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Eric French

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DODGING DUE PROCESS: HOW *UNITED STATES V. DODGE* PUSHES THE LIMITS OF CIVIL REGULATION

Abstract: On March 5, 2010, the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Dodge* held that courts may take a non-categorical approach in determining whether a defendant qualifies as a sex offender under the Sex Offender Registration and Notification Act. Although a non-categorical approach is warranted by accepted standards of statutory construction, courts following a non-categorical approach in the future should be wary of violating due process. Given that registration requirements have certain punitive characteristics, defendants may be successful in due process challenges to registration decisions based on facts neither admitted by the defendant nor submitted to a jury. Moreover, registration decisions based on a defendant's underlying conduct stray from prior Supreme Court reasoning suggesting that registration decisions based on conviction history alone are consistent with due process.

INTRODUCTION

The Sex Offender Registration and Notification Act (SORNA)¹ is found under Title I of the Adam Walsh Child Protection and Safety Act of 2006.² President George W. Bush signed the Adam Walsh Act into law with the promise that it would “strengthen Federal laws to protect our children from sexual and other violent crimes, . . . help prevent child pornography, and . . . make the Internet safer for our sons and daughters.”³ SORNA itself contains the stated purpose of protecting the “public from sex offenders and offenders against children.”⁴ Although protecting the country's children is of the utmost importance, after the 2010 decision by the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Dodge*, courts may have to be careful that zeal

¹ Sex Offender Registration and Notification Act, 18 U.S.C. § 2250, 42 U.S.C. §§ 16901–16962 (2006).

² Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, Title I, §§ 101–635, 120 Stat. 590, 590–644 (codified at 42 U.S.C.A §§ 16901–16991, 3765, 3797ec to ee-1 (2006 & Supp. II 2009) and in scattered sections of 18 U.S.C.).

³ Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 42 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1395, 1396 (July 27, 2006).

⁴ 42 U.S.C. § 16901.

for punishment does not overshadow the basic rights of defendants subject to SORNA's registration requirement.⁵

In *Dodge*, the Eleventh Circuit, sitting en banc, held that in determining whether a defendant committed a registerable sex offense under SORNA, a court can look beyond the elements of the defendant's statute of conviction to his underlying conduct.⁶ Thus, defendants convicted of crimes with elements that do not match SORNA's definition of a sex offense may still have to register as sex offenders if courts determine that their underlying conduct constituted a registerable sex offense.⁷

Part I of this Comment provides a brief description of SORNA and what it requires of registered sex offenders.⁸ Part II examines the facts of *Dodge* and the Eleventh Circuit's reasoning in upholding the district court's non-categorical approach to sex offender registration.⁹ Finally, Part III suggests that the Eleventh Circuit's holding in *Dodge* may raise due process concerns under the Sixth and Fourteenth Amendments.¹⁰

I. SORNA

SORNA is the most recent installment in a series of federal sex offender registration laws.¹¹ The first was the Wetterling Act, enacted in 1994, which required states to create sex offender registries.¹² Since then, Congress has passed a series of laws adding registration and public notification requirements.¹³ Before SORNA was passed in 2006,

⁵ See *United States v. Dodge*, 597 F.3d 1347, 1349 (11th Cir. 2010); *infra* notes 68–120 and accompanying text.

⁶ 597 F.3d at 1347.

⁷ See *id.* at 1353–56.

⁸ See *infra* notes 11–23 and accompanying text.

⁹ See *infra* notes 24–61 and accompanying text.

¹⁰ See *infra* notes 62–120 and accompanying text.

¹¹ See *infra* notes 12–15 and accompanying text.

¹² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XVII, § 170101, 108 Stat. 1796, 2038 (codified at 42 U.S.C. § 14071 (2006)); see National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,030 (July 2, 2008).

¹³ See COUNCIL OF STATE GOV'TS, SEX OFFENDER MANAGEMENT POLICY IN THE STATES, STRENGTHENING POLICY & PRACTICE: FINAL REPORT 1, 3, 7 (2010) [hereinafter FINAL REPORT], available at <http://www.csg.org/policy/documents/SOMFinalReport-FINAL.pdf> (providing a timeline of sex offender laws); see also Terra R. Lord, Comment, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute's Purpose*, 62 OKLA. L. REV. 273, 280 (2010). In 1996, for example, Congress adopted Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified at 42 U.S.C. § 14071(e) (2006)), which amends the Wetterling Act to provide for community notification about nearby sex offenders, and the Pam Lyncher Sexual Offender Tracking and Identification Act, Pub. L.

