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## COMMENT

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### RETROACTIVITY AND THE FUTURE OF SEX OFFENDER REGISTRATION IN MARYLAND

By: Timothy J. Gilbert<sup>1</sup>

#### INTRODUCTION

Maryland's statutory sex offender registration scheme<sup>2</sup> requires certain convicted sex offenders<sup>3</sup> residing in Maryland to register with the Department of Public Safety and Correctional Services (the Department), or to register with another law enforcement or correctional entity for certain lengths of time<sup>4</sup> depending on the offense(s) for which they were convicted.<sup>5</sup> Among them are potentially "thousands of Maryland sex offenders"<sup>6</sup> who have been required to register for offenses committed before the enactment of Maryland's registration scheme.<sup>7</sup> Retroactive application of sex offender registration schemes like Maryland's, under the direction of the federal Sex Offender Registration and Notification Act (SORNA),<sup>8</sup> has prompted a variety of *ex post facto* challenges nationwide including challenges on federal and state constitutional grounds.<sup>9</sup>

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<sup>2</sup> See MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (2013).

<sup>3</sup> See *id.* § 11-704. Certain adjudicated juvenile sex offenders are also required to register with the Department; however, the nuances of the juvenile sex offender registry are outside the scope of this comment.

<sup>4</sup> *Id.* § 11-707.

<sup>5</sup> See *id.* § 11-701(o)-(q) (identifying that sexual offenses are assigned to one of three "tiers"); see also *infra* note 42 and accompanying text.

<sup>6</sup> Appellant's Pet. for Writ of Cert. 9, *Roe v. Maynard*, 435 Md. 501, 79 A.3d 947 (2013) [hereinafter State Certiorari Petition], *decision reached on appeal by Dep't of Pub. Safety & Corr. Servs. v. Doe*, 439 Md. 201, 94 A.3d 791 (2014). Counsel for the Department later reported the number of offenders in this retroactive class as 1,250 during oral argument on May 6, 2014.

<sup>7</sup> MD. CODE ANN., CRIM. PROC. § 11-702.1(a). Maryland's first sex offender registration scheme was originally enacted in 1995 and applied prospectively only. See 1995 Md. Laws, Ch. 142 (codified at Art. 27, § 692B). The statute's successor required certain offenders convicted of identified sex offenses on or after October 1, 1995, for offenses committed before that date to register. See 2001 Md. Laws, Ch. 221 (later codified at MD. CODE ANN., CRIM. PROC. § 11-702.1); 2009 Md. Laws, Ch. 541 (later codified at MD. CODE ANN., CRIM. PROC. § 11-702.1); 2010 Md. Laws, Ch. 175 (later codified at MD. CODE ANN., CRIM. PROC. § 11-702.1).

<sup>8</sup> 42 U.S.C. §§ 16901–16929 (2013).

<sup>9</sup> See William M. Howard, Annotation, *Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions*, 63 A.L.R. 6th 351 (2011).

A plurality of the Court of Appeals of Maryland sustained an *ex post facto* challenge to Maryland's statutory retroactive registration requirement on state constitutional grounds<sup>10</sup> in *Doe v. Department of Public Safety and Correctional Services*.<sup>11</sup> In *Doe I*, the court joined other states<sup>12</sup> in contravening the Supreme Court's analysis and conclusion on an identical issue in *Smith v. Doe*,<sup>13</sup> which held that Alaska's retroactive sex offender registration statute did not constitute punishment sufficient to sustain a challenge under the *ex post facto* clause of the federal Constitution.<sup>14</sup> The court of appeals held in *Doe I* that the application and consequences of Maryland's retroactive registration requirement constituted an impermissible *ex post facto* punishment prohibited by Article 17 of the Maryland Declaration of Rights.<sup>15</sup>

This comment will analyze the effect of two recent landmark court of appeals rulings on Maryland's *ex post facto* jurisprudence, focusing on the legality and propriety of the State's retroactive sex offender registration requirements under the encouragement of federal SORNA registration standards. Part I discusses the statutory development of Maryland's sex offender registration law in the context of the federal standards and provides an overview of pertinent *ex post facto* case law. It further discusses two Maryland cases that sparked the *ex post facto* controversy with respect to retroactive sex offender registration obligations. Part II outlines problems created in the wake of the *Doe* plurality holding, including a potential wave of challenges by registrants convicted before the enactment of Maryland's law, the challenges faced by the State in pursuit of certain federal grant funding, and subsequent appellate dispute<sup>16</sup> before the Court of Appeals of Maryland regarding the interplay between federal and state sex offender registration laws. Part III proposes a possible solution that would result in an equitable balance between public safety, fiscal responsibility, and effective sex offender registration and monitoring in Maryland.

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<sup>10</sup> See *infra* Part I.d.

<sup>11</sup> 430 Md. 535, 62 A.3d 123 (2013) (hereinafter *Doe I*).

<sup>12</sup> See discussion *infra* Part I.e.

<sup>13</sup> 538 U.S. 84 (2003).

<sup>14</sup> *Id.* at 105-06.

<sup>15</sup> *Doe I*, 430 Md. at 568, 62 A.3d at 143.

<sup>16</sup> The recent consolidated opinion in *Department of Public Safety and Correctional Services v. Doe* and *Hershberger v. Roe* is the culminating Court of Appeals of Maryland decision on retroactive sex offender registration in Maryland. See Dept. of Pub. Safety and Corr. Servs. v. Doe, 439 Md. 201, 94 A.3d 791 (2014) (hereinafter *Doe II*); see also *infra* note 143.

## I. SEX OFFENDER REGISTRATION IN MARYLAND

## A. Background

Congress originally established national standards for sex offender registration in 1994 by passing the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act.<sup>17</sup> The Wetterling Act conditions a portion of federal law enforcement grant funding to states on their adoption and enactment of registration laws based upon the minimum federal standards.<sup>18</sup> Following substantial amendments to the Wetterling Act, the Attorney General was tasked with issuing guidelines and regulations to interpret the current iteration of the federal statute.<sup>19</sup> The federal act is now known as Title I of the Adam Walsh Child Protection and Safety Act of 2006, the Sex Offender Registration and Notification Act (SORNA).<sup>20</sup>

Sex offender registration and notification programs in the United States, according to the Attorney General, serve important public safety purposes. They include tracking sex offenders following their release into the community and providing broad notice to the public and law enforcement of their whereabouts.<sup>21</sup> SORNA sought to “close potential gaps and loopholes” caused by “piecemeal amendments” to the existing federal standards, and to “strengthen the nationwide network of sex offender registration and notification programs.”<sup>22</sup> At the time the final guidelines were promulgated, each state and the District of Columbia had passed sex offender registration laws.<sup>23</sup>

The Maryland General Assembly enacted the state’s first sex offender registration statute in 1995.<sup>24</sup> The law was prompted both by the 1994

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<sup>17</sup> 42 U.S.C. §§ 14071-14073, *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 129(a), 120 Stat. 600 (2006); *see also* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38045 (Jul. 2, 2008) [hereinafter 2008 Guidelines], *available at* <http://www.gpo.gov/fdsys/pkg/FR-2008-07-02/pdf/E8-14656.pdf>; *Doe II*, 439 Md. at 222 n.12, 94 A.3d at 803 n.12.

<sup>18</sup> *Smith v. Doe*, 538 U.S. at 89-90; 42 U.S.C. § 16925(d).

<sup>19</sup> 42 U.S.C. § 16912(b) (2013).

<sup>20</sup> 42 U.S.C. §§ 16901-16929 (2013); *Doe II*, 439 Md. at 222, 94 A.3d at 803. The full extent of the revision of both the federal standards and Maryland’s statutes is beyond the scope of this comment. This comment will focus on the evolution of Maryland’s statute to apply retroactively to offenders convicted before the enactment of each.

<sup>21</sup> 2008 Guidelines, *supra* note 17, at 38044-45.

<sup>22</sup> *Id.* at 38045; *see also Doe II*, 439 Md. at 222-23, 94 A.3d at 803.

<sup>23</sup> 2008 Guidelines, *supra* note 17, at 38044; *see also* Sarah Tofte, *No Easy Answers: Sex Offender Laws in the US*, 19 No.4(G) HUMAN RIGHTS WATCH 2, 48 (2007).

<sup>24</sup> *Graves v. State*, 364 Md. 329, 336-37, 772 A.2d 1225, 1230 (2001) (citing 1995 Md. Laws, Ch. 142).

Wetterling Act and in part by public outrage over the sexual assault of a young Dundalk child in the summer of 1993.<sup>25</sup> The child victim and his parents became aware of the convicted molester's release only by observing him in their community after having been released from prison earlier than expected.<sup>26</sup> At its inception and in an effort to notify the surrounding community of the offender's presence, the Maryland statute was only applied prospectively, requiring certain sex offenders to notify law enforcement of their presence in the county where he or she intended to live once released.<sup>27</sup> Meanwhile, the federal standards have undergone significant revision.<sup>28</sup>

*B. Retroactive Registration in Maryland: How We Got Here*

SORNA delegates authority to the U.S. Attorney General<sup>29</sup> "to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction . . . ."<sup>30</sup> In 2007, the Attorney General published an interim rule specifying that SORNA applies retroactively and requires implementing jurisdictions to subject sex offenders convicted before the enactment of SORNA to its registration and public notification requirements and to modify their programs accordingly to remain compliant with the federal standards.<sup>31</sup> In 2008 the Department of Justice published the Attorney General's final guidelines, which reinforced the retroactivity requirements outlined in the

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<sup>25</sup> Gregory G. Gillette, *The Maryland Survey: 1994-1995: Recent Developments: The Maryland General Assembly*, 55 MD. L. REV. 847, 852 (1996) (The current iteration of the federal statute expressly states its purpose to respond to "vicious attacks by violent predators" against several children and adults including Jacob Wetterling, abducted at age 11 in 1989.); 42 U.S.C. § 16901 (2013).

<sup>26</sup> *Gillette*, *supra* note 25, at 852.

<sup>27</sup> *Graves*, 364 Md. at 337, 772 A.2d at 1230; *see also* MD. CODE ANN., CRIM. PROC. § 11-702.1(a) (2013).

<sup>28</sup> 2008 Guidelines, *supra* note 17, at 38030.

<sup>29</sup> All references herein to the Attorney General refer to the Attorney General of the United States.

<sup>30</sup> 42 U.S.C. § 16913(d) (2006) (the federal Act facially applies directly to sex offenders nationwide); *see also Doe II*, 439 Md. 201, 223, 94 A.3d 791, 804; *infra* Part II for a discussion of federalism, statutory construction, and SORNA's interaction with state law.

<sup>31</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894-01 (February 28, 2007) (later codified at 28 C.F.R. pt. 72) (The Attorney General's requirements as they relate to implementing jurisdictions are "only conditions required to avoid the reduction in Federal funding under [SORNA]."); *see also Doe II*, 439 Md. at 223, 94 A.3d at 804 (quoting 42 U.S.C. § 16925(d)).

interim rule.<sup>32</sup> Citing the 2003 holding in *Smith v. Doe*,<sup>33</sup> the Attorney General noted that the application of the SORNA standards to sex offenders whose convictions predate SORNA creates no ex post facto problem:

[B]ecause the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions<sup>34</sup>) against sex offenders whose predicate convictions occurred prior to the creation of these requirements.<sup>35</sup>

Despite the Attorney General's narrowing of the retroactive class via supplemental guidelines in 2011,<sup>36</sup> the apparent precedent keeping pre-SORNA offenders within its reach is the Supreme Court's ruling in *Smith v. Doe*.<sup>37</sup>

Maryland, like seventeen other states and several tribal jurisdictions and territories, has "substantially implemented" SORNA's requirements in its existing sex offender tracking program.<sup>38</sup> Accordingly, Maryland's sex offender registration and notification statutes have also undergone a number

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<sup>32</sup> The 2008 Guidelines state:

The applicability of the SORNA requirements is not limited to sex offenders whose predicate sex offense convictions occur following a jurisdiction's implementation of a conforming registration program. Rather, SORNA's requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment.

