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CHALLENGING OHIO'S ADAM WALSH ACT: SENATE BILL 10 BLURS THE LINE BETWEEN PUNISHMENT AND REMEDIAL TREATMENT OF SEX OFFENDERS

*Daniel J. Schubert**

I. INTRODUCTION

Since the early 1990s, sex offender registration laws at both the federal and state levels have continuously been passed with impunity and little opposition. Also, since the early 1990s, the sex offender registration laws have continuously increased the scope, scale, and registration requirements.

The 127th Ohio General Assembly passed Senate Bill 10 (“S.B. 10”) on June 27, 2007, and the Governor of Ohio subsequently signed the bill into law on June 30, 2007.¹ S.B. 10 was enacted to amend, among other chapters, chapter 2950 of the Ohio Revised Code in order to bring Ohio sex offender registration laws into compliance with the Adam Walsh Child and Safety Protection Act (“Adam Walsh Act”).² The Adam Walsh Act is a piece of federal legislation that increased the severity of sex offender registration and classification, requiring more strict and stringent supervision of people convicted or adjudicated of sex offenses.³ The Adam Walsh Act requires that states comply with its provisions within three years of its enactment; if the state fails to comply within three years, then the state will lose ten percent of the funding allocated for that year and for each subsequent year the state fails to comply.⁴

Congress also added a financial incentive to encourage the states’ prompt compliance.⁵ If a state complies with the Adam Walsh Act within two years of its enactment, it can receive a bonus of ten percent in federal funding. This has caused some states, such as Ohio, to rush legislation through before the deadline. Given such haste, it is unclear whether the Ohio General Assembly adequately considered the constitutional

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¹ S.B. 10, 127th Gen. Assem., Reg. Sess. (Ohio 2008), available at http://www.legislature.state.oh.us/BillText127/127_SB_10_EN_N.pdf.

² *Id.*

³ See generally Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended at 42 U.S.C. §§ 16901–16991 (2006)).

⁴ Adam Walsh Act §§ 124-25.

⁵ *Id.* § 126.

implications of passing a law that retroactively increases punishment⁶ for sex offenders. Also, it is doubtful the Ohio General Assembly considered whether such punishment would have any effect on protecting the public from sex offenders. Further, it is questionable whether the cost to implement the Adam Walsh Act in Ohio will be offset by the funds received through its application.⁷

The Adam Walsh Act is aimed at protecting children, preventing child abuse, and honoring the memory of Adam Walsh and other child victims.⁸ However, there is little evidence that the sex offender classification and registration requirements have any significant effect on lowering the number of sex offenses committed on children.⁹ Arguably, these continuously increasing registration requirements are shifting from the intended remedial purpose of protecting society to a purely punitive measure of punishing and embarrassing sex offenders in violation of their constitutional rights.

This Comment examines the constitutionality of the current Ohio sex offender registration laws, as amended by S.B. 10, under the United States and Ohio Constitutions. Specifically, this Comment is focused on the whether the new registration laws constitute violations of the Ex Post Facto Clause of the United States Constitution or the retroactivity clause of the Ohio Constitution.

In order to properly analyze the above listed issues, it is important to understand how sex offender legislation has developed both at the federal level and within Ohio. Thus, Section II of this comment explains past legislation regarding sex offender supervision and further explains the developments in the sex offender registration and classification requirements. Section III examines the constitutional implications of the enactment of S.B. 10, which retroactively applies additional burdens on sex offenders for past conduct for which they have already been convicted and punished. This brings up constitutional issues such as laws against Ex Post Facto and laws of retroactivity.

⁶ The Adam Walsh Act is the latest sex offender registration law to retroactively increase registration requirements imposed on sex offenders at sentencing. While arguably the registration requirements can be seen as “punishment,” presently the United States Supreme Court and the Ohio Supreme Court have declined to reach that conclusion. *See* *Smith v. Doe*, 538 U.S. 84, 105-06 (2003); *State v. Cook*, 700 N.E.2d 570, 581 (Ohio 1998); *see also* *Kansas v. Hendricks*, 521 U.S. 346, 368-69 (1997). Accordingly, given the history and development of Ohio’s sex offender registration laws over the last decade, it seems the Ohio General Assembly is determined to continually increase the registration requirements (or punishment) imposed on sex offenders by merely referring to this dramatic increase as remedial in nature, thereby avoiding any violation of the United States or Ohio Constitutions.

⁷ Margo Pierce, *Next Comes Burning at the Stake: Is Ohio Getting Too Tough on Sex Offenders?*, CITYBEAT, Aug. 15, 2007, <http://www.citybeat.com/cincinnati/article-3033-cover-story-next-comes-burning-at-the-stake.html>.

⁸ Adam Walsh Act § 102.

⁹ Pierce, *supra* note 7.

II. HISTORY AND DEVELOPMENT OF FEDERAL AND STATE SEX OFFENDER REGISTRATION LAWS

A. *Initial Development of Sex Offender Registration Laws*

In 1944, California passed the first sex offender registration statute of any kind, which required a compilation of the names of felony offenders for the purpose of information sharing among law enforcement agencies.¹⁰ By 1986, five states had taken offender registration laws one step further by focusing their requirements on sex offenders.¹¹ These early sex offender registration statutes limited the dissemination of registration information only to law enforcement agencies.¹² However, “several high-profile child-rape and murder cases in the early 1990s” set in motion a new wave of sex offender registration statutes, and by 1994, thirty-nine states had passed sex offender registration laws.¹³

In the late 1980s and early 1990s, the state of Washington suffered several heinous and disturbing events involving the rape and murder of children. In 1989, Westley Dodd abducted, raped, and murdered two young brothers.¹⁴ While still at large, Dodd molested and murdered another young boy only a month later.¹⁵ After his capture, Dodd claimed that “if released he would rape and kill again and enjoy it”¹⁶ Later in 1990, Earl Shriner, a repeat sex offender, raped a boy and left him for dead after he stabbed the boy and cut off his penis.¹⁷

These gruesome events dominated the Washington media in the early 1990s, leading to a frightened and outraged public.¹⁸ Subsequently, Washington passed the first sex offender registration statute, which allowed the release of sex offender information to the public “when ‘relevant . . . [and] necessary . . . to protect the public.’”¹⁹ Washington allowed community notification through means such as posting bulletin board notices or putting flyers in mailboxes.²⁰

Also in 1989, an eleven-year-old boy, named Jacob Wetterling, was abducted in Minnesota.²¹ Authorities believed his abduction was related to a

¹⁰ Steven J. Costigliacci, Note, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 182 (2008).

¹¹ Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 164 (2003).

¹² *Id.*

¹³ *Id.* at 164-65.

¹⁴ *Id.* at 165.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Garfinkle, *supra* note 11, at 165.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Costigliacci, *supra* note 10, at 182.

particular group of sex offenders who were recently released and living in the area.²² However, at the time, law enforcement officials did not have any information on the identity or locality of sex offenders.²³ Accordingly, Minnesota passed legislation requiring sex offenders to register on a central list available to all law enforcement agencies.²⁴ The impact of these high profile sex offenses committed against children coupled with the increased number of states passing sex offender registration laws led to the first federal act requiring states to create sex offender registries.

B. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act

The tragedy of Jacob Wetterling's abduction inspired the creation of the first federal statute requiring all fifty states to create sex offender registries or face a reduction in federal funding.²⁵ The Act was named after Jacob and came to be known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Jacob Wetterling Act").²⁶ Passed by Congress in 1994, the Jacob Wetterling Act mandated that all states enact laws requiring offenders convicted of offenses "against a minor or a sexually violent offense to register a current address with state or local authorities."²⁷ Further, the Jacob Wetterling Act allowed the Office of the Attorney General to issue guidelines stating that any state that failed to comply with the Act within the required time period would lose ten percent in federal funding.²⁸ Under the Jacob Wetterling Act, the length of registration was determined by the "previous number of convictions, the nature of the offense, and the characterization of the offender as a sexual predator."²⁹ Further, local law enforcement agencies were not required to notify the community, but rather, law enforcement agencies were given the discretion to notify or to not notify communities of sex offenders recently released and living in the area.³⁰

C. Megan's Law

In 1994, another high profile crime involving the rape and murder of a child influenced legislatures to increase the provisions of sex offender registration laws. On July 29, 1994, a seven-year-old girl, named Megan

²² *Id.*

²³ *Id.* at 182-83.

²⁴ *Id.*

²⁵ *Id.* at 183.

²⁶ *Id.* at 182-83.

²⁷ Alicia A. Sterrett, Note, *The Case for Kentucky Sex Offenders: Residency Restrictions and Their Constitutional Validity*, 96 KY. L.J. 119, 120 (2007-08).

²⁸ *Id.* at 120-21.

²⁹ *Id.* at 120.

³⁰ Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 30 (2008).

Kanka, was enticed into the home of a neighbor who promised Megan that there was a puppy inside for her to play with.³¹ The neighbor, Jesse Timmendequas, was a twice convicted sex offender against children, and he raped and murdered Megan just thirty yards from her own home.³² Megan's mother and thousands of supporters begged the New Jersey legislature to help communities identify and locate the sex offenders residing amongst them.³³ Megan's mother claimed "her daughter would still be alive if she had known about her neighbor's history of sexual offenses"³⁴ Therefore, the New Jersey legislature passed "the first piece of legislation bearing the name 'Megan's Law.'"³⁵

This tragedy, as well as others, alerted Congress that some law enforcement agencies were not exercising their discretion to notify communities of sex offenders living in the area, leading to inconsistent community notification standards. In response, Congress amended the Jacob Wetterling Act in 1996, which abolished law enforcement discretion and imposed an affirmative duty on law enforcement agencies to release sex offender registration information.³⁶ Further, Congress amended the Jacob Wetterling Act to allow registration information to be distributed for any purpose permitted by state law. The amended Jacob Wetterling Act was renamed Megan's Law, which was the federal version of Megan's Law enacted by New Jersey.³⁷ Under the newly enacted federal Megan's Law, all fifty states were obligated to operate under a common standard of community notification.³⁸ Later in 1996, Congress passed the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, which created a federal database for sex offender registration information, further adding to the nationwide conformity of sex offender legislation.³⁹

D. The Adam Walsh Act

The Adam Walsh Act is the latest development in federal sex offender registration laws, and it has raised the bar on sex offender registration laws throughout the country. On July 27, 2006, the Adam Walsh Act was signed into law and has greatly increased "the scope, scale, and requirements of sex offender registration programs."⁴⁰ The Adam Walsh Act is the culmination of ever-increasing registration requirements influenced by several highly publicized crimes against children, as shown in

³¹ Garfinkle, *supra* note 11, at 165; Sterrett, *supra* note 27, at 121.

³² Garfinkle, *supra* note 11, at 166; Sterrett, *supra* note 27, at 121.

³³ Garfinkle, *supra* note 11, at 166.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Sterrett, *supra* note 27, at 121.

³⁷ Garfinkle, *supra* note 11, at 166-67.

³⁸ *Id.* at 167.

³⁹ *Id.*

⁴⁰ Wright, *supra* note 30, at 31.

section 102 of the Act.⁴¹

Nearly a decade after Megan's Law required law enforcement agencies to notify communities of sex offender registration, the Adam Walsh Act requires those law enforcement agencies to "make sex offenders' information accessible to anyone with the click of a button."⁴² Section 118 of the Adam Walsh Act states:

Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user. The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.⁴³

The Adam Walsh Act requires the U.S. Attorney General to "maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry," and to ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.⁴⁴ The Attorney General must also maintain a website that

include[s] relevant information for each sex offender and other person listed on a jurisdiction's Internet site. The Website shall allow the public to obtain relevant

⁴¹ Adam Walsh Act § 102.

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders: (1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing. (2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey. (3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas. (4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa. (5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.

Id.

⁴² Wright, *supra* note 30, at 30.

⁴³ Adam Walsh Act § 118.

⁴⁴ *Id.* § 119.

information for each sex offender by a single query for any given zip code or geographical radius set by the user in a form and with such limitations as may be established by the Attorney General and shall have such other field search capabilities as the Attorney General may provide.⁴⁵

Further, the Adam Walsh Act groups sex offenders into three categories or tiers based solely on the sex offense committed.⁴⁶ The Adam Walsh Act defines a “sex offender” as “an individual who was convicted of a sex offense.”⁴⁷ A Tier I sex offender is a sex offender other than a Tier II or Tier III sex offender.⁴⁸ A Tier II sex offender is a sex offender that has committed an offense that is punishable by more than one year in prison and fits within a list of offenses (which are less severe than Tier III offenses) or committed an offense after becoming a Tier I offender.⁴⁹ A Tier III sex offender is a sex offender that has committed an offense that is punishable by more than one year in prison and is a serious offense, such as aggravated sexual abuse, or committed a sex offense while becoming a Tier II sex offender.⁵⁰ Under the Adam Walsh Act, the registration requirements of the three tiers of sex offenders are as follows:

- (1) Tier I offenders are required to register in person once a year for fifteen years;⁵¹
- (2) Tier II offenders are required to register in person every six months for twenty-five years;⁵²
- (3) Tier III offenders are required to register in person every three months for life.⁵³

The Adam Walsh Act not only increases “the scope, scale, and requirements of sex offender registration programs,” but it also allows for retroactive application. Before releasing or after sentencing a sex offender, the Adam Walsh Act requires that an appropriate official inform the sex offender of his duty to register, explain those duties, have the sex offender

⁴⁵ *Id.* § 120(b).

⁴⁶ *Id.* § 111.

⁴⁷ *Id.* § 111(1).

⁴⁸ Adam Walsh Act § 111(2); 42 U.S.C. § 16911(2).

