

## CASENOTE

### FORFEITING SEX OFFENDERS' CONSTITUTIONAL RIGHTS DUE TO THE STIGMA OF THEIR CRIMES?: *STATE V. TROSCLAIR*

#### I. INTRODUCTION

Although all crimes are harmful to society, sexual offenses are universally deemed as especially egregious. Statutes regulating sex offenders after their release originated in large part from legislatures acting quickly in response to the public's outcry for protection from these "perceived monsters."<sup>1</sup> Despite the atrocity of their crimes, these "monsters" are still entitled to certain constitutional protections, regardless of how much society may disdain them and their crimes.<sup>2</sup>

However, societal disdain toward sex offenders, and the resulting social stigma, remains the driving force behind newly enacted and amended statutes that apply harsh regulations to sex offenders—statutes that sometimes even impose retroactive application, which violates the sex offenders' constitutional rights under the Ex Post Facto Clause.<sup>3</sup> The endurance of this driving force is largely politically motivated, and "[f]ew politicians dare to vote against such laws, because if they do, the attack ads practically write themselves."<sup>4</sup> Violations of constitutional rights are being permitted so that politicians and lawmakers may placate public fear in order to be reelected, despite the fact that

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1. Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1492 (1999).

2. See *id.* at 1493.

3. The United States Constitution prohibits Congress and all state legislatures from passing ex post facto laws. See U.S. CONST. art. I, § 9, cl. 3 (prohibiting the United States legislature from passing ex post facto laws); U.S. CONST. art. I, § 10, cl. 1 (forbidding states from also passing any ex post facto laws). For a discussion on laws that violate the Ex Post Facto Clause, see *infra* Part III.A.

4. *America's Unjust Sex Laws*, ECONOMIST, Aug. 6, 2009, <http://www.economist.com/node/14165460>.

this public fear is unfounded.<sup>5</sup> Because this issue has been met with judicial inaction, questionable court decisions have emerged in which judges defer to legislation that is driven by this public fear.<sup>6</sup>

The Louisiana Supreme Court, for example, has held that retroactive application of sex offender statutes is constitutional.<sup>7</sup> This is not unique to Louisiana; throughout many jurisdictions, sex offender statutes are consistently found constitutional when challenged pursuant to the Ex Post Facto Clause.<sup>8</sup> This Note explores a recent Louisiana Supreme Court case, *State v. Trosclair*,<sup>9</sup> one of the many cases affected by this public policy. Section II discusses the facts and holding of *Trosclair*. Section III then addresses the relevant background law regarding the constitutional determination for retroactive application of sex offender statutes. Section IV details how the Louisiana Supreme Court applied this law to reach its holding in *Trosclair*. Finally, Section V explains why the court's rationale was flawed and what the potential future impact of the result will be.

## II. FACTS AND HOLDING

Rudy Trosclair was convicted of sexual battery in 2012.<sup>10</sup> In the bill of information, the State of Louisiana alleged that he fondled the genitals of a female child at least once while she was between the ages of four and seven.<sup>11</sup> Trosclair was closely

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5. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1073-74 (2012) (arguing that the public's fear is unfounded because harsher sex offender regulations do not protect children more effectively and rely upon "unproven recidivism statistics").

6. *Id.* at 1073-75.

7. *See generally* *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340; *State ex rel. Olivieri v. State*, 2000-0172 (La. 2/21/01); 779 So.2d 735.

8. Small, *supra* note 1, at 1452-53. *E.g.* *Hatton v. Bonner*, 356 F.3d 955, (9th Cir. 2004) (finding California's sex offender registration and notification statute was non-punitive and thus did not violate the Ex Post Facto clause); *Smith v. Doe*, 538 U.S. 84 (2003) (holding Alaska's sex offender registration and notification statute did not violate the Ex Post Facto clause); *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) (holding Tennessee's sex offender registration and monitoring statute did not violate the Ex Post Facto clause). The United States Constitution prohibits Congress and all state legislatures from passing ex post facto laws. *See* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

9. *Trosclair*, 89 So. 3d 340.

10. *Id.* at 341.

11. *Id.* at 342.

acquainted with the child and admitted during police questioning to committing the alleged sexual battery while the child slept at his house.<sup>12</sup> He pled guilty and was sentenced to thirty months incarceration at hard labor without the possibility of early release through parole, probation, or suspension of sentence.<sup>13</sup> Upon his release from prison, Trosclair was subjected to the relevant Louisiana sex offender statutes, such as the requirements for registration and notification and the conditions for supervised release.<sup>14</sup> At the time of Trosclair's conviction, the statute for supervised release stated that supervised release of sex offenders lasted for five years following release from incarceration.<sup>15</sup> However, this statute, listing the conditions for supervised release, was amended in 2008 to require lifelong post-conviction supervision for sex offenders whose victim was under the age of thirteen.<sup>16</sup> The amendment became effective three months after Trosclair pled guilty.<sup>17</sup>

After serving his full sentence, Trosclair was released on November 24, 2010.<sup>18</sup> Shortly thereafter, he became aware that the State intended for his supervised release to last a lifetime in accordance with the newly amended statute.<sup>19</sup> Trosclair challenged the State's ability to keep him under lifetime supervised release because he had only been subject to five years of supervised release at the time of his conviction.<sup>20</sup> Trosclair maintained that his case fit into the third category of prohibited application of ex post facto laws, and thus his new sentence of lifetime supervision violated both the United States and Louisiana Constitutions because the amended statute inflicted a greater and more burdensome post-conviction punishment upon him than the statute did at the time he was convicted.<sup>21</sup> Trosclair

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12. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d at 342.

13. *Id.*

14. *See id.* at 341. *See generally* LA. REV. STAT. ANN. § 15:561-561.7 (2012) (giving the guidelines of how and by whom sex offenders, with victims thirteen years or younger, will be supervised upon release from incarceration).

15. *Trosclair*, 89 So. 3d at 342. *See also* LA. REV. STAT. ANN. § 15:561.2 (2012) (as amended by 2008 La. Acts 672).

16. *Trosclair*, 89 So. 3d at 342.

17. *Id.* at 347.

18. *Id.* at 342.