2008 Guidelines, *supra* note 17, at 38046.

<sup>33</sup> 538 U.S. at 85.

<sup>34</sup> 18 U.S.C. § 2250(a) (2006) (subjecting those convicted of a SORNA sex offense to a fine, imprisonment for up to 10 years, or both for failing to register with the destination jurisdiction as required by SORNA when traveling in interstate or foreign commerce). Failure to register occurring after SORNA's enactment and the effective date of the regulation indicates that SORNA applies to all sex offenders. *See* U.S. v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010).

<sup>35</sup> 2008 Guidelines, *supra* note 17, at 38046 (citing 72 Fed. Reg. 8894-01, 8896; *Smith v. Doe*, 538 U.S. 84, 105-06 (2013)).

<sup>36</sup> 76 Fed. Reg. 1630-01, 1630, 1639 (Jan. 11, 2011).

<sup>37</sup> 538 U.S. 84 (2003); *see also supra* text accompanying notes 13-14.

<sup>38</sup> *Doe II*, 439 Md. 201, 224, 62 A.3d 791, 804.

of significant revisions to remain compliant with SORNA's requirements in pursuit of federal grant funds.<sup>39</sup>

In 1999, the General Assembly substantially modified Maryland's registration statute, retroactively subjecting certain categories of sex offenders to lifetime registration.<sup>40</sup> Again in 2009, further revisions retroactively required certain sex offenders committing their offenses prior to October 1, 1995, and convicted on or after that date, *who were not previously required to register under Maryland law*, to register as sex offenders.<sup>41</sup> In 2010, further amendments adopted SORNA's tiered offender classification structure, retroactively increasing the registration obligation of those offenders newly classified as tier-III offenders to lifetime registration.<sup>42</sup>

Angel Ochoa is one Maryland offender who, in 2013, sought declaratory relief after his ten-year post-conviction registration obligation was converted to a lifetime registration obligation pursuant to revisions of Maryland's statute.<sup>43</sup> A majority of the Court of Appeals of Maryland in *Ochoa* applied the heavily revised Maryland registration statute, holding that Ochoa was subject to lifetime registration pursuant to those revisions despite having satisfied the previous statutorily imposed ten-year registration requirement.<sup>44</sup> The majority's straightforward statutory interpretation and application eschewed any ex post facto analysis.<sup>45</sup> Chief Judge Bell's dissent criticized the statutory revisions, which have subtly evolved to recapture Maryland offenders convicted prior to SORNA's existence, as obfuscated.<sup>46</sup> The *Ochoa* case illustrates Maryland's statutory evolution leading to the recent ex post facto legal bottleneck faced by Maryland lawmakers and regulators today.<sup>47</sup>

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<sup>39</sup> See, e.g., Fiscal Note to S.B. 73, 413th Gen. Assemb., Reg. Sess., at 2 (Md. 1999), available at [http://mgaleg.maryland.gov/1999rs/fnotes/bil\\_0003/sb0073.pdf](http://mgaleg.maryland.gov/1999rs/fnotes/bil_0003/sb0073.pdf) (S.B. 73 was later enacted as 1999 Md. Laws, ch. 317); see also *Doe I*, 430 Md. 535, 545-46, 62 A.3d 123, 129 (providing background on the evolution of Maryland's sex offender registration laws).

<sup>40</sup> 1999 Md. Laws, ch. 317, art. 27(D)(2); see also *Ochoa v. Dept. of Pub. Safety and Corr. Servs.*, 430 Md. 315, 319-21, 61 A.3d 1, 3-4 (2013).

<sup>41</sup> 2009 Md. Laws, ch. 541, § 2(a)(5); *Doe I*, 430 Md. at 545-46, 62 A.3d at 129; *Doe II*, 439 Md. at 223, 62 A.3d at 804.

<sup>42</sup> 2010 Md. Laws, ch. 174-75; *Doe I*, 430 Md. at 541, 62 A.3d at 126; *Doe II*, 439 Md. at 223, 94 A.3d at 804.

<sup>43</sup> *Ochoa*, 430 Md. at 316, 61 A.3d at 1-2.

<sup>44</sup> *Id.* at 316-17, 61 A.3d at 2.

<sup>45</sup> *Id.* The issue on which Ochoa appealed did not contemplate an ex post facto challenge.

<sup>46</sup> See *id.* at 340, (Bell, C.J., dissenting) ("An individual in the petitioner's petition, looking to all these statutes, at best, would have a very difficult time ascertaining the current status of his registration obligation. . . . It is simply unfair for this Court to hold the petitioner responsible for deciphering the complicated and often inscrutable history of Maryland's sex offender registration laws.")

<sup>47</sup> See *infra* Part II.

C. *The Ex Post Facto Prohibition*

Article 17 of the Maryland Declaration of Rights provides “[t]hat retrospective Laws, *punishing* acts committed before the existence of such Laws, *and by them only declared criminal*, are oppressive, unjust and incompatible with liberty; wherefore, no ex post facto Law ought to be made; *or any retrospective oath or restriction be imposed, or required.*”<sup>48</sup> The United States Constitution prohibits states from “pass[ing] any Bill of Attainder [or] ex post facto Law.”<sup>49</sup> The juxtaposition is important because as is the case in Maryland, criminal defendants may be afforded broader protections under individual states’ constitutions.<sup>50</sup>

Justice Chase in 1798 endeavored to interpret the federal Constitution’s ex post facto prohibition:

Laws considered ex post facto laws, within the words and the intent of the prohibition, include: (1) Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was, when committed. (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. (4) Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.<sup>51</sup>

....

[But] [e]very ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law: The former, only, are prohibited. . . . [T]here are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon.<sup>52</sup>

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<sup>48</sup> MD. CONST. Declaration of Rights, art. 17 (emphasis added).

<sup>49</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>50</sup> See *Doe I*, 430 Md. 535, 548-49, 62 A.3d 123, 131; *Doe II*, 439 Md. 201, 235, 94 A.3d 791, 811; see also *infra* note 68 and accompanying text.

<sup>51</sup> *Calder v. Bull*, 3 U.S. 386, 390 (1798).

<sup>52</sup> *Id.* at 391. Justice Chase relied in part on Maryland’s Constitution in making his opinion. The Court of Appeals of Maryland has also determined that “not every law passed after the commission of an offense, which changes the consequences of that offense, is barred by the ex post facto provision.” *Doe I*, 430 Md. at 560-61, 62 A.3d

Justice Chase also noted that the Supreme Court of the United States “has no jurisdiction to determine that any law of any state legislature, contrary to the Constitution of such state, is void.”<sup>53</sup> Maryland’s ex post facto clause, like its federal equivalent, has been interpreted to apply only to criminal laws.<sup>54</sup>

#### *D. Doe and Ex Post Facto Interpretation in Maryland*

The Court of Appeals of Maryland has historically interpreted the state’s constitutional ex post facto prohibition *in pari materia* with that of the Federal Constitution, and has in the past held that the clauses have the same meaning.<sup>55</sup> Almost 100 years after *Calder*, the court in 1987 adopted the “disadvantage” standard in analyzing a federal ex post facto issue.<sup>56</sup> By that standard the ex post facto “prohibition ‘extends broadly to any law passed after the commission of an offense which . . . in relation to that offense, *or its consequences*, alters the situation of a party to his disadvantage . . . .’”<sup>57</sup>

The Supreme Court abandoned this standard in 1990 by expressly overruling *Kring* in *Collins v. Youngblood*.<sup>58</sup> In *Collins*, the Supreme Court returned to analyzing ex post facto problems within the confines of *Calder*’s four elements.<sup>59</sup> Then in 2003, in the context of SORNA-inspired retroactive state sex offender registration analyzed under the Federal Constitution’s ex post facto prohibition, the Supreme Court in *Smith* employed a two-part intent-effects test to hold that Alaska’s retroactive sex offender registration statute did not violate the Federal Constitution’s ex post facto prohibition.<sup>60</sup> The issue

at 138 (quoting *Anderson v. Dep’t of Health & Mental Hygiene*, 310 Md. 217, 226, 528 A.2d 904, 909 (1987)).

<sup>53</sup> *Calder*, 3 U.S. at 392.

<sup>54</sup> *Doe I*, 430 Md. at 553-54, 62 A.3d at 134 (quoting *Anderson*, 310 Md. at 223, 528 A.2d at 907).

<sup>55</sup> See Sec’y, Dept. of Pub. Safety and Corr. Servs. v. Demby, 390 Md. 580, 608, 890 A.2d 310, 327 (2006); *Doe I*, 430 Md. at 548, 62 A.3d at 130-31. The court departs from this interpretation in *Doe I*. See *Doe I*, 430 Md. at 551, 62 A.3d at 132.

<sup>56</sup> *Doe I*, 430 Md. at 554, 62 A.3d at 134 (citing *Kring v. Missouri*, 107 U.S. 221, 235 (1883), *overruled by Collins v. Youngblood*, 497 U.S. 37 (1990) (standard adopted in *Anderson*, 310 Md. at 224, 528 A.2d at 908).

<sup>57</sup> *Id.* at 554, 62 A.3d at 134 (emphasis in original) (quoting *Anderson*, 310 Md. at 224, 528 A.2d at 908).

<sup>58</sup> 497 U.S. 37, 50 (1990); see also *Doe I*, 430 Md. at 581, 62 A.3d at 150 (Barbera, J., dissenting).

<sup>59</sup> *Collins*, 497 U.S. at 50; see also *supra* text accompanying notes 51-52.

<sup>60</sup> *Doe I*, 430 Md. at 556-57, 62 A.3d at 135-36, (citing *Smith v. Doe*, 538 U.S. 84 (2003)). The Supreme Court utilized seven factors in its ex post facto analysis: whether the regulatory scheme has been regarded as punishment in the nation’s history and traditions; whether the scheme subjects respondents to affirmative disability or restraint; whether it promotes traditional aims of punishment; whether it has a rational connection to a legitimate non-punitive objective; whether the scheme is not excessive with respect to its purpose; whether a finding of scienter is required

of sex offender registration retroactivity was one of first impression in *Smith*, and the opinion is widely cited.<sup>61</sup>

The intent-effects test in *Smith* sought to “ascertain whether the legislature meant the statute to establish ‘civil’ proceedings.”<sup>62</sup>

If the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State’s] intention to deem it civil . . . [O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.<sup>63</sup>

Despite Maryland’s traditional interpretation of its constitution’s ex post facto prohibition *in pari materia* with federal ex post facto jurisprudence,<sup>64</sup> a divided Court of Appeals of Maryland in a plurality opinion in *Doe I*<sup>65</sup> refused to unanimously apply the intent-effects test and instead retained the disadvantage standard in deciding that Mr. Doe could not, under Maryland’s constitution, be required to register as a sex offender pursuant to the retroactive provision in Maryland’s sex offender registration statute.<sup>66</sup> Judge Greene, invoking a rule articulated in *Dua v. Comcast Cable of Maryland, Inc.*,<sup>67</sup> noted that while the Court of Appeals of Maryland has generally interpreted its constitutional ex post facto provision *in pari materia* with the federal Constitution, the federal interpretation is merely persuasive and the court’s interpretation of Maryland’s constitution is not thereby limited.<sup>68</sup>

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to trigger its operation; and whether the behavior to which it applies is already a crime. *Smith*, 538 U.S. at 86-87 (citations omitted).

<sup>61</sup> *Smith v. Doe*, 538 U.S. at 92.