states had substantial discretion in implementing their registration systems, leading to discrepancies between those systems and allowing offenders to avoid registration by simply moving from one state to another.¹⁴ With SORNA, Congress sought to close those loopholes by setting out a uniform system of registration with stricter baseline requirements for states.¹⁵

After SORNA, sex offenders must register in each jurisdiction where they reside, are employed, and go to school.¹⁶ They must register their social security number, addresses, and other personal information,¹⁷ update any changes in registration information within three business days,¹⁸ and remain registered from fifteen years to life.¹⁹ They also must verify their registration information in person every three months to one year.²⁰ In addition, offenders' information is published on the internet in a publicly accessible database²¹ and is provided to certain authorities, or anyone else who requests it, upon initial registration and whenever registration information is updated.²² SORNA also created a federal crime for failure to register, punishable by up to ten years in prison.²³

II. *UNITED STATES V. DODGE* AND THE NON-CATEGORICAL APPROACH

Despite SORNA's attempts to create a clear and comprehensive registration system, questions have arisen about who exactly is required to register.²⁴ In *Dodge*, the Eleventh Circuit grappled with the question

No. 104-236, 110 Stat. 3093 (1996) (codified at 42 U.S.C. §§ 14702, 14703 (2006)), which allows the FBI to create a national database of sex offender names and addresses. See FINAL REPORT, *supra*, at 7.

¹⁴ See Lord, *supra* note 13, at 280.

¹⁵ See FINAL REPORT, *supra* note 13, at 3–4 (providing a comprehensive overview of SORNA's provisions); Lord, *supra* note 13, at 281. SORNA sought to close these loopholes through two types of requirements: (1) registration obligations on offenders wherever they reside, and (2) obligations on states to incorporate uniform SORNA standards. Applicability of the Sex Offender Registration and Notification, 28 C.F.R. § 72.1 (2007). Registrants convicted of state and federal crimes are subject to the same general requirements. See *id.*

¹⁶ 42 U.S.C. § 16913(a) (2006).

¹⁷ *Id.* § 16914(a).

¹⁸ *Id.* § 16913(c).

¹⁹ *Id.* § 16915(a).

²⁰ *Id.* § 16916.

²¹ *Id.* § 16918.

²² 42 U.S.C. § 16921 (2006).

²³ 18 U.S.C. § 2250 (2006). For a detailed discussion of SORNA's provisions, see National Guidelines for Sex Offender Registration and Notification, *supra* note 12, at 38,044–70.

²⁴ See *United States v. Dodge*, 597 F.3d 1347, 1351 (11th Cir. 2010); *United States v. Byun*, 539 F.3d 982, 983 (9th Cir. 2008).

of what qualifies as a registerable “sex offense” under SORNA.²⁵ The appellant, Matthew Dodge, was originally charged with and pled guilty to transferring obscene material to a minor under 18 U.S.C. § 1470.²⁶ Dodge, a thirty-three-year-old man, had sent indecent pictures and video of himself over the internet to someone he thought was a thirteen year-old girl, but who in fact was an undercover agent.²⁷ Although Dodge’s conduct clearly fell under a common-sense definition of a “sex offense,” Dodge argued that he had not been convicted of a “sex offense” as defined by SORNA and therefore should not have to register as a sex offender.²⁸

SORNA defines a “sex offense” as:

(i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor; (iii) a Federal offense . . . under section 1591 or chapter 109A, 110 . . . or 117, of Title 18; (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note); or an attempt or conspiracy to commit an offense described in clauses (i) through (iv).²⁹

Although § 1470 is not one of the enumerated federal offenses under the definition of “sex offense,” the district court held that Dodge had nonetheless committed a registerable sex offense under (ii): “a criminal offense that is a specified offense against a minor.”³⁰ SORNA defines “criminal offense” as “a State, local tribal, foreign, or military offense . . . or other criminal offense.”³¹ It defines “specified offense against a minor” to include offenses by child predators involving, among other

²⁵ See 597 F.3d at 1351.

²⁶ *Id.* at 1349. Section 1470 prohibits the transfer of obscene material to a person under sixteen years old:

Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 1470 (2006).

²⁷ *Dodge*, 597 F.3d at 1349–50.

²⁸ See Appellant’s Brief at 10, *Dodge*, 597 F.3d 1347 (No. 08-10802-BB10).