19. *Id.*

20. *Id.*

21. *Id.* Laws applied retroactively to defendants that would result in a greater or more burdensome punishment than those in force at the time a defendant is

challenged the State's actions as a violation of the Ex Post Facto Clause and filed a motion to declare unconstitutional the retroactive application of the amended statute.<sup>22</sup> The district court denied Trosclair's motion.<sup>23</sup>

On appeal, the Louisiana Fifth Circuit vacated the trial court's ruling and held that retroactive application of the amended statute, imposing supervised release for longer than five years, was unconstitutional.<sup>24</sup> The Fifth Circuit relied heavily upon *Smith v. Doe*, a decision of the Supreme Court of the United States that implied that retroactive application of a statute for supervised release of sex offenders would be unconstitutional because of the punitive nature of such statutes.<sup>25</sup> Ultimately, the Fifth Circuit agreed with Trosclair that imposing supervised release for the duration of his life rather than for five years would inflict a greater punishment than expected or allowed at the time he pled guilty.<sup>26</sup> The State appealed to the Louisiana Supreme Court to reverse the Fifth Circuit's decision and to reinstate the ruling of the trial court.<sup>27</sup>

After re-designating the State's appeal as a supervisory writ, the Louisiana Supreme Court granted certiorari.<sup>28</sup> The court then reviewed the punitive nature of the supervised release statute and its constitutional effects with respect to the Ex Post Facto Clause.<sup>29</sup> In a 5–4 decision, the Louisiana Supreme Court

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convicted is one of the four classifications of prohibited ex post facto laws. *Trosclair*, 89 So. 3d at 347 (citing *Calder v. Bull*, 3 U.S. 368 (1798) (enumerating the four categories of Ex Post Facto laws forbidden by the Constitution for the first time, which courts still follow verbatim)). See *infra* Part III.A.

22. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d at 347.

23. *Id.* at 342.

24. *Id.* at 342-43.

25. *Id.* at 343. See also *Smith v. Doe*, 538 U.S. 84 (2003) (rejecting an argument that the Alaska sex offender registration and notification statute was parallel to a probation or supervised release, and thus finding that the statute was not punitive in nature). For an explanation of the importance of determining a statute as punitive for ex post facto violations, see *infra* Part III.A-B.

26. *Trosclair*, 89 So. 3d at 343.

27. *Id.*

28. *Id.* at 344.

29. *Id.* at 344, 348. Whether a retroactively applied statute violates the Ex Post Facto Clause depends upon the statute's classification as criminal or civil. See e.g., *Smith v. Doe*, 538 U.S. 84 (2003) (finding that Alaska's sex offender registration and notification statute was civil in nature, and concluding that the retroactive application of the statute did not violate the Ex Post Facto Clause); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (finding that the Kansas Sexually Violent Predator's

2013]

*State v. Trosclair*

271

reversed the decision of the Fifth Circuit and held that the retroactive application of the amended statute, providing for lifetime supervised release of sex offenders, was constitutional and did not offend the Ex Post Facto Clause of the Constitution.<sup>30</sup>

### III. BACKGROUND

The relevant background law pertaining to a constitutional evaluation of retroactive application of sex offender statutes involves several elements, which are described in this section. First, the meaning and importance of the Ex Post Facto Clause is presented, including the specific prohibition of statutes deemed punitive. Second, the intents/effects analysis, which is used to determine whether a statute is deemed punitive, is introduced and explained. Third, precedents applicable to this case are explored, including some that have been established through previous uses of the intents/effects analysis. Finally, the last subsection provides Louisiana's current law regarding the supervised release of sex-offenders.

#### A. DEFINING THE EX POST FACTO CLAUSE AND THE STATUTES IT PROHIBITS

The United States Constitution prohibits both Congress and all state legislatures from enacting ex post facto laws.<sup>31</sup> The existence of two explicit prohibitions against ex post facto legislation indicates the extreme concern the founding fathers had for preventing laws from being applied retroactively.<sup>32</sup> It is noteworthy that the Ex Post Facto Clause is located in the text of the Constitution itself, rather than among the amendments, showing the importance and priority of restricting the power of the federal and state governments in this way.<sup>33</sup> The three

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Act, which establishes procedures for civil commitment of individuals who have mental abnormalities and are likely to commit future sexually violent acts, is civil in nature because it protects the public from dangerous individuals and can thus be retroactively applied without running afoul of the Ex Post Facto Clause).

30. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d at 357.

31. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. "No state shall . . . pass any Bill of Attainder, [or] ex post facto Law." U.S. CONST. art. I, § 10, cl. 1.

32. Michelle Olson, *Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois under the Ex Post Facto Clause*, 5 NW. J. L. & SOC. POL'Y 403, 404 (2010).

33. *Id.* at 405.

generally accepted legal ideals upon which the Ex Post Facto Clause is based are “to provide a fair warning of the law’s effect, . . . to ensure proper reliance on the law, . . . [and] to provide a check on legislative power.”<sup>34</sup>

The Louisiana legislature is not only prohibited by the United States Constitution from passing any ex post facto law, but also by its own state constitution.<sup>35</sup> Neither the federal nor the state constitution provides a definition of what constitutes an ex post facto law; however, the United States Supreme Court has provided four categories of prohibited ex post facto laws.<sup>36</sup> The four categories include any law passed that: (1) makes prior innocent actions a crime and attaches punishment to a person for those actions; (2) elevates the severity of a crime after it was committed; (3) makes the punishment greater or more burdensome for a crime already committed; and (4) denies the defendant a defense, or makes his defense more burdensome, than at the time the crime was committed.<sup>37</sup>

These four categories do not provide conclusive parameters in determining whether a violation of the Ex Post Facto Clause has occurred.<sup>38</sup> Whether a retroactive application of a statute fits within one of these categories of ex post facto laws, and thus whether that statute is unconstitutional, depends on whether the statute is criminal or civil—also referred to as punitive or non-punitive.<sup>39</sup> This is an important distinction because civil laws are not subject to the same constitutional restraints as criminal laws.<sup>40</sup> Because many laws often can be interpreted as either civil or criminal, a two-part analysis, which is generally referred to as the intent/effects analysis, is employed to determine a statute’s classification.<sup>41</sup>

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34. Olson, *supra* note 32, at 406.

35. LA. CONST. art. 1, § 23. “No bill of attainder, [or] ex post facto law . . . shall be enacted.” *Id.*

36. *See* *Calder v. Bull*, 3 U.S. 386, 390-91 (1798).