<sup>62</sup> *Id.* (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

<sup>63</sup> *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980) and *Hudson v. United States*, 522 U.S. 93, 100 (1997)) (internal citations and quotations omitted).

<sup>64</sup> See *supra* note 55 and accompanying text.

<sup>65</sup> *Doe I*, 430 Md. 535, 62 A.3d 123.

<sup>66</sup> *Id.* at 551, 62 A.3d at 132-33. The Department in its petition for certiorari in *Roe* pointed out that four out of seven judges on the Court of Appeals of Maryland (a majority) elected to utilize the federal intent-effects test. Of them, two found that Maryland’s scheme was overly punitive in effect and two found that it was not, thereby creating no ex post facto problem. The Court of Appeals in *Doe II* rejected the Department’s plea to reconsider the holding in *Doe I* on the basis that “the decision provides inadequate guidance to the lower courts . . . [and that] there is no single rationale that commanded a majority of the judges in *Doe I* . . .” *Doe II*, 439 Md. at 218, 94 A.3d at 801.

<sup>67</sup> 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002).

<sup>68</sup> *Doe I*, 430 Md. at 549, 62 A.3d at 131. Judge Greene noted that Maryland’s Constitutional ex post facto protections may be broader than those of the federal Constitution and that the Supreme Court has sanctioned broader interpretations of

The 2013 Court of Appeals of Maryland plurality decision in *Doe I* marks a departure from the court's consistent interpretation of Maryland's ex post facto prohibition *in pari materia* with the federal Constitution.<sup>69</sup> Mr. Doe<sup>70</sup> pled guilty to, and was convicted of, one count of child sexual abuse for his inappropriate conduct with a thirteen-year-old student that occurred during the 1983-84 school year while he was employed at the school as a teacher.<sup>71</sup> The conviction, however, did not occur until the victim ultimately came forward in 2006, after the initial enactment of Maryland's first sex offender registration scheme.<sup>72</sup> Although the plea agreement itself did not expressly contemplate Doe's registration as a sex offender,<sup>73</sup> he was required to register pursuant to the then-existing statute as a condition of his three-year supervised probation following release from his four and one-half year unsuspended prison term.<sup>74</sup> Mr. Doe, however, successfully challenged the portion of his sentence requiring registration as a sex offender because he did not meet the then-existing express statutory conditions requiring registration at the time of his conviction.<sup>75</sup>

Approximately five months after Mr. Doe's release from prison in 2008, Governor O'Malley signed Senate Bill 425 into law, which modified the statute's retroactivity provision and required him to register as a child sex offender.<sup>76</sup> Mr. Doe registered under protest pursuant to his probation officer's

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such states. *Id.* at 550, 62 A.3d at 131-32 n.13 (citing William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)); see also *Doe II*, 439 Md. at 235, 94 A.3d at 811 ("Marylanders, like Hoosiers, enjoy 'greater protection under the prohibition on ex post facto laws' of the Maryland Declaration of Rights.") (citing *Andrews v. State*, 978 N.E.2d 494, 502 (Ind. Ct. App. 2012)).

<sup>69</sup> See *supra* text accompanying notes 64-66.

<sup>70</sup> John Doe is a pseudonym used in these cases after the offender had his name stricken from the record. See *Doe I*, 430 Md. at 538, 62 A.3d at 124 n.3.

<sup>71</sup> *Id.* *Doe II* provides an additional overview of the facts and procedural history in Mr. Doe's and Mr. Roe's cases. *Doe II*, 439 Md. at 208-14, 94 A.3d at 795-98.

<sup>72</sup> *Doe I*, 430 Md. at 538, 62 A.3d at 125. See also *supra* note 24 and accompanying text.

<sup>73</sup> *Doe I*, 430 Md. at 539, 62 A.3d at 125. For purposes of Maryland's registration obligation, a guilty plea qualifies as a conviction, without any other statutory mention of the effect of a guilty plea on the obligation. See MD. CODE ANN., CRIM. PROC. § 11-702 (2013).

<sup>74</sup> *Doe I*, 430 Md. at 539-40, 62 A.3d at 125.

<sup>75</sup> *Id.* at 540, 62 A.3d at 125-26.

<sup>76</sup> *Id.* at 540, 62 A.3d at 126. "The Department shall contact and notify each person who is not under the custody or supervision of a supervising authority on October 1, 2009, for whom registration is required under . . . this subsection." 2009 Md. Laws, ch. 541 (codified at MD. CODE ANN., CRIM. PROC. § 11-707(c)(2)). The passage of this amendment undoubtedly blindsided many convicted sex offenders not previously required to register.

direction, “under threat of ‘arrest[] and incarcerat[ion] . . . .’”<sup>77</sup> Later in 2009, Mr. Doe filed a civil complaint seeking a declaratory judgment that he was not required to register as a sex offender pursuant to Maryland’s SORNA-inspired statute.<sup>78</sup> Not until after the trial court denied Mr. Doe’s complaint for declaratory relief, in part for lack of an ex post facto problem, did he raise that issue on appeal to the Court of Special Appeals.<sup>79</sup> The court of special appeals affirmed the trial court’s decision in an unreported opinion<sup>80</sup> and the Court of Appeals of Maryland issued a writ of certiorari to consider, inter alia, the federal and state ex post facto prohibitions.<sup>81</sup>

Unlike in *Ochoa*, the Court of Appeals of Maryland in *Doe I* considered whether Maryland’s registration statute constituted an ex post facto violation as applied to Mr. Doe.<sup>82</sup> Judge Greene’s plurality opinion, however, resolved the issue solely on state constitutional grounds,<sup>83</sup> definitively diverging from a reading of Article 17’s ex post facto prohibition *in pari materia* with that of the federal Constitution.<sup>84</sup> The decision, while a victory for Mr. Doe and Maryland’s retroactively registered offenders, left much instability and uncertainty not only in the court’s ex post facto analysis, but also in the implementation of the State’s current retroactive sex offender statutes by the executive branch.<sup>85</sup>

Judge Greene, Judge Eldridge, and Chief Judge Bell held for the plurality in *Doe I* that “[b]ased upon principles of fundamental fairness and the right to fair warning within the meaning of Article 17, retrospective application of the

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<sup>77</sup> *Doe I*, 430 Md. at 540-41, 62 A.3d at 126.

<sup>78</sup> *Id.* at 541, 62 A.3d at 126. Meanwhile, the Maryland General Assembly modified the registration statute again, categorizing Doe as a Tier-III lifetime registrant. *Id.* It is worth noting that Doe did not advance a constitutional ex post facto argument in his complaint; rather, it was the Department that argued the absence of an ex post facto violation during a hearing on the complaint, thereby preserving the issue for appeal. *Id.* at 541-42, 543-44, 62 A.3d at 127-28.

<sup>79</sup> In addition to the ex post facto issue, Doe challenged the statute on bill of attainder, equal protection, and due process grounds. *Id.* at 542, 62 A.3d at 127.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 542-43, 62 A.3d at 127.

<sup>82</sup> See *Doe I*, 430 Md. at 553, 62 A.3d at 133.

<sup>83</sup> See *id.* at 547, 62 A.3d at 130. The plurality opinion by Judge Greene also represented the opinions of Chief Judge Bell and Judge Eldridge (retired, specially assigned). See *id.* at 578 n.1, 62 A.3d at 149 n.1 (Barbera, J., dissenting).

<sup>84</sup> *Id.* at 551, 553, 558, 62 A.3d at 132, 134, 137. The salient effect of deciding the case on state constitutional grounds is the insulation from review by the Supreme Court, which would only decide the case on federal constitutional grounds. See *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>85</sup> State Certiorari Petition, *supra* note 6, at 9. See generally Brief of Amici Curiae at 17-22, *Doe v. Dep’t of Pub. Safety and Corr. Servs.*, 430 Md. 535, 62 A.3d 123 (2013) (No. 125) 2012 WL 1969096, at \*17-45 [hereinafter Amicus Brief] (providing a detailed history of Maryland’s Declaration of Rights Article 17 ex post facto prohibition).

sex offender registration statute to Petitioner is unconstitutional.”<sup>86</sup> Judge Greene’s application of the disadvantage standard expressly relied in part on the brief of amici curiae, which outlined in detail the actual requirements of registrants and the multitude of adverse practical effects of registration.<sup>87</sup> These include requirements that the registrant register and report in person; disclose detailed private information; notify law enforcement with changes in e-mail addresses, phone numbers, mailing addresses, and school enrollment information; restrictions on the registrants’ travel and their ability to enter certain property; and widespread public dissemination of personal and private information on the Department’s website.<sup>88</sup> These restrictions also impose substantial housing and employment problems on registrants and generate threats, which amount to punishment akin to public shaming.<sup>89</sup> The court found that the retroactive sweep of the registration statute at the time of Mr. Doe’s conviction “had an effect that was the equivalent of placing Petitioner on probation for life as a result of his sex offense.”<sup>90</sup>

Furthermore, referencing Justice Ginsburg’s dissent in *Smith*, Judge Greene agreed that the public dissemination of registrants’ information is “tantamount to the historical punishment of shaming[.]”<sup>91</sup> suggesting that the Department’s placement of a searchable color picture of registrants along with detailed

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<sup>86</sup> *Doe I*, 430 Md. at 553, 62 A.3d at 133. The holding renders MD. CODE ANN., CRIM. PROC. § 11-702.1 (Retroactive Application of Subtitle) unconstitutional on state grounds, thereby rendering § 11-704 (Persons Subject to Registration) prospective only.

<sup>87</sup> *See id.* at 566-67, 62 A.3d at 142; *see also* Amicus Brief, *supra* note 85 at 7-16. Regardless of whether the court utilized the disadvantage standard or the more deferential intent-effects test, five of seven judges on the court of appeals determined that Maryland’s registration scheme was overly punitive and violated Article 17 of Maryland’s Declaration of Rights.

<sup>88</sup> “These restrictions and obligations have the same practical effect of placing Petitioner on probation or parole.” *Doe I*, 430 Md. at 562-63, 62 A.3d at 139 (citing *Doe v. State*, 189 P.3d 99, 1012 (Alaska 2008)).

<sup>89</sup> *See* Amicus Brief, *supra* note 85 at 7-16. The Department of Public Safety and Correctional Services’ website provides the following warning on its search results page: “Warning – Do not use this information to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. Such action could result in civil or criminal penalties.” DEP’T OF PUB. SAFETY AND CORR. SERV., *Maryland SOR Search*, [www.dpscs.state.md.us/sorSearch/](http://www.dpscs.state.md.us/sorSearch/) (last visited Dec. 18, 2013). The warning does not appear until a search or browse is conducted. *See* Tofté, *supra* note 23, for a comprehensive report of the purported adverse effects imposed on registrants.

<sup>90</sup> *Doe I*, 430 Md. at 564, 62 A.3d at 140.

