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NOTE

Civil or Criminal?: Deciding Whether a Law May Be Applied Retrospectively Yet Constitutionally in Missouri

State v. Wade, 421 S.W.3d 429 (Mo. 2013) (en banc).

TIMOTHY M. GUNTLI*

I. INTRODUCTION

Although the U.S. Constitution and the constitutions of every state ban *ex post facto* laws, only Missouri and a minority of other states prohibit enactment of laws retrospective in their operation.¹ Understanding the difference between the two types of laws can be difficult at first glance. According to the Supreme Court of Missouri, an *ex post facto* law is one that “provides for punishment for an act that was not punishable when it was committed or that imposes an additional punishment to that in effect at the time the act was committed.”² In comparison, a law retrospective in its operation is “one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when the act transpired.”³

An example should help to clarify the difference. Suppose that a defendant was convicted of a felony in the year 2002, at which time the state had not enacted a statute prohibiting convicted felons from possessing firearms.⁴ Suppose further that the state enacts such a statute in 2004, two years after the defendant’s conviction, and charges the defendant with violating the statute in 2005. Such a statute would not be an *ex post facto* law because it would not actually punish the conduct leading to the defendant’s original conviction that occurred before the firearm statute’s enactment. Rather, the

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1. *State v. Wade*, 421 S.W.3d 429, 432 (Mo. 2013) (en banc). Other states prohibiting enactment of retrospective laws include Colorado, Georgia, Indiana, Maryland, New Hampshire, Ohio, Tennessee, and Texas. *See id.* at 432 n.3.

2. *State v. Harris*, 414 S.W.3d 447, 449-50 (Mo. 2013) (en banc) (quoting *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. 2005) (en banc)).

3. *Squaw Creek Drainage Dist. No. 1 v. Turney*, 183 S.W. 12 (Mo. 1911).

4. This example is loosely based on *State v. Honeycutt*, which is discussed *infra* Part III.B.

statute would punish the defendant's *possession of a firearm*, which occurred after enactment of the statute.⁵ However, the statute would be a retrospective law because it would impose a new disability (i.e., a prohibition on firearm possession) upon the defendant due to his past felony conviction.

Although *ex post facto* laws and retrospective laws are similar concepts, the distinction can have an important impact on any given case in Missouri because the state constitution's ban on retrospectively operational laws applies only to civil – and not criminal – laws.⁶ Thus, a party challenging a law as unconstitutional due to retrospective operation must first show that the law is civil in nature.⁷ The distinction between criminal and civil laws is obvious in some cases, but the line can become quite blurry in the context of sex offender registration and restriction statutes.⁸

Although the Supreme Court of Missouri recognized the difference between *ex post facto* laws and retrospectively operative laws long ago, the advent of sex offender statutes and their unique pseudo-criminal characteristics have challenged the court to delineate and apply criteria for deciding whether a particular provision is civil and, therefore, subject to the prohibition of retrospective laws.⁹ Even though the Supreme Court of the United States provided substantial aid for this task with its decision in *Smith v. Doe* in 2003,¹⁰ the application of *Smith*'s standard still leaves plenty of room for reasonable minds to disagree, as recently demonstrated by a divided Supreme Court of Missouri in *State v. Wade*.¹¹

This Note begins by discussing the facts and holding of *Wade*.¹² Next, this Note examines generally the legal background and history of bans on *ex post facto* laws and on laws retrospective in their operation in Missouri.¹³ Then, this Note explains recent precedent regarding such bans, particularly in

5. See *Harris*, 414 S.W.3d at 450.

6. *Wade*, 421 S.W.3d at 432. Thus, if the firearm statute in the above example were deemed a “criminal” statute, it would be constitutional in Missouri. However, if it were deemed a “civil” statute, it would be unconstitutional.

7. See *id.* at 435.

8. In response to the 1994 sexual assault and murder of seven-year-old Megan Kanka by a neighbor who, unknown to the victim's family, had previously been convicted of sex offenses against children, legislatures across the country began enacting laws that imposed “a variety of reporting, residential, employment, and other similar restrictions on persons convicted of a wide array of sex and other related offenses.” Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 348 (2014); see also *Smith v. Doe*, 538 U.S. 84, 89 (2003). Often colloquially known as “Megan's Laws,” a version of these laws has now been enacted by all fifty states, the District of Columbia, and the federal government. *Smith*, 538 U.S. at 90.