37. *Id.*

38. *See generally* *Smith v. Doe*, 538 U.S. 84 (2003); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

39. *Hendricks*, 521 U.S. at 361.

40. *Carpenter & Beverlin*, *supra* note 5, at 1101.

41. *See* cases cited *supra* note 38.

**B. THE INTENT/EFFECTS ANALYSIS: DETERMINING WHETHER A STATUTE IS CRIMINAL OR CIVIL IN NATURE**

Under the first step of this analysis, the legislative intent in enacting the statute must be established.<sup>42</sup> This is a question of statutory construction: whether the legislature expressly or impliedly indicated a civil, non-punitive goal in enacting the statute.<sup>43</sup> If the legislative intent is found to have been punitive, the analysis is complete, and the retroactive application of the statute is unconstitutional.<sup>44</sup> If, however, the legislative intent was not punitive, the second part of the analysis must be completed.<sup>45</sup>

The second part of the analysis asks whether, despite the non-punitive legislative intent, the statute is so punitive in its purpose or effects that it is more criminal in nature than civil.<sup>46</sup> To analyze the punitive effects of a statute, the Supreme Court of the United States has provided seven factors, referred to as the *Mendoza* factors, which guide courts in determining if the effects or purpose of a statute are sufficiently punitive to overcome a legislature's civil intent.<sup>47</sup> These seven factors are "neither exhaustive nor dispositive"; they are merely guideposts in determining whether the effects or purpose of a statute are punitive.<sup>48</sup>

Of these seven factors, the Supreme Court has singled out five as being most relevant to determining whether a sex offender registration and notification statute, in particular, is punitive in effects or purpose, making its retroactive application unconstitutional.<sup>49</sup> These five factors ask whether the effects of

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42. *Smith v. Doe*, 538 U.S. 84, 92-93 (2003).

43. *Id.*

44. *Id.* at 92.

45. *Id.*

46. *Id.*

47. *Id.* at 97; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

48. *Smith*, 538 U.S. at 97 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)).

49. *Id.* (finding only five of the seven *Mendoza* factors relevant to the analysis of whether the retroactive application of Alaska's sex offender registration and notification law was constitutional). These five *Mendoza* factors are applicable to all analyses regarding punitive effects of sex offender statutes. See *United States v. Young*, 585 F.3d 199, 206 (5th Cir. 2009) (following *Smith v. Doe*, and finding that only five of the seven *Mendoza* factors were relevant in concluding that a federal statute, the Sex Offender Registration and Notification Act (SORNA), did not violate

the statute: (1) have historically been seen as punishment; (2) impose an affirmative disability or restraint on the defendant; (3) promote traditional aims of punishment; (4) are excessive in comparison to the purpose of the statute; and (5) whether there is a rational connection to a non-punitive objective?<sup>50</sup>

Although these factors are helpful in determining whether a statute has a punitive effect or purpose, “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”<sup>51</sup> What will suffice as “clearest proof” has not been well-defined; however, one guideline is that, in decisions where courts have found a failure to establish “clearest proof” of a statute’s criminal nature, the statutes in question did not have any punitive effects.<sup>52</sup> Although most cases concerning the “clearest proof” have multiple *Mendoza* factors indicating the statutes punitive effects,<sup>53</sup> the “clearest proof” has successfully been shown where only one punitive effect has been acknowledged.<sup>54</sup> Regardless, it

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the Ex Post Facto Clause and was non-punitive because it was not distinguishable from Alaska’s sex offender registration and notification statute for purposes of punitive effects); *State v. Trosclair*, 2011-2302 (La. 5/8/12); No. 2011- KA- 2302, 2012 WL 1606032, at \*13, 17-22 (La. 2012) (agreeing that those same five *Mendoza* factors were relevant in making the determination of whether Louisiana’s sex offender supervised release statute had punitive effects).

50. *Smith v. Doe*, 538 U.S. 84, 97 (2003).

51. *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *State v. Ward*, 448 U.S. 242, 249 (1980)).

52. *E.g.*, *Smith*, 538 U.S. at 100 (finding none of the *Mendoza* factors militated Alaska’s sex offender registration and notification statute as punitive, and subsequently clearest proof was not found to deem the statute punitive); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (finding Kansas’s Sexually Violent Predator Act had not satisfied the *Mendoza* factors, and likewise the clearest proof did not exist, to deem the statute punitive); *Hudson*, 522 U.S. 93 (1997) (finding that there was “nothing of the clearest proof” to show that monetary penalties and debarment sanctions were criminal).

53. *E.g.*, *Mikaloff v. Walsh*, 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio 2007) (finding clear proof of the statute’s punitive effects because the statute imposes an affirmative restraint, can historically be seen as punishment, promotes traditional aims of punishment, is only slightly related to a non-punitive goal, and is excessive in comparison to its purpose); *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009) (finding the clearest proof because five of the seven *Mendoza* factors show the statute’s punitive effects); *Commonwealth v. Baker*, 295 S.W.3d 437, 445-46 (Ky. 2009) (finding five *Mendoza* factors showed clear proof of the statute’s punitive effects).

54. *Berlin v. Evans*, 923 N.Y.S.2d 828, 836 (N.Y. Sup. Ct. 2011) *appeal dismissed*, 958 N.Y.S.2d 594 (N.Y. App. Div. 1st Dept. 2013) (analyzing the excessiveness of the statute compared to the legislature’s non-punitive purpose, the court found “the lack of individual assessment renders the statute punitive”).

2013]

*State v. Trosclair*

275

is clear that this standard will be a high one; satisfaction of the “clearest proof” is not accomplished easily.<sup>55</sup> Undoubtedly, this determination will have to be done on a case-by-case basis. The requirement of the “clearest proof” reemphasizes the deference given to the legislature by the courts when considering whether a designated civil statute is actually criminal.<sup>56</sup>

### C. THE LOUISIANA SUPREME COURT AND LEGISLATURE’S POSITION

The Supreme Court has held that registration of individuals deemed to be dangerous has historically been regarded as a legitimate governmental interest, and thus is non-punitive in nature.<sup>57</sup> Registration serves a non-punitive, legitimate governmental interest by protecting the public from threats that dangerous individuals pose.<sup>58</sup> The Supreme Court also affirmed the civil objective of statutes requiring sex offender registration and notification that seek to protect the public from high recidivism rates of sex offenders.<sup>59</sup> Likewise, the Louisiana Supreme Court has reviewed the state statute requiring sex offender registration and notification.<sup>60</sup> The court recognized that the statute was enacted without punitive intent and that registration and notification requirements were of “paramount governmental interest.”<sup>61</sup> The Louisiana legislature decreed that the “paramount governmental interest” of sex offender statutes was protecting the public from the high recidivism rates of sex offenders as a whole, without individual assessment of sex offenders.<sup>62</sup>

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55. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (noting the inclination to choose the constitutional interpretation, if possible, and the presumption of constitutionality for all statutes, which can only be overcome with the “clearest proof”).