²⁹ 42 U.S.C. § 16911(5)(A) (2006).

³⁰ 554 F.3d 1357, 1359–60 (11th Cir. 2009) (discussing the district court’s holding), *rev’d en banc*, 597 F.3d 1347 (11th Cir. 2010).

³¹ 42 U.S.C. § 16911(6) (emphasis added).

things, “any conduct that by its nature is a sex offense against a minor.”³² Looking to the facts admitted in Dodge’s guilty plea, the district court concluded that Dodge’s conduct was clearly “by its nature a sex offense against a minor.”³³

On appeal to the Eleventh Circuit, Dodge put forth two arguments in his defense.³⁴ First, he argued that SORNA was not intended to include offenses under § 1470 because that section is not included in SORNA’s list of federal sex offenses.³⁵ Under the doctrine of *expressio unius est exclusio alterius*, he argued, the federal offenses listed were meant to be exhaustive.³⁶ Second, Dodge urged the Eleventh Circuit to take a categorical approach to applying SORNA and only consider whether the elements of his statute of conviction, not his underlying conduct, met the definition of a sex offense.³⁷

Initially, the Eleventh Circuit withheld judgment as to Dodge’s arguments and decided that Dodge did not have to register because Dodge’s actions lacked a necessary element of “unwanted sexual assault, offense, or other violation that contacts or opposes one’s rights.”³⁸ Without any form of contact or physical invasion into the victim’s personal space, the court reasoned, Dodge’s conduct could not be considered a sex offense “against” a minor.³⁹

Sitting en banc in 2010, however, the Eleventh Circuit vacated the panel opinion and affirmed the district court’s decision to require registration.⁴⁰ The court first rejected Dodge’s argument that the federal offenses listed in SORNA are exhaustive.⁴¹ The court reasoned that a broader reading of the statute did not suggest “an intent to exclude certain offenses but rather to expand the scope of offenses that meet the statutory criteria.”⁴²

The court then rejected Dodge’s argument that courts should take a categorical approach in applying SORNA.⁴³ Under a categorical ap-

³² *Id.* § 16911(7).

³³ *Dodge*, 554 F.3d at 1359–60 (discussing district court’s holding).

³⁴ *Id.* at 1360–62.

³⁵ *Id.* at 1360–61; see 42 U.S.C. § 16911(5)(A)(iii).

³⁶ Appellant’s Brief, *supra* note 28, at 11. The doctrine of *expressio unius est exclusio alterius* is a canon of construction and means that to express or include one thing implies the exclusion of the other. BLACK’S LAW DICTIONARY 661–62 (9th ed. 2009).

³⁷ Appellant’s Brief, *supra* note 28, at 13.

³⁸ 554 F.3d at 1363.

³⁹ *Id.*

⁴⁰ 597 F.3d at 1349 (en banc).

⁴¹ See *id.* at 1352–53.

⁴² *Id.* at 1352.

⁴³ See *id.* at 1353–54.

proach, courts look only at the elements of the defendant's statute of conviction, and not his or her underlying conduct, in determining whether the defendant must register under SORNA.⁴⁴ A categorical approach is most commonly used in the context of sentence enhancement statutes and immigration cases.⁴⁵ For example, in 2008, in *Begay v. United States*,⁴⁶ the U.S. Supreme Court adopted a categorical approach in holding that three prior felonies for drunk driving did not qualify as "violent felony" convictions that would trigger a sentence enhancement under the Armed Career Criminal Act.⁴⁷ The Court reasoned that although drunk driving was a dangerous crime, it did not meet the statutory definition of a "violent felony," which referred to burglary, arson, etc.⁴⁸ Dodge argued that courts should take the same approach in applying SORNA.⁴⁹ Under a categorical approach, he argued, his conviction would not meet the statutory definition of a sex offense because § 1470 prohibits a broader range of conduct than what would qualify as a sex offense under SORNA.⁵⁰ Thus, the elements of § 1470 would not match the definition of a SORNA sex offense.⁵¹

In rejecting Dodge's argument for a categorical approach to SORNA, the court relied heavily on 2008 decision by the U.S. Court of Appeals for the Ninth Circuit, *United States v. Byun*,⁵² which held that SORNA's language implies a non-categorical approach.⁵³ In *Byun*, the appellant, Mi Kyung Byun, was convicted of alien smuggling and importation of an alien for purposes of prostitution.⁵⁴ As part of her plea agreement, Byun admitted to inducing a seventeen-year-old Korean girl

⁴⁴ See *Taylor v. United States*, 495 U.S. 575, 600 (1990) (defining categorical approach in the context of a sentence enhancement statute).