<sup>91</sup> *Id.* at 564-66, 62 A.3d at 140-41 (citing *Smith v. Doe*, 538 U.S. 84, 116 (2003) (Ginsburg, J., dissenting)).

information including an icon on a map marking the offender's home rises to the level of shunning the offender within their community.<sup>92</sup>

Judges McDonald and Adkins concurred in the result, instead by reading Article 17 *in pari materia* with the federal Constitution's ex post facto prohibition.<sup>93</sup> Finding "no principled reason" to "differentiat[e] [Article 17's] prohibition against ex post facto laws from the parallel prohibition in the Federal Constitution[,]"<sup>94</sup> Judge McDonald opined that the 2009 and 2010 amendments to Maryland's sex offender registry implicates the effects prong of the federal intent-effects test by "[t]aking the] law across the line from civil regulation to an element of the punishment of offenders."<sup>95</sup>

In her dissent, Judge Barbera agreed that Maryland's Article 17 should be read *in pari materia* with the federal Constitution, but believed that Mr. Doe did not meet the clearest proof burden, set forth by the Supreme Court in *Smith's* intent-effects test.<sup>96</sup> Under that analysis, Judge Barbera would have held that Maryland's registration statute does not "override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."<sup>97</sup> Judge Barbera determined that the legislature did not intend the 2009 and 2010 amendments to be punitive, but rather to serve "public safety, regulatory ends," and that no ex post facto problem existed.<sup>98</sup>

Although Judge Harrell did not agree with the plurality analysis, he nonetheless concurred in the result, sealing a 6-1 vote in favor of Mr. Doe.<sup>99</sup> Judge Harrell would have ordered specific performance of Mr. Doe's 2006 plea agreement, which did not include registering as a sex offender, pursuant to the procedural safeguards underlying Maryland Rule 4-243<sup>100</sup> and the rule

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<sup>92</sup> *Id.* at 566, 62 A.3d at 141-42. Judge Greene noted that the public display of the registrants' address and other information, allowing members of the registrants' communities in which they live, work, or attend school, impermissibly resembles shaming for purposes of Maryland's ex post facto prohibition. *Id.* at 568, 62 A.3d at 142-43.

<sup>93</sup> *See id.* at 577-78, 62 A.3d at 148-49 (McDonald, J., concurring).

<sup>94</sup> *Id.*

<sup>95</sup> *Doe I*, 430 Md. at 577-78, 62 A.3d at 148-49 (McDonald, J., concurring)

<sup>96</sup> *Id.* at 586, 62 A.3d at 154 (Barbera, J., dissenting). Judge Barbera became Chief Judge of the Court of Appeals of Maryland in July 2013.

<sup>97</sup> *Id.* (Barbera, J., dissenting) (quoting *Smith v. Doe*, 538 U.S. 84 (2003)) (noting that the plurality opinion did not even establish the threshold requirement in any ex post facto violation that Maryland's registration statute is a "criminal or penal law").

<sup>98</sup> *Id.* at 587, 62 A.3d at 154. (Barbera, J., dissenting). Judge Barbera also provided authority interpreting SORNA's civil, regulatory purpose at the federal level, noting extensive failure of ex post facto challenges to SORNA in federal courts. *Id.* at 589, 62 A.3d at 155 (Barbera, J., dissenting).

<sup>99</sup> *Doe I*, 430 Md. at 569, 62 A.3d at 143 (Harrell, J., concurring).

<sup>100</sup> *Id.* at 576, 62 A.2d at 147 (Harrell, J., concurring) (citing *Cuffley v. State*, 416 Md. 568, 580-81, 7 A.3d 557, 563-65 (2010)) (referencing the four corners of the plea agreement approach).

of lenity.<sup>101</sup> Although concurring in the result on this unique basis, Judge Harrell agreed with the dissent—Judges McDonald, Adkins, and Barbera—that Maryland’s ex post facto prohibition should be read *in pari materia* with the federal Constitution, thus requiring the court to apply the more deferential intent-effects test.<sup>102</sup> This opinion, though condemning the statutory operation of Maryland’s sex offender registration system in light of the plea agreement, formed a 4-3 majority agreement that Article 17 should be read *in pari materia* with the federal Constitution.<sup>103</sup>

#### *E. Other Courts’ Decisions on the Issue*

State and federal appellate courts, including the Supreme Court of the United States, have repeatedly held that imposing restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive government objective,<sup>104</sup> and have rejected ex post facto claims by offenders required to register retroactively.<sup>105</sup> For example, the Fourth Circuit Court of Appeals upheld West Virginia’s registration and notification statute as civil and

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<sup>101</sup> Concurring in *Doe I*, Judge Harrell wrote:

Determining the meaning of a sentencing term in a plea agreement requires strict adherence to the ‘four corners’ of the plea agreement as established in the Maryland Rule 4-243 plea proceeding and to ‘due process concerns for fairness and adequacy of procedural safeguards.’ . . . Any ambiguities in the record concerning the agreement’s terms are resolved in the defendant’s favor.

*Doe I*, 430 Md. at 576, 62 A.3d at 147 (Harrell, J., concurring) (quoting *Cuffley*, 416 Md. at 580-81, 7 A.3d at 563-65). Judge Harrell reiterated his stance in a concurrence in *Doe II*. See *Doe II*, 439 Md. at 238, 94 A.3d at 813 (Harrell, J., concurring).

<sup>102</sup> *Doe I*, 430 Md. at 569, 62 A.3d at 143 (Harrell, J., concurring).

<sup>103</sup> See *supra* text accompanying notes 64-66.

<sup>104</sup> See e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997) (holding that prior criminal conduct serves solely an evidentiary purpose to demonstrate “mental abnormality” or to support a finding of future dangerousness to invoke involuntary commitment under Kansas’ Sexually Violent Predator Act); see also *Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (holding that Alaska’s retroactive sex offender registration statute did not constitute punishment sufficient to sustain a challenge under the ex post facto clause of the federal constitution).

<sup>105</sup> See Howard, *supra* note 9.

nonpunitive in nature,<sup>106</sup> following the lead of the state's supreme court.<sup>107</sup> Numerous state courts have agreed with this analysis.<sup>108</sup>

It is clear that under *Smith's* controlling precedent on the federal ex post facto issue, federal judges have little, if any, *substantive* leeway to grant relief to registrants in federal courts.<sup>109</sup> However, just as there have been substantive losses for registrants challenging their sex offender registration obligation on ex post facto grounds in federal courts,<sup>110</sup> there have been instances of procedural wins.<sup>111</sup>

State high courts, however, have both substantive and procedural leeway to strike down registration schemes offensive to their respective state constitutions.<sup>112</sup> Alaska, Indiana, Ohio, Oklahoma, Maine, Missouri, and Kentucky are included among other states that have declared their registry schemes to constitute ex post facto violations, independent of the federal constitutional provision, affording broader protection on state constitutional grounds as did a plurality of the Court of Appeals of Maryland in *Doe I*.<sup>113</sup>

The Supreme Court of Alaska, notwithstanding the Supreme Court of the United States' holding in *Smith v. Doe* and its concession that it has on several

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<sup>106</sup> *Cunningham v. Lemmon*, 251 Fed.Appx. 829, 830 (4th Cir. 2007) (per curiam) (no ex post facto violation on federal constitutional grounds), *aff'g* *Cunningham v. West Virginia*, No. 6:06-cv-00169, 2007 WL 895866, at \*7 (D. W. Va. Mar. 22, 2007).

<sup>107</sup> *See Haislop v. Edgell*, 215 W.Va. 88, 95, 593 S.E.2d 839, 846 (2003) (no ex post facto violation on state constitutional grounds).

<sup>108</sup> *See* Howard, *supra* note 9.

<sup>109</sup> *See Doe I*, 430 Md. at 556-57, 62 A.3d 123, 135-36 (citing *Smith v. Doe*, 538 U.S. 84 (2003)); *supra* text accompanying note 60. The analysis in *Smith* may, however, produce a different result where a registrant meets the "clearest proof" burden under registration schemes more punitive than Alaska's.

<sup>110</sup> *See, e.g., United States v. Shoulder*, 738 F.3d 948, 958 (9th Cir. 2013) (criminal prosecution valid for failure to register retroactively under SORNA); *United States v. Elkins*, 683 F.3d 1039, 1045 n.7 (9th Cir. 2012) (Sixth Circuit citing authority for no ex post facto violation for pre-SORNA retroactive registration and Ninth Circuit holding same).

<sup>111</sup> *See generally* *United States v. Reynolds*, 710 F.3d 498 (3d Cir. 2013) (outlining circuit split on whether the Attorney General had good cause to bypass the Administrative Procedure Act notice and comment period on interim retroactivity rule, holding that he did not, thereby prejudicing plaintiff); *United States v. Valverde*, 628 F.3d 1159 (9th Cir. 2010) (holding the same).

<sup>112</sup> *See Doe I*, 430 Md. at 549, 62 A.3d at 131; *supra* text accompanying note 68.

<sup>113</sup> *See Doe v. State*, 189 P.3d 999, 1003 (Alaska 2008) (utilizing federal intent-effects test); *Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009) (utilizing federal intent-effects test); *State v. Williams*, 952 N.E.2d 1108, 1111 (Ohio 2011) (utilizing unique Ohio ex post facto test); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1019 (Okla. 2013) (intent-effects test); *State v. Letalien*, 985 A.2d 4, 16 (Me. 2009) (federal intent-effects test); *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006) (utilizing state constitutional bar on "laws retrospective in operation").

occasions followed the federal constitutional ex post facto analysis, later extended broader protection on state constitutional grounds where Alaska's statutory scheme "treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision."<sup>114</sup> The court ultimately held that the effects of the statute "are punitive, and convincingly outweigh the statute's nonpunitive purposes and effects."<sup>115</sup> Likewise, in *Wallace*, the Supreme Court of Indiana found that despite the Indiana legislature's civil intent, the punitive effects of Indiana's sex offender registration statute were particularly excessive.<sup>116</sup> The Supreme Court of Ohio, utilizing an ex post facto test from the turn of the twentieth century, found that the punitive effect of the state's sex offender registration statute impermissibly "takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right."<sup>117</sup>

## II. RESIDUAL DISPUTE AND THE PROBLEM IN MARYLAND TODAY

At the federal level, the current bottleneck in the retroactive operation of Maryland and other states' sex offender registration statutes illustrates a problem for the Attorney General in applying SORNA retroactively as a national standard.<sup>118</sup> Maryland is now among several states that have declared retroactive sex offender registration obligations unconstitutional as punitive based upon state ex post facto prohibitions.<sup>119</sup> The decision initially opened the floodgates to challenges by offenders required to register because of antecedent convictions. Serving to delay this result, the Department of Public Safety and Correctional Services, the administrator of Maryland's sex offender registration system, initially resisted the decision of the Court of Appeals of Maryland in *Doe I*, and appellate litigation continued.<sup>120</sup>

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<sup>114</sup> *Doe v. State*, 189 P.3d at 1009. The court applied the seven *Mendoza-Martinez* ex post facto factors applied in *Smith*, noting the intrusive practical effects of the scheme, which threatens prosecution for non-compliance. *See id.* at 1008 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

<sup>115</sup> *Doe v. State*, 189 P.3d at 1018.

<sup>116</sup> *Wallace*, 905 N.E.2d at 384.

<sup>117</sup> *Williams*, 952 N.E.2d at 1110-11 (quoting *Pratte v. Stewart*, 929 N.E.2d 415, at 37 (Ohio 2010)).

<sup>118</sup> Ostensibly, the Attorney General anticipated states' ex post facto analyses to be consistent with the prevailing federal intent-effects analysis in all cases (an obviously flawed assumption). *See infra* notes 170-71 and accompanying text.

<sup>119</sup> *See supra* text accompanying note 113. State constitutionality rulings, of course, inherently vary depending upon the various language in and interpretations of state constitutions and the degree of each states' retroactive registration obligations, many of which have been inspired by the federal SORNA standards.

<sup>120</sup> *See infra* Part II.a-c.

