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Maine's Sex Offender Registry and the Ex Post Facto Clause: An Examination of the Law Court's Unwillingness to Use Independent Constitutional Analysis in *State v. Letalien*

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POST FACTO CLAUSE: AN EXAMINATION OF THE
LAW COURT’S UNWILLINGNESS TO USE
INDEPENDENT CONSTITUTIONAL ANALYSIS IN
STATE V. LETALIEN

Lauren Wille

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*Lauren Wille**

I. INTRODUCTION

In 1996, Eric Letalien pleaded guilty to the gross sexual assault of a thirteen-year-old girl, an offense he committed when he was nineteen years old.¹ At the time of his sentencing in August of 1996, Letalien was subject to Maine's Sex Offender Registration and Notification Act of 1995 (SORNA of 1995).² Pursuant to SORNA of 1995, Letalien was required to register his address with the State Bureau of Identification (SBI) and update his address in the event he moved.³ This registration requirement was to be in effect for fifteen years from the time he was released from incarceration.⁴ After five years, however, Letalien would be eligible to petition for a waiver from the Superior Court if he could show that the registration requirement was no longer necessary.⁵

In 1999, the Maine Legislature passed a more stringent version of the SORNA law (SORNA of 1999).⁶ In 2001, the Legislature once again amended SORNA of 1999 so that it applied retroactively to offenses committed on or after June 30, 1992.⁷ As a result of the 2001 amendment, Letalien was subject to the reporting requirements of SORNA of 1999.⁸ Under the amended law, instead of being required to register as a sex offender for fifteen years, with the possibility of obtaining a waiver after five years, Letalien was required to register for the rest of his life without the possibility of ever obtaining a waiver.⁹ In addition, SORNA of 1999 required him to report in person to his local law enforcement agency every ninety days in order to verify his address and place of employment, to be

* J.D. Candidate, 2011, University of Maine School of Law. I would like to thank Professor Melvyn Zarr for his invaluable insight and guidance on this Note. I would also like to thank the editors and staff of the *Maine Law Review* for their excellent editing and hard work.

1. *State v. Letalien*, 2009 ME 130, ¶ 2, 985 A.2d 4, 7-8. According to then-Maine law, a person was guilty of gross sexual assault if that person engaged in a sexual act with another person who had not in fact attained fourteen years of age. 17-A M.R.S.A., § 253(1)(B) (1992-1993).

2. *Letalien*, 2009 ME 130, ¶ 3, 985 A.2d at 8 (citing 34-A M.R.S.A. §§ 11101-11144 (1996-1997)).

3. *Id.* ¶ 5, 985 A.2d at 9 (citing 34-A M.R.S.A. § 11121(2)-(3) (1996-1997)).

4. *Id.* (citing 34-A M.R.S.A. § 11121(2) (1996-1997)).

5. *Id.* (citing 34-A M.R.S.A. § 11121(6)(C) (1996-1997)).

6. *Id.* ¶ 6, 985 A.2d at 9 (citing P.L. 1999, ch. 437, § 2 (effective Sept. 18, 1999) (codified at 34-A M.R.S.A. §§ 11201-11252 (1999-2000))).

7. *Id.* ¶ 7, 985 A.2d at 10 (citing P.L. 2001, ch. 439, § 000-7 (effective Sept. 21, 2001) (codified at 34-A M.R.S.A. § 11202 (2001-2002))).

8. *Letalien*, 2009 ME 130, ¶ 7, 985 A.2d at 10.

9. *Id.* ¶ 8, 985 A.2d at 10.

fingerprinted, and to have his photograph taken.¹⁰ In 2003, the Legislature once again amended SORNA of 1999 to require the SBI to maintain an Internet website posting this information.¹¹

When Letalien was arrested in 2007 for failure to comply with the SORNA of 1999 registration requirements, he challenged SORNA of 1999, asserting that its retroactive application against him violated the Ex Post Facto Clauses of both the Maine Constitution and the United States Constitution.¹² Letalien argued that the Maine Constitution's ban on ex post facto laws afforded a greater level of protection than the minimum standard secured by the Federal Constitution, and that the Maine Supreme Judicial Court, sitting as the Law Court, should utilize an analysis independent of federal courts' analyses of ex post facto challenges.¹³ The Law Court held that the Ex Post Facto Clauses of the Maine and Federal Constitutions are coextensive, and evaluated the law consistent with the United States Supreme Court's analysis of ex post facto laws, ultimately concluding that the retroactive application of SORNA of 1999 was a violation of the Ex Post Facto Clauses of both constitutions.¹⁴

Justice Silver concurred in the judgment, and argued that Maine's Constitution provides a higher level of protection against ex post facto laws than the United States Constitution.¹⁵ His concurrence focused on the location of the Ex Post Facto Clause in the Declaration of Rights article in the Maine Constitution, as compared with the location of the clause in the legislative powers article of the Federal Constitution.¹⁶ Justice Silver argued that the respective placement of the clauses indicated that the Maine Constitution "declares that the right to be free of ex post facto laws as a personal right, and not simply a limitation of legislative power, as it is in the United States Constitution."¹⁷

This Note will explore the Law Court's conclusion that the Ex Post Facto provisions of the Maine Constitution and the United States Constitution are coextensive, and thus require the same analysis when determining whether a law violates the respective clauses. Part II will discuss the Law Court's analysis of the retroactive application of SORNA of 1999 in *Letalien*, and explore the legal context surrounding ex post facto jurisprudence in general. Part III will examine the Law Court's history of conducting state constitutional analyses independent of federal courts' analyses under the United States Constitution. Finally, in Part IV, this Note will discuss whether *Letalien* required the Law Court to address the question of co-extensiveness with regard to ex post facto challenges, and also whether public policy in Maine demands an independent analysis of laws under the Ex Post Facto Clause of the Maine Constitution. This Note will argue that Maine's public policy objectives are better served by using a balancing approach to the

10. *Id.* (citing 34-A M.R.S.A. § 11222(4) (2001-2002)).