56. *Id.* See also *Carpenter & Beverlin*, *supra* note 5, at 1104.

57. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (upholding a Kansas statute, deemed non-punitive, restricting the freedom of the dangerously mentally ill with a propensity for sexual violence because of the threat posed to the public).

58. *Id.* at 364.

59. *Smith v. Doe*, 538 U.S. 84, 93 (2003).

60. *State ex rel. Olivieri v. State*, 2000-0172 (La. 2/21/01); 779 So. 2d 735, 747.

61. *Id.* It should be noted that this determination was made solely with regard to the Louisiana statute requiring sex offenders to register and notify the proper authorities of their living arrangements once released.

62. LA. REV. STAT. ANN. § 15:540 (2012).

#### D. LOUISIANA'S STATUTE CONTAINING THE CONDITIONS FOR SUPERVISED RELEASE OF SEX OFFENDERS

Louisiana's supervised release statute delineates additional conditions beyond registration and notification, and sex offenders must adhere to these conditions for a specified time period after completing their sentence.<sup>63</sup> These conditions include subjecting

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63. See LA. REV. STAT. ANN. § 15:561.5 (2012), stating that

A person placed on supervised release shall comply with the following conditions:

- (1) Report immediately to the division of probation and parole office, Department of Public Safety and Corrections, which is listed on the face of the certificate of supervised release.
- (2) Establish a schedule of a minimum of one meeting per month with his supervised release officer to provide the officer with his current address, electronic mail address or addresses, instant message name or names, date of birth, place of employment, and verification of compliance with all registration and notification requirements of a sex offender as required by law.
- (3) Be subject to periodic visits with his supervising officers without prior notice.
- (4) Abide by any curfew set by his supervising officers.
- (5) Refrain from using or possessing any controlled dangerous substance or alcoholic beverage and submit, at his own expense, to screening, evaluation, and treatment for controlled dangerous substances or alcohol abuse as directed by his supervising officers.
- (6) Refrain from purchasing or possessing any pornographic or sexually explicit materials. "Pornographic or sexually explicit materials" means any paper, magazine, book, newspaper, periodical, pamphlet, composition, publication, photograph, drawing, picture, poster, motion picture film, video tape, figure, phonograph record, album, cassette, wire or tape recording, compact disc, digital versatile disc, digital video disc, or any other form of visual technology or other similar tangible work or thing which is devoted to or principally consists of descriptions or depictions of illicit sex or sexual immorality, the graphic depiction of sex, including but not limited to the visual depiction of sexual activity or nudity, ultimate sexual acts, normal or perverted, actual, simulated, or animated, whether between human beings, animals, or an animal and a human being.
- (7) Report to the supervised release officer when directed to do so.
- (8) Not associate with persons known to be engaged in criminal activities or with persons known to have been convicted of a felony without written permission of his supervised release officer.
- (9) In all respects, conduct himself honorably, work diligently at a lawful occupation, and support his dependents, if any, to the best of his ability.
- (10) Promptly and truthfully answer all inquiries directed to him by the supervised release officer.
- (11) Live and remain at liberty and refrain from engaging in any type of criminal conduct.
- (12) Not have in his possession or control any firearms or dangerous weapons.
- (13) Submit himself to available medical, psychiatric, or mental health examination and treatment for persons convicted of sex offenses when deemed appropriate and ordered to do so by the supervised release officer.
- (14) Defray the cost, or any portion thereof, of his supervised release by making payments to the Department of Public Safety and Corrections in a sum and manner determined by the Department of Public Safety and Corrections, based upon his ability to pay.
- (15) Submit a residence plan for approval by the supervised release officer.
- (16) Submit himself or herself to continued supervision, either in person or

2013]

*State v. Trosclair*

277

the offender to random visits from supervising officers and monthly meetings, the imposition of curfews, the requirement that the offender report to an officer whenever ordered, forbidding the offender from possessing firearms, and subjecting the offender to website and e-mail monitoring.<sup>64</sup> In 2008, the period of supervised release for sex offenders with victims thirteen years old or younger was extended from a duration of five years to a lifetime.<sup>65</sup>

#### IV. THE LOUISIANA SUPREME COURT'S DECISION IN *STATE V. TROSCLAIR*

In *State v. Trosclair*, the Louisiana Supreme Court set out to resolve “whether the amendment, which increased the five-year period [requiring supervised release of sex offenders] to life and became effective . . . after the defendant pled guilty, can be applied to him retroactively.”<sup>66</sup> The defendant, Trosclair, asserted that imposing the conditions of supervised release on him for a lifetime would create a more burdensome punishment than was allowed at the time he was convicted.<sup>67</sup> The court could not follow the precedent that sex offender registration and notification laws are non-punitive; the task was determining whether the statute for supervised release, which contains conditions in excess of registration and notification, is civil or criminal.<sup>68</sup> The court used the same two-part analysis that the Supreme Court of the United States used in *Smith v. Doe*.<sup>69</sup>

As the intent/effects analysis requires, the Louisiana

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through remote monitoring, of all of the following Internet related activities:

(a) The person's incoming and outgoing electronic mail and other Internet-based communications.

(b) The person's history of websites visited and the content accessed.

(c) The periodic unannounced inspection of the contents of the person's computer or any other computerized device or portable media device and the removal of such information, computer, computer device or portable media device to conduct a more thorough inspection.

(17) Comply with such other specific conditions as are appropriate, stated directly, and without ambiguity so as to be understandable to a reasonable man.

*Id.*

64. LA. REV. STAT. ANN. § 15:561.5 (2012).

65. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 347; LA. REV. STAT. ANN. § 15:561.2 (2012).

66. *Trosclair*, 89 So. 3d at 347.

