RUTGERS UNIVERSITY LAW REVIEW

VOLUME 71 | ISSUE 5 SUMMER 2019

STATE CONSTITUTIONAL LAW—EX POST FACTO—THE PENNSYLVANIA SUPREME COURT HOLDS THAT PENNSYLVANIA'S NEW SEX OFFENDER REGISTRATION LAW VIOLATES THE FEDERAL AND STATE CONSTITUTIONS. *COMMONWEALTH V. MUNIZ*, 164 A.3D 1189 (PA. 2017)

*Kaitlin L. Meola**

TABLE OF CONTENTS

* J.D. Candidate, Rutgers Law School—Camden, January 2019.

I. INTRODUCTION

In *Commonwealth v. Muniz*,[1] Jose Muniz was convicted in the trial court of Cumberland County, Pennsylvania of two counts of indecent assault. He was sentenced, in part, to lifetime registration requirements pursuant to Pennsylvania's Sex Offender Registration and Notification Act ("SORNA").[2] After a post-sentence motion and subsequent appeal, the Pennsylvania Supreme Court vacated part of Muniz's sentence and remanded back to the sentencing court, holding that applying SORNA retroactively to Muniz's crimes violated the ex post facto provisions of the United States[3] and Pennsylvania[4] Constitutions.[5] In so holding, the Pennsylvania Supreme Court explained that the increased severity of SORNA's registration requirements, coupled with advances in modern technology, make SORNA's requirements more akin to punishment than other versions of sex offender registration laws. Accordingly, its retroactive application violates ex post facto prohibitions in both the United States and Pennsylvania Constitutions.[6]

This Comment will focus on two aspects of the *Muniz* opinion: the substantive grounds the court considered in holding that SORNA is punitive and therefore violates ex post facto prohibitions, and the methodological approach the majority took in analyzing the issues to protect its decision on the state constitutional claim. While the majority, concurring, and dissenting opinions take into account the history, purpose, and effectiveness of sex offender registration laws, the majority properly and prudently considered the ever-increasing and onerous registration and notification requirements in light of the modern technological environment. The *Muniz* majority opinion was a necessary step in protecting constitutional rights against increasingly punitive sex offender registration legislation that has largely been

1. 164 A.3d 1189 (Pa. 2017).

2. *Id.* at 1193. Pennsylvania's Sex Offender Registration and Notification Act is codified at 42 PA. STAT. AND CONS. STAT. ANN. §§ 9799.10–.42 (West 2019).

3. U.S. CONST. art. I, § 9, cl. 3.

4. PA. CONST. art. I, § 17.

5. *Muniz*, 164 A.3d at 1193–94.

6. *Id.* at 1223; *see also id.* at 1212 (citing Commonwealth v. Perez, 97 A.3d 747, 765–66 (Pa. 2014) (Donohue, J., concurring)).

protected from judicial scrutiny by the supposedly regulatory intent behind it.

II. STATEMENT OF THE CASE

In *Muniz*, the Pennsylvania Supreme Court considered the constitutionality of applying sex offender registration requirements under SORNA to certain offenses committed prior to SORNA's enactment under the ex post facto provisions in both the United States and Pennsylvania Constitutions.[7]

In February 2007, Jose Muniz was convicted in Cumberland County of two counts of indecent assault under title 18, sections 3126(a)(1) and 3126(a)(7) of the Pennsylvania Code for touching the breasts of his girlfriend's then twelve-year-old daughter.[8] Sentencing was scheduled for May 2007, at which time he was expected to register as a sex offender with the Pennsylvania State Police for a period of ten years, as required by Megan's Law III,[9] the sex offender registration statute in effect at that time.[10] Unfortunately, Muniz did not appear for his sentencing in May 2007.[11] It was not until approximately seven years later, in September 2014, that Muniz was arrested in Rhode Island on unrelated charges.[12] During those seven years, the Pennsylvania General Assembly replaced Megan's Law III with SORNA.[13] Under SORNA, anyone convicted of indecent assault of a person less than thirteen years old, as Muniz was, is categorized as a Tier III offender and is required to register as a sex offender for life.[14]

Due to the enactment of SORNA during Muniz's absence, the Court of Common Pleas of Cumberland County imposed a sentence of four to fourteen months incarceration and ordered him to comply with lifetime registration requirements pursuant to SORNA.[15] In a post-sentence motion, Muniz argued that the ten-year registration period should apply under Megan's Law III because that was the law in effect at the

7. *Id.* at 1193–94.

8. *Id.* at 1193, 1993 n.2.

9. 42 PA. STAT. AND CONS. STAT. ANN. §§ 9795.1–9799.9 (West 2012), *invalidated by* Commonwealth v. Neiman, 84 A.3d 603 (Pa. 2013); *see also* discussion *infra* Section III.A.3.

10. *Muniz*, 164 A.3d at 1193.

11. *Muniz*, 164 A.3d at 1193.

12. *Id.*

13. *Id.*

14. *Id.* at 1193, 1207; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.15(a)(3) (West 2019).

15. *Muniz*, 164 A.3d at 1193.

time of his offense and conviction.[16] The trial court denied Muniz's motion.[17] Muniz appealed to the superior court, which affirmed the trial court and rejected Muniz's claim that retroactive application of SORNA violates the ex post facto clauses of the United States and Pennsylvania Constitutions and the reputation clause of the Pennsylvania Constitution.[18] In its rejection, the superior court relied on *Commonwealth v. Perez*,[19] which stated that SORNA is not punitive and therefore that its retroactive application does not violate ex post facto prohibitions.[20] On appeal, the Pennsylvania Supreme Court reversed, carefully focusing on the punitive effect of SORNA's requirements compared to its regulatory purpose, along with the greater protection the Pennsylvania Constitution provides against ex post facto laws than the United States Constitution.[21]

III. HISTORY OF PENNSYLVANIA SEX OFFENDER REGISTRATION LAWS

A. Development of Pennsylvania Sex Offender Registration Laws

1. Megan's Law I

In Pennsylvania, the General Assembly first required convicted sex offenders to register with the Pennsylvania State Police in 1995 by creating the "Registration of Sexual Offenders" provision of the Sentencing Code,[22] which has come to be known as Pennsylvania's "Megan's Law."[23] Under Megan's Law I, the General Assembly