The residual problem in Maryland following *Doe I* was apparent in the form of a federalism problem in part and a statutory construction problem in part in *Roe v. Maynard* (Roe),<sup>121</sup> and was a certified question of law in *Doe II*.<sup>122</sup> Following the plurality decision in *Doe I*,<sup>123</sup> the Circuit Court for Washington County entered an order directing the Department of Public Safety and Correctional Services to remove Mr. Doe's registration information from state and federal databases.<sup>124</sup> The Department resisted this order, claiming that the court lacked authority to remove offender information from *federal* databases.<sup>125</sup> The Department appealed the denial of its motion to alter or amend the order on that ground, and the court of special appeals certified that question to the Court of Appeals of Maryland pursuant to Rule 8-304.<sup>126</sup> A similar question was raised in a separate case occurring at the same time as the *Doe I* litigation, and the matters were consolidated for argument in the Court of Appeals of Maryland in May 2014.<sup>127</sup>

#### A. *The Roe Case*

John Roe was similarly affected by the 2009-10 amendments to Maryland's registration statute as a result of a conviction in 1997, for offenses committed between late 1994 and early 1996.<sup>128</sup> As a result of the amendments, Roe's original ten-year registration obligation was retroactively converted into a twenty-five-year obligation under the new tier system.<sup>129</sup> Roe filed a complaint for declaratory judgment in the Circuit Court of Maryland for Wicomico County following the legislature's passage of the 2009 amendments.<sup>130</sup> He challenged his retroactive registration obligation in part on federal and state ex post facto grounds, but the circuit court denied relief.<sup>131</sup> He appealed the denial to the court of special appeals, which ultimately reversed the circuit court pursuant to the *Doe I* plurality, holding that the 2009

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<sup>121</sup> *Roe v. Maynard*, 435 Md. 501, 79 A.3d 947 (2013).

<sup>122</sup> *See Doe II*, 439 Md. at 222, 94 A.3d 791, 803.

<sup>123</sup> *See supra* Part I.d.

<sup>124</sup> *See Doe II*, 439 Md. at 210, 94 A.3d at 796.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*; *see also* State Certiorari Petition, *supra* note 6, at 3.

<sup>127</sup> The Department of Public Safety and Correctional Services successfully petitioned for certiorari in *Roe* in the Court of Appeals of Maryland shortly after *Doe* was decided. *See infra* Part II.c. *See also* State Certiorari Petition, *supra* note 6, at 17.

<sup>128</sup> *Doe II*, 439 Md. at 211-12, 94 A.3d at 797.

<sup>129</sup> *Id.* at 212-13, 94 A.3d at 797-98 (If not for the 2010 amendment, the 2009 amendment reclassifying Mr. Roe would have required him to register for life.).

<sup>130</sup> *Id.* Roe had already spent 13 years as a registered sex offender. *See also* *Roe v. Maynard*, 435 Md. 501, 79 A.3d 947 (2013).

<sup>131</sup> *Doe II*, 439 Md. at 212, 94 A.3d at 797.

and 2010 amendments could not be applied retroactively.<sup>132</sup> The Department of Public Safety and Correctional Services then appealed from the subsequent order of the circuit court for Wicomico County that had ordered it, as it had in *Doe I*, to “remove any and all information regarding Roe from the Maryland Sex Offender Registry website [and] . . . remove Roe’s sex offender registration information from all federal databases including the NCIC . . . .”<sup>133</sup> The Court of Appeals of Maryland granted the Department’s certiorari petition and consolidated the question for oral argument with that which was posed in *Doe I*<sup>134</sup> to consider whether the circuit court had authority to direct the Department to remove Roe from databases maintained in compliance with federal law.<sup>135</sup>

*B. Doe’s Ex Post Facto Analysis is the Law of Maryland*

The Court of Appeals of Maryland in *Doe II* did not revisit the ex post facto analysis articulated by the *Doe I* plurality.<sup>136</sup> The Department argued in its petition for certiorari that because the *Doe I* plurality relied upon the “disadvantage” analysis in reaching its result while two other judges on the court reached the same result in using the intent-effect analysis, *Doe I* “has generated uncertainty with regard to the registration obligations of thousands of Maryland sex offenders.”<sup>137</sup> It further argued that *Doe I* should be reconsidered to bring Maryland in line with the Supreme Court’s result in *Smith*.<sup>138</sup> Strength for this argument was apparent because a majority of the

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<sup>132</sup> *Id.* at 213, 94 A.3d at 798.

<sup>133</sup> *Id.* The Circuit Court for Wicomico County did not address the Department’s motion for appropriate relief, seeking to have the court declare Roe’s registration obligation under federal law, prior to entering its order. However, the Court of Appeals of Maryland treated it as denied, making it a final, appealable order. *Id.* at 215, 94 A.3d at 799.

<sup>134</sup> *Id.* at 207 n.1, 94 A.3d at 794 n.1.

<sup>135</sup> *Id.* at 207, 94 A.3d at 794.

<sup>136</sup> *Doe II*, 439 Md. at 214 n.8, 94 A.3d at 798 n.8.

<sup>137</sup> State Certiorari Petition, *supra* note 6, at 8-9. Mr. Roe, in his response to the Department’s certiorari petition, called this a “back-door effort” on the part of the Department “to raise issues it failed to raise or preserve in Mr. Roe’s case . . . before the Circuit Court . . . .” Appellee’s Response to Petition for Writ of Certiorari at 1, *Roe v. Maynard*, 435 Md. 501, 79 A.3d 947 (2013) (No. 125), 2012 WL 3791643 [hereinafter *Roe Response*].

<sup>138</sup> State Certiorari Petition, *supra* note 6, at 9-10. The practical effect of this would have been to narrow the ex post facto protections under Maryland’s constitution despite Article 17’s broader language than the Federal constitution’s ex post facto prohibition. By presenting a favorable question of federal law for review, the Department ostensibly strategized to persuade the Court of Appeals to reconsider *Doe I* in its favor. The Court of Appeals of Maryland agreed with the characterization of this as an attempt at “backdoor preemption” – the Department’s

judges that took part in the *Doe I* decision favored reading Article 17 of the Maryland Declaration of Rights *in pari materia* with the federal Constitution's ex post facto prohibition using the intent-effects test.<sup>139</sup> However, in granting certiorari in *Roe* and accepting the certified question in *Doe I*, the court limited its review in *Doe II* to the independent registration obligation under federal law and the Maryland courts' ability to order removal of offenders from federal databases.<sup>140</sup> The court did not accept the Department's question of whether Maryland's registration requirements are considered punishment for purposes of the federal and State ex post facto prohibitions.<sup>141</sup>

*C. The Independent Federal Registration Obligation: A Matter of Statutory Interpretation*

The basis of the Department's position following the *Doe I* plurality was that, irrespective of the constitutionality of Maryland's sex offender registration statute, federal law imposes an independent obligation upon offenders to register in Maryland. Therefore, convicted offenders in Mr. Roe and Mr. Doe's position must remain listed in "federal databases."<sup>142</sup> The Court of Appeals of Maryland addressed this argument head on in *Doe II*.<sup>143</sup> The questions resolved by the Court of Appeals of Maryland in *Doe II* included whether:

In light of the requirement imposed by federal law that each state maintain an online registry of sex offenders residing in the state and the obligation imposed on convicted sex offenders by federal law to register in the state where they reside, . . . the circuit court lack[ed] authority to direct the State to remove Mr. Roe from databases maintained in

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attempt at "us[ing] federal law to effectively override [its] decision in *Doe I*." See *Doe II*, 439 Md. at 221 n.11, 94 A.3d at 802 n.11.

<sup>139</sup> State Certiorari Petition, *supra* note 6, at 9-10.

<sup>140</sup> *Doe II*, 439 Md. at 220-21, 94 A.3d at 802-03.

<sup>141</sup> *Id.* at 214 n.8, 94 A.3d at 798 n.8. Though the Court did not grant certiorari regarding revisiting *Doe*, the Department did not fully abandon these arguments during oral argument.

<sup>142</sup> State Certiorari Petition, *supra* note 6, at 17. Federal law, the Department's argument continued, precluded Maryland courts' authority to order the Department to remove sex offender information from "federal databases." *Doe II*, 439 Md. at 219-20, 94 A.3d at 802.

<sup>143</sup> *Doe II*, 439 Md. at 207, 94 A.3d at 794. The *Maynard v. Roe* portion of the consolidated opinion was re-captioned as *Hershberger v. Roe* after Gregg Hershberger succeeded Gary Maynard as Secretary of the Maryland Department of Public Safety and Correctional Services. *Id.* at 207 n.1, 94 A.3d at 794 n.1.

compliance with federal law, irrespective of his challenge to registration requirements imposed by MD law?<sup>144</sup>

The question was essentially the same in *Doe I*.<sup>145</sup>

The court of appeals in *Doe II* eschewed Mr. Roe's constitutional arguments and resolved the issues solely by statutory interpretation.<sup>146</sup> The court expressly declined the constitutional arguments, thereby limiting the grounds for its holding on the independent federal registration obligation issue.<sup>147</sup>

The Attorney General's final guidelines provide guidance on sex offenders' federal obligation:

SORNA's regulatory system for sex offenders involves a combination of federal and non-federal elements. In part, SORNA directly prescribes registration requirements that sex offenders must comply with, and authorizes the Attorney General to augment or further specify those requirements in certain areas. . . . These requirements are subject to direct federal enforcement, including prosecution under 18 U.S.C. 2250 where violations occur under circumstances supporting federal jurisdiction, and prescription of compliance with the SORNA requirements as mandatory conditions of supervision for federal sex offenders under 18 U.S.C. 3563(a)(8), 3583(d). SORNA provides incentives for states and other covered jurisdictions to incorporate its registration requirements for sex offenders, and other registration and notification-related measures set out in other provisions of SORNA, into their own sex offender registration notification programs.<sup>148</sup>

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<sup>144</sup> *Id.* at 214, 94 A.3d at 798.

<sup>145</sup> *Id.* at 211, 94 A.3d at 796. The modified certified question considered in *Doe II* was whether "circuit courts have the authority to order the Department to remove sex offender registration information from 'federal databases'?" *See id.*

<sup>146</sup> *Id.* at 221-22, 94 A.3d at 802-03. Mr. Roe argued that SORNA was merely an exercise of the Spending Clause to encourage states' implementation of SORNA to avoid losing federal grant funds under the Edward R. Byrne Justice Assistance Grant. *See Roe Response, supra* note 137, at 18-22. He further argued that any federal government regulation of Maryland's sex offender registration system clearly exceeds Congress' commerce power and that Congress cannot compel Mr. Roe to register in Maryland as a sex offender notwithstanding the *Doe* plurality holding. *Doe II*, 439 Md. at 220-21, 94 A.3d at 802-03.

<sup>147</sup> *Doe II*, 439 Md. at 221-22, 94 A.3d at 802-03.

<sup>148</sup> 2008 Guidelines, *supra* note 17, at 38034.

The Second Circuit interpreted the independent federal registration obligation pursuant to 42 U.S.C. § 16913(a)<sup>149</sup> in *United States v. Guzman*.<sup>150</sup> *Guzman* involved federal criminal enforcement of offenders who failed to register, then subsequently traveled in interstate commerce.<sup>151</sup> In *Guzman*, the court acknowledged that “according to [section 2250’s] explicit terms, a sex offender who never crosses state lines . . . cannot be criminally liable [under section 2250] for failure to comply with SORNA.”<sup>152</sup> The Fourth Circuit rejected another Commerce Clause challenge to SORNA enforcement in *United States v. Gould*,<sup>153</sup> upholding a Maryland sex offender’s federal

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<sup>149</sup> Section 16913(a) provides:

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a)

<sup>150</sup> 591 F.3d 83 (2d Cir. 2010), *cert. denied* 561 U.S. 1019 (2010).

<sup>151</sup> *Id.* The federal criminal enforcement provision provides:

(a) In general. Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)

(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice [10 USCS §§ 801 et seq.], the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a) (2006).

<sup>152</sup> *Guzman*, 591 F.3d at 90. In so holding, the Second Circuit noted that it joined “every other circuit that has examined the issue in concluding that 18 U.S.C. § 2250(a) is a legitimate exercise of congressional Commerce Clause authority.” *Id.* (citations omitted).