⁴⁵ See, e.g., *James v. United States*, 550 U.S. 192, 202 (2007) (taking a categorical approach to determine whether a defendant's conviction qualifies as a violent felony under the Armed Career Criminal Act (ACCA)); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (acknowledging that the Court usually takes a categorical approach in determining whether a defendant's prior conviction is a burglary under the ACCA); *Taylor*, 495 U.S. at 602 (holding that courts should apply a categorical approach in determining whether a defendant's prior conviction qualifies him for sentence enhancement under the ACCA); *Keungne v. U.S. Att'y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009) (taking a categorical approach in determining whether alien's conviction for criminal reckless conduct was a crime of moral turpitude).

⁴⁶ 553 U.S. 137, 141 (2008).

⁴⁷ *Id.*

⁴⁸ *Id.* at 141–42.

⁴⁹ See *Dodge*, 597 F.3d at 1353.

⁵⁰ See Appellant's Brief, *supra* note 28, at 13.

⁵¹ See *id.*

⁵² 539 F.3d 982 (9th Cir. 2008).

⁵³ See *Dodge*, 597 F.3d at 1353–54; *Byun*, 539 F.3d at 992.

⁵⁴ 539 F.3d at 983–84.

to work at her night club in Guam and have sex with the club's clients.⁵⁵ Although the facts showed that Byun had committed a sex offense against a minor, which would require her to register under SORNA, the statute Byun was convicted under did not include an age element.⁵⁶ Thus, based solely on Byun's conviction record, she had not committed a registerable sex offense.⁵⁷ The Ninth Circuit, however, after examining the statutory language, held that it could take a non-categorical approach in applying SORNA and look beyond the elements of Byun's crime to her plea agreement to determine the age of the victim.⁵⁸

The court in *Dodge* followed *Byun* in reading SORNA's language to support a non-categorical approach.⁵⁹ In addition to the provisions examined in *Byun*, the Eleventh Circuit interpreted the statute's inclusive language as an indication that Congress intended for courts to examine an offender's underlying conduct.⁶⁰ Thus, the court rejected Dodge's arguments and held that SORNA warranted a non-categorical approach in determining whether a conviction qualified as a registerable sex offense.⁶¹

III. DID THE *DODGE* COURT PROVIDE SUFFICIENT DUE PROCESS?

Requiring Dodge to register seems like the correct decision based on the facts: an individual who tries to send indecent pictures to minors over the internet is certainly the kind of person that sex offender registries are supposed to keep track of.⁶² The court's adoption of a non-categorical approach to SORNA, however, raises potential due process

⁵⁵ *Id.* at 984.

⁵⁶ *Id.* at 990.

⁵⁷ *See id.*

⁵⁸ *Id.* at 993–94. In holding that it could take a non-categorical approach with regard to the victim's age, the Ninth Circuit followed *Taylor v. United States* in looking to the statutory language to determine whether Congress intended a categorical or non-categorical approach. *Byun*, 539 F.3d at 991. *See generally* *Taylor v. United States*, 495 U.S. 575 (1990). The court noted that the pertinent category in the definition of "sex offense"—"a criminal offense that is a specified offense against a minor"—contains no mention of a crime's elements, as opposed to the preceding category, which defines "sex offense" as "a criminal offense that has an element involving a sexual act or sexual contact with another." *Id.* at 991–92 (citing 42 U.S.C. § 16911(5)(A) (2006)). Moreover, the list of "specified offense[s] against a minor" in § 16911(7) includes "any conduct that by its nature is a sex offense against a minor." *Id.* at 992 (citing 42 U.S.C. § 16911(7)(I)). The Ninth Circuit thus held that use of the word "conduct" indicated that the offender's underlying conduct is more relevant than the elements of the conviction itself. *Id.*

⁵⁹ *See Dodge*, 597 F.3d at 1353–54.

⁶⁰ *See id.* at 1354–55.

⁶¹ *Id.* at 1356.