16. *Id.*
17. *Id.*
18. *Id.* at 1193–94; *see* U.S. CONST. art. I, § 9, cl. 3; PA. CONST. art. I, § 17.
19. 97 A.3d 747 (Pa. Super. Ct. 2014).
20. *Muniz*, 164 A.3d at 1194.
21. *Id.* at 1213.
22. 42 PA. STAT. AND CONS. STAT. ANN. §§ 9791–9799 (West 2019).
23. Megan's Law was precipitated by *State v. Timmendequas*, which involved the brutal rape and murder of seven-year old Megan Kanka in Hamilton, New Jersey. 737 A.2d 55, 64 (N.J. 1999). In response, the State of New Jersey passed the nation's first Megan's Law, which required the publication of the whereabouts of "high-risk sex offenders." Rich Schapiro, *Exclusive: Parents of Little Girl Who Inspired Megan's Law Recall Brutal Rape, Murder of Their Daughter 20 Years Later*, DAILY NEWS (July 27, 2014), http://www.nydailynews.com/news/crime/parents-girl-inspired-megan-law-recall-tragedy-article-1.1881551. Shortly thereafter, the federal Megan's Law was enacted as a portion of the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Act, codified as 42 U.S.C. § 14071 and later repealed. ROBERT E. FREEMAN-LONGO, REVISITING MEGAN'S LAW AND SEX OFFENDER REGISTRATION: PREVENTION OR PROBLEM 1 (2001). The purpose of Megan's Law was to notify the public that a sexual offender lived

established a procedure whereby offenders categorized as "sexually violent predators" were subject to a post-conviction, pre-sentence assessment, followed by a hearing before the trial court, in which the offender was given the opportunity to rebut the presumption that they are a sexually violent predator.[24] If, following the hearing, the offender was adjudicated as such, an enhanced maximum sentence of life imprisonment was imposed and they were required to comply with "registration and community notification requirements."[25]

However, in 1999, the Pennsylvania Supreme Court in *Commonwealth v. Williams*[26] ("*Williams I*") invalidated the "sexually violent predator" provisions of Megan's Law I because, if adjudicated as a sexually violent predator, the offender's maximum term of confinement would be increased above the statutory maximum for the underlying offense and would amount to criminal punishment.[27] The *Williams I* court invalidated the provision based on this ground alone, and therefore did not decide whether the enhanced registration and notification requirements also constituted criminal punishment.[28]

2. Megan's Law II

In 2000, following the *Williams I* decision, the General Assembly enacted Megan's Law II. This law differed from Megan's Law I in that an offender convicted of a predicate offense was no longer presumed to be a sexually violent predator and those deemed sexually violent predators were "no longer subjected to an automatic increased maximum term of imprisonment."[29] Instead, they were subject to lifelong registration, notification, and mandatory monthly counseling procedures.[30] Failure to abide by these procedures would result in probation or imprisonment.[31]

For registration under Megan's Law II, all offenders were required to: (1) register their current residence with the State Police upon release from incarceration, (2) notify the State Police within ten days of a change of residence, and (3) register within ten days with law

in the community so that parents could protect their children and reduce the risk that offenders will reoffend. *Id.* at 2.

24. *Muniz*, 164 A.3d at 1196.
25. *Id.*
26. 733 A.2d 593, 608 (Pa. 1999).
27. *Muniz*, 164 A.3d at 1196.
28. *Id.*
29. *Id.* at 1196–97.
30. *Id.* at 1197.
31. *Id.*

enforcement in the state of new residency.[32] The State Police then provided this information, along with fingerprint and photographic data collected from the sentencing court, to local police where the offender resides.[33] For sexually violent predators, the local police would then notify the offender's neighbors, day care operators, and schools within the municipality.[34]

In addition to these registration and notification requirements, the offender was required to verify their current address with the State Police periodically, which involved appearing in person at any police station approximately every three months, where they were to be photographed and required to submit a completed verification report.[35]

Finally, Megan's Law II required a sexually violent predator to attend "at least monthly" counseling sessions and verify compliance at the periodic verification process described above.[36]

3. Megan's Law III

In November 2004, Megan's Law III was created when the General Assembly amended Megan's Law II with the following relevant changes, among other requirements: it made failure to comply with registration requirements a crime and created a "searchable computerized database" listing all registered sexual offenders.[37] The period of registration under Megan's Law III remained ten years.[38]

4. SORNA

On December 20, 2012, the General Assembly replaced Megan's Law III with the Sex Offender Registration and Notification Act ("SORNA") to comply with the federal Adam Walsh Child Protection and Safety Act of 2006.[39] This federal act conditions federal grant

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1197–98. However, Megan's Law III was struck down by the Pennsylvania Supreme Court in *Commonwealth v. Neiman*, because it contained a provision establishing a two-year statute of limitations for asbestos actions, in violation of Pennsylvania's "single subject rule," which provides that a statute may only deal with one main issue. 84 A.3d 603, 607, 615 (Pa. 2013).
38. *Muniz*, 164 A.3d at 1198.
39. 34 U.S.C. §§ 20901–20962 (2018). This act is known as "federal SORNA." *Muniz*, 164 A.3d at 1203 n.13 (citations omitted). For the sake of clarity, this Comment will refer to federal SORNA as the "Adam Walsh Act."

funding on the states' imposition of tier-based registration and notification requirements.[40]

Besides complying with the Adam Walsh Act, SORNA's other stated purposes include: requiring offenders to register with the Pennsylvania State Police if they live, work, or go to school within the Commonwealth; requiring homeless offenders located within the Commonwealth to register with the Pennsylvania State Police; requiring incarcerated offenders or those on parole to register with the Pennsylvania State Police; providing a way for the public to obtain information about offenders, including whether any are in a particular zip code or radius; and providing a way for law enforcement in and out of the Commonwealth to obtain information about offenders.[41]

Additionally, in its legislative findings, the General Assembly expressed that SORNA would, in part, increase regulation of sex offenders "in a manner which is nonpunitive" but offers increased protection to the public.[42] In that regard, the General Assembly further found that: protecting the community from the "high risk" of sexual offenders "committing additional sexual offenses" is "paramount [to] governmental interest"; that "[sex] offenders have a reduced expectation of privacy"; that the release of information about offenders to the public will further governmental interests of public safety so long as the information released is "rationally related to the furtherance of those goals"; that knowledge of a person's status as a sex offender allows people to protect themselves from "recidivist acts by such offenders"; and finally, that making the information readily available through the internet enables people to "undertake appropriate remedial precautions to prevent or avoid placing potential victims at risk."[43] Furthermore, the General Assembly declared that the policy served by SORNA is to further protect the safety and general welfare of the Commonwealth's citizens and "shall not be construed as punitive."[44]

The registration provisions of SORNA apply to people living in, employed in, or going to school in Pennsylvania, or in Pennsylvania state, county, or federal prisons who have been convicted of a sexually violent offense on or after the effective date of SORNA.[45] It also applied

40. *Muniz*, 164 A.3d at 1203.