<sup>153</sup> 568 F.3d 459, 466 (4th Cir. 2009), *cert. denied* 559 U.S. 974 (2010).

conviction as a valid exercise of the federal government's commerce power, and not an ex post facto violation where the defendant was convicted under section 2250 following an antecedent District of Columbia conviction and failure to register upon moving to Maryland.<sup>154</sup> *Gould* clearly illustrates the operation of section 16913(a)'s mandate on offenders in the context of its criminal enforcement by section 2250(a), where federal jurisdiction exists.

However, *Guzman* and *Gould* can easily be distinguished from the issue before the Court of Appeals of Maryland in *Doe II* because neither Mr. Roe nor Mr. Doe had been convicted "under Federal law[], the law of the District of Columbia, Indian tribal law, or the law of any territory of possession of the United States . . . [,]" nor had they "travel[ed] in interstate or foreign commerce[,]" either of which would subject them to federal criminal liability for failure to register under section 2250.<sup>155</sup> Moreover, as the court of appeals pointed out, these and other cases on which the Department relied serve to only affirm the notion that section 16913(a)'s mandate on individual offenders operated regardless of whether the state in which the offender was located had implemented SORNA.<sup>156</sup> This was irrelevant to the resolution of the issues in *Doe II*.<sup>157</sup>

Despite the absence of facts to support federal jurisdiction for purposes of federal criminal enforcement in *Roe* or *Doe I*, *Guzman* and *Gould* do support the Department's position that 42 U.S.C.A. § 16913(a) imposes a federal law obligation on sex offenders convicted in Maryland to register based upon their

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<sup>154</sup> *Id.* This was even prior to Maryland's implementation of SORNA standards.

<sup>155</sup> See 18 U.S.C. § 2250(a). Mr. Roe also raised this point in his response to the Department's certiorari petition in his case. See Roe Response, *supra* note 137, at 8.

<sup>156</sup> *Doe II*, 439 Md. at 227-28, 94 A.3d at 807.

<sup>157</sup> The *Doe II* court stated:

What the [Department] fails to recognize . . . is the distinguishing fact that in those federal cases, the purported obstacle to registration was that Maryland had not yet *implemented* SORNA. By contrast, here Appellees' asserted stumbling block is that this Court has declared the retroactive application of Maryland's sex offender registry to be *unconstitutional* under the Maryland Declaration of Rights." *Id.* "[A]lthough . . . SORNA creates a direct obligation on sex offenders to register in their home state, independent of that State's *implementation* of SORNA, the state need not accept the registration if doing so would be contrary to state law. This is precisely the case here. The [Department] cannot legally accept a sex offender's involuntary registration when that individual's registration is unconstitutional under Maryland law.

*Id.* at 232, 94 A.3d at 809.

status as sex offenders set forth in 42 U.S.C.A. § 16911.<sup>158</sup> The Department cited a decision of the Supreme Court of Missouri, which held that SORNA requires Missouri officials to maintain offenders on the state's registry pursuant to section 16913 "irrespective of any allegedly retrospective state law that has been enacted and may be subject to [the Missouri constitution's] ban on the enactment of retrospective state laws."<sup>159</sup> However, the Supreme Court of Missouri later qualified its holding in *Keathley*, explaining that SORNA's independent registration obligation in section 16913(a) merely triggered the registration obligation by operation of Missouri statute, meaning that Missouri may require an offender to register based on section 16913(a)'s mandate without violating its state constitution.<sup>160</sup>

The Court of Appeals of Maryland rejected the Department's preemption argument, noting that "the federal statute itself does not purport to 'preempt the field' of sex offender registration . . . [,]" and that the Attorney General's regulations explain that SORNA does not preempt state sex offender registration schemes.<sup>161</sup> Therefore, absent a constitutionally-valid, state-level criminal enforcement option, enforcement of this federal obligation is limited to circumstances supporting federal jurisdiction, including traveling in interstate commerce.<sup>162</sup> It follows that a state *could* theoretically choose to eliminate its sex offender registration statutes entirely, leaving no enforcement option for failure to register under the federal mandate.<sup>163</sup> Further, there can be no intrastate criminal enforcement of this independent retroactive federal obligation to register, provided that offenders in Mr. Roe's and Mr. Doe's

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<sup>158</sup> See *Applicability of the Sex Offender Registration Act*, 75 Fed. Reg. 81849-01, at 81850 (Dec. 29, 2000) (to be codified at 28 C.F.R. pt.72) ("SORNA directly imposes registration obligations on sex offenders as a matter of federal law and provides for federal enforcement of these obligations under circumstances supporting federal jurisdiction."); see also *Doe II*, 439 Md. at 227-28, 94 A.3d at 806-07.

<sup>159</sup> *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. 2009) (necessitating the assumption that Missouri has a registry in the first place). Missouri is of course, like any state, free to decide whether to maintain a sex offender registration program at all. Ostensibly on this basis, the Court of Appeals of Maryland noted that "the federal statute itself does not purport to 'preempt the field' of sex offender registration . . ."  
*Doe II*, 439 Md. at 221 n.11, 94 A.3d at 802 n.11.

<sup>160</sup> *Doe II*, 439 Md. at 233, 94 A.3d at 810 (citing *Doe v. Toelke*, 389 S.W.3d 165, 167 (Mo. 2012) (internal citations omitted)).

<sup>161</sup> *Doe II*, at 221 n.11, 94 A.3d at 802 n.11.

<sup>162</sup> See *Roe Response*, *supra* note 137 at 23-24 (citing *Carr v. United States*, 560 U.S. 438, 452 (2010)); see also *Guzman*, 591 F.3d at 90 ("[W]ithout § 2250, § 16913 lacks federal criminal enforcement, and without § 16913, § 2250 has no substance.").

<sup>163</sup> As a practical matter, SORNA's independent obligation to register depends on a state's enactment and implementation of a sex offender registry in the first place. Indeed, there would be no point in SORNA's requirement that states adopt separate state-level criminal penalties for failure to register if the federal criminal liability for failure to register pursuant to SORNA could reach purely intrastate activity. See 42 U.S.C. § 16913(e) (2006).

situation do not subject themselves to federal criminal enforcement by traveling in interstate commerce or becoming convicted in a manner conferring federal jurisdiction.<sup>164</sup>

The Department further argued that:

[P]recluding [offenders] from complying with [their] federal obligation to register in [their] place of residence under 42 U.S.C. § 16913(a)[,] . . . frustrates the purpose of SORNA to protect children from child sex offenders and creates a situation where Maryland will become a ‘sanctuary state’ for child sex offenders attempting to escape the federal statute’s registration requirements.<sup>165</sup>

It is now apparent that this policy argument carries weight only to the extent that Maryland offenders removed from the State’s registry pursuant to *Doe I* do not leave the state. Any out-of-state offenders moving to Maryland in an attempt to avoid registration requirements will be subject to federal criminal liability under 18 U.S.C. § 2250.<sup>166</sup>

Whether or not the Department’s argument is true, the court of appeals did not reach this issue in *Doe II*. The court of appeals read the SORNA statutory provisions as a whole<sup>167</sup> to hold that, despite SORNA’s “independent federal registration obligation,” Maryland circuit courts are authorized to direct state officials to remove Maryland sex offender registrants from the State’s registry when the offenders were placed on the registry illegally under *Doe I*.<sup>168</sup> This highlights the Department’s recent dilemma: relieve the State’s existing retroactive class as a whole from their existing registration requirements or evaluate each individual offender’s challenge in a wave of litigation following *Doe I* and *Doe II*?

#### D. Substantial Implementation

Congress expressly contemplated state-level constitutionality problems, providing that the Attorney General, in the face of such a problem, must consult with the state’s chief executive and chief legal officer to determine “reasonable alternative procedures or accommodations . . . consistent with the purposes of this chapter” in determining whether the state has substantially implemented SORNA, thereby potentially preserving states’ entitlement to

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<sup>164</sup> See *Guzman*, 591 F.3d 83; *supra* text accompanying note 151.

<sup>165</sup> See State Certiorari Petition, *supra* note 6, at 15.

<sup>166</sup> See *United States v. Gould*, 568 F.3d 459, 464 (4th Cir. 2009) (holding that a sex offenders’ registration obligation is not contingent upon SORNA implementation).

<sup>167</sup> See *Doe II*, 439 Md. at 229, 94 A.3d at 807 (citing *Gardner v. State*, 420 Md. 1, 9, 20 A.3d 801, 806 (2011)) (internal quotations omitted).

<sup>168</sup> *Doe II*, 439 Md. at 206, 231, 94 A.3d at 794, 808.

grant awards.<sup>169</sup> The Attorney General, in implementing SORNA retroactively, expressly recognized the states' authority to declare their SORNA-inspired registration statutes unconstitutional on state constitutional grounds, specifically as a result of the retroactivity aspect of the SORNA guidelines.<sup>170</sup> However, in response to comments he received on SORNA's retroactivity, the Attorney General ostensibly anticipated no *ex post facto* problems based upon the Supreme Court's determination in *Smith v. Doe* in stating, perhaps not controversially at the time, that:

[A]s non-punitive regulatory measures, the SORNA requirements do not implicate the Constitution's prohibition of *ex post facto* laws. Moreover, fairness does not require that an offender, at the time he acknowledges his commission of the crime and pleads guilty, be able to anticipate all future regulatory measures that may be adopted in relation to persons like him for public safety purposes.<sup>171</sup>

Given that section 16925 expressly contemplates a mechanism to preserve states' substantial implementation in the face of state constitutionality problems, it is not the case, as the Department argued, that "these federal obligations operate independently of state law and of any judicial determination that state law registration requirements cannot be applied to Mr. Roe."<sup>172</sup>

Therefore, it is clearly the case that Maryland's obligation to "maintain [individuals] on its sex offender registry" only affects substantial implementation of SORNA and its attendant retention of federal grant funds in support of SORNA's purpose to bolster nationwide network of registrants.<sup>173</sup> Having considered the issue of offenders' independent federal

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<sup>169</sup> *Id.* at 230, 94 A.3d at 808 (citing 42 U.S.C. § 16925 (b)).

<sup>170</sup> See 2008 Guidelines, *supra* note 17, at 38036.

<sup>171</sup> *Id.* This certainly conflicts with the policy rationale underlying plea agreements. See *Doe I*, 430 Md. at 576, 62 A.3d at 147; *supra* text accompanying note 101.

<sup>172</sup> State Certiorari Petition, *supra* note 6, at 17; see also *Doe II*, 439 Md. at 231, 94 A.3d at 808 ("To arrive at the [Department]'s proposed interpretation of the statute – that Appellees must register in Maryland even if doing so violates their rights under Maryland's constitution – would render SORNA § 125, 42 U.S.C. § 16925, useless surplusage.").

<sup>173</sup> See *Doe II*, 439 Md. at 223, 94 A.3d at 804 (citing 42 U.S.C. § 16925(d)); see also *supra* note 22 and accompanying text; Roe Response, *supra* note 137, at 18-26; U.S. DEPARTMENT OF JUSTICE, *Sex Offender Registration and Notification in the United States: Current Case Law and Issues*, at 6 n.32 (Sept. 2014), available at [http://www.ojp.usdoj.gov/smart/caselaw/handbook\\_july2012.pdf](http://www.ojp.usdoj.gov/smart/caselaw/handbook_july2012.pdf) ("Federal courts have interpreted SORNA as directly imposing a duty on a person to attempt to register if they meet the definition of 'sex offender' under SORNA. [But,] there will be situations where . . . the jurisdiction where that offender lives . . . refuses to

obligation to register pursuant to SORNA's express terms and states' obligations to substantially implement SORNA's standards only to avoid federal grant funding reduction, the next issue the court of appeals considered was the question of the ability of Maryland courts to remove offenders from "federal databases."