11. *Id.* ¶ 9, 985 A.2d at 10 (citing P.L. 2003, ch. 371, § 7 (effective Sept. 13, 2003) (codified at 34-A M.R.S.A. § 11221(9) (2004-2005))).

12. *Id.* ¶ 13, 985 A.2d at 11.

13. *Id.* ¶ 20, 985 A.2d at 13.

14. *Letalien*, 2009 ME 130, ¶ 63, 985 A.2d at 26.

15. *Id.* ¶ 65, 985 A.2d at 26 (Silver, J., concurring).

16. *Id.* ¶¶ 69-71, 985 A.2d at 28.

17. *Id.* ¶ 71, 985 A.2d at 28.

retroactive application of SORNA, where the court weighs the interests of the individual affected by the law against the State's interests in promoting public safety.

II. THE *STATE V. LETALIEN* DECISION

A. *The Facts of the Case*

In 1996, Eric Letalien pleaded guilty to the gross sexual assault of a thirteen-year-old girl, an offense he committed when he was nineteen years old.¹⁸ He was sentenced to four years' incarceration, with all but twenty months suspended, and four years' probation.¹⁹ A clinical psychologist testified at trial that Letalien presented the lowest possible risk of reoffending.²⁰ In August of 1996, during his sentencing, Letalien was subject to SORNA of 1995, which required him to register his address with the SBI for a period of fifteen years from the time of his release from incarceration.²¹ Under SORNA of 1995, Letalien could seek a waiver from the registration requirements when five years had passed from the time he first registered.²²

In 1999, the Maine Legislature enacted SORNA of 1999.²³ SORNA of 1999, unlike the earlier versions of the law, recognized two categories of offenders: "sex offenders," who were required to register for ten years (ten-year registrants) and "sexually violent offenders," who were required to register for life (lifetime registrants).²⁴ A waiver of these registration requirements was only available for either category of offender in the event of a pardon or if the offender's conviction was overturned.²⁵ In 2001, the Legislature amended SORNA of 1999 so that it applied to defendants sentenced for sex offenses on or after June 30, 1992, and

18. *Id.* ¶ 2, 985 A.2d at 7. The sexual encounter that resulted in his conviction took place with the younger sister of Letalien's best friend. Brief of Appellee at 3, *State v. Letalien*, 2009 ME 130, 985 A.2d 4. At trial, the district court found that the act would have been consensual but for the age of the girl, who was two months shy of her fourteenth birthday at the time of the incident. *Id.* at 4. Letalien testified that at the time of the encounter, he believed she was fourteen or fifteen. *Id.* The district court received expert testimony from a forensic psychologist reporting that Letalien did not meet any of the diagnostic criteria for that of a pedophile. *Id.* at 12.

19. *Letalien*, 2009 ME 130, ¶ 2, 985 A.2d at 8.

20. *Id.*

21. *Id.* ¶ 5, 985 A.2d at 9 (citing 34-A M.R.S.A. § 11121(2)-(3) (1996-1997)). SORNA of 1995 defined "sex offender" as "an individual convicted of gross sexual assault if the victim had not in fact attained 16 years of age at the time of the crime . . ." § 11103(5). Thus, because Letalien's victim was thirteen-years-old at the time of the offense, Letalien was required to register under this statute.

22. *Letalien*, 2009 ME 130, ¶ 5, 985 A.2d at 9 (citing 34-A M.R.S.A. § 11121(6)(C) (1996-1997)). SORNA of 1995 provided that "[r]egistration may be waived only if . . . [t]he Superior Court, upon the petition of the sex offender, . . . determine[s] that the sex offender has shown a reasonable likelihood that registration is no longer necessary and waiver of the registration requirement is appropriate." § 11121(6)(C).

23. *Letalien*, 2009 ME 130, ¶ 6, 985 A.2d at 9 (citing P.L. 1999, ch. 437, § 2 (effective Sept. 18, 1999) (codified at 34-A M.R.S.A. §§ 11201-11252 (1999-2000))).

24. *Id.* (citing 34-A M.R.S.A. § 11225(1)-(2) (1999-2000)).

25. *Id.* (citing 34-A M.R.S.A. § 11225(4) (1999-2000)).

before September 18, 1999.²⁶ As a result of this amendment, Letalien became subject to the more stringent registration requirements of SORNA of 1999.²⁷ Because Letalien had been convicted of gross sexual assault of a person who was under the age of fourteen, he was a “sexually violent offender” under SORNA of 1999, and thus was required to register as a sex offender for the rest of his life.²⁸ In addition, Letalien was now required to report in person to his local law enforcement agency for address and employment verification, fingerprinting, and photographing, every ninety days, without the possibility of ever obtaining a waiver from these requirements.²⁹ In 2003, the Legislature further revised SORNA of 1999 to require that the SBI maintain an Internet website posting information about the registrants.³⁰

Letalien first registered as a sex offender under SORNA of 1995 upon his release from incarceration, and for the first time under SORNA of 1999 in 2003.³¹ In July 2007, Letalien was arrested for failure to comply with SORNA of 1999 after he failed to verify his registration information as required.³² Letalien pleaded not guilty and claimed that the retroactive application of SORNA of 1999 violated the prohibition of ex post facto laws under both the Maine and Federal Constitutions.³³ The District Court granted Letalien’s motion to dismiss the complaint, concluding that SORNA of 1999, as applied to Letalien, violated the Ex Post Facto Clauses under both constitutions.³⁴ In December 2009, the Law Court affirmed the decision of the District Court.³⁵

B. Federal Ex Post Facto Jurisprudence and the Law Court’s Analysis

Article I of the United States Constitution, which sets forth the powers and limitations of the legislative branch, provides that “[n]o State shall . . . pass any . . . ex post facto Law”³⁶ Similarly, the Ex Post Facto Clause of the Maine

26. *Id.* ¶ 7, 985 A.2d at 10 (citing P.L. 2001, ch. 439, § 000-7 (effective Sept. 21, 2001) (codified at 34-A M.R.S.A. § 11202 (2001-2002))).