41. *Id.* at 1204; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.10 (West 2019).

42. *Muniz*, 164 A.3d at 1205; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.11(2) (West 2019).

43. *Muniz*, 164 A.3d at 1205; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.11(a)(1)–(8) (West 2019).

44. *Muniz*, 164 A.3d at 1205; *see also* 42 PA. STAT AND CONS. STAT. ANN. § 9799.11(b)(2) (West 2019).

45. *Muniz*, 164 A.3d at 1205–06.

to those "who were required to register under previous versions of Megan's Law and had not yet fulfilled their registration period as of the effective date of SORNA."[46]

Consistent with the Adam Walsh Act, SORNA classifies offenders into three tiers. Tier I[47] offenders are subject to a fifteen year registration period, are required to be photographed, and must verify their registration information annually in person.[48] Tier II[49] offenders are subject to a twenty-five year registration period, are required to be photographed, and must verify their registration information semiannually in person.[50] Tier III[51] offenders are subject to lifetime registration requirements, are required to be photographed, and must verify their registration information quarterly in person.[52]

Additionally, SORNA establishes a statewide registry maintained by the Pennsylvania State Police, which contains a plethora of personal information about the offender including: residence, employment information, social security number, aliases, internet usernames, telephone numbers, passport information, licensing information, motor vehicle information, student enrollment information, date of birth, a physical description of the offender, criminal history, detailed physical information such as scars and tattoos, current photograph, fingerprints, a photocopy of the offender's identification, and a DNA sample.[53] Significantly, SORNA further provides for the publication of information contained in the registry to the public through the internet.[54]

Finally, in addition to the in-person registration verification requirements, offenders are required to appear in person within three business days of any changes to their registration information.[55]

46. *Id.* at 1206 (citing 42 PA. STAT. AND CONS. STAT. ANN. § 9799.13 (West 2019)).

47. See title 42, section 9799.14(b) of the Pennsylvania Code for a list of all Tier I offenses. Notably, many of these are nonsexual offenses. *E.g., id.* at § 9799.14(b)(14), (19).

48. *Muniz*, 164 A.3d at 1206; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.15(a)(1), (e)(1) (West 2019).

49. See title 42, section 9799.14(c) of the Pennsylvania Code for a list of all Tier II offenses.

50. *Muniz*, 164 A.3d at 1206; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.15(a)(2), (e)(2) (West 2019).

51. See title 42, section 9799.14(d) of the Pennsylvania Code for a list of all Tier III offenses.

52. *Muniz*, 164 A.3d at 1207; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.15(a)(3), (e)(3) (West 2019).

53. *Muniz*, 164 A.3d at 1207–08; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.16(a)(1), (b), (c) (West 2019).

54. *Muniz*, 164 A.3d at 1208; *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9799.28 (West 2019).

55. *Muniz*, 164 A.3d at 1208.

Additionally, they are required to appear in person twenty-one days in advance of any travel outside country and must provide all travel information.[56] Failure to comply with any of these requirements is grounds for prosecution and incarceration.[57]

B. Ex Post Facto Laws Generally

Article 1, Section 9, Clause 3 of the United States Constitution prohibits Congress from enacting ex post facto laws: "[n]o Bill of Attainder or ex post facto Law shall be passed."[58] Article I, Section 10 similarly prohibits states from passing ex post facto laws: "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law."[59] The purpose of these clauses was to "assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation"[60] and to ensure that individuals receive "'fair warning' about what constitutes criminal conduct, and what the punishments for that conduct entail."[61]

Based on those concerns, the United States Supreme Court in *Calder v. Bull*[62] articulated four categories of laws that violate ex post facto provisions:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. 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.[63]

Additionally, two elements must be met for a law to be deemed ex post facto: (1) it must be retrospective, applying to events occurring before its enactment, and (2) it must disadvantage the offender affected by it.[64]

56. *Id.*
57. *Id.*; 42 PA. STAT. AND CONS. STAT. ANN. § 9799.21(a) (West 2019).
58. U.S. CONST. art. I, § 9, cl. 3.
59. U.S. CONST. art. I, § 10.
60. *Muniz*, 164 A.3d at 1195 (quoting Miller v. Florida, 482 U.S. 423, 429 (1987)).
61. *Id.* at 1195 (quoting *Miller*, 482 U.S. at 430).
62. 3 U.S. 386 (1798).
63. *Muniz*, 164 A.3d at 1195 (quoting *Calder*, 3 U.S. at 390).
64. *Id.* at 1195–96 (citing Weaver v. Graham, 450 U.S. 24, 29 (1981)).

C. Ex Post Facto Clause in the United States Constitution Compared to the Ex Post Facto Clause of the Pennsylvania Constitution

Whether a law violates ex post facto prohibitions depends on what constitutes punishment. The inquiry extends beyond the law-at-issue's intent and determines whether the law is so punitive in effect such that it outweighs the legislature's nonpunitive intent.[65]

Pennsylvania's ex post facto provision, located in article I, section 17 of Pennsylvania's Constitution,[66] is the Commonwealth's counterpart to the federal ex post facto provision. The Pennsylvania ex post facto provision provides that "[n]o ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."[67] Historically, courts have held that ex post facto clauses incorporated into state and federal constitutions are comparable, and for laws involving violations of both, no separate analysis is required; a law that violates the federal clause will also violate the state clause.[68]

While the United States and Pennsylvania ex post facto provisions appear identical, and while Pennsylvania courts have held that no separate analysis is required, the *Muniz* majority decided both the federal and state constitutional challenge, basing its state constitutional analysis on independent state law. Although precedent has deemed this unnecessary,[69] the *Muniz* majority properly analyzed both for reasons set forth in Section V.B. of this Comment.

D. Applicable Case Law

In its analysis, the *Muniz* majority relied on two key cases—one United States Supreme Court case and one Pennsylvania Supreme Court case—to determine whether the provisions of SORNA violated the federal and state ex post facto clauses of the United States and Pennsylvania Constitutions.

65. *See infra* Section III.D.1 (discussing the "intent-effects" test).