⁶² *See United States v. Dodge*, 597 F.3d 1347, 1349 (11th Cir. 2010).

complications.⁶³ The U.S. Supreme Court has held—in the 2000 decision in *Apprendi v. New Jersey* and the 1999 decision in *Jones v. United States*—that under the constitutional guarantees of due process and trial by jury, any fact that increases the penalty for a crime beyond the statutory maximum, aside from a previous conviction, must be submitted to a jury and proved beyond a reasonable doubt.⁶⁴ Although SORNA was enacted as a civil regulatory scheme, registration requirements based on a non-categorical interpretation of SORNA may push the limits of due process if they are not based on facts submitted to a jury.⁶⁵ Moreover, although the Supreme Court dismissed a Fourteenth Amendment due process challenge to sex offender registration laws in *Connecticut Department of Public Safety v. Doe* in 2003, it predicated its holding on the fact that the registration laws at issue required registration based on conviction history alone.⁶⁶ A non-categorical approach to registration determinations strays from the line of reasoning that upheld *Connecticut DPS*.⁶⁷

A. *Is SORNA Punitive?*

Courts owe defendants different due process measures depending on whether the proceeding is civil or criminal.⁶⁸ If courts find that registration for sex offenders is punitive in effect, they may owe defendants additional due process.⁶⁹ In *Smith v. Doe*,⁷⁰ a 2003 case, the U.S. Supreme Court held that the Alaska Sex Offender Registration Act (ASORA) did not violate the constitutional prohibition against ex post facto laws because ASORA is a civil regulation, not a criminal law.⁷¹ De-

⁶³ See *infra* notes 68–120 and accompanying text.

⁶⁴ See *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

⁶⁵ See *Apprendi*, 530 U.S. at 476; *Jones*, 526 U.S. at 243 n.6.

⁶⁶ See 538 U.S. 1, 4–10 (2003).

⁶⁷ See *infra* notes 110–120 and accompanying text.

⁶⁸ SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 71–73 (8th ed. 2007) (comparing the different procedural requirements in civil versus criminal proceedings); see also Richard E. Meyers, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1376–78 (2008) (discussing differences between civil and criminal law, including additional procedural protections in criminal cases).

⁶⁹ See KADISH ET AL., *supra* note 68, at 71–73.

⁷⁰ 538 U.S. 84 (2003).

⁷¹ See *id.* at 105–06. The Supreme Court has not yet considered whether SORNA qualifies as a criminal law, but the Office of the Attorney General determined that the registration requirements considered in *Smith* were sufficiently similar to SORNA's requirements for *Smith* to be controlling. See *Applicability of the Sex Offender Registration and Notification Act*, 75 Fed. Reg. 81,849, 81,851 (Dec. 29, 2010) (Final Rule).

spite that holding, however, a growing body of research suggests that registration is so burdensome on sex offenders that it may qualify as a criminal sanction.⁷²

In determining whether a statute is civil or criminal, courts typically employ an intent-effects test.⁷³ Under this test courts look first to whether the legislature intended the law to be criminal or civil.⁷⁴ If the answer is civil, the court then looks at whether the statute is nonetheless “so punitive either in purpose or effect as to negate the State’s intention to deem it civil.”⁷⁵ Although SORNA contains a criminal provision for failure to register, for the most part Congress intended to create a civil regulatory scheme.⁷⁶ The question, therefore, is whether SORNA is nevertheless punitive in effect.⁷⁷

Courts refer to a seven-factor balancing test in evaluating the effect prong.⁷⁸ The factors are: “whether [the statute] involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment[,] . . . whether the behavior to which it applies is already a crime,” whether it has a rational connection to a nonpunitive purpose, and whether it appears excessive in relation to that purpose.⁷⁹

Without engaging in a full-fledged analysis of whether SORNA qualifies as a criminal law under the seven-factor test, several facts at least suggest that registration laws may be punitive in effect.⁸⁰ First, registration makes it difficult for offenders to find employment and housing.⁸¹ Employers often either refuse to hire registered sex offenders or fire offenders once their conviction history is revealed.⁸² In addition,

⁷² See *infra* note 15; *infra* notes 16–23 and accompanying text.

⁷³ See *Smith*, 538 U.S. at 92.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See 75 Fed. Reg. at 81,851.

⁷⁷ See *Smith*, 538 U.S. at 92.

⁷⁸ See *id.* at 97.

⁷⁹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

⁸⁰ See *infra* notes 81–98 and accompanying text.

⁸¹ See *infra* notes 82–84 and accompanying text.