27. *Id.*

28. *Id.* ¶ 8, 985 A.2d at 10 (citing 34-A M.R.S.A. §§ 11202, 11203(7)(A), 11203(8)(A), 11225(2) (2001-2002)).

29. *Letalien*, 2009 ME 130, ¶ 8, 985 A.2d at 10 (citing 34-A M.R.S.A. § 11222(4) (2001-2002)).

30. *Id.* ¶ 9, 985 A.2d at 10 (citing P.L. 2003, ch. 371, § 7 (effective Sept. 13, 2003) (codified at 34-A M.R.S.A. § 11221(9) (2004-2005))). *See also* Dep’t of Pub. Safety, *Maine Sex Offender Registry Online Search Service*, <http://sor.informe.org/sor> (last visited Oct. 18, 2010).

31. *Letalien*, 2009 ME 130, ¶ 13, 985 A.2d at 11.

32. *Id.*

33. *Id.*

34. *Id.* ¶ 14, 985 A.2d at 11.

35. *Id.* ¶ 1, 985 A. 2d at 7. Though the District Court evaluated the law as applied to Letalien, the Law Court held that a facial analysis was consistent with precedent and analyzed it as such. *Id.* ¶ 34, 985 A.2d at 17.

36. U.S. CONST. art. I, § 10, cl. 1. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit provided an enlightening explanation for the importance of the Ex Post Facto Clause:

It both enforces the principle that legislation is prospective, whereas punishment—the job assigned . . . to the judicial branch—is retrospective, and gives people a minimal sense of control over their lives by guaranteeing that as long as they avoid an act in the future they can avoid punishment for something they did in the past, which cannot be altered.

Constitution, which is included in the Declaration of Rights article, states that “[t]he Legislature shall pass no . . . ex post facto law”³⁷ Although the phrase “ex post facto,” taken literally, would include any law passed after the performance of an action, the Supreme Court acknowledged in *Collins v. Youngblood* that the prohibition of ex post facto laws applies only to criminal statutes that “disadvantage” the offender affected by them.³⁸ Included within the scope of the clause is “any statute . . . which makes more burdensome the punishment for a crime, after its commission”³⁹ The Law Court adopted a standard of analysis similar to the United States Supreme Court’s standard in *Collins v. Youngblood* when it held that a state law did not violate Maine’s Ex Post Facto Clause because it did not make more burdensome the punishment of a crime after its commission.⁴⁰

In determining whether a statute renders the punishment for a crime more burdensome, the Supreme Court has implemented what is known as the “intent-effects” test.⁴¹ Under the first prong of this two-pronged analysis, the Court determines whether the legislature, in passing a statute, intended it to impose punishment, or whether the statute was intended to be of a civil, regulatory nature.⁴² If the Court finds the legislature intended the statute as punishment, the law violates the Ex Post Facto Clause, and the analysis ends there.⁴³ If the statute is found to have been intended as regulatory, the inquiry continues to the “effects” prong, where the Court determines whether the statute, as shown by the “clearest proof,” is “so punitive either in purpose or effect as to negate the State’s intention to deem it ‘civil.’”⁴⁴ The Supreme Court has utilized seven factors, known as the “*Mendoza-Martinez* factors,” when examining the punitive effects of a civil statute.⁴⁵ These factors are:

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

United States v. Dixon, 551 F.3d 578, 584 (7th Cir. 2008).

37. Me. Const. art. I, § 11.

38. 497 U.S. 37, 41 (1990).

39. *Id.* at 42 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)).

40. *State v. Joubert*, 603 A.2d 861, 869 (Me. 1992) (citing *Collins*, 497 U.S. at 41).

41. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Hudson v. United States*, 522 U.S. 93, 99 (1997) (utilizing the “intent-effects” test to determine the punitive nature of a statute in the context of the Double Jeopardy Clause); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (utilizing the “intent-effects” test to determine the punitive nature of a statute in the context of the Due Process Clause).

42. *Smith*, 538 U.S. at 92.

43. *Id.*

44. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

45. *Id.* at 97. In *Mendoza-Martinez*, the Supreme Court utilized these factors in determining whether the Nationality Act of 1940, which divested a person of his United States citizenship if he left the United States for the purposes of evading the draft, was so punitive in effect as to violate the person’s due process rights. 372 U.S. at 163-70.

alternative purpose assigned.⁴⁶

The Court has stated that the factors are “neither exhaustive nor dispositive, but are useful guideposts.”⁴⁷

Although ex post facto challenges to sex offender registry and notification laws have been brought in many state and federal courts,⁴⁸ the question did not reach the United States Supreme Court until 2003, in *Smith v. Doe*.⁴⁹ The *Smith* Court held that the Alaska Sex Offender Registration Act, enacted in 1994, did not violate the United States Constitution’s Ex Post Facto Clause when applied to Doe, who had been convicted of the sexual abuse of a minor and sentenced in 1990.⁵⁰ In doing so, the Court applied the “intent-effects” test and utilized the *Mendoza-Martinez* factors, placing the greatest emphasis on whether the statute had a rational connection to a non-punitive purpose.⁵¹

Letalien argued that the retroactive application of SORNA of 1999 violated the prohibition of ex post facto laws because it rendered the punishment for his crime more burdensome.⁵² He urged the Law Court to construe the Ex Post Facto Clause of the Maine Constitution as affording greater protection than its federal counterpart, and to apply an independent and more stringent method of analysis than the United States Supreme Court has applied in ex post facto cases.⁵³ Prior to *Letalien*, the Law Court had never explicitly held that Maine’s constitutional prohibition of ex post facto laws was coextensive with the federal prohibition. However, the Law Court had consistently applied the same analysis set forth by the Supreme Court when considering ex post facto challenges.⁵⁴ Letalien’s contention was that the placement of the Ex Post Facto Clause in the Declaration of Rights article in the Maine Constitution should be regarded as setting forth an affirmative right affording greater protection than its federal counterpart, which is “set forth as a limitation on the power of the legislative branch in the article establishing

46. *Letalien*, 2009 ME 130, ¶ 31, 985 A.2d at 16-17 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69).