⁴⁹ *Id.* § 111(3)(A)-(B) (offenses include: “(i) sex trafficking (as described in section 1591 of title 18, United States Code); (ii) coercion and enticement (as described in section 2422(b) of title 18, United States Code); (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a) of title 18, United States Code; (iv) abusive sexual contact (as described in section 2244 of title 18, United States Code); (B) involves—(i) use of a minor in a sexual performance; (ii) solicitation of a minor to practice prostitution; or (iii) production or distribution of child pornography . . .”).

⁵⁰ *Id.* § 111(4)(A)(i)–(ii) (offenses include: “(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code); or (ii) abusive sexual contact (as described in section 2244 of title 18, United States Code) against a minor who has not attained the age of 13 years . . .”).

⁵¹ *Id.* §§ 115-16.

⁵² *Id.*

⁵³ *Id.*

acknowledge that those duties have been explained to him by signing a form, and ensure that the sex offender is registered.⁵⁴ However, the Adam Walsh Act further states “[t]he Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a).”⁵⁵ This means that every sex offender who was previously convicted of a sex offense and who is in custody, will have to comply with section 117(a) of the Adam Walsh Act before release. Furthermore, every sex offender who was previously convicted of a sex offense and who is no longer in custody will be subject to the rule prescribed by the Attorney General.

In compliance with section 117(a) of the Adam Walsh Act, the Attorney General issued a rule on February 28, 2007, which states “[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.”⁵⁶ This rule requires retroactive application of the Adam Walsh Act to all sex offenders already convicted and classified under Megan’s Law. This increases the registration requirements⁵⁷ and raises issues as to the constitutionality of the Adam Walsh Act.

E. Ohio Sex Offender Registration Laws Under House Bill 180

Ohio has mandated sex offender registration since 1963.⁵⁸ In 1996, the Ohio General Assembly rewrote chapter 2950 of the Ohio Revised Code (“R.C.”) to comply with Megan’s Law.⁵⁹ Ohio’s version of Megan’s Law came in the form of House Bill 180 (“H.B. 180”), and was enacted into law in July 1996 before going into effect on January 1, 1997.⁶⁰

Under R.C. chapter 2950, as amended by H.B. 180, sex offenders were classified into one of three categories: (1) sexually oriented offenders; (2) habitual sexual offenders; or (3) sexual predators.⁶¹ All offenders were required to register with the county sheriff and to provide the county sheriff, at the minimum, a current home address, a current business address, and a current photograph.⁶² The frequency of the required registration was determined by the sex offender’s classification:

⁵⁴ Adam Walsh Act § 117(a).

⁵⁵ *Id.* § 117(b).

⁵⁶ 28 C.F.R. § 72.3 (2007); *see also* United States v. Waybright, 561 F. Supp. 2d 1154, 1159-60 (D. Mont. 2008).

⁵⁷ Failure of a sex offender to comply with the new registration requirements is a federal offense, which can result in a fine or imprisonment of not more than ten years, or both. 18 U.S.C. § 2250 (2006).

⁵⁸ Cook, 700 N.E.2d at 574.

⁵⁹ H.B. 180, 121st Gen. Assem., Reg. Sess. (Ohio 1996); *see* OHIO REV. CODE ANN. ch. 2950 (West 2006 & Supp. 2009); *see also* Cook, 700 N.E.2d at 574.

⁶⁰ Cook, 700 N.E.2d at 574.

⁶¹ *See generally* OHIO REV. CODE ANN. ch. 2950.01 (2006).

⁶² *Id.* § 2950.04(A), (C).

- (1) Sexually oriented offenders were required to register once a year for ten years;
- (2) Habitual sexual offenders were required to register once a year for twenty years;
- (3) Sexual predators were required to register every ninety days for life.⁶³

In determining whether an offender was a sexual predator, courts were to consider the following factors: (1) the offender's age; (2) any prior criminal record; (3) the age of the victim; (4) the number of victims; (5) whether drugs or alcohol were used to impair the victim; (6) whether any prior convictions or pleas led to any available programs for sex offenders; (7) mental illness or mental disability; (8) the nature of the conduct with the victim and evidence of a pattern of abuse; (9) whether the offender acted with cruelty or threatened cruelty; (10) any additional behavior that contributed to the conduct.⁶⁴ Also, sexual predators could request a hearing in which the court would review the threat the offender posed to the community.⁶⁵ If the court found that the offender was no longer a threat, the court could revoke the sexual predator classification.⁶⁶

Under R.C. chapter 2950, as amended by H.B. 180, the community notification provisions applied equally to all sexual offenders.⁶⁷ The sheriff of each jurisdiction was required to notify all community members of a sex offender's registration, including: (1) adjacent neighbors; (2) local law enforcement agencies; and (3) officials responsible for the safety of children and other potential victims.⁶⁸

F. Ohio Sex Offender Registration Laws Under Senate Bill 5

The Ohio General Assembly again amended R.C. chapter 2950 through Senate Bill 5 ("S.B. 5"), which was enacted in 2003.⁶⁹ Under S.B. 5, the ability of a sexual predator to receive a hearing to determine his current threat to the community was abolished.⁷⁰ Also, sexually oriented offenders were barred from residing within one thousand feet of a school, and landlords and municipalities were granted the right to seek injunctive relief against offenders residing within one thousand feet of a school.⁷¹ Finally, S.B. 5 expanded the amount of personal information included on the

⁶³ *Id.* §§ 2950.07(B)(1), 2950.06(B)(1), 2950.04(C)(2).

⁶⁴ *Id.* § 2950.09(B)(3)(a)-(j).

⁶⁵ *Id.* § 2950.07(B)(1).

⁶⁶ *Id.*

⁶⁷ OHIO REV. CODE ANN. § 2950.11(A).

⁶⁸ *Id.*

⁶⁹ S.B. 5, 125th Gen. Assem., Reg. Sess. (Ohio 2003), available at <http://www.lsc.state.oh.us/analyses125/s0005-ps-125.pdf>.

⁷⁰ *Id.*

⁷¹ *Id.*

sex offender database, and required sex offenders to register in the county of their employment, their school, and their residence.⁷²

G. Ohio Sex Offender Registration Laws Under Senate Bill 10

The Ohio General Assembly brought Ohio sex offender registration laws into compliance with the Adam Walsh Act with the passing of Senate Bill 10 (“S.B. 10”).⁷³ S.B. 10 amended R.C. chapter 2950 in five ways: (1) re-classified sex offenders into tiers based on offense; (2) increased frequency and prolonged duration of registration requirements; (3) heightened notification requirements; (4) expanded residency restrictions; and (5) increased penalties for non-compliance.⁷⁴

S.B. 10, like the Adam Walsh Act, classifies sex offenders using a three-tier system. Tier I sex offenders are persons who pleaded guilty to, are convicted of, or conspired to commit any of the following crimes:

- (1) Sexual imposition;
- (2) Importuning;
- (3) Voyeurism;
- (4) Pandering obscenity;
- (5) Unlawful sexual conduct with a minor, when the offender is less than four years older than the other person, where the person did not consent and the offender has not been convicted of or plead guilty to a violation of R.C. sections 2907.02, 2907.03;
- (6) Gross sexual imposition;
- (7) Illegal use of a minor in nudity oriented material or performance; and
- (8) Menacing by stalking with sexual motivation, or enticement with sexual motivation.⁷⁵

Tier II offenders are persons who pleaded guilty to, are convicted of, or conspired to commit any of the following crimes:

- (1) Compelling prostitution, pandering obscenity involving a minor, or pandering sexually oriented material involving a

⁷² *Id.*

⁷³ See generally S.B. 10, 127th Gen. Assem., Reg. Sess. (Ohio 2008). Prior to the enactment of S.B. 10, Ohio sex offender registration laws were modeled after Megan’s Law. *Id.* The Ohio General Assembly quickly passed S.B. 10 to model Ohio sex offender registration laws after the Adam Walsh Act, and thereby avoided the penalty of a ten percent reduction in federal law enforcement funding as set forth in the Adam Walsh Act. Adam Walsh Act § 125.