9. See discussion *infra* Part III.A.

10. See *Smith*, 538 U.S. at 92-94, 97.

11. See *infra* Parts III.B, IV.

12. See *infra* Part II.

13. See *infra* Part III.A.

the context of sex offender registration statutes.¹⁴ After the discussion of precedent, this Note explores the analyses of the majority, concurring, and dissenting opinions in *Wade*.¹⁵ Finally, this Note concludes with a critique of these analyses in the instant decision and contemplates the future effects of the court's decision.¹⁶

II. FACTS AND HOLDING

This appeal arose from three consolidated cases of different defendants: Michael Wade, Jason Reece Peterson, and Edwin Carey.¹⁷ In the late 1990s, all three men had been convicted of, or had pleaded guilty to, various sex crimes, and each was required to register as a sex offender.¹⁸ Beginning in 2010 and continuing through the summer of 2011, each of the defendants was charged with violating Missouri Revised Statute Section 566.150, which prohibits any individual who has pleaded guilty to, or been convicted of, various sex offenses from “knowingly be[ing] present in or loiter[ing] within five hundred feet of any real property comprising any public park with playground equipment or a public swimming pool.”¹⁹ At the time of the charges, each defendant was in full compliance with all sex offender registration requirements.²⁰

Wade filed a motion to dismiss the indictment in his case, arguing that Section 566.150 was unconstitutionally retrospective as applied to him.²¹ Wade claimed that the charge violated Article I, Section 13 of the Missouri Constitution, which prohibits enactment of any such retrospective law.²² The trial court overruled his motion, and Wade waived his right to a jury trial.²³ Wade was convicted after a bench trial, and the court sentenced him to three years' imprisonment.²⁴ Wade appealed this sentence.²⁵

14. See *infra* Part III.B-C.

15. See *infra* Part IV.

16. See *infra* Part V.

17. *State v. Wade*, 421 S.W.3d 429, 430 (Mo. 2013) (en banc).

18. *Id.* at 430-32. Wade had pleaded guilty to statutory sodomy, child molestation, and sexual abuse in the first degree and was sentenced to participate in the state's Sexual Offender Assessment Unit program. *Id.* at 430. Peterson was convicted of indecent behavior with a juvenile in Louisiana but had moved to Missouri. *Id.* at 431. Carey had pleaded guilty to statutory rape. *Id.*

19. MO. REV. STAT. § 566.150.1 (Cum. Supp. 2013).

20. *Wade*, 421 S.W.3d at 430-32.

21. *Id.* at 431.

22. *Id.*

23. *Id.*

24. *Id.* The court then suspended execution of Wade's sentence and placed him on five years' probation. *Id.*

25. *Id.*

Peterson also filed a motion to dismiss the charge against him as unconstitutionally retrospective in violation of Article I, Section 13.²⁶ The State responded by arguing that the constitution's ban on retrospective laws applied only to civil rights and proceedings – not to criminal proceedings.²⁷ The State further argued that even if the retrospective ban applied to criminal statutes, the statute neither deprived Peterson of any of his rights nor did it “confer any additional duty, obligation, or disability on Peterson to comply with the statute.”²⁸ The trial court, assuming that the constitutional ban on retrospective laws was not limited to civil statutes, sustained Peterson's motion to dismiss and found that Section 566.150 was unconstitutionally retrospective as applied to Peterson.²⁹ The State appealed this decision.³⁰

Carey also filed a motion to dismiss in his case, alleging that Section 566.150 was unconstitutional as applied to him because it “imposed a new obligation that was not present at the time of his conviction” in violation of the constitutional ban on retrospective laws.³¹ Carey argued in particular that Section 566.150 became effective twelve years after his guilty plea and that laws similar to Section 566.150 had been found unconstitutionally retrospective as applied to offenders convicted before the enactment of the law.³² The State responded by arguing that Article I, Section 13's prohibition against retrospective laws did not apply to criminal laws but only to civil rights and remedies.³³ The trial court sustained Carey's motion and dismissed the information.³⁴ The State appealed the trial court's dismissal.³⁵

On appeal of the three consolidated cases, the Supreme Court of Missouri affirmed Wade's conviction and reversed the lower courts' dismissals of Peterson's and Carey's charges.³⁶ The court, reaffirming that the constitutional prohibition on retrospective laws did not apply to criminal statutes, held that Section 566.150 was a criminal law and, therefore, was not invalid under the constitutional prohibition.³⁷

III. LEGAL BACKGROUND

This Part begins with a general overview of Missouri precedent discussing the distinction between *ex post facto* laws and laws retrospective in their operation. The latter half of this Part details more recent precedent regarding

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 432.