47. *Smith*, 538 U.S. at 97 (internal quotations and citations omitted).

48. In 1994, New Jersey became the first state to enact a sex offender registration and community notification statute, commonly known as “Megan’s Law.” See *Wallace v. State*, 905 N.E.2d 371, 374 (Ind. 2009). Megan’s Law was passed after seven-year-old Megan Kanka was abducted, molested, and murdered by a convicted sex offender who had moved in across the street from Megan’s family without their knowledge. *Id.* After the constitutionality of Megan’s Law was upheld by the Supreme Court of New Jersey in *Doe v. Poritz*, 662 A.2d 367, 404-05 (N.J. 1995), ex post facto challenges sprang up in courts all over the country as states enacted similar sex offender registration and notification laws. See *Wallace*, 905 N.E.2d at 374.

49. 538 U.S. 84.

50. *Id.* at 105-06.

51. *Id.* at 102.

52. *Letalien*, 2009 ME 130, ¶ 26, 985 A.2d at 14.

53. *Id.* ¶ 20, 985 A.2d at 13.

54. See, e.g., *State v. Joubert*, 603 A.2d 861, 868-69 (Me. 1992); *State v. Haskell*, 2001 ME 154, ¶¶ 6-10, 784 A.2d 4, 8-10; *Doe v. Dist. Attorney*, 2007 ME 139, ¶¶ 27-28, 932 A.2d 552, 560-61. In *Doe v. District Attorney*, the Law Court stated: “We do not have cause to reconsider our equating the Ex Post Facto Clause in the Maine Constitution with the same clause in the United States Constitution.” 2007 ME 139, ¶ 26 n.6, 932 A.2d at 560 (citation to footnote only). Presumably, this is because the plaintiff in *Doe* did not argue that the respective clauses should not be equated.

legislative authority.”⁵⁵ The Law Court declined to accept this argument, noting that the placement of the Ex Post Facto Clauses in the state and federal constitutions is a function of the history and context in which each constitution was developed, and that the framers of both constitutions regarded the ban on ex post facto laws as fundamental to the protection of individual liberty.⁵⁶ After holding that the state and federal clauses are coextensive, the Law Court applied the “intent-effects” test set forth by the Supreme Court, utilizing the seven *Mendoza-Martinez* factors to conclude that the effect of the law was so punitive as to overcome the Legislature’s regulatory intent.⁵⁷

In applying the *Mendoza-Martinez* factors to the retroactive application of SORNA of 1999, the Law Court noted that the United States Supreme Court had recognized that a statute’s “rational connection to a nonpunitive purpose” was the most significant factor in determining the punitive effect of a regulatory statute.⁵⁸ In its own evaluation, however, the Law Court emphasized two other *Mendoza-Martinez* factors as being the most probative: whether the regulation imposes an affirmative disability or restraint, and whether sanctions imposed by the statute have historically been regarded as punishment.⁵⁹

To the Law Court, it was beyond question that the newly imposed lifetime in-person registration requirements on Letalien constituted an affirmative disability or restraint: “[Q]uarterly, in-person verification . . . , including fingerprinting and the submission of a photograph, for the remainder of one’s life, is undoubtedly a form of significant supervision by the state.”⁶⁰ The Law Court distinguished SORNA of 1999 from the Alaska sex offender registry statute upheld by the Supreme Court in *Smith*, which did not require updates to be made in person.⁶¹

The Law Court’s analysis as to whether the registration requirements have historically been regarded as punishment differed somewhat from the Supreme Court’s analysis in *Smith*.⁶² In *Smith*, the Supreme Court considered Alaska’s statute in light of the historical punishments of public shaming and banishment during colonial times.⁶³ In contrast, the Law Court’s analysis focused on the “unique history of the development of sex offender registration laws in Maine”⁶⁴ The Law Court concluded that the registration requirements were an integral part of the sentencing process of the earlier versions of SORNA, and thus, in the context of Maine’s history of sex offender registration laws, the registration

55. *Letalien*, 2009 ME 130, ¶ 20, 985 A.2d at 13.

56. *Id.* ¶ 24, 985 A.2d at 14.

57. *Id.* ¶ 62, 985 A.2d at 26.

58. *Id.* ¶ 32, 985 A.2d at 17 (citing *Smith v. Doe*, 538 U.S. 84, 102 (2003)).

59. *Id.* ¶ 57, 985 A.2d at 24.

60. *Id.* ¶ 37, 985 A.2d at 18.

61. *Letalien*, 2009 ME 130, ¶ 37, 985 A.2d at 18.

62. *Id.* ¶ 38, 985 A.2d at 19.