⁷⁴ See S.B. 10, 127th Gen. Assem., Reg. Sess. (Ohio 2008).

⁷⁵ See OHIO REV. CODE ANN § 2950.01(E) (Supp. 2009).

minor;

(2) Unlawful sexual conduct with a minor, where the offender is at least four years older than the victim but has not been previously convicted of or plead guilty to a violation of R.C. sections 2907.02, 2907.03, 2907.04;

(3) Gross sexual imposition where the victim is under the age of thirteen, or illegal use of a minor in nudity oriented material or performance;

(4) Kidnapping with sexual motivation;

(5) Kidnapping when the victim is eighteen or older; and

(6) Abduction with sexual motivation.⁷⁶

Tier III offenders are persons who pleaded guilty to, are convicted of, or conspired to commit any of the following crimes:

(1) Rape or sexual battery;

(2) Gross sexual imposition;

(3) Aggravated murder pursuant to R.C. section 2903.01, murder pursuant to R.C. section 2903.02, or felonious assault pursuant to R.C. section 2903.11, when committed with a sexual motivation;

(4) Unlawful death or termination of pregnancy as a result of committing or attempting to commit a felony pursuant to R.C. section 2903.04(A), when the offender committed or attempted to commit the felony that is the basis of the violation with a sexual motivation;

(5) Kidnapping pursuant to R.C. section 2905.01(A)(4), when the victim is under the age of eighteen; and

(6) Kidnapping of a minor pursuant to R.C. section 2905.01(B), where the victim is under the age of eighteen and the offender is not the parent of the victim.⁷⁷

Under S.B. 10, the duration and frequency of the registration of sex offenders is determined by the tier and is as follows: (1) Tier I sex offenders must register every year for fifteen years; (2) Tier II offenders must register every 180 days for twenty-five years; (3) Tier III offenders must register every ninety days for life.⁷⁸ Further, regardless of classification, the sheriff with whom the offender registers is required to notify all those living within

⁷⁶ See *id.* § 2950.01(F).

⁷⁷ See *id.* § 2950.01(G).

⁷⁸ *Id.* §§ 2950.06(B), 2950.07(B).

one thousand feet of the offender's residence.⁷⁹ That notification includes the offender's: (1) name; (2) address; (3) offense and conviction; (4) classification; and (5) photograph.⁸⁰ This notification is also provided to schools, day care facilities, law enforcement agencies, and other groups who have contact with minors within a specified geographic region.⁸¹

Residency restrictions, regardless of classification, include provisions prohibiting sex offenders from residing within one thousand feet of a school or day care facility.⁸² In addition, landlords are permitted to terminate rental agreements and seek injunctive relief in an effort to oust the offender from the residence.⁸³ Failure to comply with the registration requirements is a felony under S.B. 10. Further, the Ohio Attorney General has the discretion to retroactively apply the heightened registration requirements of S.B. 10 to persons convicted of sex offenses prior to the enactment of S.B. 10.⁸⁴

III. ANALYSIS

One of the most significant differences between R.C. chapter 2950, as amended by H.B. 180, and R.C. chapter 2950, as amended by S.B. 10, is that the H.B. 180 amendments allowed judges to use discretion when determining a sex offender's classification.⁸⁵ Therefore, under the H.B. 180 amendments, judges were able to determine the sex offender's risk of recidivism, and then apply the appropriate sex offender registration requirements necessary to protect the community from the sex offender. The enactment of S.B. 10 erased this discretion and now requires all current sex offenders to be classified or re-classified under one of the three tiers, which are based solely on the offense committed.

The problem that arises is that many sex offenders who were at one time deemed by judges to be low risk offenders are now required to be re-classified as Tier III offenders. In many cases, this dramatically increases the frequency of registration requirements from once a year for ten years to every ninety days for life. While this negatively affects all sex offenders, it especially affects juvenile offenders because they were not previously given such strict registration requirements under the adjudicating judge's discretion.⁸⁶ Generally, the sentencing of juveniles is aimed at rehabilitation

⁷⁹ *Id.* § 2950.11(A).

⁸⁰ *See id.* § 2950.11(B)(1)-(5).

⁸¹ OHIO REV. CODE ANN. § 2950.11(A) (Supp. 2009).

⁸² *Id.* § 2950.034(A).

⁸³ *See id.* § 2950.034(B); *State v. Omiecinski*, No. 90510, 2009 WL 626114, at *14 (Ohio Ct. App. March 12, 2009).

⁸⁴ OHIO REV. CODE ANN. § 2950.031(A)(1) (Supp. 2009).

⁸⁵ OHIO REV. CODE ANN. § 2950.021 (2006).

⁸⁶ *See* Jennifer M. O'Connor & Lucinda K. Treat, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1310 (1996) ("Although juvenile courts are at least as 'tough' on juveniles as criminal courts are on adults in the areas of formal

rather than punishment.⁸⁷ Undoubtedly, the dramatic increase in the frequency of the sex offender registration requirements has and will continue to create a wave of litigation challenging the constitutionality of such a law.

While the constitutionality of S.B. 10 can be challenged in a number of different ways, this comment seeks to focus on two similar but distinct constitutional challenges. First, this comment analyzes whether S.B. 10 is constitutional under the Ex Post Facto Clause of the United States Constitution. Second, this comment analyzes whether S.B. 10 is constitutional under the retroactivity clause of the Ohio Constitution. Also, this comment uses the Ohio Supreme Court's analysis in *State v. Cook* as a basis for analyzing the above listed constitutional challenges.⁸⁸ In *Cook*, the constitutionality of R.C. chapter 2950, as amended by H.B. 180, was challenged under both the Ex Post Facto Clause of the United States Constitution and the retroactivity clause of the Ohio Constitution.⁸⁹ The Ohio Supreme Court upheld H.B. 180 as constitutional under both challenges.⁹⁰ When challenges to S.B. 10 reach the Ohio Supreme Court, *Cook* will likely act as the guiding precedent in determining the constitutionality of S.B. 10 under the Ex Post Facto and the retroactivity clauses.