66. PA. CONST. art. I, § 17.

67. *Id.*

68. Commonwealth v. Young, 637 A.2d 1313, 1316–17 n.7 (Pa. 1993); *see also* Commonwealth v. Rose, 127 A.3d 794, 798 n.11 (Pa. 2015) ("As the Ex Post Facto Clause of the United States and the Ex Post Facto Clause of the Pennsylvania Constitution, Art. 1, § 17, are virtually identical in language, this Court has explained that the standards applied to determine *ex post facto* violations under both constitutions are comparable, and a law that violates an appellant's federal *ex post facto* rights will be held violative of his state *ex post facto* rights.").

69. *See Rose*, 127 A.3d at 798 n.11.

1. *Smith v. Doe*

The first case, *Smith v. Doe*, involved a constitutional challenge to the retroactive application of Alaska's Sex Offender Registration Act ("SORA") under the Federal Ex Post Facto Clause of the United States Constitution.[70] Under SORA, the offenders in *Smith* were required to register and verify certain information with local law enforcement on a quarterly basis.[71] Additionally, some of their information was published on the internet, such as:

> name, aliases, address, photograph, physical description . . . license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender . . . is in compliance with [SORA's] requirements.[72]

In determining that these requirements under SORA were nonpunitive and therefore did not violate of the Federal Ex Post Facto Clause,[73] the Supreme Court undertook a dual analysis, called the "intent-effects test."[74] First, whether the legislature in enacting the law meant to "establish 'civil' proceedings" and, if so, whether the statutory scheme "is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[75]

In the first determination, whether the legislature intended the statute to be civil rather than punitive, the Court in *Smith* looked at the text of the statute and the location of the notification provisions in the code.[76] In the next step in determining whether the law is punitive in purpose or effect despite the civil intent, the Court analyzed certain factors set forth in *Kennedy v. Mendoza-Martinez*[77] ("*Mendoza-Martinez* factors"):

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of

70. 538 U.S. 84, 89 (2003).
71. *Id.* at 90.
72. *Id.* at 91 (quoting ALASKA STAT. § 18.65.087(b) (2019)).
73. *Id.* at 105–06.
74. *Id.* at 92–102; *see also* Commonwealth v. Muniz, 164 A.3d 1189, 1224 (Pa. 2017) (Wecht, J., concurring).
75. *Muniz*, 164 A.3d at 1199 (quoting Smith v. Doe, 538 U.S. 84, 92 (2003)).
76. *Id.* at 1199–1200; *see also Smith*, 538 U.S. at 92.
77. *Muniz*, 164 A.3d at 1200; *see also* 372 U.S. 144 (1963).

> *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[78]

The Supreme Court ultimately found that SORA was nonpunitive in intent and also in effect such that it did not negate the nonpunitive intent, and therefore that its retroactive application did not violate the Federal Ex Post Facto Clause of the United States Constitution.[79]

2. *Commonwealth v. Williams*

The *Muniz* majority next analyzed the Pennsylvania Supreme Court's decision in *Commonwealth v. Williams* ("*Williams II*"),[80] which concerned whether the registration, notification, and counseling requirements of Megan's Law II constituted criminal punishment such that its retroactive application violated due process rights under the United States and Pennsylvania Constitutions.[81] The Pennsylvania Supreme Court in *Williams II* conducted the two-part *Smith* analysis ("intent-effects test") and concluded that Megan's Law II's purpose was to promote safety through a civil rather than criminal regulatory scheme.[82]

In step two, the analysis of the *Mendoza-Martinez* factors, the court found that the provisions of Megan's Law II were not punitive in effect as to negate the civil intent based on the following key findings: the registration requirements did not impose any deprivation or restraint on the offender; offenders were free to move around as they please; the notification requirements were not akin to public shaming because the aim of the notification requirements was to allow the public to avoid being victimized, rather than at stigmatizing the offender; scienter[83] does not matter because Megan's Law II applies in some cases regardless of whether the offender knew they were doing anything

78. *Mendoza-Martinez*, 372 U.S. at 168–69.
79. *Smith*, 538 U.S. at 96, 105–06.
80. 832 A.2d 962 (2003); *Muniz*, 164 A.3d at 1201.
81. *Williams*, 832 A.2d at 964□65, 968–70.
82. *Id.* at 971–72; *Muniz*, 164 A.3d at 1224 (Wecht, J., concurring).
83. Scienter refers to the defendant's knowledge of wrongdoing. *Scienter*, BLACK'S LAW DICTIONARY (11th ed. 2019), *available at* Westlaw.

wrong;[84] registration and notification have little deterrent and retributive effect because the already substantial punishments attached to the predicate offenses; the notification provisions are rational and legitimate means chosen to serve the interest in providing persons who may be affected by presence of a sexually violent predator with information they need to protect themselves; and finally, that the registration requirements were not excessively onerous.[85]

IV. THE COURT'S REASONING

Against this framework, the Pennsylvania Supreme Court in *Muniz* reviewed the lower courts' decisions *de novo* to determine whether they properly categorized the registration and notification provisions of SORNA as nonpunitive.[86] The court first analyzed whether SORNA violated the Federal Ex Post Facto Clause of the United States Constitution, and then analyzed whether it violated the ex post facto clause of the Pennsylvania Constitution.

In analyzing the federal claim, the court undertook the two-part analysis applied in *Smith* and *Williams II*. That is, (1) whether the General Assembly enacted SORNA with the intent to impose punishment, and if not, (2) "whether the statutory scheme is nonetheless so punitive either in purpose or effect as to negate the legislature's non-punitive intent."[87] Under the first step of the analysis, just as the Pennsylvania Supreme Court did in *Smith*, the court looked to the text and structure of SORNA, along with the General Assembly's stated intent.[88] The court first observed the several spots in the General Assembly's where it characterized SORNA as nonpunitive, stating its purpose is to "increase its regulation of sexual offenders in a manner which is *nonpunitive* but offers an increased measure of protection to the citizens of this Commonwealth"[89] and "the exchange of relevant information about sexual offenders . . . [is] a means of assuring public protection and shall not be construed as punitive."[90]

84. *See Muniz*, 164 A.3d at 1202 ("[T]he statute applies to the crime of sexual abuse of children, where the defendant may be convicted despite the good faith belief the child was over eighteen years of age." (citing *Williams*, 832 A.2d at 977–78)).

85. *Muniz*, 164 A.3d at 1202–03; *Williams*, 832 A.2d at 978, 980, 982.

86. *Muniz*, 164 A.3d at 1195.

87. *Id.* at 1208 (quoting *Williams*, 832 A.2d at 971).