63. *Id.* (citing *Smith*, 538 U.S. at 97-98). In *Smith*, the Supreme Court distinguished the registration law by noting that any similarity to the early punishments was misleading; shaming punishments had the sole purpose of stigmatizing an individual, while the registration statute’s purpose was to disseminate truthful information in the name of public safety. 538 U.S. at 98. The Court stated: “Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.” *Id.*

64. *Letalien*, 2009 ME 130, ¶ 39, 985 A.2d at 19.

requirements had historically been regarded as punishment.⁶⁵ Therefore, the retroactive application of more stringent registration requirements of SORNA of 1999 made this “punishment” more burdensome.⁶⁶

Placing great emphasis on these two factors, the Law Court concluded that Letalien had shown by the “clearest proof” that the punitive effects of the retroactive application of SORNA of 1999, as applied to those sentenced under earlier versions of the law and without, at minimum, affording those offenders any opportunity to ever be relieved of the duty, were enough to overcome the Legislature’s regulatory intent.⁶⁷

C. Justice Silver’s Concurrence

Justice Silver issued a concurring opinion in which he asserted that the Maine Constitution should be regarded as providing a higher level of protection against ex post facto laws than the Federal Constitution.⁶⁸ The majority’s decision, according to Justice Silver, should have been based on an independent analysis under the Maine Constitution.⁶⁹ In so concluding, Justice Silver relied on the placement of the clause in Maine’s Declaration of Rights article.⁷⁰ He argued that it is significant that the framers of the Maine Constitution chose to place the prohibition in that article, where personal rights are enumerated, rather than in Article IV, which sets out the powers and limitations of Maine’s Legislature.⁷¹

The analysis Justice Silver proposed would have paralleled the analysis utilized by the Supreme Court of Alaska in *Doe v. Alaska*.⁷² In that case, the Alaska Supreme Court struck down the very same statute upheld by the United States Supreme Court in *Smith v. Doe*, concluding that the Alaska Constitution afforded a higher level of protection against ex post facto laws than the United States Constitution.⁷³ While the *Doe* court adopted the same “intent-effects” test utilized by the United States Supreme Court, it lowered the standard of proof required for the “effects” prong of the inquiry.⁷⁴ Instead of requiring the “clearest proof” of punitive effects to overcome a legislature’s civil intent, it adopted a “presumption of constitutionality” approach.⁷⁵ According to Justice Silver,

65. *Id.* ¶ 43, 985 A.2d at 20-21.

66. *Id.*

67. *Id.* ¶ 62, 985 A.2d at 26.

68. *Id.* ¶ 65, 985 A.2d at 26 (Silver, J., concurring).

69. *Id.* ¶ 65, 985 A.2d at 26-27.

70. *Letalien*, 2009 ME 130, ¶ 71, 985 A.2d at 28.

71. *Id.* ¶ 69, 985 A.2d at 28.

72. *Id.* ¶ 72, 985 A.2d at 28 (citing *Doe v. Alaska*, 189 P.3d 999, 1008 n.62 (Alaska 2008)).

73. *Doe v. Alaska*, 189 P.3d at 1005.

74. *Id.* at 1008 n.62 (citation to footnote only).

75. *Id.* Applying the lower standard of proof, the Supreme Court of Alaska held that there was sufficient evidence to conclude that the statute imposed an affirmative disability or restraint: Doe had shown instances of registrants losing and having difficulty finding housing and employment, suffering community hostility, damage to business, and damage to marital relationships due to fear of effects of public dissemination. *Id.* at 1011-12. This finding is in stark contrast with the United States Supreme Court’s conclusion in *Smith* that it was mere conjecture that employers would not want to risk loss of business by hiring registered sex offenders. *Smith*, 538 U.S. at 100-01. The Supreme Court of Alaska also noted that the dissemination requirements of the statute were comparable to the historical

adherence to the heightened “clearest proof” standard could “threaten rights protected by [the Maine] Constitution and might be inconsistent with the responsibilities of this court.”⁷⁶

Justice Silver also disagreed with the majority’s conclusion that the registration requirements of SORNA of 1999 only incidentally promoted the traditional aims of punishment—retribution and deterrence.⁷⁷ He reasoned that even though the statute was not intended as retribution, there can be no doubt that it promotes community condemnation, and in some instances, vigilantism.⁷⁸ To support of this position, he referred to the 2006 murders of two men whose addresses had been obtained by their killer from Maine’s Sex Offender Registry.⁷⁹

III. INDEPENDENT CONSTITUTIONAL ANALYSIS IN MAINE

A. *Some Views on the Validity of State Courts Conducting Independent Constitutional Analyses*

It has long been an accepted tenet of federalism that states are free to adopt higher standards of protection than those afforded by the United States Constitution.⁸⁰ Former United States Supreme Court Justice William Brennan argued that the states have not only the ability, but the responsibility to their citizens to consider whether their own state constitutions afford greater protection than the constitutional floor provided by the United States Constitution:

[T]he point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the [F]ederal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.⁸¹

There has been much debate concerning when and under what circumstances state courts should conduct independent state constitutional analyses that differ or afford greater protection than the Federal Constitution. Some scholars and judges

punishment of shaming, and resembled the conditions of parole. *Doe v. Alaska*, 189 P.3d at 1012. The Supreme Court of Indiana has similarly concluded that its state constitution affords greater protection against ex post facto laws than does the United States Constitution, and has also imposed this less stringent “presumption of constitutionality” standard. *Wallace*, 905 N.E.2d at 378 n.7 (citation to footnote only).

76. *Letalien*, 2009 ME 130, ¶ 72, 985 A.2d at 28 (Silver, J., concurring) (quoting *Doe v. Alaska*, 189 P.3d at 1008 n.62 (citation to footnote only)).

77. *Id.* ¶ 75, 985 A.2d at 29.

78. *Id.*

79. *Id.* In 2006, a Canadian man compiled the names, addresses, and photographs of twenty-nine sex offenders from Maine’s Online Sex Offender Registry before killing two registered sex offenders at their homes and then committing suicide. See David Hench, *Killer Drove to Maine with a Long List of Sex Offenders*, PORTLAND PRESS HERALD, Apr. 26, 2006, at A1.

80. See *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (“Of course, the States are free, pursuant to their own law, to adopt a higher standard.”).

81. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

have expressed dissatisfaction with what they consider poorly articulated rationales from state judges who have departed from federal constitutional analyses.⁸² Some factors that have been considered by states in determining whether their own constitutions afford greater protection than the Federal Constitution are: differences between the text of the state and federal constitutional provisions; the history of the provision; structural differences between the state and federal constitutions; case law from other states; and state public policy concerns.⁸³

B. *Independent State Constitutional Analysis in Maine*

The Law Court has held that the Maine Constitution affords greater protection than its federal counterpart in a number of areas of criminal law. For example, in *State v. Collins*, the Law Court held that the Maine Constitution provides a higher level of protection for the voluntariness of confessions.⁸⁴ At the time, the United States Supreme Court had recently decided the case of *Lego v. Twomey*, where it established that the prosecution should bear the burden of establishing by a “preponderance of the evidence” the “voluntariness” of a confession.⁸⁵ In doing so, the Supreme Court stressed that such a standard was adequate for promoting the government’s goal of deterring lawless conduct by police officers.⁸⁶ The Law Court, in contrast, held that a heightened standard of scrutiny should be applied in Maine, requiring the voluntariness of confessions to be established by the prosecution by “proof beyond a reasonable doubt.”⁸⁷ In doing so, the Law Court

82. See Joseph A. Grasso, Jr., “John Adams Made Me Do It”: *Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*, 77 *MISS. L.J.* 315, 342-43 (2007) (arguing that a state court has an obligation to articulate its rationale very clearly when constitutionalizing a principle and persuading reasonable people that the court’s departure from federal jurisprudence stems from reasoning other than personal predilection); Francis Barry McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 *SYRACUSE L. REV.* 79, 80 (2007) (arguing that state courts’ independent analyses of state constitutions are “counterfeit” in that they are not really independent at all, but only pale imitations of the Supreme Court’s analyses); Jack L. Landau, *A Judge’s Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 *VAL. U.L. REV.* 451, 451-52 (2004) (arguing that reliance on history and original intent in state constitutional interpretation unavoidably involves value judgments and personal predilection of judges); Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 *MISS. L.J.* 265, 267-68 (2007) (arguing that reactive state constitutional interpretations that lack completely theorized justifications are problematic because they fail to contribute meaningfully to the larger legal discourse and fail to supply the legal community with sufficient guidance regarding constitutional interpretation). *But see* Leigh A. Morrissey, *State Courts Reject Leon on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 *VAND. L. REV.* 917, 940 (1994) (“[N]o reason exists to consider reactive decisions less principled or legitimate than those decisions that base their rejections of a Supreme Court decision on a state-specific factor.”).

83. *Madison v. State*, 163 P.3d 757, 764 (Wash. 2007).

84. 297 A.2d 620, 627 (Me. 1972).

85. *Id.* at 625 (citing *Twomey*, 404 U.S. at 489). The *Twomey* Court noted that it had long held that evidence, including involuntary confessions, obtained in violation of the Fourth Amendment’s protection against “unreasonable searches and seizures” or the Fifth Amendment’s protection against self-incrimination was to be excluded from trial. *Twomey*, 404 U.S. at 488-89. The Maine Constitution contains similar provisions protecting against “unreasonable searches and seizures” and self-incrimination. Me. Const. art. I, §§ 5, 6.

86. *Twomey*, 404 U.S. at 489.

87. *Collins*, 297 A.2d at 627.

focused on Maine's public policy goals and the "appropriate resolution of the values [we] find at stake."⁸⁸ The Law Court focused on the importance of safeguarding the right of the individual defendant in not being compelled into self-incrimination, apart from the objective of deterring lawless conduct of police officers.⁸⁹ The Law Court stressed the importance of the constitutional guarantee against self-incrimination in the furtherance of public policy in Maine.⁹⁰

The reliance on the importance of Maine's public policy concerns was stressed again by the Law Court in *State v. Rees*, which reaffirmed *Collins*'s heightened standard on the voluntariness of confessions.⁹¹ In *Rees*, former Chief Justice Wathen's majority opinion reiterated Maine's public policy objective in safeguarding the rights of individual defendants, and concluded that the rationale in *Collins* continued to support the State's public policy.⁹² In her dissent, then-Associate Justice Saufley focused on the historical application of the federal and state provisions and noted that the Law Court, until recently, had consistently followed the analysis of the United States Supreme Court with regard to protection against self-incrimination.⁹³ Justice Saufley stated: "[W]e have consistently interpreted fundamentally similar provisions of our constitution coextensively with their federal counterparts. When we have chosen to depart from this principle, we have traditionally exercised great restraint in doing so."⁹⁴

IV. SHOULD THE LAW COURT HAVE CONDUCTED AN INDEPENDENT STATE CONSTITUTIONAL ANALYSIS OF THE RETROACTIVE APPLICATION OF SORNA OF 1999?

A. *The Law Court Should Have Reserved the Question of Co-extensiveness for a Case When an Independent Analysis Would Have Been Necessary*

In *Letalien*, there was no cause for the Law Court to have explicitly foreclosed the possibility of an independent analysis under the state constitution because the court had already decided that the retroactive application of the law had fallen below the constitutional floor established by the federal ex post facto prohibition. In *Doe v. Alaska*, the Supreme Court of Alaska was faced with a statute that had already been held as passing federal constitutional muster by the United States Supreme Court using the "clearest proof" standard.⁹⁵ In deciding that the Alaska Constitution afforded greater protection against ex post facto laws, the court noted that it was now faced with a federal decision that was inconsistent with the Alaska Constitution.⁹⁶ In *Letalien*, on the other hand, the Law Court was not faced with a similar inconsistency. It applied the "intent-effects" test according to federal precedent and determined that the retroactive application of SORNA of 1999

88. *Id.* at 626 (internal quotations omitted).

89. *Id.*

90. *Id.*

91. 2000 ME 55, ¶ 8, 748 A.2d 976, 979.

92. *Id.*

93. *Id.* ¶ 28, 748 A.2d at 984 (Saufley, J., dissenting).