⁸² See *Doe v. State*, 189 P.3d 999, 1010–11 (Alaska 2008) (discussing employment restrictions that result from registration); CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, TIME TO WORK: MANAGING THE EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION 1 (Jan. 2002) [hereinafter CSOM, TIME TO WORK], available at <http://www.csom.org/pubs/timetowork.pdf> (discussing the dilemma posed by the importance of work for sex offender rehabilitation and the fact that employers are reluctant to hire sex offenders); Jill S. Levenson & David A. D’Amora, *Social Policies to Prevent Sexual Violence: The Emperor’s*

increasing numbers of states and localities have implemented exclusionary zones where registered sex offenders are not allowed to reside.⁸³ As a result, sex offenders can be very restricted in where they are able to live and work.⁸⁴

Second, registered sex offenders are frequently subject to vigilante violence.⁸⁵ Public dissemination of offender identities and addresses through accessible databases makes it easy for members of the public to take justice into their own hands.⁸⁶

Limitations on employment and housing and threats of vigilante justice could both be considered affirmative disabilities or restraints on sex offenders under the seven-factor test because they severely limit offenders' fundamental rights.⁸⁷ In addition, these limitations clearly serve as deterrence factors for sex offenders, showing that registration promotes the traditional aims of punishment.⁸⁸

Third, evidence suggests that SORNA has a weak connection to a non-punitive purpose.⁸⁹ Congress adopted SORNA in order to protect the public from potential re-offenders.⁹⁰ But, studies show that sex offenders have low rates of recidivism compared to other criminals, which undercuts the premise that sex offenders pose a unique threat of re-

New Clothes?, 18 CRIM. JUST. POL'Y REV. 168, 172–73 (2007) (noting that a substantial portion of sex offenders in Florida and Kentucky reported adverse consequences, such as job loss).

⁸³ FINAL REPORT, *supra* note 13, at 7–10, 13–14 (discussing the state law trend of residency restrictions for sex offenders); Amy Baron-Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, 20 FED SENT'G REP. 357, 359 (2008); Levenson & D'Amora, *supra* note 82, at 172–73 (discussing the impact of residency restrictions on sex offenders); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 135–39 (2007) (arguing that the trend of residency restrictions on sex offenders is a form of internal banishment). Because no state or locality wants to end up being the safe-haven for sex offenders, legislatures have passed stronger and stronger residency restrictions to prevent sex offenders from migrating to those states. Levenson & D'Amora, *supra* note 82, at 173. Housing difficulties for registered offenders can also come in other forms, such as housing discrimination by landlords. *See id.* at 173.

⁸⁴ *See supra* notes 81–83 and accompanying text.

⁸⁵ *See, e.g.*, Corey Kilgannon, *Threats of Violence as Homes for Sex Offenders Cluster in Suffolk*, N.Y. TIMES, Oct. 9, 2006, at B1 (recounting story about a man who devised a plan to burn down a house while registered sex offenders were inside); Gitika Ahuja, *Sex Offender Registries: Putting Lives at Risk?*, ABC NEWS (Apr. 18, 2006), <http://abcnews.go.com/US/story?id=1855771&page=1> (recounting story of a young man who murdered two registered sex offenders after looking them up in a registry); *see also Doe*, 189 P.3d at 1010 n.81 (listing numerous articles of violence against sex offenders).

⁸⁶ *See supra* note 85.

⁸⁷ *See Kennedy*, 372 U.S. at 168–69.

⁸⁸ *See id.*

⁸⁹ *See id.* at 168–69; *infra* notes 90–94 and accompanying text.

⁹⁰ 42 U.S.C. § 16901 (2006).

offense.⁹¹ In addition, studies indicate that treatment is effective in reducing recidivism and that reintegration into society is an important part of sex offender rehabilitation.⁹² Registration, however, often results in sex offenders being ostracized, reducing their chances to reintegrate and receive treatment.⁹³ In other words, the theoretical foundations for registration are fairly shaky, further pushing it toward the punitive end of the spectrum under the seven-factor test.⁹⁴ Fourth, the punitive effects of registration laws may be excessive in relation to their stated purpose in at least some circumstances.⁹⁵ A young man or woman who has consensual sex with an underage boyfriend or girlfriend, for example, is considered a sex offender and required to register under the current scheme.⁹⁶ These kinds of offenders, whose actions bear a level of moral culpability far below that of more serious offenders, do not as clearly deserve the harsh after-effects of registration.⁹⁷

In summary, there is ample evidence to suggest that registration laws meet the intent-effects test and courts should classify SORNA as a criminal rather than civil statute.⁹⁸