35. *Id.*

36. *Id.* at 430.

37. *Id.*

that distinction in an era of sex offender registration statutes. Finally, this Part concludes with a brief discussion of recent precedent's impact on the decision in *Wade*.

A. *Ex Post Facto* Laws and Laws Retrospective in Their Operation

The U.S. Constitution and the constitutions of every state forbid *ex post facto* laws.³⁸ However, very few state constitutions proscribe the enactment of laws retrospective in their operation.³⁹ Among that small number of states is Missouri, which provides under Article I, Section 13 of its current constitution that “no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.”⁴⁰

The difference between the prohibition on laws retrospective in operation and the prohibition on *ex post facto* laws has been noted at least as far back as 1877, when the Supreme Court of Missouri considered the issue in *Ex parte Bethurum*.⁴¹ In *Bethurum*, the petitioner contested an amendment to Missouri's habeas corpus act that gave the court power to rectify judgments in criminal cases that erroneously stated the length or place of an incarceration sentencing.⁴² The petitioner challenged the amendment and included arguments that it was an *ex post facto* law and that it was a law retrospective in its application.⁴³

In denying all of the petitioner's arguments, the court held that a “law retrospective in its operation,” as the phrase is employed in our bill of rights, is one which relates to civil rights, and proceedings in civil causes.”⁴⁴ In reaching its conclusion, the court cited U.S. Supreme Court precedent to demonstrate that “[t]he terms *ex post facto* and retrospective . . . had acquired . . . definite, legal meaning[s], long before the adoption of [Missouri's] constitution”⁴⁵ and that each term had a history of relating exclusively to either criminal or civil actions, respectively.⁴⁶ The court further clarified that “there can be no doubt that the phrase ‘law retrospective in its operation,’ as used in

38. *Id.* at 432.

39. *Id.* For an example of the distinction between *ex post facto* and retrospectively operational laws, see *supra* Part I.

40. MO. CONST. art. I, § 13.

41. 66 Mo. 545 (Mo. 1877).

42. *Id.* at 547-48.

43. *Id.* at 547. The constitutional provision prohibiting *ex post facto* laws and laws retrospective in operation in effect at the time was Article II, Section 15, which is essentially the same as the current provision. MO. CONST. art. II, § 15 (1875) (providing that “no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly”).

44. *Bethurum*, 66 Mo. at 550.

45. *Id.* at 548 (citing *Calder v. Bull*, 3 U.S. 386 (1798)).

46. *See id.* at 549-50.

the bill of rights, has no application to crimes and punishments, or criminal procedure, and [the act at issue] is neither an *ex post facto* law nor a law retrospective in its operation.”⁴⁷ The decision in *Bethurum* set the foundation for the Supreme Court of Missouri’s future decisions, particularly those interpreting how Article I, Section 13’s ban on retrospective laws relates to sex offender statutes.⁴⁸

In 2008, the Supreme Court of Missouri considered the issue of a retrospective sex offender restriction statute in *R.L. v. State of Missouri Department of Corrections*.⁴⁹ In *R.L.*, the defendant pleaded guilty to attempted enticement of a child and was required to register as a sex offender.⁵⁰ At the time he pleaded guilty, there was no statute in Missouri restricting where he could live based upon his status as a sex offender.⁵¹ However, six months after his conviction, the legislature enacted a statute that prohibited certain sex offenders from residing within 1,000 feet of a public school.⁵² *R.L.* had lived at his residence for eight years prior to the enactment of the statute.⁵³ *R.L.* filed a petition for declaratory judgment, alleging that the new statute was unconstitutionally retrospective in its application.⁵⁴ The trial court agreed.⁵⁵ On appeal, the Supreme Court of Missouri, presuming that the statute was civil, affirmed the decision and held that the statute was impermissibly retrospective in application because it “create[d] a new obligation, impose[d] a new duty, or attache[d] a new disability with respect to transactions or considerations already past.”⁵⁶

In 2010, two years after *R.L.* was decided, the Supreme Court of Missouri was faced with two additional challenges to statutes alleged to be unconstitutional as-applied when it decided *F.R. v. St. Charles County Sheriff’s Department*.⁵⁷ The first defendant in *F.R.* challenged an amended version of the statute at issue in *R.L.*, and, for the same reasons as in *R.L.*, the court found in favor of the defendant.⁵⁸ The second defendant challenged the constitutional validity of another statute, which prohibited convicted sex offenders from going outside, turning on outdoor lights, and handing out candy on

47. *Id.* at 552-53.