A. *The Ex Post Facto Clause of the United States Constitution*

The Ex Post Facto Clause of the United States Constitution states “[n]o State shall . . . pass any . . . ex post facto Law.”⁹¹ According to Black’s Law Dictionary, ex post facto is defined as “[d]one or made after the fact.”⁹² The Ex Post Facto Clause serves the important purpose of ensuring that legislative acts “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”⁹³ Further, the Ex Post Facto Clause prevents the legislature from abusing its authority by

processing and convictions, they are less ‘tough’ in sentencing. In state criminal court, 52% of those arrested for murder, 47% of those arrested for rape, and 10% of those arrested for aggravated assault are ultimately incarcerated for these crimes. For those sentenced in juvenile court, however, only 33% of juveniles arrested for murder, 18% of juveniles arrested for rape, and 14% of juveniles arrested for aggravated assault are ultimately placed in secure confinement.”)

⁸⁷ Kristin L. Caballero, Note, *Blended Sentencing: A Good Idea for Juvenile Sex Offenders*, 19 ST. JOHN’S J. LEGAL COMMENT. 379, 384-85 (2005) (“The creation of juvenile courts was part of the Progressive Era reform. The emerging view was that juvenile criminals were different from adult criminals and should thus be treated differently. The juvenile court system was created to be a venue specially designed to deal with children’s special needs and to provide treatment and rehabilitation to juveniles. The underlying premise was the belief that children are malleable and are capable of being reformed. Under the concept of ‘*parens patriae*,’ the state was deemed to play the role of the parent. As a ‘parent,’ the state assumed the power and authority to help rehabilitate the child offender.”).

⁸⁸ *Cook*, 700 N.E.2d at 570.

⁸⁹ *Id.* at 573.

⁹⁰ *Id.* at 588.

⁹¹ U.S. CONST. art. I, § 10, cl. 1.

⁹² BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

⁹³ *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

“enacting arbitrary or vindictive legislation” aimed at disfavored groups.⁹⁴

The Ex Post Facto Clause only applies to criminal statutes; however, the United States Supreme Court has declined to set out a specific test for determining whether a statute is criminal or civil for the purposes of applying the Ex Post Facto Clause.⁹⁵ In the past, the Supreme Court has used the “intent-effects” test to delineate between civil and criminal statutes for the purposes of Ex Post Facto analysis.⁹⁶ The Ohio Supreme Court also used the “intent-effects” test in *State v. Cook* when it considered the constitutionality of H.B. 180 under the Ex Post Facto Clause.⁹⁷

In applying the intent-effects test, [the] court must first determine whether the General Assembly, “in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label of the other” and second, where the General Assembly “has indicated an intention to establish a civil penalty, . . . whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.”⁹⁸

This basically means that if a statute is intended to be criminal and is applied retroactively, then it violates the Ex Post Facto Clause; but if the statute is intended to be civil and is applied retroactively, then it will only violate the Ex Post Facto Clause if the civil statute is so punitive in effect that it negates the legislative intent.

1. The Ohio General Assembly’s Intent

The first step in determining the intent of the legislature is to look at the language and purpose of the statute.⁹⁹ In *Cook*, the Ohio Supreme Court looked at the language of R.C. section 2950.02 and found the intent of the General Assembly in passing H.B. 180 to be civil in nature.¹⁰⁰ R.C. section 2950.02(A) states:

The general assembly hereby determines and declares that it recognizes and finds all of the following:

(1) If the public is provided adequate notice and information about offenders and delinquent children who commit sexually oriented offenses or who commit child-victim oriented offenses, members of the public and communities

⁹⁴ *Miller v. Florida*, 482 U.S. 423, 429 (1987).

⁹⁵ *California Dep’t of Corr. v. Morales*, 514 U.S. 499, 504, 508-09 (1995).

⁹⁶ *See Hendricks*, 521 U.S. at 353-69.

⁹⁷ *Cook*, 700 N.E.2d at 580.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 581.

can develop constructive plans to prepare themselves and their children for the offender's or delinquent child's release from imprisonment, a prison term, or other confinement or detention. This allows members of the public and communities to meet with members of law enforcement agencies to prepare and obtain information about the rights and responsibilities of the public and the communities and to provide education and counseling to their children.

(2) Sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest. . . .

(6) The release of information about sex offenders and child-victim offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal, juvenile, and mental health systems as long as the information released is rationally related to the furtherance of those goals.¹⁰¹

R.C. section 2950.02(B) further states:

it is the policy of this state to require the exchange in accordance with this chapter of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release in accordance with this chapter of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection and that the exchange or release of that information *is not punitive*.¹⁰²

This language existed as a part of R.C. chapter 2950 after it was amended by H.B. 180 and was not substantially changed by the S.B. 10 amendments.¹⁰³

In *Cook*, the Ohio Supreme Court found that this language showed the General Assembly's intent to create a civil statute.¹⁰⁴ "This language reveals that the General Assembly's purpose behind R.C. chapter 2950 was to promote public safety and to bolster the public's confidence in Ohio's

¹⁰¹ OHIO REV. CODE ANN. § 2950.02(A)(1)-(2), (6) (Supp. 2009).

¹⁰² OHIO REV. CODE ANN. § 2950.02(B) (2006) (emphasis added).

¹⁰³ Compare OHIO REV. CODE ANN. § 2950.02 (2006) with OHIO REV. CODE ANN. § 2950.02 (Supp. 2009).

¹⁰⁴ *Cook*, 700 N.E.2d at 581.

criminal and mental health systems. The statute is absolutely devoid of any language indicating the intent to punish.”¹⁰⁵ Because the language of R.C. section 2950.02, as amended by S.B. 10, is substantially similar to the language the Ohio Supreme Court reviewed in *Cook*, the intent of S.B. 10 will most likely be found to be civil and non-punitive in nature. It will be difficult for challengers to argue that this language shows the intent to create a criminal statute; thereby the success of such a challenge must rest solely on proving that the effect of S.B. 10 is so punitive it negates legislative intent.

However, sex offenders can argue that the General Assembly showed the intent to create a criminal statute when they placed the sex offender registration requirements squarely within Title 29 of the Ohio Revised Code, which deals exclusively with crime and procedure. The strong language of R.C. section 2950.02 would likely cause the Ohio Supreme Court to further analyze the effects of S.B. 10.

2. Effects of S.B. 10

Whether a retroactive statute is so punitive as to violate the Ex Post Facto Clause is a “matter of degree.”¹⁰⁶ While there is no absolute test for determining whether a statute is punitive, the Supreme Court has created several guideposts. The guideposts include: (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether its operation will promote the traditional aims of punishment-retribution and deterrence”; (4) whether the statute has a connection to a non-punitive purpose; and (5) “whether it appears excessive in relation to [that] alternative purpose”¹⁰⁷

a. First Guidepost: Disability or Restraint

In *Cook*, the Ohio Supreme Court found that R.C. chapter 2950, as amended by H.B. 180, did not involve an affirmative disability or restraint because the dissemination of the information was not a burden placed on the sex offender and the registration requirements were *de minimis* administrative requirements.¹⁰⁸ The Ohio Supreme Court compared the sex offender registry inconvenience to that of the inconvenience of renewing a driver’s license.¹⁰⁹ However, under the amendments of S.B. 10, sex offenders may have a stronger argument for a finding of disability or restraint.