67. *Id.* at 342. Trosclair's assertion was based on the third category of ex post facto laws. *See supra* Part III.A.

68. *Id.* at 342-44. *See also* LA. REV. STAT. ANN. § 15:561.5 (2012).

69. *Trosclair*, 89 So. 3d at 349-50. *See supra* Part III.B.

Supreme Court first set out to establish the legislative intent that the Louisiana legislature had in enacting the statute.<sup>70</sup> The court looked to the legislative findings for the statute, which expressly stated the legislature's intent.<sup>71</sup> Within the legislative findings, the Louisiana legislature acknowledged that the sex offender statutes are some of the "strictest criminal penalties"; however, the Louisiana Supreme Court did not interpret this statement as an acknowledgement of punitive intent.<sup>72</sup> Instead, the court regarded this statement as a mere description of Louisiana's overall policy regarding sex offenders.<sup>73</sup> The court focused on the legislature's explicit statement that the objective of sex offender statutes is to protect citizens from sex offenders' high risk of re-offending—a non-punitive, civil intent.<sup>74</sup> This intent is deemed civil, rather than criminal, because there is a legitimate objective for enacting the statute that is not for the purpose of punishing sex offenders.<sup>75</sup> Additionally, the court found that the supervised release statute utilizes the same reasoning as the sex offender registration and notification law, which has already been held constitutional in Louisiana when retroactively applied.<sup>76</sup> Therefore, the court held that the supervised release statute also has a non-punitive legislative purpose.<sup>77</sup> Having established a non-punitive intent in creating the supervised release statute, the court then began the second part of the analysis—examining the effects of the statute.<sup>78</sup>

At this point, the court began the most detailed part of its analysis, determining whether the effects of the statute are sufficiently punitive to constitute a criminal designation despite the legislature's stated civil intent.<sup>79</sup> As other courts had done in cases involving sex offender statutes, the *Trosclair* court found that only five of the seven *Mendoza* factors were relevant and applicable to statutes concerning sex offenders.<sup>80</sup>

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70. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 349-50.

71. *See id.* at 350; LA. REV. STAT. ANN. § 15:561 (2012).

72. *Trosclair*, 89 So. 3d at 349-50 (quoting LA. REV. STAT. ANN. § 15:561 (2012)).

73. *Id.* at 350.

74. *Id.*

75. *Id.* at 350-51; *State ex rel. Olivieri v. State*, 2000-0172 (La. 2/21/01); 779 So. 2d 735, 747.

76. *Trosclair*, 89 So. 3d at 350. *See also Olivieri*, 779 So.2d 735.

77. *Trosclair*, 89 So. 3d at 351.

78. *Id.*

79. *Id.*

80. *Id.* at 351-56. *See also Smith v. Doe*, 538 U.S. 84, 97 (2003); *United States v.*

The court found that two of the factors indicated a punitive nature, and that three suggested the opposite.<sup>81</sup> The court did not dispute that the effects of the supervised release statute restrain offenders' liberties and are historically viewed as punishment.<sup>82</sup> Thus, the first *Mendoza* factor—whether the statute imposes an affirmative disability or restraint—militated in favor of the statute being found to be punitive because of the number and extent of the restrictions contained in Louisiana's supervised release statute.<sup>83</sup> The restraints that this statute imposes are neither minor nor indirect.<sup>84</sup> The second *Mendoza* factor—whether the effects of the statute have been historically viewed as punishment—also weighed in favor of the statute being found to be punitive because the supervised release statute was closely related to Louisiana's probation statute, which is punitive.<sup>85</sup> The court found that the three remaining relevant *Mendoza* factors—whether the effects of the statute promote the traditional aims of punishment, are excessive in comparison to the purpose assigned, or can be rationally connected to the assigned purpose—all were found to indicate non-punitive effects.<sup>86</sup> The court reasoned that the traditional aims of punishment, retribution, and deterrence can be present in both civil and criminal statutes; therefore, the presence of these aims in the supervised release statute did not necessarily produce a punitive effect.<sup>87</sup> The non-punitive determinations for the excessiveness and rational connection factors were both made, in large part, due to the declared high recidivism rates of sex offenders and the dire need for the public's protection from this risk.<sup>88</sup>

The court rested its decision heavily upon the rational connection factor and, consequently, found a lack of "clearest proof" of punitive effects, which is required to overcome an

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Young, 585 F.3d 199, 206 (5th Cir. 2009); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

81. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 351-55.

82. *Id.* at 351-52.

83. *Id.* at 352.

84. *See id.* at 351-352. *See also* *Smith v. Doe*, 538 U.S. 84, 99-100 (2003) (stating that if any restraint or disability produced by a statute is only minor or indirect, the statute is likely not punitive).

85. *Trosclair*, 89 So. 3d at 352.

86. *Id.* at 353-54.

87. *Id.* at 353 (internal citations omitted).

88. *Id.* at 354.

declared non-punitive legislative intent.<sup>89</sup> This reliance was formed in part by turning to cases involving electronic monitoring and residency restrictions of sex offenders from courts in other jurisdictions.<sup>90</sup> While acknowledging a division of opinion on whether electronic monitoring and residency restrictions violate the Ex Post Facto Clause, the court aligned itself with those courts that concluded that no ex post facto violations existed.<sup>91</sup> The Louisiana Supreme Court agreed with the United States Court of Appeal for the Sixth Circuit, which found that state legislatures “could rationally conclude that sex offenders present an unusually high risk of recidivism.”<sup>92</sup>

Despite the relevant factors that tended in favor of a finding of punitive effects, the Louisiana Supreme Court found that “[i]n accord with this jurisprudence, it is clear [that] the most significant question under the second stage of the intent/effects analysis is whether the law, ‘while perhaps having certain punitive aspects, serve[s] important non-punitive goals.’”<sup>93</sup> The court ultimately adopted the view that a law with non-punitive goals “is not punishment even though it may bear harshly upon one affected.”<sup>94</sup> As a result, the court found that the amended statute containing conditions for supervised release of sex offenders with victims under the age of thirteen is constitutional when retroactively applied and does not violate the Ex Post Facto Clause.<sup>95</sup>

## V. ANALYSIS

In *Trosclair*, the Louisiana Supreme Court misused the intent/effects analysis, resulting in a fundamentally flawed opinion. Instead of separating the two parts of the analysis, as is required by the Supreme Court of the United States,<sup>96</sup> the

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89. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 357 (quoting *Smith v. Doe*, 538 U.S. 84, 92 (2003)).