88. *Id.* at 1209.

89. *Id.* (emphasis added) (quoting 42 PA. STAT. AND CONS. STAT. ANN. § 9799.11(a)(2) (West 2019)).

90. *Id.* (quoting 42 PA. STAT. AND CONS. STAT. ANN. § 9799.11(a)(2) (West 2019)). The court further noted that the first stated purpose of SORNA was to comply with federal legislation. *Id.*

Although the majority pointed out certain aspects of SORNA that actually "cast[ed] doubt" on the General Assembly's stated legislative intent—namely that SORNA encompasses a broader class of offenders, includes relatively minor offenses, is found within the sentencing section of the crimes code, and vests regulatory authority in a law enforcement agency[91]—it nonetheless concluded that the General Assembly's intent was not punitive; rather, it was to comply with federal law and "promote public safety through a civil, regulatory scheme."[92]

After finding that the legislative intent behind SORNA was not punitive, the majority then analyzed the *Mendoza-Martinez* factors to determine whether SORNA "is sufficiently punitive in effect to overcome the General Assembly's stated nonpunitive purpose."[93] At the first factor—whether the registration requirements constitute a restraint on the offender—the majority disagreed with the Commonwealth that, despite in-person registration requirements, offenders were free to move or leave jobs as they pleased.[94] Instead, the court distinguished the SORNA registration requirements from those in *Smith* and *Williams II* because, in *Smith*, the reporting requirements did not require in-person updates, and in *Williams II*, the mandatory counseling sessions served the purpose of counseling offenders, while SORNA requires in-person verification and does not serve any counseling purposes.[95] Thus, this factor weighed in favor of finding SORNA's effect to be punitive.

With regard to the second factor—whether it is traditionally regarded as punishment—the court aptly took into consideration the modern internet-based world, adopting now-Justice Donohue's reasoning in her concurring opinion for *Commonwealth v. Perez*.[96] Although historically the dissemination of information was not the same as public shaming punishments, the way in which information is shared, and the worldwide scope of its dissemination through the internet "now outweighs the public safety interest of the government so as to disallow a finding that it is merely regulatory."[97] The court further

91. *Id.*
92. *Id.* at 1209–10 (quoting *Williams II*, 832 A.2d at 972).
93. *Id.* at 1210.
94. *Id.* at 1210–11.
95. *Id.*
96. *Id.* at 1211–12; Commonwealth v. Perez, 97 A.3d 747, 760 (Pa. Super. Ct. 2014) (Donohue, J., concurring).
97. *Muniz*, 164 A.3d at 1212 (quoting *Perez*, 97 A.3d at 765–66 (Donohue, J., concurring)).

found that the mandatory registration conditions of SORNA make it more like probation than the reporting requirements in *Smith*.[98]

For the fourth factor[99]—whether the operation of the statute promotes the traditional aims of punishment—the court found it weighed in favor of punishment.[100] The court first discussed the registration requirements' deterrent effect, stating that "being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect."[101] It distinguished SORNA from Megan's Law II as analyzed in *Williams II*, where the court found that the registration requirements did *not* have a deterrent effect, because the predicate offenses requiring registration under Megan's Law II already carried a "substantial period" of incarceration, whereas the predicate offenses requiring registration under SORNA do not.[102] Therefore, the additional registration requirements under SORNA have a deterrent effect that the punishment for the predicate offense may not otherwise have.

In finding that SORNA "is much more retributive than Megan's Law II and the Alaska statute at issue in *Smith*,"[103] the court stated that the courts in both *Williams II* and *Smith* did not substantively analyze those points.[104] Further, the court focused on the information released over the internet under SORNA, finding that it "goes beyond otherwise publicly accessible conviction data," which is contrary to the other courts' reasoning that the information available was accurate, public record information.[105]

The sixth factor[106]—whether there is an alternative purpose to which the statute may be rationally connected—is the only factor the court found weighed in favor of a nonpunitive effect.[107] While the court recognized that studies have shown that "the majority of sexual offenders will not re-offend, and that sex offender registration laws are ineffective in preventing re-offense," the court nonetheless deferred to

98. *Id.* at 1212–13.

99. Agreeing with the United States Supreme Court in *Smith*, the court in *Muniz* gave little credence to the third factor, a finding of scienter. *See id.* at 1213–14.

100. *Id.* at 1215–16.

101. *Id.* at 1215.

102. *Id.* (quoting Commonwealth v. Williams, 832 A.2d 962, 978 (Pa. 2003)).

103. *Id.* at 1216.

104. *Id.* at 1215 ("Although we recognize both the High Court in *Smith* and this Court in *Williams II* found sex offender laws generally do not have a retributive purpose, we note there was minimal analysis on this point in either decision.").

105. *Id.* at 1215–16.

106. The court did not give much weight to the fifth factor—whether SORNA applies to conduct that is already a crime. *Id.* at 1216.

107. *Id.* at 1217.

the General Assembly's findings that sex offenders do re-offend and that the registration provisions of SORNA serve the purpose of protecting the public from such offenders.[108] Therefore, the court concluded that SORNA was rationally connected to another purpose (protection) and therefore weighs in favor of nonpunitive purpose.[109]

Finally, despite its legitimate "alternative . . . purpose," the court determined that SORNA is excessive in relation thereto.[110] The court relied on an observation made by the *Williams II* court, that if Megan's Law II resulted in people being classified as sexually violent predators when they have not been adjudicated as such, then its provisions "could be demonstrated to be excessive."[111] Therefore, the majority determined that because SORNA as a whole is over-inclusive and applies to offenders convicted of nonsexual acts, the statutory scheme is excessive in relation to the alternative purpose of protecting the public from sex offenders.[112]

After an obvious balance of the *Martinez-Mendoza* factors in favor of finding SORNA punitive and therefore in violation of the Ex Post Facto Clause of the United States Constitution, the court went on to determine whether the statute also violates the Pennsylvania Constitution.[113] The court acknowledged the option of concluding its analysis once it decided the federal issue, citing *Rose* for the proposition that a "law that violates federal ex post facto clause will be held to violate state clause such that Court 'need not separately consider' it."[114] However, the majority instead decided to undertake an analysis "separate and independent" from its analysis under the Federal Ex Post Facto Clause with its aim "to determine whether the Pennsylvania Constitution provides even greater ex post facto protections" than the Federal Ex Post Facto Clause.[115] The stated reason for this additional analysis was so that, if the United States Supreme Court overturns the majority's decision, it does not leave the state constitutional issue undecided.[116]