¹⁰⁵ *Id.*

¹⁰⁶ *Morales*, 514 U.S. at 509.

¹⁰⁷ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

¹⁰⁸ *Cook*, 700 N.E.2d at 582.

¹⁰⁹ *Id.*

Under S.B. 10, every time a sex offender registers with the county sheriff he or she must provide the following information: (1) name; (2) social security number; (3) address of current residence or an address where the individual will reside; (4) name and address of any place the sex offender is employed or will be employed; (5) name and address of any school to which the individual is a student or will be a student; (6) license plate number and description of any vehicle owned or operated by the sex offender; (7) DNA sample; and (8) any other information required by the Ohio Attorney General.¹¹⁰ Further, in Ohio a driver's license is renewed once every several years, while newly re-classified Tier III sex offenders have to provide this information every ninety days for the rest of their lives. Further, if any of the above information is subject to change, the sex offender must provide the sheriff with a written notice twenty days before the change is to occur.¹¹¹ Additionally, the failure to renew a driver's license results in the loss of a privilege, while failure to comply with sex offender registration requirements results in criminal penalties.¹¹²

Also, as discussed above, R.C. chapter 2950 places residency restrictions on sex offenders by dictating where they can and cannot reside.¹¹³ This creates a restraint on liberty that should be considered to operate as a disability on all sex offenders. Retroactively extending the registration period for sex offenders classified under the amendments of H.B. 180 extends the disability imposed on sex offenders and strengthens the argument that the registration has a punitive effect.

b. Second Guidepost: Historically Regarded as Punishment

The Ohio Supreme Court also reasoned in *Cook* that the sex offender notification and registration requirements have long been recognized as a valid regulatory technique with a remedial purpose.¹¹⁴ The Ohio Supreme Court held that “[t]he purpose . . . to protect the public, must prevail over any ancillary, detrimental effect that the limited dissemination of the registered information may have on a sex offender.”¹¹⁵ The information available to the public, which the sex offender is to report at each registration, includes the information listed above (with the exception of their social security number), as well as all of the following information: (1) physical description of the offender; (2) text defining the offense for which the offender is registered; (3) criminal history; (4) current photograph of offender; (5) finger and palm prints; (6) photocopy of driver's license or identification card; and (7) other information required by the Attorney

¹¹⁰ OHIO REV. CODE ANN. § 2950.04(C) (Supp. 2009).

¹¹¹ *Id.* § 2950.05(A).

¹¹² *Id.* § 2950.99.

¹¹³ *Id.* § 2950.034.

¹¹⁴ *Cook*, 700 N.E.2d at 585.

¹¹⁵ *Id.* at 583.

General.¹¹⁶

It can be argued that the requirements of S.B. 10 go beyond mere official criminal records open to the public; instead, S.B. 10 sets up a system that effectively ostracizes sex offenders and subjects them to potential abuse. The following story is an example of such abuse towards sex offenders. In April of 2006, Stephen Marshall looked up sex offenders on Maine's sex offender website.¹¹⁷ After finding dozens of names, he drove to two sex offenders' homes and shot and killed both of them.¹¹⁸ One of Marshall's victims was required to register as a sex offender because he was convicted of statutory rape when, as a nineteen-year-old, he had sex with his fifteen-year-old girlfriend. The broad sex offender registration and notification requirements can lead to vigilantism, which is counter to public safety.

Further, our society's ridicule and abuse of sex offenders should be recognized as punishment. As stated by Justice Lanzinger, "I do not believe we can continue to label these proceedings as civil in nature . . . [they] should be recognized as part of the punishment . . ." ¹¹⁹ Retroactively extending the time a sex offender is subject to this type of ridicule and abuse should strengthen the argument that the scheme is punitive in effect.

c. Third Guidepost: Traditional Aims of Punishment

The Ohio Supreme Court has held that retribution is vengeance for its own sake, and that it does not seek to affect future conduct.¹²⁰ Deterrent measures are negative repercussions to discourage people from engaging in certain behavior, and remedial measures seek to solve a problem by removing the likely perpetrators of future corruption.¹²¹ In *Cook*, the Ohio Supreme Court held that R.C. chapter 2950, as amended by H.B. 180, did not seek vengeance for its own sake and did not act as a deterrent.¹²² The Ohio Supreme Court reasoned that because sex offenders are not deterred by the threat of incarceration the registration requirements would have little and likely no detrimental effect at all.¹²³ Also, deterrence alone is insufficient to find a punitive effect.¹²⁴

S.B. 10 is different from H.B. 180 in that S.B. 10 takes away all discretion from judges and classifies sex offenders solely on the offense

¹¹⁶ OHIO REV. CODE ANN. § 2950.081 (2006).

¹¹⁷ Wright, *supra* note 30, at 31.

¹¹⁸ *Id.*

¹¹⁹ State v. Wilson, 865 N.E.2d 1264, 1273 (Ohio 2007) (Lanzinger, J., concurring in part and dissenting in part).

¹²⁰ *Cook*, 700 N.E.2d at 583.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

committed. By connecting the registration requirements to a specific offense, potential offenders are put on notice of the consequences of any violation, thereby having at least the possibility of creating a deterrent effect. The “lack of any case-by-case determination demonstrates that the restriction is ‘vengeance for its own sake.’”¹²⁵ The amendments of S.B. 10 fail to consider the likelihood that the sex offender will re-offend and further imposes even more stringent registration requirements. Retroactively applying more stringent registration requirements to sex offenders deemed by judges to be unlikely to recidivate should be viewed as furthering the traditional aims of punishment or seen as vengeance for its own sake.

d. Fourth Guidepost: Connection to Non-Punitive Purpose

In *Cook*, the Ohio Supreme Court held that R.C. chapter 2950 serves the purpose of protecting the general public from released sex offenders and that the protection of the public is a paramount governmental police power.¹²⁶ The Ohio Supreme Court reasoned that released sex offenders have a high rate of recidivism, which demands that the government take action to protect against such offenses.¹²⁷ The sex offender registration requirements allow local law enforcement agencies to maintain the necessary information needed to monitor sex offenders, thereby lowering recidivism.¹²⁸

The S.B. 10 amendments are not as connected to a non-punitive purpose as the H.B. 180 amendments because S.B. 10 requires classification of sex offenders based solely on the offense committed. The S.B. 10 amendments fail to consider the likelihood that a sex offender will re-offend, and in some instances, place life-time registration requirements on offenders who may never re-offend. Further, not all sex offenders have a high rate of recidivism. For example, juvenile sex offenders have recidivism rates that range between seven to thirteen percent, while the recidivism rates of juvenile non-sexual offenders range between twenty-five and fifty percent.¹²⁹ On average, sex offender recidivism rates are found to be around thirteen percent, which happens to be a lower recidivism rate than any other category of offenders besides murderers.¹³⁰

Laws such as the Adam Walsh Act are designed to provide protection from sex offenses committed by strangers. However, only three percent of sexual abuse and six percent of child murders are committed by

¹²⁵ Mikaloff v. Walsh, No. 5:06-CV-96, 2007 WL 2572268, at *11 (N.D. Ohio Sept. 4, 2007).