90. *Id.* at 355. *See also Doe v. Bredesen*, 507 F.3d 998, 1006 (6th Cir. 2007) (allowing retroactive application of registration and electronic monitoring requirements because the Tennessee legislature “rationally concluded” that sex offenders have high recidivism rates, and so there is a rational connection between those requirements and the non-punitive purpose behind them).

91. *Trosclair*, 89 So. 3d at 355.

92. *Id.* (quoting *Bredesen*, 507 F.3d at 1006).

93. *Id.* at 356 (quoting *Russel v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir.1997)).

94. *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 614 (1960)).

95. *Id.* at 357.

96. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Smith v. Doe*, 538

2013]

*State v. Trosclair*

281

Louisiana Supreme Court's effects analysis only reiterated the legislative intent. By relying on the legislative intent, the court not only based its decision on just one part of the analysis, but also on a legislative intent that was unjustified. The "clearest proof" of the statute's punitive effects that is necessary to overcome the stated legislative intent was present; yet, the court failed to come to this conclusion because of its misuse of the intent/effects analysis.

**A. DETERMINING LEGISLATIVE INTENT: THE COURT'S  
INAPPROPRIATE DEFERENCE TO THE LEGISLATURE AND  
RELIANCE ON PRECEDENT**

Simply deferring to the legislature's stated civil intent in enacting retroactive sex offender statutes without any further investigation was incorrect. The legislature attempted to justify its expressed civil intent by reference to sex offenders' high recidivism rates; yet, the legislature offered no empirical evidence for that declaration, and it is not fair to apply a blanket assumption of a high-risk of recidivism to all sex offenders without any individual consideration. Also, more emphasis should have been placed on the statement by the legislature, given within the same statute where the declared civil intent was found, that recognized that Louisiana's sex offender statutes impose some of the "strictest criminal penalties" for sex offenders in the United States.<sup>97</sup>

Additionally, the Louisiana Supreme Court relied on its earlier decision in *State ex rel. Olivieri v. State* to provide further justification for finding a non-punitive intent.<sup>98</sup> However, the *Olivieri* case is not directly applicable to *Trosclair* and should have been distinguished. The decision in *Olivieri* affirmed the legislature's stated non-punitive intent only in regards to Louisiana's registration and notification statute for sex offenders. Registration and notification are much less burdensome on offenders than the seventeen invasive conditions of supervised release imposed for a lifetime that were at issue in *Trosclair*.<sup>99</sup> The differences between the two statutes warrant a separate review of legislative intent in enacting and amending the statute

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U.S. 84 (2003).

97. LA. REV. STAT. ANN. § 15:561 (2012).

98. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 350-51 (citing *State ex rel. Olivieri v. State*, 2000-0172 (La. 2/21/01); 779 So. 2d 735, 747)).

99. *See supra* note 63.

for supervised release.

Although the *Trosclair* court should have conducted a more in-depth analysis of legislative intent, realistically, it can reasonably be inferred that a non-punitive intent still would have been found. Courts around the country regularly find sex offender registration laws to have civil goals.<sup>100</sup> Despite the reliance on inappropriate precedent and the lack of evidence of high recidivism rates,<sup>101</sup> the Louisiana legislature explicitly asserted a non-punitive intent in ratifying regulations for sex offenders after they are released from incarceration.<sup>102</sup> Both the Supreme Court of the United States and the Louisiana Supreme Court have already shown that extreme deference will be given to the stated intent of the legislature.<sup>103</sup> The more questionable area of the *Trosclair* decision was the application of the second part of the inquiry—the effects analysis.

#### B. THE COURT'S IMPROPER PRIORITIZATION OF THE *MENDOZA* FACTORS

While the Supreme Court of the United States has held that no single *Mendoza* factor is determinative, the Louisiana Supreme Court in *Trosclair* devoted all of its attention to just one factor—whether the statute has a rational connection to a non-punitive objective.<sup>104</sup> This factor did not deserve the attention it was given, because it is too easily satisfied and can be used to reemphasize any purported legislative intent. Rationality is a low standard in the court system and almost always will be established.<sup>105</sup> All criminal sanctions surely have some non-punitive aspect to them; this fact alone should not have satisfied the requirement of establishing a rational connection to a non-punitive objective. Courts must keep in mind that the purpose of this part of the test is to analyze the punitive effects of the statute, not the non-punitive goals and objectives involved. If a stricter view of this factor was taken that was more in accord

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100. Carpenter & Beverlin, *supra* note 5, at 1102.

101. *See infra* Section V.D.

102. LA. REV. STAT. ANN. § 15:561 (2012).

103. *See generally* State v. Williams, 00-1725 (La. 11/28/01); 800 So.2d 790; *Olivieri*, 779 So. 2d 735; *see also* Smith v. Doe, 538 U.S. 84 (2003); Carpenter & Beverlin, *supra* note 5, at 1104.

104. *See* State v. Trosclair, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 355-56.

105. *E.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (holding that as long as there is some reasonable basis for the statute, there is a rational classification).

with the purpose of the effects part of the analysis, a rational connection may not have been found because the conditions in Louisiana's statute for supervised release do nothing to actually regulate offenders' interaction with children.<sup>106</sup>

Admittedly, the Supreme Court of the United States has called the rational connection factor the most "significant factor," but this needs to be taken into context.<sup>107</sup> The weight each *Mendoza* factor is given should depend on the case at issue. The rational connection factor was labeled most significant in *Smith v. Doe*, which involved sex offender registration.<sup>108</sup> In finding that there was no violation of the Ex Post Facto Clause, the Supreme Court of the United States differentiated the registration law at issue before the Court from more punishment-oriented laws such as probation laws and supervised release laws.<sup>109</sup> Presumably, the Court interprets laws containing conditions of supervised release as more punitive in nature.<sup>110</sup> Furthermore, in *Smith v. Doe*, none of the remaining six factors tended to show punitive effects.<sup>111</sup> In *Trosclair*, on the other hand, at least two, and, arguably, three, of the other six factors tended to show punitive effects.