48. *See* State v. Wade, 421 S.W.3d 429, 432-33 (Mo. 2013) (en banc) (citing and discussing the impact of *Bethurum*); State v. Honeycutt, 421 S.W.3d 410, 416-22 (Mo. 2013) (en banc) (citing and discussing the impact of *Bethurum*).

49. *R.L. v. State Dep’t of Corr.*, 245 S.W.3d 236, 236 (Mo. 2008) (en banc).

50. *Id.*

51. *Id.*

52. *Id.* at 237 (citing MO. REV. STAT. § 566.147 (Supp. 2006)).

53. *Id.* at 236.

54. *Id.* at 237.

55. *Id.*

56. *Id.* (quoting Squaw Creek Drainage Dist. v. Turney, 138 S.W. 12, 16 (Mo. 1911)); *see also* State v. Honeycutt, 421 S.W.3d 410, 423 (Mo. 2013) (en banc); *infra* notes 78-79 and accompanying text.

57. 301 S.W.3d 56 (Mo. 2010) (en banc).

58. *Id.* at 58; *see also R.L.*, 245 S.W.3d at 237.

Halloween while requiring them to post a sign stating “no candy or treats at this residence.”⁵⁹ Just as with the 1,000-foot-residence requirement statute, the court, again presuming the statute to be civil, held that because the defendant had been convicted and sentenced before the statute was enacted, the statute was unconstitutionally retrospective in its operation as applied to the defendant.⁶⁰ Noting the principle that Article I, Section 13 “bars enactment of laws that impose a new obligation, duty or disability on matters already legally and finally settled,” the court found that the Halloween statute, which was enacted some eighteen years after the defendant’s conviction, imposed a new obligation, duty, or disability for the conviction and, therefore, was unconstitutional as applied.⁶¹

B. State v. Honeycutt & Smith v. Doe: Reexamining R.L., F.R., and Bethurum

More than a century after it was decided, *Bethurum*’s key principle regarding the difference between *ex post facto* and retrospective laws was reaffirmed and expounded upon in the 2013 decision of *State v. Honeycutt*, in which the Supreme Court of Missouri explicitly held that “Article I, Section 13’s ban on the passage of any law retrospective in its operation does not apply to criminal laws.”⁶² In *Honeycutt*, the State charged the defendant as a prior and persistent offender with stealing a firearm and unlawful possession of a firearm under a state statute providing that “a person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and . . . has previously been convicted of any felony under [state law].”⁶³ The defendant had previously been convicted of felony possession of a controlled substance in September 2002.⁶⁴

Honeycutt filed a motion to dismiss the firearm possession indictment, arguing that when he was convicted of possession of a controlled substance, the version of the firearm-felony-possession statute in effect in 2002 made it a crime only for a person convicted of a “dangerous felony”⁶⁵ to possess a concealable firearm.⁶⁶ He then argued that because possession of a controlled substance did not fall into the “dangerous felony” category, his controlled substance possession conviction did not prohibit him from possessing a fire-

59. *F.R.*, 301 S.W.3d at 58.

60. *Id.*; see also *Honeycutt*, 421 S.W.3d at 423; *infra* notes 78-79 and accompanying text.

61. *F.R.*, 301 S.W.3d at 61-62.

62. 421 S.W.3d at 413.

63. *Id.* at 413 (citing MO. REV. STAT. § 571.070.1(1) (Supp. 2012)).

64. *Id.*

65. Examples of felonies in this statutorily created category include, among others, the following: kidnapping, second-degree murder, and first-degree arson, assault, rape, sodomy, elder abuse, domestic assault, and robbery. MO. REV. STAT. § 556.061(8) (Cum. Supp. 2013).