*E. Removal from "Federal" Databases?*

Pursuant to *Doe I*, the circuit courts for Washington County and Wicomico County directed the Department of Public Safety and Correctional Services to remove Mr. Doe and Mr. Roe's information from Maryland's sex offender registration databases and website as well as "all federal databases including the NCIC."<sup>174</sup> Mr. Roe, in his response to the Department's opposition to these orders, was partially correct to point out that there is no "federal registry."<sup>175</sup> There is in fact no *public* federal sex offender registry—a nationwide collection of sex offender registration information is maintained by the Federal Bureau of Investigation for law enforcement purposes only.<sup>176</sup> These records, maintained as a component of the FBI's National Crime Information Center (NCIC) database, are available to criminal justice agencies nationwide, which themselves enter the records.<sup>177</sup> This compilation of sex offender registration information is not publicly available. Since "NCIC policy requires the inquiring agency to make contact with the entering agency to verify the information is accurate and up-to-date[,] the agency where sex offender registration was initiated would be responsible for the updating and removal of that information from the NCIC."<sup>178</sup>

Because the federal government by way of SORNA does not, and cannot, preempt the field of sex offender registration,<sup>179</sup> the public national sex

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register him, because the jurisdiction's laws do not require registration for the offense of conviction.")

<sup>174</sup> *Doe II*, 439 Md. at 210, 213, 94 A.3d at 796-98.

<sup>175</sup> Roe Response, *supra* note 137, at 18.

<sup>176</sup> The Pam Lychner Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. § 14072, originally directed the Federal Bureau of Investigation to establish a national law enforcement database (the National Sex Offender Registry or "NSOR") to track certain violent classes of sex offenders and those offenders convicted of an offense against a minor victim. See *Doe II*, 439 Md. at 235-36, 94 A.3d at 811; 2008 Guidelines, *supra* note 17, at 38032-33. Although § 14072 has been repealed, SORNA continued the FBI's National Sex Offender Registry intended for use by law enforcement only by incorporating the NSOR into the FBI's National Crime Information Center (NCIC). *Doe II*, 439 Md. at 235-36, 94 A.3d at 811; see also 42 U.S.C. § 16919(a) (2013).

<sup>177</sup> *Doe II*, 439 Md. at 235-36, 94 A.3d at 811 (citing FED. BUREAU OF INVESTIGATION, *National Crime Information Center*, <http://www.fbi.gov/about-us/cjis/ncic/ncic> (last visited July 6, 2014)).

<sup>178</sup> *Doe II*, 439 Md. at 236, 94 A.3d at 811-12 (internal quotations omitted).

<sup>179</sup> See *infra* Part II.c.

offender registry is not a centralized database or registry at all. The federal Dru Sjodin National Sex offender Public Website (NSOPW) provides that:

NSOPW [does not] have a single national database of all registered sex offenders from the registry Jurisdictions that participate with NSOPW[.] NSOPW primarily uses Web services to search the individual databases of the Jurisdictions in real time when a search is conducted.<sup>180</sup>

The Maryland Department of Public Safety and Correctional Services has the responsibility to maintain, manage, and authorize termination of entries in the State's central sex offender registry and to exchange information with federal agencies.<sup>181</sup> Therefore, the court of appeals concluded that Maryland officials, by virtue of removing offenders from Maryland's registry, also remove offender information from the NCIC database and NSOPW "search engine" results, eliminating law enforcement's and the public's ability to search for removed offenders at both the federal and state level.<sup>182</sup> This indeed is a critical component of the alleviation of public shaming and shunning concerns expressed by the court of appeals in *Doe I* and by amicus.<sup>183</sup>

The court of appeals reviewed the language and scope of the court orders that directed the Department to remove offender information from state and federal databases.<sup>184</sup> The court of appeals determined that the circuit courts' orders in Mr. Doe and Mr. Roe's cases were incorrect to the extent they ordered the Department to *directly* remove their information from "federal databases."<sup>185</sup> In so doing, the court, recognizing that removal from Maryland databases should in due course result in removal of the information from federal "databases," instructed the court of special appeals to order the Department on remand only to "[r]emove any and all [offender] information . . . from the Maryland Sex Offender Registry website and any additional database(s) where the State has published such information, and notify all relevant federal agencies of the removal of Doe's information from Maryland's registry."<sup>186</sup>

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<sup>180</sup> U.S. DEPARTMENT OF JUSTICE, *Frequently Asked Questions: Using the NSOPW*, <http://www.nsopr.gov/en/Home/FAQ#answer-09> (last visited July 11, 2014).

<sup>181</sup> *Doe II*, 439 Md. at 237, 94 A.3d at 812 (citing MD. CODE REGS. 12.06.01.01-.18, 12.06.01.08).

<sup>182</sup> *Doe II*, 439 Md. at 237, 94 A.3d at 812.

<sup>183</sup> See *supra* notes 87, 89-90 and accompanying text.

<sup>184</sup> *Doe II*, 439 Md. at 213, 94 A.3d at 798.

<sup>185</sup> *Id.* at 237-38, 94 A.3d at 812. SORNA requires registering agencies and law enforcement entities to submit the information necessary to populate the National Sex Offender Registry Database utilized by law enforcement. U.S. DEPARTMENT OF JUSTICE, *supra* note 173, at 3.

<sup>186</sup> *Doe II*, 439 Md. at 238, 94 A.3d at 812-13. As of November 1, 2014 DPSCS has begun the process of removing over 850 offenders from the State's registry, and is

## III. POSSIBLE SOLUTIONS

It is now clear that the Maryland constitution and the recent Court of Appeals of Maryland rulings preclude retroactive sex offender registration in Maryland, whether or not the State seeks to maintain substantial implementation of SORNA's requirements. Maryland is by no means alone in its historical struggle to substantially implement SORNA in pursuit of an important and just public policy in protecting minors, victims, and potential victims from violent sex offenders. However, using SORNA's federal standards as the focal point, most states have still failed to implement SORNA for a variety of reasons including state constitutionality problems, resistance to juvenile registration components, political will, and ex post facto retroactivity issues.<sup>187</sup> Indeed, the Attorney General's retroactivity analysis has proven to be fundamentally incompatible with an apparently growing number of states covered by SORNA.<sup>188</sup> Below are some potential possibilities for Maryland to consider in legislating and administering

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reviewing still more, following the Court of Appeals ruling in *Doe II* in June 2014. See DPSCS Press Release: DPSCS begins removing offenders from Sex Offender Registry after the June Court of Appeals Ruling (Aug. 12, 2014), available at <http://news.maryland.gov/dpscs/2014/08/12/dpscs-begins-removing-offenders-from-sex-offender-registry-after-june-court-of-appeals-ruling/>; Ian Duncan, *Sun Investigates Court ruling upends Maryland's sex offender registry*, BALTIMORE SUN (November 1, 2014) <http://www.baltimoresun.com/news/maryland/crime/bs-md-sex-offenders-20141101-story.html#page=1>; *A Shrinking Registry*, BALTIMORE SUN (October 31, 2014, 4:11 PM), <http://www.baltimoresun.com/news/maryland/crime/bal-sex-offender-registry-graphic-10-31-2014-htlstory.html>.

<sup>187</sup> As of April 2015, only 17 states, three territories, and 83 Indian tribes have substantially implemented SORNA. The final deadline following an extension was July 27, 2011. See *Jurisdictions that have substantially implemented SORNA*, available at [http://www.smart.gov/newsroom\\_jurisdictions\\_sorna.htm](http://www.smart.gov/newsroom_jurisdictions_sorna.htm) (last accessed April 8, 2015); Adam Walsh Child Protection and Safety Act: Compliance news, NCSL, available at <http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx> (last accessed Dec. 18, 2014); *Search Survey on State Compliance with the Sex Offender Registration and Notification Act (SORNA)* (April 2009) available at <http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf> (listing state-by-state reasons for failure to comply with SORNA). This is a reduction from November 2012, at which time 19 of 56 jurisdictions had substantially implemented SORNA. SEE UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *Report to the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives, Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects*, at 13 (Feb. 2013) available at <http://www.oregonlive.com/sexoffenders/special-presentation/media/GAOsexoffenderFeb.2013reportSORNA.pdf>.

<sup>188</sup> See *infra* Part III.a.

Maryland's sex offender registration scheme moving forward in the wake of *Doe I* and *Doe II*.

A. *Should Maryland Abandon Substantial Implementation?*

Many states face fiscal barriers and insufficient incentive to pursuing substantial implementation.<sup>189</sup> Several states have publicly reported that the cost of substantially implementing SORNA is much greater than the cost of losing ten percent of its Byrne grant funds.<sup>190</sup> For example, California officials have recommended that the state not pursue compliance with SORNA and instead “absorb the comparatively small loss of federal funds that would result from not accepting the very costly and ill-advised changes to state law and policy required by the [Adam Walsh] Act.”<sup>191</sup> Similarly, Texas officials recently estimated that it would cost 38.7 million dollars to comply with SORNA, while the state would only lose 1.4 million dollars for failing to comply.<sup>192</sup> In addition to fiscal considerations, Texas officials also expressed concern that SORNA's offense-based classification system would improperly classify offenders and undermine the state's work to individually assess offender risk in order to “narrow the sex offender registry to those who are most likely to be dangerous.”<sup>193</sup>

Colorado's Sex Offender Management Board (SOMB) also recommended that the state not implement the requirements of SORNA, in part based upon a lack of evidence suggesting the effectiveness of SORNA's standards.<sup>194</sup>

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<sup>189</sup> See, e.g., JUSTICE POLICY INST., *What Will it Cost States to Comply with the Sex Offender Registration and Notification Act?*, available at [http://www.justicepolicy.org/images/upload/08-08\\_FAC\\_SORNACosts\\_JJ.pdf](http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf) (last visited Dec. 18, 2014).

<sup>190</sup> *Id.*

<sup>191</sup> See STATE OF CAL. SEX OFFENDER MGMT. BD., *Adam Walsh Act Statement of Position*, 1-2 (2014), <http://www.casomb.org/docs/Adam%20Walsh%20Position%20Paper.pdf>. California elected to adopt a system assigning risk levels to individual offenders via actuarial risk assessment instruments as opposed to SORNA's offense-based tier system. *Id.* at 2.

<sup>192</sup> Donna Lyons, *Sex Offender Law: Down to the Wire: June 2011*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-law-down-to-the-wire.aspx#clash> (last visited Dec. 18, 2014).

<sup>193</sup> *Id.* Similarly, “develop[ing] criteria for measuring a person's risk of reoffending to assist the court in determining whether a person may be appropriately released from [lifetime] supervision [pursuant to Maryland's registration statute]” and “review[ing] the laws and practices of other states and jurisdictions concerning sexual offenders” are two of the tasks assigned to Maryland's Sex Offender Advisory Board. MD. CODE ANN., PUB. SAFETY § 1-401(g)(1) (2014).