Because the Louisiana supervised release statute imposes restraints upon convicted sex offenders and can be reasonably viewed as punishment, the first two *Mendoza* factors highlight the punitive effects of the statute.<sup>112</sup> Arguably, the fourth *Mendoza* factor—whether the effects of the statute promote traditional aims of punishment, namely retribution and deterrence—may also serve as additional proof of the statute's punitive effects, but, unfortunately, this factor is often too easily disposed of without being given the weight it deserves.<sup>113</sup> Many

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106. See, e.g., *Commonwealth v. Baker*, 295 S.W.3d 437, 445-46 (Ky. 2009) (finding that the imposition of an amended statute restricting where sex offenders may live violated the Ex Post Facto Clause, partly because the statute did nothing to regulate interaction with children, and thus had no rational connection to a non-punitive objective and created punitive effects).

107. *Smith v. Doe*, 538 U.S. 84, 102 (2003).

108. *Id.*

109. *Id.*

110. See *id.*

111. *Id.* at 98-105.

112. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 350-52.

113. E.g., *Smith*, 538 U.S. at 102; *Hudson v. United States*, 522 U.S. 93, 102 (1997); *United States v. Ursery*, 518 U.S. 267, 292 (1996) ("[W]e long have held that [the] purpose [of deterrence] may serve civil as well as criminal goals."); *Trosclair*, 89

courts have found that both civil and criminal statutes may have deterrence as a goal, and that retributive purposes are appropriate where there are risks of high recidivism rates.<sup>114</sup> In *Trosclair*, the Louisiana Supreme Court's interpretation focused on the legislature's intent to bring forth deterrence and retribution when it enacted the supervised release statute, rather than on the effects that may inadvertently promote these two traditional aims of punishment.<sup>115</sup> By doing this, the Louisiana Supreme Court again mistakenly reemphasized the intent of the legislature, which should not provide any influence at the second stage of the analysis.

**C. THE COURT'S MISAPPLICATION OF THE TWO-PART  
INTENT/EFFECTS ANALYSIS AS A ONE-PART DETERMINATION  
OF LEGISLATIVE INTENT**

In its misguided application of the intent/effects analysis, the court continually dismissed the punitive effects of the supervised release statute as trivial, and reemphasized the non-punitive goals involved due to the supposed high recidivism of sex offenders. By dismissing the punitive effects of the statute and repeatedly focusing on the non-punitive goals, the court effectively turned the two-part analysis into a one-part determination of the legislative intent in creating the statute. The Fifth Circuit decision was admonished and overturned because, according to the Louisiana Supreme Court, the Fifth Circuit focused too much on the punitive aspects of the statute instead of focusing on the non-punitive goals in the second part of its analysis.<sup>116</sup>

The Louisiana Supreme Court's reasoning is circular. The court declared that the most important part of the second step of the analysis is determining whether the legislature's goals in enacting the statute were non-punitive, regardless of whether the statute creates punitive effects;<sup>117</sup> but this is exactly what the first step of the analysis is intended to establish. The court's reasoning operates on the logic that establishing the first step will always complete the second as well. With this logic in mind, the intent/effects analysis, endorsed by both the United States

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So. 3d at 353.

114. *State v. Trosclair*, 2011-2302 (La. 5/8/12); 89 So. 3d 340, 353.

115. *See id.*

116. *Id.* at 357.

117. *See id.* at 356.

2013]

*State v. Trosclair*

285

and Louisiana Supreme Courts, is really only a one-part analysis in Louisiana, so long as the statute has a substantial government interest of protecting the public. Because the Louisiana Supreme Court and the Louisiana legislature have expressed concern about high recidivism rates among sex offenders, supervisory conditions and other statutes regarding sex offenders that may seem and feel punitive will almost never violate the Ex Post Facto Clause. The high recidivism rate and the need for public protection can, and probably will, always be invoked to establish that the legislature had a non-punitive goal (a “paramount governmental interest”) regardless of the punitive effects involved, and courts will thus find that retroactive application is constitutional. A court should take a closer look at actual recidivism rates, rather than blindly accepting statements made by legislatures and courts.

**D. LACK OF EVIDENCE OF HIGH RECIDIVISM RATES AMONG SEX OFFENDERS**

The Louisiana legislature relied upon purported high recidivism rates among sex offenders as its justification for the non-punitive objective of protecting the public from sexual re-offenders, without any proof or certainty of this statement.<sup>118</sup> Although findings released by Louisiana’s Department of Public Safety and Corrections show almost half of the sex offenders released in 2006 returned to custody within five years, the findings included those offenders convicted of a new felony and revocations of the offenders’ previous release.<sup>119</sup> Additionally, total recidivism rates for all criminals within five years of release in 2006 are identical, showing that sex offenders do not pose a higher risk of re-offending, much less a higher risk of re-committing sexual offenses.<sup>120</sup> The Bureau of Justice Statistics reports that non-sex offenders are more likely to be re-arrested for any type of offense than are sex offenders.<sup>121</sup> Even more

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118. See LA. REV. STAT. ANN. § 15:561.2 (2012).

119. LA. DEP’T OF PUB. SAFETY AND CORR., STATISTICS BRIEFING BOOK 60 (2012), available at <http://www.doc.la.gov/wp-content/uploads/2009/10/Complete-Briefing-Book-July-2012.pdf> (showing 47.6% of sex offenders released in 2006 had returned to adult corrections).

120. *Id.* (showing 47.6% of the total population released in 2006 had returned to adult corrections).

121. *5 Percent of Sex Offenders Rearrested for Another Sex Crime Within Three Years of Prison Release*, BUREAU OF JUSTICE STATISTICS (Nov. 16, 2003, 4:30 PM), <http://bjs.ojp.usdoj.gov/content/pub/press/rsorp94pr.cfm> (documenting the recidivism

enlightening is the fact that only a minimal amount of released sex offenders actually commit future sex crimes.<sup>122</sup> An even smaller number of child molesters are rearrested for molesting another child within three years of their release.<sup>123</sup> Several states that have specifically tracked sex offender recidivism rates for subsequent sex crimes also reflect similarly low rates.<sup>124</sup> In contrast, the majority of the public believes that sex offenders go on to commit more sex crimes; this is the probable fuel for the public policy of imposing strict regulations on sex offenders.<sup>125</sup> How can legislatures urge a paramount governmental interest in protecting the public from the high recidivism rates of sex-offenders when the empirical data paints a different picture? The available statistics weaken the Louisiana legislature's assertion of a non-punitive intent and the Louisiana Supreme Court's finding of a rational connection to a non-punitive objective. Additionally, it is inappropriate to generalize an entire group of people as having a high tendency to behave in a certain way; individual assessments are needed for accuracy, and accuracy is necessary to justify harsh sanctions, such as the conditions imposed upon offenders under Louisiana's supervised release

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rates for all crimes committed by sex offenders (43%) and non-sex offenders (68%) in 1994).