⁹¹ See FINAL REPORT, *supra* note 13, at 2 (citing Bureau of Justice Statistics study that suggests that sex offenders have lower rates of recidivism than other criminals); Barons-Evans, *supra* note 83, at 359 (discussing studies suggesting that recidivism rates among sex offenders are lower compared to other criminals); Levenson & D'Amora, *supra* note 82, at 177–78 (summarizing studies suggesting that sex offenders have low rates of recidivism). It should be noted recidivism rates for sex offenders are still in debate; for an interesting discussion of recent research on recidivism rates, see Carl Bialik, *How Likely Are Sex Offenders to Repeat Their Crimes?*, WALL ST. J. BLOGS (Jan. 24, 2008, 11:35 PM), <http://blogs.wsj.com/numbersguy/how-likely-are-sex-offenders-to-repeat-their-crimes-258/>.

⁹² FINAL REPORT, *supra* note 13, at 13, 16 (discussing research that suggests that social reintegration is an important part of rehabilitation); Levenson & D'Amora, *supra* note 82, at 177 (citing study that found that treatment is effective); Yung, *supra* note 83, at 145–46 (discussing evidence that treatment is effective in reducing recidivism among sex offenders).

⁹³ See *supra* notes 82–83 and accompanying text.

⁹⁴ See *supra* notes 89–93 and accompanying text.

⁹⁵ See *Kennedy*, 372 U.S. at 168–69.

⁹⁶ See Ahuja, *supra* note 85 (reporting case where a registered sex offender, whose crime had been having sex with his fifteen-year-old girlfriend when he was twenty, was murdered by an individual who had looked up his information on a sex offender registry).

⁹⁷ Compare, for example, the crime of the offender in note 96 with that of a serial child rapist. See Thomas Kaplan, *In Connecticut, A Paroled Serial Rapist Is Met With a Wave of Fear and Anger*, N.Y. TIMES, Oct. 13, 2007, at B1 (describing the release of a serial rapist).

⁹⁸ See *supra* notes 78–97 and accompanying text.

B. Does Dodge Violate Due Process Under *Jones and Apprendi*?

If SORNA registration qualifies as a criminal sanction, application of the non-categorical approach threatens to violate a defendant's Sixth Amendment right to a trial by jury.⁹⁹ The Sixth Amendment guarantees the right to a jury trial to all criminal defendants.¹⁰⁰ In *Jones* and *Apprendi*, the Supreme Court held that any fact that increases a criminal penalty beyond the statutory maximum, aside from the fact of prior conviction, must be tried before a jury and proved beyond a reasonable doubt.¹⁰¹

Although *Dodge* itself does not violate *Jones-Apprendi*, other courts may have to be wary of doing so if they follow *Dodge* in taking a non-categorical approach to SORNA.¹⁰² *Dodge* does not violate *Jones-Apprendi* for two reasons.¹⁰³ First, for SORNA registration to trigger Sixth Amendment protection, the Supreme Court would have to find that registration is a criminal penalty.¹⁰⁴ Although it may do so in the future, it has yet to rule on whether SORNA is a civil regulation or criminal sanction.¹⁰⁵ Second, the Eleventh Circuit in *Dodge* based its finding that Dodge committed a sex offense on facts admitted by Dodge in his guilty plea.¹⁰⁶ Although *Jones* and *Apprendi* require facts increasing a penalty beyond the statutory maximum to be submitted to a jury, the Court has also noted that facts *admitted* by the defendant may be used for penalty increases.¹⁰⁷

⁹⁹ See U.S. CONST. amend. VI; *infra* notes 100–109 and accompanying text.

¹⁰⁰ U.S. CONST. amend. VI.

¹⁰¹ See *Apprendi*, 530 U.S. at 490 (applying the Due Process Clause of the Fourteenth Amendment to a state statute); *Jones*, 526 U.S. at 243, n.6 (construing a federal statute and applying the Due Process Clause of the Fifth Amendment). SORNA implicates the Due Process Clauses of both the Fifth and Fourteenth Amendments because it applies to sex offenders under both state and federal jurisdiction. See U.S. CONST. amends. V, XIV; Applicability of the Sex Offender Registration and Notification, 28 C.F.R. § 72.1 (2007). SORNA's registration requirements apply directly to offenders under federal jurisdiction; and SORNA requires states to incorporate SORNA's standards into their own registration and notification systems. See 28 C.F.R. § 72.1. Dodge was convicted of a federal statute and therefore SORNA's requirements apply to him directly, which means that he is protected under the Fifth Amendment. See U.S. CONST. amend. V; *Dodge*, 597 F.3d at 1349.