<sup>194</sup> See COLO. SEX OFFENDER MGMT. BD., *White Paper on the Adam Walsh Child Protection and Safety Act of 2006*, 4 (September 2008), available at

However, the SOMB recommended some compromise, including “supporting efforts to enhance inter-jurisdictional communications relative to registrants” and continued participation in the law enforcement National Sex Offender Registry maintained by the FBI.<sup>195</sup> Florida, too, has published virtually identical concerns with respect to its compliance with SORNA, noting that “[the Adam Walsh Act] has generated significant debate and controversy.”<sup>196</sup> Maine legislators also published a report with recommendations for a combination risk and offense-based revision of the state’s registration laws following the supreme judicial court’s finding in *Letalien*.<sup>197</sup>

### B. Fiscal Considerations in Implementation

The National Conference of State Legislatures (NCSL) has pointed out the difficulty in assessing the cost of failing to implement SORNA based upon fluctuations in federal funding “during a time of deep recession and overall revenue and spending reductions.”<sup>198</sup> In 2009, the exact cost of implementing SORNA-mandated retroactive registration in Maryland was unknown. At that time the Department of Public Safety and Correctional Services preliminarily projected the need to hire additional agents to supervise this retroactive class of offenders at an annual cost of \$1,600 per offender and \$50,000 in salary per new agent required for these low offender-agent ratios and specialized caseloads.<sup>199</sup> Assuming conservatively that supervising Maryland’s retroactive class of approximately 1,250 offenders at a 1:15 agent to offender caseload ratio, this amounts to a cost of approximately 6.2 million dollars to supervise this population based upon those financial estimates.<sup>200</sup> By the

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[http://www.opd.ohio.gov/AWA\\_Information/AWA\\_Colorado\\_SOMB\\_White%20Pa per.pdf](http://www.opd.ohio.gov/AWA_Information/AWA_Colorado_SOMB_White%20Pa%20per.pdf), for a discussion of this and other noted conflicts.

<sup>195</sup> *Id.* Maryland’s Sex Offender Advisory Board is also mandated to “consider ways to increase cooperation among states with regard to sexual offender registration and monitoring.” See MD. CODE ANN., PUB. SAFETY § 1-401(g)(8).

<sup>196</sup> See THE FL. SENATE, *Issue Brief 2009-312: Fiscal, Policy, and Legal Considerations Regarding State Compliance with the Adam Walsh Act*, 1 (Oct. 2008), <http://www.ovsom.texas.gov/docs/Florida-Fiscal-Legal-Considerations-AWA-2008.pdf>.

<sup>197</sup> See *State v. Letalien*, 985 A.2d 4, 16 (Me. 2009); *supra* text accompanying note 113; see also FINAL REP. OF THE CRIM. JUSTICE & PUB. SAFETY COMM., STUDY OF SEX OFFENDER REGISTRATION LAWS, 123d Leg., 2d Sess., at 18 (Me. Nov. 2008), available at <http://www.maine.gov/legis/opla/sexoffender2008report.pdf> (recommending in part a revision that does not strictly adhere to SORNA’s standards).

<sup>198</sup> *Cost-Benefit Analyses of SORNA Implementation*, NCSL, <http://www.ncsl.org/research/civil-and-criminal-justice/cost-benefit-analyses-of-sorna-implementation.aspx> (last visited Jul. 7, 2014).

<sup>199</sup> See Fiscal Note to S.B. 425 (Revised), 426th Gen. Assemb., Reg. Sess., at 3 (Md. 2009) (enacted as 2009 Md. Laws, ch. 541).

<sup>200</sup> See *id.*

NCSL's calculation, in Fiscal Year 2012 Maryland would have lost only \$622,500 of its \$6,225,000 in Byrne funds for failure to substantially implement SORNA.<sup>201</sup> As has been the experience of other states, it is very likely true that other costs associated with maintaining SORNA implementation in Maryland well exceed the loss of its Byrne funding.<sup>202</sup> The cost to capture and supervise this retroactive class has proven to be substantially out of proportion with the grant funds allocated for this and other purposes.

Given the constitutionality issue under Maryland's ex post facto constitutional prohibition, the costs of implementation experienced by Maryland and other states,<sup>203</sup> and uncertain public safety benefits of SORNA implementation, Maryland regulators and lawmakers should consider abandoning efforts to substantially implement SORNA and carefully reevaluate sex offender registration requirements to ensure that only high-risk, dangerous offenders are required to register moving forward.<sup>204</sup> Maryland is currently presented with this opportunity.

The Maryland Sexual Offender Advisory Board, formed in 2006, has existed prior to SORNA's substantial implementation deadlines, and is an existing vehicle for such change.<sup>205</sup> Although initially finding that the State's compliance with SORNA has bolstered Maryland's ability to "more accurately track and register convicted sex offenders, and to increase information sharing among jurisdictions[.]"<sup>206</sup> the Board has more recently drafted legislation that would permit discharge of lifetime registrants from their lifetime registration

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<sup>201</sup> See *SORNA Noncompliance Penalties*, NCSL, available at <http://www.ncsl.org/Portals/1/documents/cj/jagstatedollars.pdf>. This is not to undermine the importance of Byrne funding to Maryland communities and a wide variety of Maryland criminal justice efforts it supports. See also GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, *FY 2014 Edward J. Byrne Memorial Justice Assistance (BJAG) Grant – Notice of Funding Available (NOFA) Application Guidance Kit*, at 2-3, <http://www.goccp.maryland.gov/grants/2014/bjag/BJAG%20NOFA%20FY%2014.pdf> (last accessed Dec. 18, 2014), for information on Maryland's utilization of Byrne grant funds.

<sup>202</sup> It is important to note the persistent reduction of Byrne funding provided to Maryland within the past few years. The 10% penalty reduced from \$2.5 million in fiscal year 2010 to approximately \$622,500 in fiscal year 2012. See *supra* note 198, at 3.

<sup>203</sup> See *supra* Part III.a.

<sup>204</sup> The sentencing court in Mr. Doe's 2006 criminal case in 2006 noted that it was impressed with Mr. Doe's life, responsibility, and rehabilitative efforts since the sex offenses for which he was convicted. The court believed it unlikely that Mr. Doe would reoffend. *Doe I*, 430 Md. at 539, 62 A.3d at 125.

<sup>205</sup> See MD. CODE, PUB. SAFETY § 1-401 (2013).

<sup>206</sup> MARYLAND SEXUAL OFFENDER ADVISORY BOARD, *Report to the Governor and the Maryland General Assembly*, at 6 (2011), available at [http://dlslibrary.state.md.us/publications/Exec/DPSCS/PS1-401\(h\)\\_2011.pdf](http://dlslibrary.state.md.us/publications/Exec/DPSCS/PS1-401(h)_2011.pdf).

obligation based in part upon a risk assessment.<sup>207</sup> While an immediate threat of the risk to public safety created in the wake of the recent *Doe* opinions is a tenable argument, the Board is well-equipped to address strategies to counteract this risk.<sup>208</sup>

*C. Reasonable Alternative Procedures or Accommodations*

Should Maryland lawmakers and regulators choose to attempt to sustain substantial compliance in the wake of *Doe I* and *Doe II*, SORNA provides the standards of implementation.<sup>209</sup> Maintaining substantial implementation in Maryland's circumstance requires the "[U.S.] Attorney General and the jurisdiction [to] make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution."<sup>210</sup> Further, the Attorney General "may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter."<sup>211</sup>

Maryland regulators and officials would need to work with the Attorney General in determining how, in light of *Doe I* and *Doe II*, the retroactivity component of SORNA's applicability could be omitted while still

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<sup>207</sup> See *id.* The proposed administrative process involves a risk assessment implemented by the Department's Collaborative Offender Management/Enforced Treatment containment team. *Id.* However, the Board suggested in its 2011 report that it did not want to "risk losing its status as 'substantially compliant' with [SORNA]." See *id.* at 33.

<sup>208</sup> For example, the Board could recommend that the Department incorporate screening for prior sex offenses into a tool utilized to actuarially assign increased supervision levels among current probationers and parolees. This would bolster supervision requirements for pre-SORNA sex offenders who have re-entered the criminal justice system for non-sex offenses. The Board could also examine other state's statutes and policies for guidance.

<sup>209</sup> Theoretically, Maryland lawmakers could take a conservative approach such as re-codifying the sex offender registration scheme outside the Criminal Procedure Article, relaxing offender registration and community notification requirements, expressly stating a civil legislative purpose, or re-writing some of the registration statutes and procedures to avoid the punitive effects outlined in *Doe I*. See, e.g., *Doe I*, 430 Md. at 573, 62 A.3d at 146 (Harrell, J., concurring) ("As long as a registration statute is tailored narrowly to prevent repetition of sex offenses and requires only qualifying sex offenders to register . . . it is not excessive in its deterrent purpose.") (citing *Smith v. Doe*, 538 U.S. at 103-04 (2003)). A constitutional amendment of Article 17 to avoid the result in *Doe I*, while theoretically possible, is improbable.

<sup>210</sup> 42 U.S.C. § 16925 (b)(2). The Court of Appeals of Maryland discussed the effect § 16925 of SORNA had on its opinion in *Doe II*. 439 Md. 201, 234, 94 A.3d 791, 810.

<sup>211</sup> 42 U.S.C. § 16925 (b)(3).

substantially implementing SORNA's standards.<sup>212</sup> Likewise, the Department of Public Safety and Correctional Services would have to scrutinize its implementation of SORNA and other regulations and policies in determining methods to sustain substantial implementation without retroactive application.<sup>213</sup> However, SORNA and its retroactive implementation by the Attorney General remains the standard, despite the purely offense-based classification methodology that is being called into question in Maryland and other states.<sup>214</sup> This represents a much larger problem for Congress and the Attorney General in legislating and implementing a federal policy, the effectiveness and propriety of which is being questioned on a national stage.

#### IV. CONCLUSION

Maryland was deemed to have substantially implemented SORNA in Summer 2011 with the addition of certain required registration components.<sup>215</sup> However, Maryland policymakers are now faced with a decision following the court of appeals decisions in *Doe I* and *Doe II* regarding options for appropriate treatment and supervision of sex offenders convicted prior to the enactment of Maryland's sex offender registration scheme. Policymakers should closely examine other states' decisions to abandon implementation of SORNA because of its legal, practical, and financial barriers to implementation. Maryland has moved toward risk-based and efficient offender management techniques.<sup>216</sup> Our state now has opportunity and

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<sup>212</sup> The Attorney General would also have to work with all other states with ex post facto and other state-constitutional problems in reconsidering the retroactive registration aspect of SORNA's standards.

<sup>213</sup> In assessing compliance, the SMART Office will look at rules, administrative policies and procedures, and statutes. 2008 Guidelines, *supra* note 17, at 38047.

<sup>214</sup> "Applying such a broad-reaching statute like Maryland's to any qualifying sex offender without particularized determinations of recidivism may undermine the law's intent to prevent the repetition of sex offenses[.] Indeed, recent research reports that broad-reaching sex offender registration and notification laws do not reduce recidivism by sex offenders." *Doe I*, 430 Md. at 573, 62 A.3d at 146 (Harrell, J., concurring) (internal citations omitted). See also FINAL REP. OF THE CRIM. JUSTICE & PUB. SAFETY COMM., STUDY OF SEX OFFENDER REGISTRATION LAWS, 123d Leg., 2d Sess., at 18 (Me. Nov. 2008) (recommending a combined risk- and offense-based registration scheme), available at <http://www.maine.gov/legis/opla/sexoffender2008report.pdf>.

<sup>215</sup> MARYLAND SEXUAL OFFENDER ADVISORY BOARD, *supra* note 206, at 53.

<sup>216</sup> For example, Maryland's Violence Prevention Initiative violent offender supervision strategy utilizes a risk-based assessment tool to intensely supervise high-risk offenders and has been met with substantial success in reducing violent crime during the O'Malley administration. See *GOCCP Fact Sheet, Violence Prevention Initiative*, available at <http://www.goccp.maryland.gov/documents/VPI-Fact-SheetB.pdf>; *Maryland DPSCS fact sheet: Keeping Communities Safe: Parole & Probation: Violence Prevention Initiative*, GOCCP, available at [http://www.dpscs.state.md.us/initiatives/one\\_sheets/VPI-One-Sheet-Feb-2010.pdf](http://www.dpscs.state.md.us/initiatives/one_sheets/VPI-One-Sheet-Feb-2010.pdf).

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occasion to expand similar practices and strategies to the management of sex offenders within constitutional bounds and potentially without the assistance of the policy of the federal government.