¹²⁶ *Cook*, 700 N.E.2d at 581.

¹²⁷ *Id.* at 584.

¹²⁸ *Id.*

¹²⁹ TIM BYNUM, CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS (2001), <http://www.csom.org/pubs/recidsexof.html>.

¹³⁰ Garfinkle, *supra* note 11, at 172.

strangers.¹³¹ The non-punitive purpose is weakened by the reality that the high profile cases committed by strangers, for which S.B. 10 was created to protect against, are already rare occurrences. While the S.B. 10 amendments may provide a select few with some protection, it definitely extends, without discretion, more restrictive registration requirements on high and low risk sex offenders, and this extension should strengthen the argument for a punitive effect.

e. Fifth Guidepost: Excessive in Relation to the Alternative Purpose

In *Cook*, the Ohio Supreme Court held that R.C. chapter 2950, as amended by H.B. 180, was “narrowly tailored to comport with the respective danger and recidivism levels of the different classifications”¹³² Also, sex offenders could request a hearing and submit evidence under R.C. section 2950.09(D)(1) to show that they no longer fit a certain label.¹³³ The dissemination of the information was also restricted to those likely to have contact with the sex offender, such as neighbors.¹³⁴ The holding by the United States Supreme Court in *Kansas v. Hendricks* also influenced the Ohio Supreme Court’s decision in *Cook*.¹³⁵ In *Hendricks*, the Kansas passed a law that allowed a sex offender to be involuntarily detained for treatment purposes, even after he served his prison term.¹³⁶ The United States Supreme Court upheld the law as constitutional, precluding any finding that the law was in violation of the Ex Post Facto Clause.¹³⁷ The Ohio Supreme Court reasoned that the involuntary commitment of Hendricks was far more restrictive than the registration and notification requirements of R.C. chapter 2950, and therefore held that the H.B. 180 amendments were non-punitive.¹³⁸

R.C. chapter 2950, as amended by S.B. 10, can no longer be viewed as narrowly tailored to a non-punitive purpose. S.B. 10 is not narrowly tailored because it imposes more stringent restrictions and obligations without any regard for the sex offender’s potential future harm. Further, under the S.B. 10 amendments, the sex offender does not have the same opportunities for a hearing. For example, R.C. section 2950.09 has been repealed under the S.B. 10 amendments.¹³⁹ There is no longer a need for a hearing because the sex offender cannot offer any evidence to sway the

¹³¹ *Id.* at 173.

¹³² *Cook*, 700 N.E.2d at 584-85.

¹³³ *Id.* at 584.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Hendricks*, 521 U.S. at 351-52.

¹³⁷ *Id.* at 373.

¹³⁸ *Cook*, 700 N.E.2d at 585.

¹³⁹ See OHIO REV. CODE ANN. § 2950.09 (repealed 2008). “The judge who is to impose sentence on a person who is convicted of or pleads guilty to a sexually oriented offense that is not a registration-exempt sexually oriented offense shall conduct a hearing to determine whether the offender is a sexual predator” OHIO REV. CODE ANN. § 2950.09(B)(1)(a) (2006).

judge's determination. Presently, the classifications are based solely on the offense committed.

For example, in *Doe v. Dann* the plaintiffs filed for a preliminary injunction in the United States District Court for the Northern District of Ohio to enjoin the Attorney General from re-classifying them under the S.B. 10 amendments without a hearing.¹⁴⁰ The plaintiffs were all sex offenders previously classified under the H.B. 180 amendments and, effective January 1, 2008, were subject to re-classification under S.B. 10.¹⁴¹ The plaintiffs argued "that procedural due process require[d] that they receive a hearing to challenge their reclassification before they [were] to be subject[ed] to the heightened obligations and duties imposed by the [amendments of S.B. 10]."¹⁴² The Northern District of Ohio held:

plaintiffs "who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." As explained above, Ohio's [S.B. 10] does not base an offender's tier classification on any determination of current dangerousness. Instead, the classification is based on the fact of his conviction alone. Thus, *Connecticut v. Doe* appears to support a finding that plaintiffs are not likely to succeed in showing they are entitled to a hearing before being reclassified.¹⁴³

The plaintiff's motion for a preliminary injunction was denied, and the plaintiffs were likely re-classified without a hearing.¹⁴⁴

Also, while the Kansas statute in *Hendricks* does provide for involuntary commitment, it does have procedural safeguards built-in to narrow the scope. The Kansas statute in *Hendricks* at least provided the sex offender with a hearing accompanied by the right to present and cross-examine witnesses, the right to assistance of counsel, and the right to examination by a mental health care professional, all at the state's expense.¹⁴⁵ The Kansas statute did not involuntarily commit all sex offenders, both past and present, based solely on their offense.

S.B. 10 provides that the information obtained from the sex offender registration be stored and maintained on an Internet database, which is

¹⁴⁰ *Doe v. Dann*, No. 1:08 CV 220, 2008 WL 2390778, at *1 (N.D. Ohio June 9, 2008).

¹⁴¹ *Id.*

¹⁴² *Id.* at *6.

¹⁴³ *Id.* at *7 (quoting *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) ("the United States Supreme Court has held that public disclosure of a state's sex offender registry without a hearing as to whether an offender is 'currently dangerous' does not offend due process where the law required an offender to be registered based on the fact of his conviction alone.")).

¹⁴⁴ *Id.* at *12.

¹⁴⁵ *Hendricks*, 521 U.S. at 353.

viewable by anyone with Internet access.¹⁴⁶ This information is no longer narrowly disseminated or available only to those the offender may contact. Now, sex offender registration information is available to every person with Internet access.¹⁴⁷ The above listed circumstances certainly strengthen the argument that the S.B. 10 amendments are not narrowly tailored to a non-punitive purpose.