122. BUREAU OF JUSTICE STATISTICS, *supra* note 121 (noting that only 5.3% of released sex offenders were re-arrested for another sex crime).

123. *Id.* (noting that only 3.3% of classified child molesters who have molested children thirteen-years-old or younger were re-arrested for another sex crime).

124. Iowa's Department of Human Rights, Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center reports that "24.5% of registry sex offenders were convicted of a new crime, 3.0% of which were sex crimes" and "33.3% pre-registry sex offenders were convicted of a new crime, 3.5% of which were sex crimes" within 4.3 years. *State Recidivism Studies*, THE SENTENCING PROJECT, [http://sentencingproject.org/doc/publications/inc\\_StateRecidivismStudies2010.pdf](http://sentencingproject.org/doc/publications/inc_StateRecidivismStudies2010.pdf), (last visited March 25, 2013). A 2007 study reported by Minnesota's Department of Corrections shows out of 3,166 sex offenders released between 1990 and 2002, 7% were re-arrested, 6% were re-convicted, and 3% were incarcerated for committing a sexual offense within three years. *Id.* "Of 746 sex offenders released in Connecticut in 2005, five years later, less than 4 percent had been re-arrested and charged with a new sex crime." Uma Ramiah, *Report finds low recidivism rate amongst convicted sex offenders*, THE CT. MIRROR, Feb. 15, 2012, <http://www.ctmirror.org/story/15450/report-finds-low-recidivism-rate-amongst-convicted-sex-offenders>.

125. *E.g.*, Jason Singer, *Sex Offender Survey Shows Low Recidivism*, PORTLAND PRESS HERALD, Jul. 31, 2011, [http://www.pressherald.com/news/sex-offender-survey-shows-low-recidivism\\_2011-07-31.html](http://www.pressherald.com/news/sex-offender-survey-shows-low-recidivism_2011-07-31.html) (regarding a 2009 survey conducted in Florida showing that 65-80% of the public believe that sex offenders are very likely to commit future sex crimes).

2013]

*State v. Trosclair*

287

statute.<sup>126</sup> Although the acts committed by sex offenders should in no way be condoned, sex offenders are entitled to their constitutional rights, rights that should be vigorously protected for all people.

**E. THE PUNITIVE EFFECTS OF THE STATUTE AS “CLEAREST PROOF” TO OVERCOME THE NON-PUNITIVE LEGISLATIVE INTENT**

Had the Louisiana Supreme Court appropriately acknowledged the presence of the punitive effects produced by the supervised released statute, the “clearest proof” standard would have been satisfied. This “clearest proof” standard is an elusive one, and courts have little guidance regarding how to analyze it, other than giving deference to the legislature.<sup>127</sup> The *Trosclair* opinion seems to support the idea that a statute with punitive aspects is not the “clearest proof” when the legislature claims to have non-punitive goals for the statute. But this sends the wrong message. The standard for “clearest proof” is coupled with the effects portion of the analysis, which needs to be separated from any consideration of non-punitive legislative intent.

Additionally, should such deference really be given to the legislature when questionable motivations, unfounded in law or fact, may be behind the enactments of sex offender statutes?<sup>128</sup> In enacting these statutes, legislatures have been criticized as “eager to please a fearful public” and as being “given unfettered freedom by a deferential judiciary.”<sup>129</sup> While the standard for “clearest proof” may take time to fully develop, extreme deference to legislatures involving controversial areas such as sex offender statutes should not be routinely accepted.

Notwithstanding deference to the legislature, determining the existence of punitive evidence of the “clearest proof” has been conducted on a case-by-case basis.<sup>130</sup> Within the facts and circumstances of the *Trosclair* case, the “clearest proof” of punitive effects of the supervised release statute is evident. The

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126. Small, *supra* note 1, at 1456 (arguing for the necessity of individual determinations of a sex offenders' likelihood of reoffending).

127. See Carpenter & Beverlin, *supra* note 5, at 1104; see also *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

128. Carpenter & Beverlin, *supra* note 5, at 1105.

129. *Id.* at 1073.

130. See cases cited *supra* notes 53-54.

legislative intent based on an empty rationale is weak compared to the obvious punitive effects of the supervised release statute, as shown by the *Mendoza* factors, as well as the insinuation made by the Supreme Court of the United States regarding the criminal nature of these types of statutes.<sup>131</sup> In consideration of the lack of evidence of high recidivism rates among sex offenders, and the punitive effects produced by the statute (which should be apparent), the Louisiana Supreme Court should have classified the supervised release statute as punitive. In the defense of constitutional rights, Louisiana's lifetime-supervised release should be prohibited from retroactive application.

## VI. CONCLUSION

The Louisiana Supreme Court failed to respect the true purpose of the intent/effects analysis and failed to properly apply it. Further investigation is needed into recidivism rates of sex offenders for a better indication of the actual threat they pose before any paramount governmental interest in protecting the public is declared as a means to justify retroactive application of harsh statutes. Additionally, punitive aspects of statutes must be readily recognized toward establishing the "clearest proof" necessary to overcome expressed legislative intent.

If constitutional rights are not vigorously protected for *all* citizens, regardless of the heinousness of their crimes, then these rights may no longer be relied upon as guaranteed to all of us. The Louisiana Supreme Court's holding in *State v. Trosclair* is ominous for the future protection of sex offenders' constitutional rights. As long as the legislature continues to appease a fearful public and the courts continue their deference, the stigma of sex offenders and their crimes will most likely block any fair constitutional analyses of whether retroactive application of sex offender laws violates the Ex Post Facto Clause of the Constitution.

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131. See *Smith v. Doe*, 538 U.S. 84, 87 (2003) (rejecting the argument that the sex offender registration and notification statute was "parallel" to probation or supervised release programs, and ultimately denying the defendant's constitutional challenge to retroactive application of the statute).