In doing so, the court analyzed factors set forth in *Commonwealth v. Edmunds*.[117] The *Edmunds* factors are: (1) text of the constitution, (2)

108. *Id.*
109. *Id.*
110. *Id.* at 1218.
111. *Id.* (quoting Commonwealth v. Williams, 832 A.2d 962, 983 (Pa. 2003)).
112. *Id.* at 1218.
113. *Id.* at 1218–19.
114. *Id.* at 1218–19; *see* Commonwealth v. Rose, 127 A.3d 794, 798 n.11 (Pa. 2015).
115. *Muniz*, 164 A.2d at 1219.
116. *Id.*
117. 586 A.2d 887 (Pa. 1991).

history of the provision, including Pennsylvania case law, (3) related case law from other states, and (4) policy considerations, including unique issues of state and local concern.[118]

The majority acknowledged that the federal and Pennsylvania ex post facto provisions contain identical language and derive from the same "pre-revolutionary-war concerns"; however, the court gave considerable weight to the fact that the Pennsylvania clause is found within its Declaration of Rights, while the Federal Ex Post Facto Clause is not found in the United States Constitution's Bill of Rights, in determining that it is meant to provide more protection.[119]

In analyzing the case law in other states, the court again acknowledges that the majority of states adopt the court's reasoning in *Smith* to hold that retroactivity of their sex offender registration laws do not violate the state's constitution.[120] However, the court distinguishes the Pennsylvania Constitution from those other states' constitutions on the ground that the Pennsylvania Constitution is concerned with protecting the right to reputation.[121] It compared this unique concern to the concerns of the few states that have held that their sex offender laws violate their state constitutions.[122] Because SORNA's registration provision places a "unique burden on the right to reputation," it weighs in favor of providing more protection than the federal clause.[123]

In sum, the majority opinion emphasized certain considerations that justified its departure from *Smith* and *Williams II*—the change in technological environment that contributes to the widespread dissemination and publication of information, the excessive punitive effect this consequence has in relation to the alternative nonpunitive purpose, and the fundamental right to reputation that the Pennsylvania Constitution affords its citizens. These critical differences are paramount to the majority's conclusion that SORNA has crossed the line from nonpunitive to punitive, such that its retroactive application violates both the federal and state ex post facto clauses, warranting vacation of Muniz's sentence, and requiring his compliance with SORNA.

118. *Id.* at 894–95; *Muniz*, 164 A.2d at 1219.

119. *Muniz*, 164 A.3d at 1220; *see also id.* at 1227 (Wecht, J., concurring) (raising the point that the Federal Ex Post Facto Clause "predates the Bill of Rights.").

120. *Id.* at 1222.

121. *Id.*

122. *Id.*

123. *Id.* at 1223.

V. AUTHOR'S ANALYSIS

The *Muniz* majority opinion appears to depart from established federal and state precedent regarding the retroactivity of sex offender registration laws. Indeed, the majority takes a nuanced approach in analyzing the *Mendoza-Martinez* factors that can understandably be characterized as an attempt to draw arbitrary distinctions. However, in light of the increasingly harsh sex offender registration and notification laws enacted by state legislators, who are largely motivated by public fear, such "registration schemes" have become "unmoored from [their] initial constitutional grounding" under the guise of a regulatory, administrative necessity to protect the public.[124] Rather than defer blindly to the state legislators, the *Muniz* majority prudently drew a line between the registration and notification requirements actually serving to protect the community and those that are so burdensome, restrictive, and humiliating that they cannot reasonably be considered nonpunitive. The court's analysis and holding was cautious and forward-thinking and draws the necessary boundaries that serve the purposes underlying the ex post facto provisions of both the United States and Pennsylvania Constitutions. Additionally, the court's approach in analyzing both the federal and state ex post facto challenges effectively insulates its decision from United States Supreme Court review.

A. Effect of Technology on the Imposition of Punishment

In the court's nuanced analysis, it highlighted a significant but seemingly overlooked consideration in determining whether sex offender registration and notification laws have a punitive effect: the advancement of technology.

The majority distinguished SORNA's effect on Muniz from the sex offender laws at issue in both *Smith* and *Williams II*. Specifically, *Smith* is distinguishable because the statute at issue did not require in-person updates,[125] technology was different back when *Smith* was decided,[126] the repercussions for failing to comply with the registration

124. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1073–74 (2011).

125. *Muniz*, 164 A.3d at 1210 ("The *Smith* Court found the Alaska statute did not involve an affirmative disability or restraint partly due to the fact it does not require in-person updates.") (citing Smith v. Doe, 538 U.S. 84, 102 (2003)).

126. *Id.* at 1212 ("[W]e recognize the significance of the *Smith* Court's decision with regard to its analysis of the Alaska statute. However, *Smith* was decided in an earlier technological environment.").

requirement were different,[127] and the information publicly available on the internet was not as extensive as SORNA.[128] Similarly, *Williams II* was distinguishable because the monthly counseling sessions deemed nonpunitive in *Williams II* could be fairly characterized as therapy, and did not subject a broad range of offenders[129] to the "most severe requirements" without a judicial determination that they are sexually violent predators.[130]

In analyzing the second *Mendoza-Martinez* factor—whether the registration requirements have historically been regarded as punishment—the court emphasized that it is not so much the difference in what information is being disseminated (although it plays a part), but it is the way in which the information is being disseminated. Specifically, because SORNA requires the dissemination of "more private" data, including data that is not otherwise publicly available, such as residence address, school address, employment information, photographs, and license plate numbers, among other information,[131] in a time where modern technology provides people all over the world with ready internet access "exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation" such that it "outweighs the public safety interest of the government"[132] and is therefore "comparable to shaming punishments."[133]

127. *Id.* at 1213.

128. *Id.* at 1215–16.

129. *Id.* at 1210–11, 1217–18. Under Megan's Law II, those adjudicated sexually violent predators were required to undergo monthly counseling sessions. *Id.* at 1197. However, under SORNA, all offenders, even those who are not sexually violent predators, were required to submit to in-person verification requirements. *Id.*

130. *Id.* at 1217.

131. *Id.* at 1211, 1217–18 (citing 42 PA. STAT. AND CONS. STAT. ANN. §§ 9799.27–.28 (West 2019)).