¹⁰² See *infra* notes 103–109 and accompanying text.

¹⁰³ See *infra* notes 104–109 and accompanying text.

¹⁰⁴ See U.S. CONST. amend. VI.

¹⁰⁵ See *supra* note 71.

¹⁰⁶ See 554 F.3d at 1359.

¹⁰⁷ See *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (“Our precedents make clear . . . that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”); *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 243, n.6.

Other courts following *Dodge* and taking a non-categorical approach to applying SORNA, however, will have to be wary of basing a registration determination on facts neither admitted nor submitted to a jury.¹⁰⁸ SORNA is arguably so punitive in effect that it qualifies as a criminal penalty, and a Sixth Amendment challenge to a registration determination based on facts neither tried nor admitted might be successful.¹⁰⁹

C. Dodge Nonetheless Pushes the Limits of Due Process

Although *Dodge* satisfies the Sixth Amendment under the *Jones-Apprendi* principle, it nonetheless throws doubt on the sufficiency of due process offered to registrants.¹¹⁰ The Supreme Court examined due process in the context of sex offender registration laws in 2003 in *Connecticut DPS*.¹¹¹ The defendant in *Connecticut DPS* argued that Connecticut's registration laws violated the Due Process Clause because the state had not provided him a hearing to determine whether he was a dangerous offender, so as to warrant his inclusion in a publicly disseminated sex offender registry.¹¹² The Court rejected his argument, holding that because the state's registration requirement was based solely on the fact of prior conviction of a sex offense, the defendant was not owed a hearing as to his level of dangerousness.¹¹³ His prior conviction was a fact that the offender already had a "procedurally safeguarded opportunity to contest."¹¹⁴ The Court further explained that to "assert a right to a hearing under the Due Process Clause [the defendant] must show that the facts [he] seek[s] to establish in that hearing are relevant under the statutory scheme."¹¹⁵ Because the Connecticut registration law was concerned only with the defendant's conviction record and not the likelihood that he would reoffend, the defendant did not have a right to a hearing on that fact.¹¹⁶

Dodge, however, is distinguishable from *Connecticut DPS*.¹¹⁷ By taking a non-categorical approach, the Eleventh Circuit separated the re-

¹⁰⁸ See *supra* notes 68–98 and accompanying text.

¹⁰⁹ See *supra* notes 68–98 and accompanying text.

¹¹⁰ See *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 243, n.6.; *Dodge*, 597 F.3d at 1355; *infra* notes 111–120 and accompanying text.

¹¹¹ 538 U.S. at 4–10.

¹¹² *Id.* at 6.

¹¹³ *Id.* at 7–8.

¹¹⁴ *Id.* at 7; see CONN. GEN. STAT. §§ 54-257, -258 (2001).

¹¹⁵ *Connecticut DPS*, 538 U.S. at 8.

¹¹⁶ *Id.* at 7–8.

¹¹⁷ See *Dodge*, 597 F.3d at 1355.

quirement to register from Dodge's conviction record.¹¹⁸ Although *Dodge* itself may present no due process violation, its approach does suggest that courts basing registration decisions on non-categorical determinations cannot rely on *Connecticut DPS* to show that the registration procedures at issue comport with due process.¹¹⁹ Defendants who are required to register based on their underlying conduct may have a strong claim to a level-of-dangerousness hearing to establish the basis for their inclusion in a publicly disseminated registry.¹²⁰

CONCLUSION

Although the Eleventh Circuit's holding in *Dodge* appears to follow accepted standards of statutory construction, a non-categorical approach to SORNA may raise due process concerns in the future. Given that registration requirements have certain punitive characteristics, defendants may be successful in due process challenges to registration decisions based on facts neither admitted nor submitted to a jury. Moreover, registration decisions based on a non-categorical approach stray from the line of reasoning in the 2003 Supreme Court case of *Connecticut Department of Public Safety v. Doe* and therefore raise doubts about the sufficiency of due process under a non-categorical approach to SORNA. To ensure that registered sex offenders receive adequate due process, courts and legislatures should either classify registration requirements as criminal laws or further clarify the boundaries of what information courts can use in making registration determinations.

ERIC FRENCH

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¹¹⁸ See *id.*

¹¹⁹ See *Connecticut DPS*, 538 U.S. at 6–8.

¹²⁰ See *id.*