94. *Id.* ¶ 31, 748 A.2d at 985 (internal quotations omitted).

95. 189 P.3d 999, 1002 (Alaska 2008).

96. *Id.* at 1005.

violated the Ex Post Facto Clause of the Federal Constitution. The Law Court went further and explicitly held that the clauses are coextensive. As a result, the court foreclosed the possibility that, if presented with a case in the future where ex post facto analysis under the federal standard is inconsistent with the Maine Constitution, it may adopt an independent test, thus affording greater protection against ex post facto laws.

B. Can a More Useful Analysis Be Suggested?

In relying solely on a comparison of the framers' intent in drafting the respective constitutions, the Law Court failed to consider whether Maine's public policy goals would have been better served by conducting an independent ex post facto analysis.⁹⁷ The Law Court noted that the United States Supreme Court considered the *Mendoza-Martinez* factors to be but a "useful framework" for ex post facto analysis, yet mechanically considered each of the seven factors, deciding whether each one resulted in a determination of "punitive" or "nonpunitive."⁹⁸

What the Law Court did not consider in its analysis was just how useful each of these seven factors is to laws challenged under the Ex Post Facto Clause, and whether a more useful test conducted independent of the federal courts' analyses would have been more appropriate. The *Mendoza-Martinez* case, in which the factors were originally enumerated, was a due process case. All seven factors do not necessarily translate into the context of an ex post facto analysis. For example, the factor concerning whether the obligation to register under SORNA is triggered only upon a finding of scienter seems wholly misplaced in the context of ex post facto analysis, and the Law Court disposed of this factor in one short sentence.⁹⁹ Another factor addresses whether the regulation is excessive in relation to a nonpunitive purpose. Given the fact that another factor—the "rational connection to a nonpunitive purpose" factor—requires a court to determine whether the statute is narrowly drawn, a separate inquiry into whether the regulation is excessive seems redundant.

A balancing analysis would have been a more useful approach for the Law Court to have applied in this case. Such an analysis would require the court to weigh the state interests in protecting children against the burden placed upon the individual who is to be subjected to the more stringent registration requirements. Certain *Mendoza-Martinez* factors have relevance in a balancing analysis, while allowing the Law Court to tailor the approach so that it aligns more closely with ex post facto analysis in general and Maine's public policy interests in particular, and does not "threaten rights protected by [the Maine] Constitution."¹⁰⁰

When considering the burdens placed upon an individual resulting from the retroactive application of SORNA of 1999, two main concerns should be considered. The first is whether the regulation imposes an affirmative disability or

97. Other courts have rejected the use of the *Mendoza-Martinez* factors in ex post facto analysis. *See, e.g., Doe v. Poritz*, 662 A.2d 367, 399-400 (N.J. 1995); *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1262 (3d Cir. 1996).

98. *Letalien*, 2009 ME 130, ¶¶ 35-55, 985 A.2d at 18-24.

99. *Id.* ¶ 44, 985 A.2d at 21.

100. *Id.* ¶ 72, 985 A.2d at 28 (Silver, J., concurring) (internal quotations and citation omitted).

restraint. In *Letalien*, the Law Court placed great emphasis on this factor. The Law Court concluded that lifetime quarterly in-person registration requirements without the possibility of a waiver constituted a significant restraint on the individual. The retroactive application of SORNA of 1999 to *Letalien* imposed a substantial new burden on him by requiring him to physically report to his local law enforcement agency.

Another concern is the stigma that is created upon registering as a sex offender. The Law Court did not take this factor into account in its analysis, nor did it consider how the stigma itself can create an affirmative disability or restraint. For example, *Letalien* testified in the trial court that he had lost at least one job due to his status as a registered sex offender.¹⁰¹ One job loss resulted from pressure on his employer from customers “raising Cain that [he was] employing a sex offender” and from *Letalien*’s fears for his own safety after a co-worker who was also a registered sex offender was beaten to the point of requiring hospitalization.¹⁰² The stigma associated with being a registered sex offender can impact other aspects of life as well, such as housing. For instance, after discovering that seventeen registered sex offenders were residing in one property in Portland, Maine, Portland’s City Manager announced that the City Council was working on an ordinance to ban sex offenders from living within 750 feet of a public or private school.¹⁰³ In another instance, a registered sex offender committed suicide when faced with the prospect of police notifying the community of his presence in the neighborhood.¹⁰⁴ These concerns highlight the fact that registering as a sex offender can affect registrants’ lives in real and substantial ways by affecting their ability to find employment and housing. Retroactively imposing tougher registration requirements while at the same time eliminating the ability to ever be granted relief from them clearly imposes a significant burden on an individual.

On the other side of the coin, the very legitimate state interest in protecting the public, particularly children, from convicted sex offenders must be considered. Community notification statutes warn parents when a potentially dangerous predator has moved into the neighborhood. Thus, sex offender registry statutes have a nonpunitive purpose even though they may have a palpable detrimental effect on the registrant.

However, one must ask how effective community notification laws are in promoting a state’s nonpunitive goal of protecting children. Erik Lotke, in his article critiquing the effectiveness of community notification statutes, argued that sex offender registry laws were hastily passed by legislatures, are based on false assumptions, and are apt to create unintended problems that weaken any perceived

101. Brief of Appellee at 21-22, *State v. Letalien*, 2009 ME 130, 985 A.2d 4.

102. *Id.* at 22.