132. *Id.* at 1212 (quoting Commonwealth v. Perez, 97 A.3d 747, 765–66 (Pa. 2014) (Donohue, J., concurring)); *see also* Miriam Aukerman, *Sex Offender Registries Endanger the Lives They're Meant to Protect*, THE HILL (Oct. 25, 2017), http://thehill.com/opinion/criminal-justice/357096-sex-offender-registries-endanger-the-lives-theyre-meant-to-protect ("[T]he internet has turned these registries into modern-day scarlet letters, leading to harassment and even vigilantism."); Wendy Cole, *Sex-Offender Apps: Use with Caution*, REALTOR MAG. (June 1, 2010), http://realtormag.realtor.org/technology/feature/article/2010/06/sex-offender-apps-use-caution (stating that advancements in technology allow virtually anyone with a mobile device to download apps that will allow them to "pin down [an offender's] exact location, see their photo, and possibly find out what offense landed them on the registry").

133. *Muniz*, 164 A.3d at 1213; *see also* Smith v. Doe, 538 U.S. 84, 109 (2003) (Souter, J., concurring) ("Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community."

This sentiment regarding the impact of the advancements in technology resonates outside of the sex offender registration context as well. For example, bullying in some form or another has likely occurred for as long as people have been interacting with each other. However, the internet has created an environment where bullying is "harder to contain and harder to ignore" and where bullies, from behind computer screens, justify their harassing and disparaging behavior toward others with some moral reason.[134] This behavior is "uncomfortably close" to public shaming, which occurs over the internet when people band together under some common belief that the target deserves punishment, and they are taking it into their own hands.[135]

B. Analysis of Both State and Federal Ex Post Facto Clauses

1. Adequate and Independent State Ground

With regard to its handling of the ex post facto challenges to both the United States and Pennsylvania Constitutions, the *Muniz* majority properly analyzed both and was correct in ensuring that it expressly based its decision on independent state grounds. Despite previous decisions stating that such analysis was unnecessary,[136] the *Muniz* majority protected its decision with regard to the Pennsylvania constitutional claim against reversal by the United States Supreme Court.

One question in examining both state and federal constitutional challenges is methodology in analyzing the issues.[137] That is, "whether state courts should develop criteria to guide them in deciding whether to interpret identical or similar state constitutional rights to be more protective than the federal analog."[138] This is important because the United States Supreme Court will review only state court cases in which the court bases its decision on federal law.[139] Therefore, under

(citing Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1992))).

134. Maria Konnikova, *How the Internet has Changed Bullying*, NEW YORKER (Oct. 21, 2015), https://www.newyorker.com/science/maria-konnikova/how-the-internet-has-changed-bullying.

135. *Id.*

136. *See Muniz*, 164 A.3d at 1219.

137. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 135 (2009).

138. *Id.*

139. J. Douglas Wilson, *State Law Independence and the Adequate and Independent State Grounds Doctrine After* Michigan v. Long, 62 WASH. U. L. REV. 547, 547 (1984) ("Thus the Court will not review state court decisions that purport to decide federal

the "adequate and independent state ground" doctrine, the United States Supreme Court will not review a state court's decision if its decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment."[140]

In this regard, the United States Supreme Court in *Michigan v. Long*[141] held that where a state court relies on federal precedent merely for guidance, and that its decision actually rests upon a "bona fide separate, adequate, and independent" state ground, the state court should "clearly and expressly" state so.[142] Without such a clear and express statement, the United States Supreme Court will presume that the decision is based on federal grounds and review the decision.[143]

In developing their independent state analyses, many courts develop a set of criteria under which they will determine whether the state constitution is more protective than the federal constitution, which will in effect root that decision in state law.[144] This is known as the "factor" or "criteria" approach.[145] In *Muniz*, the Pennsylvania Supreme Court first analyzed the federal constitutional claim and then analyzed the state constitutional claim.[146] When it reached the state constitutional issue, the court took the "factor" approach in interpreting Pennsylvania's Ex Post Facto Clause more broadly than the Federal Ex Post Facto Clause.[147] Specifically, the court analyzed factors set forth in *Edmunds*.[148] In *Edmunds*, the Pennsylvania Supreme Court established a set of criteria to consider in analyzing Pennsylvania Constitutional issues.[149] In doing so, the court stated that "the federal constitution establishes certain minimum levels which are 'equally applicable to the [analogous] state constitutional provision.'"[150] This approach is consistent with the approach taken by other state courts in

questions if, in the Court's view, adequate and independent state law grounds support the judgment.").

140. Coleman v. Thompson, 501 U.S. 722, 729 (1991)*; see also* Justin Kadoura, Note, *A Constitution Without a Remedy: Forfeitures and Alternative Holdings Under AEDPA*, 89 TEMP. L. REV. 401, 406 (2017).

141. 463 U.S. 1032 (1983).

142. *Id.* at 1033.

143. *Id.* at 1032–33.

144. Williams, *supra* note 137, at 142.

145. *Id.*

146. Commonwealth v. Muniz, 164 A.3d 1189, 1218–19 (Pa. 2017). This is known as the "supplemental" model, in which courts supplement their federal analysis with state constitutional law. Williams, *supra* note 137, at 142.

147. *Muniz*, 164 A.3d at 1219.

148. *Id.* at 1219–23; *see supra* text accompanying notes 117–18.

149. Commonwealth v. Edmunds, 586 A.2d 887, 894–95 (Pa. 1991).

150. *Id.* at 894 (alteration in original) (quoting Commonwealth v. Platou, 312 A.2d 29, 31 n.2 (1973)).

deciding state constitutional claims "where there is also a federal claim that is unlikely to prevail."[151] This is precisely the reasoning provided by the *Muniz* court for its undertaking of the state constitutional issue.[152]

By analyzing its own state constitutional provisions in addition to relying on the federal provision, the majority has relied on an "adequate and independent state ground" that will protect its decision in the event that the United States Supreme Court reverses the decision that SORNA violates the Ex Post Facto Clause of the Federal Constitution.

2. Adequacy of the Independent State Ground

The majority's conclusion that the Pennsylvania Constitution affords greater protection than the United States Constitution was well reasoned and completely rooted in state law. In stating that the majority went "one step further" in holding that the Pennsylvania Constitution provides greater protection than the United States Constitution, Justice Wecht's concurring opinion failed to account for the need of an adequate and independent state ground on which the court would need to base its state court conclusion.[153]

The *Muniz* majority directly acknowledged that its analysis of SORNA under the Federal Ex Post Facto Clause was a "departure from federal case law" that previously held federal SORNA (the Adam Walsh Act) is not a violation of the Federal Ex Post Facto Clause.[154] In recognizing this, the court seemed to heed the warning of the United States Supreme Court in *Michigan v. Long*, that without a decision independently rooted in state law, a reversal of the decision based on

151. Williams, *supra* note 137, at 146; *see, e.g.*, State v. Hunt, 450 A.2d 952, 955 (N.J. 1982).

152. 164 A.3d at 1219.