B. The Retroactivity Clause

The Ohio Constitution provides that “[t]he general assembly shall have no power to pass retroactive laws.”¹⁴⁸ The Ohio Supreme Court has held that a retroactive law only violates the Ohio Constitution if it is a substantive law.¹⁴⁹ The Ohio Revised Code states that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.”¹⁵⁰ This means that prior to the court determining whether the statute is substantive, the court must first determine whether the General Assembly expressly specified that the statute apply retroactively.¹⁵¹

The General Assembly showed the intent to apply the S.B. 10 amendments retroactively under several provisions. First, R.C. section 2950.04(A)(2) states that “[r]egardless of when the sexually oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply with [certain] registration requirements”¹⁵² Second, R.C. section 2950.11(A) also uses language such as “[r]egardless of when the sexually oriented offense or child-victim oriented offense was committed” when describing the community notification information that the sex offenders are responsible to provide.¹⁵³ R.C. section 2950.99(A)(1)(b) also applies penalties to sex offenders whose convictions took place before the enactment of the S.B. 10 amendments, and makes it a crime to fail to register under the current amendments.¹⁵⁴

Most of this language is substantially similar to the H.B. 180 amendments, and the Ohio Supreme Court in *Cook* found such language to clearly express a legislative intent for the statute to apply retroactively.¹⁵⁵ The retroactivity clause of the Ohio Constitution only prohibits retroactive statutes that are substantive, but allows retroactive remedial statutes: “A

¹⁴⁶ OHIO REV. CODE ANN. § 2950.081(A) (Supp. 2009).

¹⁴⁷ See Ohio’s Electronic Sex Offender Registration and Notification (eSORN), <http://www.esorn.ag.state.oh.us/Secured/p1.aspx> (last visited Feb. 3, 2010).

¹⁴⁸ OHIO CONST. art. II, § 28.

¹⁴⁹ *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 496 (Ohio 1988).

¹⁵⁰ OHIO REV. CODE ANN. § 1.48 (Supp. 2009).

¹⁵¹ See *Van Fossen*, 522 N.E.2d at 494-96.

¹⁵² OHIO REV. CODE ANN. § 2950.04(A)(2) (Supp. 2009).

¹⁵³ *Id.* § 2950.11(A).

¹⁵⁴ *Id.* § 2950.99(A)(1)(b).

¹⁵⁵ *Cook*, 700 N.E.2d at 576-77.

purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively.”¹⁵⁶

“A statute is ‘substantive’ if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation [sic] or liabilities as to a past transaction, or creates a new right.”¹⁵⁷ “[R]emedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.”¹⁵⁸

In *Cook*, the Ohio Supreme Court held that the H.B. 180 amendments were remedial in nature and therefore did not violate the retroactivity clause of the Ohio Constitution.¹⁵⁹ The Ohio Supreme Court found support for their decision in the fact that much of R.C. chapter 2950 is directed at public officials rather than sex offenders.¹⁶⁰ Also, the Court reasoned that the new registration requirements would only increase the frequency and duration of sex offender registration requirements and that sex offenders had “no reasonable right to expect that their conduct [would] never thereafter be made the subject of legislation.”¹⁶¹ The Ohio Supreme Court reasoned that sex offender registration requirements were *de minimis* procedural requirements necessary to protect the community.¹⁶² The Ohio Supreme Court recognized that sex offenders would endure emotional anguish and social stigma, but concluded that such consequences were social consequences and not a direct result of the new sex offender registration law.¹⁶³

The S.B. 10 amendments do more than alter the notification and verification procedures. The S.B. 10 amendments impose a change in the classification of the sex offender, and such a change can be as dramatic as registration requirements of once a year for ten years to every ninety days for life. The S.B. 10 amendments also impose severe criminal penalties for failure to comply with reporting requirements.¹⁶⁴ Also, a sex offender cannot live within one thousand feet of a school or day care center.¹⁶⁵ These changes strengthen the argument that S.B. 10 is not remedial in nature. As Justice Lanzinger stated, “[t]hese restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender’s actions.”¹⁶⁶ The

¹⁵⁶ *Cook*, 700 N.E.2d at 577; see also *Van Fossen*, 522 N.E.2d at 496.

¹⁵⁷ *Cook*, 700 N.E.2d at 577.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 578.

¹⁶⁰ *Id.* at 577.

¹⁶¹ *Id.* at 578.

¹⁶² *Id.*

¹⁶³ *Cook*, 700 N.E.2d at 579.

¹⁶⁴ OHIO REV. CODE ANN. § 2950.99 (Supp. 2009).

¹⁶⁵ *Id.* § 2950.034(B).

¹⁶⁶ *Wilson*, 865 N.E.2d at 1274 (Lanzinger J., concurring in part and dissenting in part).

changes made by S.B. 10 should be seen as affecting substantive rights, and consequently should be found to violate the retroactivity clause of the Ohio Constitution.

IV. CONCLUSION

Laws such as the Adam Walsh Act and Ohio's S.B. 10 are viewed by society as the solution to the public's prevailing view that sex offenses are rising and that sex offenders are lurking behind every corner. Studies have shown that in the last decade actual sex offenses have been declining while news media coverage has been increasing.¹⁶⁷ This means news stories are not in response to more sex offenses, but rather in response to the public's interest in stories about sex offenders.¹⁶⁸ Further, legislation such as the Adam Walsh Act and Ohio's S.B. 10 are often passed without question because no politician can reasonably object to sex offender legislation and still be re-elected. Sex offender legislation is a political tool in which political candidates vow to crack down on sex offenders while at the same time accusing their opponent of being too soft on pedophiles.¹⁶⁹ Those in political office then exaggerate sex offender statistics to gain support for more stringent legislation to fix the problem and promote their political image.

The problem currently arising in Ohio as well as other states is that sex offender laws are becoming more restrictive despite the fact that there is no empirical evidence supporting such actions. When the Ohio General Assembly rushed to pass S.B. 10 to receive a bonus in funding and to crack down on sex offenders, it did not carefully weigh the constitutional implications of such an overbearing law. The Adam Walsh Act and Ohio's S.B. 10 are designed to protect children from the tragic but rare sexual assault committed by a stranger. However, children are far more likely to be abducted or sexually assaulted by a family member or someone they already know.¹⁷⁰ This fact undermines the central foundation upon which sex offender registration is built—the need to protect society against the unidentified, looming sex offender.¹⁷¹

In times of misguided fear and paranoia, it is the responsibility of the courts to stand up to the legislatures and uphold the constitutions at both the state and federal levels. The Ohio General Assembly's passage of S.B. 10 was an attempt to create a remedial measure that effectively protects children; however, in reality, it only succeeded in increasing the punishment

¹⁶⁷ Emily Horowitz, *Growing Media and Legal Attention to Sex Offenders: More Safety or More Injustice?*, 2007 J. INST. JUST. INT'L STUD. 143, 146-47.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 150.

¹⁷⁰ Wright, *supra* note 30, at 21.

¹⁷¹ *Id.*

for past, present, and future sex offenders. In the next several years, the constitutionality of S.B. 10 will come before the Ohio Supreme Court just as the constitutionality of H.B. 180 came before the Ohio Supreme Court in *Cook*. Since the Ohio Supreme Court's decision in *Cook*, the S.B. 10 amendments have dramatically changed Ohio's sex offender registration laws, and may have edged the retroactive application of such laws closer to violating both the United States and Ohio Constitutions. S.B. 10 litigation will raise a number of constitutional issues, but ultimately the Ohio Supreme Court will have to decide between reinforcing society's misguided fear and paranoia or upholding the United States and Ohio Constitutions.

