects of juvenile sex offender registration is unsettling. On the one hand, *Juvenile Male* may signal that *Smith* was wrongly decided and that the Court's abstract, deferential approach is unable to properly respond to the grave burdens that modern legislatures, fueled by fearful public sentiment, can impose on released offenders. On the other hand, the Court's deference under the *Kennedy* factors may reflect that where the overall wisdom or propriety of a statute is the real concern, an ex post facto ruling is an ill-suited remedy. Indeed, most of Judge Reinhardt's opinion reflected general criticisms of the fact that SORNA applies to juveniles *at all*, which his ruling does little to address: a juvenile convicted in 2006 would be required to register, while one convicted in 2005 would not. Rather, these policy issues suggest the need for a total legislative overhaul of SORNA.

As their lower rates of recidivism reveal, juvenile offenders are uniquely amenable to rehabilitative treatment,[62] which public notification severely undermines, threatening vital social and educational supports for offenders.[63] Furthermore, one study now shows that SORNA's conviction-based criteria fail to capture those juveniles most at risk for re-offending and instead impede rehabilitation for many

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58 Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

59 *See, e.g.*, *Smith*, 538 U.S. at 103–04; Block v. Rutherford, 468 U.S. 576, 587–88 (1984) (holding blanket prohibition on contact visits for pretrial detainees to be not excessive because of, inter alia, the administrative difficulties of identifying high- and low-risk detainees); Schall v. Martin, 467 U.S. 253, 271–74 (1984) (holding pretrial detention of juveniles to be nonpunitive, in spite of statistics showing that the majority of juveniles so detained eventually had their cases dismissed or were given noncustodial sentences).

60 *Juvenile Male*, 581 F.3d at 982 (quoting *Smith*, 538 U.S. at 92).

61 *Smith*, 538 U.S. at 110 (Souter, J., concurring in the judgment).

62 *See* HUMAN RIGHTS WATCH, *supra* note 47, at 69 (noting that many factors behind juvenile sex offenses are "ones that are quite amenable to treatment, for example, conduct disorders, depression, and learning disabilities"); Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability To Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POL'Y & L. 89, 104 (2008) (concluding that "among adolescents, sexual reoffense risk is dynamic and susceptible to mitigation through treatment").

63 *See* Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, DEV. MENTAL HEALTH L., July 2008, at 33, 48–49.

who would respond most favorably to it.[64] These counterproductive effects on juveniles are only one example of the ineffectiveness of expansive public registries at promoting public safety.[65] Additionally, the monetary costs of implementing SORNA are exorbitant.[66]

SORNA's failures may show that sex offender registration is better left to state legislatures, which can advance more sensible policies while still responding to the public's desire for regulation. Prior to SORNA, many states had more narrowly tailored registration requirements, including individualized risk assessment and review procedures.[67] Indeed, most states have thus far failed to comply with SORNA, with many raising objections to its inflexible juvenile criteria.[68] At any level of government, a sincere interest in public safety requires a reassessment of the efficacy of public registries, the criteria for their imposition, and the treatment resources available to juveniles.

While the Ninth Circuit was motivated by worthy policy concerns in its *Juvenile Male* decision, it failed to adhere to the limited scope of the ex post facto inquiry. This limited scope perhaps recognizes that legislatures must bear the responsibility for weighing the larger costs and benefits of laws aimed at public safety and for effectuating more comprehensive reforms where, as here, an approach proves counterproductive. In the case of juvenile sex offenders, legislatures must not shrink from this task.

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[64] Caldwell et al., *supra* note 62, at 106.

[65] *See, e.g.*, J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 24–25 (Univ. of Mich. Law Sch., John M. Olin Ctr. for Law & Econ., Working Paper No. 08-006, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100663 (concluding from empirical study that sex offender notification does not affect recidivism and may in fact increase it, and recommending only small public registries to achieve deterrent effects on first-time offenders).

[66] In California, for example, SORNA was estimated to cost over $59 million in 2009, while the loss of 10% of federal crime control funds for failure to comply with SORNA would have been only $2 million. *See* JUSTICE POLICY INST., WHAT WILL IT COST STATES TO COMPLY WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT?, http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf (last visited Feb. 27, 2010).

[67] *See* Caldwell et al., *supra* note 62, at 105–06 (summarizing state approaches). For a description of New York's intricate risk-based classification and notification system, see Doe v. Pataki, 120 F.3d 1263, 1266–70 (2d Cir. 1997).

[68] NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, SEARCH SURVEY ON STATE COMPLIANCE WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) 2–9 (2009), *available at* http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf; *see also* Office of the Att'y Gen., Order No. 3081-2009 (May 26, 2009), *available at* http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf (extending SORNA compliance deadline for states to 2010).