> [W]e are cognizant of the difficulties arising in the wake of a decision from this Court based exclusively on federal grounds, which is subsequently appealed to the United States Supreme Court and remanded after a contrary decision regarding the federal constitution; inevitably, a state claim follows and a decision rendered by this Court only after intervening uncertainty and delay.

Id.

153. *Id.* at 1225 (Wecht, J., concurring). Indeed, the concurring opinion "agree[s] that SORNA . . . violates Article I, Section 17 of the Pennsylvania Constitution." *Id.* at 1224. However, the concurring opinion bases this on the majority's analysis of the intent-effects test in analyzing the *Federal* Ex Post Facto Clause, not the state's. *Id.* Without a separate, independent analysis, the court's conclusion risks being overturned by the United States Supreme Court. *See supra* text accompanying notes 114–16.

154. *Muniz*, 164 A.3d at 1219 (citing United States v. Young, 585 F.3d 199, 203–06 (5th Cir. 2009)).

federal law would leave the state court to deal then with the state law claim.[155]

To that end, the *Muniz* majority astutely undertook an entirely separate analysis of the Pennsylvania Constitution rooted in state law. The court placed emphasis on considerations in two aspects of the *Edmunds* factors in its determination that the Pennsylvania ex post facto clause provides *greater* protection than the Federal Ex Post Facto Clause: the divergence in the way Pennsylvania historically defines punishment and the inclusion of reputation as a "fundamental right" in its constitution.[156]

Significantly, the framers of the Pennsylvania Constitution included the right to reputation as a fundamental right. Article I, section I of the Pennsylvania Constitution provides that:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, *possessing and protecting property and reputation*, and of pursuing their own happiness.[157]

Such a right to reputation is "notably absent" from the Federal Constitution.[158] The Pennsylvania Supreme Court has, in various contexts, emphasized Pennsylvania's unique protection of the right to reputation. For example, in *R. v. Department of Public Welfare*,[159] the Pennsylvania Supreme Court observed that:

> The United States Supreme Court has already held that reputation is not an interest which, standing alone, is sufficient to invoke the procedural protections [of] the Fourteenth Amendment's due process clause. *Paul v. Davis,* 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). However, in Pennsylvania, reputation is an interest that is recognized and

155. *Id.*; *see* Michigan v. Long, 463 U.S. 1032, 1033, 1042 (1983). The Pennsylvania Supreme Court had done this before in *Commonwealth v. Kohl*, which analyzed the permissibility of certain searches under the Federal and Pennsylvania Constitutions, reasoning that the "holding under the Pennsylvania Constitution would remain unchanged should the United States Supreme Court resolve the issue contrary to our analysis of the federal constitutional question." *Muniz*, 164 A.3d at 1219 (citing Commonwealth v. Kohl, 615 A.2d 308, 315 (Pa. 1992)).

156. *Id.* at 1222–23.

157. PA. CONST. art. I, § I (emphasis added).

158. Kevin McKeon, *A Constitutional Right to Reputation—Who Knew?*, PA. APP. ADVOC. (Sept. 20, 2017), https://paablog.com/right-to-reputation-who-knew.

159. 636 A.2d 142 (Pa. 1994).

> protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to "reputation," providing the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection.[160]

The *Muniz* dissenting opinion acknowledges Pennsylvania's unique protection of reputation, but nonetheless asserts that the Federal Constitution already considers reputation in determining whether registration and notification are akin to public shaming punishment.[161] However, given the uniqueness and importance of Pennsylvania's protection of reputation compared with the Federal Constitution, the majority was correct to base the *Edmunds* factors on that consideration. While it may be true that the harm to reputation is a natural consideration in the historical analysis of public shaming forms of punishment, the fact that Pennsylvania expressly provides that it is a fundamental right, whereas the United States Constitution is completely silent in that regard, cannot be ignored when deciding the specific question of whether the Pennsylvania Constitution affords more protection.

The reputation aspect is vital to the analysis of the punitive effect of SORNA, particularly in light of the advances in technology. Without the far-reaching way in which information can be publicly disseminated under the SORNA requirements, reputational considerations may not have been weighed as heavily and the decision might have come out differently. However, as the majority suggested, the advancing technology considerations can easily turn publicly available information (even for protective, administrative purposes) into a widespread public shaming campaign that severely damages a person's reputation.[162] This is so particularly in light of the over-inclusive nature of SORNA, which contributes significantly to the excessiveness of the registration requirements.[163] Indeed, SORNA requires the registration of convicted offenders, even those not deemed sexually violent and provides for the public dissemination of such information.[164] Therefore, even people

160. *Id.* at 149.

161. *Muniz*, 164 A.3d at 1239 (Saylor, J., dissenting).

162. *Id.* at 1212, 1214 (majority opinion); *see also* Does #1–5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016) ("SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often . . . from their own families, with whom, due to school zone restrictions, they may not even live.").

163. *Muniz*, 164 A.3d at 1218.

164. *Id.* at 1217.

convicted of nonsexual offenses, such as crimes relating to unlawful restraint and filing a factual statement about an alien individual,[165] will be subject to SORNA's onerous registration and notification requirements and exposed to the harassment, rejection, public humiliation, and even violence,[166] associated with being deemed a registered sexual offender.

VI. CONCLUSION

Commonwealth v. Muniz was substantively informed, well-reasoned, and clear in its analysis of SORNA and SORNA's distinction from other sex offender registration laws, as well its consideration of external, changing factors (such as technology) that contribute to the punitive nature of the registration requirements. Additionally, the Pennsylvania Supreme Court in *Muniz* properly insulated its decision from United States Supreme Court review by basing its decision on adequate and independent state grounds—namely, that the Pennsylvania Constitution's unique emphasis on reputation and traditional views on punishment provide more protection than the United States Constitution. Finally, the Pennsylvania Supreme Court drew an important line that may effectively halt the potentially unwieldy development of punitive sex offender registration laws that have largely been protected by the legislation's intent that the laws are civil and regulatory in nature.

165. 42 PA. STAT. AND CONS. STAT. ANN. § 9799.14(b)(1), (19) (West 2014).
166. *See generally* Aukerman, *supra* note 132.