66. *Honeycutt*, 421 S.W.3d at 413.

arm.⁶⁷ Because the legislature did not amend the firearm possession statute until 2008 to make it a crime for a person convicted of *any* felony to possess a firearm, the defendant argued that the 2008 amendment, as applied to him and his 2002 conviction, violated Article I, Section 13's ban on retrospective laws.⁶⁸ The State countered that the ban on retrospective laws had no application to criminal laws because it was limited to civil rights and remedies.⁶⁹ The trial court dismissed the indictment, and the State appealed.⁷⁰

The Supreme Court of Missouri ultimately upheld the principle that “the constitutional prohibition against enacting a law ‘retrospective in its operation’ applies only to laws affecting civil rights and remedies and was never intended to apply to criminal statutes.”⁷¹ In reaching its holding, the court rejected the defendant’s argument that the word “retrospective” should be given its “plain, literal meaning,” noting that such a restrictive interpretation “would swallow the [*ex post facto*] clause of Article I, Section 13, which applies solely to criminal laws,” thus rendering the *ex post facto* clause “mere surplusage.”⁷² The court then discussed the legislative debates and intent behind the adoption of the ban on retrospective laws and reiterated the principle embraced in *Bethurum* that the terms *ex post facto* and “retrospective” had long held distinct, definite legal meanings.⁷³ Specifically, the court noted that *ex post facto* was “a technical legal term relating exclusively to crimes, punishments, and criminal procedure.”⁷⁴

As an alternative argument, Honeycutt alleged that the court in *R.L.* and *F.R.* had implicitly overruled *Bethurum*, contending that because the statutes in those cases had carried criminal penalties, those holdings implicitly extended the application of the ban on retrospective laws to criminal statutes.⁷⁵ The court responded first by noting its general presumption against overruling precedent *sub silentio*⁷⁶ as a principle of *stare decisis*.⁷⁷ The court then explained that, in deciding *R.L.* and *F.R.*, it had presumed, based on the issues raised by the parties and previous interpretations of sex offender registration statutes as being civil laws, that the invalidated statutes in *R.L.* and *F.R.* were civil in nature.⁷⁸ Simply put, the court reasoned, because the parties in *R.L.* and *F.R.* had not argued that Article I, Section 13 applied to criminal laws,

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 414.

72. *Id.* at 415.

73. *Id.* at 415-16.

74. *Id.* at 416 (citing *Ex parte Bethurum*, 66 Mo. 545, 548-49 (Mo. 1877) (discussing *Calder v. Bull*, 3 U.S. 386 (1798))).

75. *Id.* at 422.

76. “*Sub silentio* is defined as ‘without notice being taken or without making a particular point of the matter in question.’” *Id.*

77. *Id.*

78. *Id.* at 423.

the court had not issued a holding on that particular issue (i.e., *R.L.* and *F.R.* “[did] not stand for the proposition that the ‘retrospective laws’ clause of Article I, Section 13 applies to criminal laws”).⁷⁹ However, *Honeycutt*’s decision that Article I, Section 13’s prohibition against laws retrospective in their operation does not apply to criminal laws resolved only one of the issues in that case; the court next had to determine whether the firearm possession statute was a criminal or civil law.⁸⁰

In deciding whether the law was criminal or civil, the court applied the test first explicated in 2003 by the Supreme Court of the United States in *Smith v. Doe*.⁸¹ *Smith* was crucial in the *Honeycutt* court’s analysis because it was the first time that the Court had considered whether a sex offender registration statute constituted retroactive punishment prohibited by the *ex post facto* clause of the U.S. Constitution.⁸² In *Smith*, convicted sex offenders challenged the Alaska Sex Offender Registration Act (“ASORA”), which retroactively required convicted sex offenders to register with law enforcement agencies, making a great deal of the offenders’ personal information public.⁸³ ASORA was enacted after the challengers’ convictions and releases from prison and rehabilitation, but it nevertheless applied to them.⁸⁴ The challengers argued that ASORA was unconstitutional as applied to them because it violated the *ex post facto* clause of Article I of the U.S. Constitution.⁸⁵ Relying on precedent, the Court indicated that if the legislature had intended a punitive effect through enactment, the statute would be subject to the *ex post facto* clause.⁸⁶ However, enactment with civil intent would save the statute from *ex post facto* clause application unless the statute was “so punitive either in purpose or effect” that it must be considered criminal.⁸⁷ The Court held that ASORA was non-punitive and, therefore, not subject to the *ex post facto* clause.⁸⁸ Determining the legislature’s intent was of paramount importance in deciding this issue, and the Court laid out a test for making such a decision, which provided the framework for the *Honeycutt* court to reach its conclusions.⁸⁹

Applying the two-part *Smith* test in *Honeycutt*,⁹⁰ the Supreme Court of Missouri stated that in determining whether a statute is civil or criminal, it

79. *Id.*

80. *Id.* at 425.