103. Bill Nemitz, *Sex Offenders “Have to Go Somewhere,”* PORTLAND PRESS HERALD, Dec. 20, 2009, at C1. Denise Lord, Associate Commissioner of the Maine Department of Corrections, noted that one concern with placing residency restrictions on registered sex offenders is that the more limitations are imposed, the more likely those offenders are to “drop off the registry” altogether. *Id.*

104. Jason Wolfe, *Balance Hard to Find in Notification Statutes*, PORTLAND PRESS HERALD, Feb. 15, 1998, at A1. At the time, statutes left community notification to the discretion of local authorities. *Id.* When the town began circulating fliers and knocking on doors to inform the neighborhood that registered sex offender Thomas Varnum, who had been convicted of child molestation in 1996, was living in the neighborhood, Varnum put a shotgun to his head and killed himself. *Id.*

benefits.¹⁰⁵ Though recidivism statistics are difficult to state with precision, many authorities consider sex offenders to be among the highest of any group likely to reoffend.¹⁰⁶ However, other studies have shown the re-offense rates of sex offenders to be within the range of ten to eighteen percent—a rate much lower than for other types of crime.¹⁰⁷ Furthermore, notification laws are based partially on the assumption that it is impossible to rehabilitate sex offenders. Yet, studies on the effectiveness of treatment are at worst inconclusive, and at best show that treatment can make a substantial difference on recidivism rates of offenders.¹⁰⁸ Lotke also explained that notification statutes can have many unforeseen consequences, such as the impact on the victim, the likelihood that the offender will relocate to a community with less organized notification procedures, the possibility of vigilantism against the registered offender, and the possibility of lulling the public into a false sense of security, or, paradoxically, spreading an artificial sense of terror.¹⁰⁹

Moreover, the term “sex offense” under SORNA applies to a wide variety of behavior, and the almost total elimination of the waiver provision fails to take into account the fact that some offenders pose a higher risk of reoffending than others. For example, during Letalien’s trial, a psychologist testified that he did not meet any of the criteria of a pedophile, and that he presented the lowest possible risk of reoffending.¹¹⁰ On this assessment, a court could likely have waived his registration requirements after five years under SORNA of 1995. Once SORNA of 1999 was applied to Letalien, however, this possibility was eliminated. SORNA of 1999 is overbroad in this sense. It neglects to take into account any assessment of risk among offenders, and as a result pulls low-risk perpetrators, like Letalien, within its scope along with high-risk, repeat offenders, without noting any distinction between them. The failure of the Legislature to narrowly tailor the statute suggests that its effect is directed more towards punishment than the protection of children.

Applying a balancing test to the retroactive application of SORNA of 1999 to those sentenced according to earlier versions of the law, it becomes clear that the burden to the individual outweighs the goals of the state, at least as SORNA of 1999 exists in its current form. The substantial burdens on liberty and privacy

105. Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENT’G REP. 64, 64-66 (1998).

106. Catherine Ivey, *What’s Fair? Sex Offender Notification a Balancing Act in Maine Communities*, BANGOR DAILY NEWS, Apr. 25, 1998, at A1.

107. Lotke, *supra* note 105, at 64.

108. *Id.* at 65. During the time the Maine Legislature was considering the passage of SORNA and its subsequent amendments, many groups urged that resources be used for the treatment of sex offenders rather than utilized for expanded registration requirements. *See, e.g.*, Letter from Sally Sutton, Exec. Director, Maine Civil Liberties Union, to Maine State Legislature (Mar. 4, 1992) (on file with the Maine State Law and Legislative Reference Library); Letter from Cushman D. Anthony, Clerk, Friends Comm. on Maine Pub. Policy to Senator John W. Benoit & Representative Herbert E. Clark, Co-Chairs, Joint Standing Comm. on Criminal Justice (on file with the Maine State Law and Legislative Reference Library); Memorandum from Criminal Law Advisory Comm’n to Criminal Justice Comm. (Apr. 8, 1999) (on file with the Maine State Law and Legislative Reference Library).

109. Lotke, *supra* note 105, at 66-67.

110. *Letalien*, 2009 ME 130, ¶ 2, 985 A.2d at 8.

placed on a registrant, taken with the broadness of SORNA of 1999 in encompassing such a wide variety of offenses without taking into account the individual's risk of reoffending, suggests that the punitive effects are substantial enough to overcome the civil, regulatory intent of the Legislature.

V. CONCLUSION

There is no easy answer to the question of how best to protect the public from convicted sex offenders living in their communities. Registration and notification statutes like SORNA are one method states can utilize to further the goal of promoting public safety by making communities aware of potentially violent predators. However, notification statutes can also place substantial burdens on the individual who must comply with them. SORNA raises issues of liberty, privacy, and personal safety, and legislatures must narrowly tailor such statutes to ensure that the burdens are in proportion to the nonpunitive goal of protecting the public. For *Letalien*, there is no question that there is a significant difference between having to register as a sex offender for the next five to fifteen years, as he was required to do under SORNA of 1995, and having to register for the rest of his life with no possibility of relief from these duties, as was required under SORNA of 1999. The question became whether the retroactive application of the stricter version of the law was so punitive in effect as to constitute a violation of the ex post facto prohibition.

While the Law Court reached the correct conclusion—that the law was so punitive in effect as to violate the state and Federal Constitutions—its analysis foreclosed on the opportunity of conducting an ex post facto analysis independent of the United States Supreme Court's. The question of whether the Maine Constitution affords a higher level of protection against ex post facto laws did not need to be reached in *Letalien* because the Law Court had already found that SORNA of 1999's retroactive application did not meet the minimum standard set forth by the United States Constitution.

Furthermore, the Law Court did not address the issue of whether a more appropriate ex post facto analysis could better serve Maine's public policy interests. Instead of relying on the *Mendoza-Martinez* factors, many of which have little or no relevance to challenges under the Ex Post Facto Clause, the Law Court could have used a balancing approach to evaluate the punitive effects of the statute. Utilizing a balancing approach would have allowed the Law Court to recognize the importance of both individual and state interests as reflected in Maine's Constitution. In order to achieve the "full realization of our liberties," as Justice Brennan put it,¹¹¹ the Law Court must ensure that state constitutional analysis in Maine carries the full protective force of law for its citizens.

111. Brennan, *supra* note 81, at 491.