81. *Id.* at 424 (citing *Smith v. Doe*, 538 U.S. 84 (2003)).

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

83. *Id.* at 89-91.

84. *Id.* at 91.

85. *Id.*

86. *Id.* at 92.

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

88. *Id.* at 105-06.

89. *Id.* at 92-105.

90. The Supreme Court of Missouri first adopted and employed the *Smith* test in *R.W. v. Sanders*. *State v. Honeycutt*, 421 S.W.3d 410, 424 (Mo. 2013) (en banc) (citing *R.W. v. Sanders*, 168 S.W.3d 65, 70 (Mo. 2005) (en banc)). In *Honeycutt*, the

“must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.”⁹¹ Importantly, the court noted that while an explicit legislative finding undoubtedly indicated legislative intent, “[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature’s intent.”⁹² If the court were to find that a statute “create[d] a civil regulatory scheme,” then the court would have to proceed to the second prong and “examine whether the civil scheme was ‘so punitive either in purpose or effect as to negate [the state’s] intention to deem it civil.’”⁹³ The Supreme Court of Missouri then repeated the *Smith* factors used to make such a conclusion:

To analyze the effects of the regulation, the United States Supreme Court examined whether, in its necessary operation, the regulatory scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to that purpose.⁹⁴

The court then explained that “if the law is deemed ‘civil’ under the appropriate challenge, the court [would] need to analyze whether the law is retrospective in its operation” while noting that a law is not retrospective in operation “[s]imply because [it] is civil and looks backward.”⁹⁵

Utilizing these criteria, the *Honeycutt* court evaluated the firearm possession statute and found that it was criminal in nature and, therefore, not subject to Article I, Section 13’s ban on retrospective laws.⁹⁶ In so holding, the court drew attention to its prior, distinguishable decisions of *R.W. v. Sanders* and *Doe v. Phillips*, which had utilized *Smith* and held that Missouri’s sex offender registration statutes were civil in nature⁹⁷ and that “because such registration laws were civil and retrospective in their application,

court made clear that any time a defendant challenges a statute as unconstitutional based on Article I, Section 13, Missouri courts “should employ the two-part analysis utilized in *Smith* . . . to determine the character of the particular law as the first step in analyzing whether a law violates the either ‘*ex post facto*’ provision or the ‘retrospective laws’ provision of [A]rticle I, [S]ection 13.” *Id.* at 425.

91. *Id.* at 424 (quoting *Smith*, 538 U.S. at 92-93).

92. *Id.* (quoting *Smith*, 538 U.S. at 94).

93. *Id.* (quoting *Smith*, 538 U.S. at 92, 97).

94. *Id.* (quoting *Smith*, 538 U.S. at 97).

95. *Id.* at 425.

96. *Id.* at 426.

97. *Id.* at 424. In its evaluation of the *Smith* factors in *R.W.*, the court repeatedly pointed out that the statute’s principal purpose was the collection of information and that the statute did not impose physical restraints or confinements upon convicted sex offenders. *R.W. v. Sanders*, 168 S.W.3d 65, 69-70 (Mo. 2005) (en banc).

they violated Article I, Section 13's retrospective laws provision" if applied to those who were convicted prior to the statute's effective date.⁹⁸

C. *State v. Wade: Assessing a Sex Offender Restriction Statute's Civil or Criminal Status Under the Influence of Honeycutt*

Section 566.150, which the Supreme Court of Missouri interpreted in the instant *Wade* decision, was enacted in 2009.⁹⁹ It provided that anyone who had been convicted of, or pleaded guilty to, one of various sex crimes against minors "shall not knowingly be present in or loiter within five hundred feet of any real property comprising any public park with playground equipment or a public swimming pool."¹⁰⁰ The first violation of this section results in a class D felony,¹⁰¹ which allows a sentence of imprisonment for up to four years.¹⁰² Any violations after the first one are class C felonies,¹⁰³ punishable by imprisonment for up to seven years.¹⁰⁴

This type of statute, which places restrictions on convicted sex offenders' residences and movements, has "proliferated over the past decade" across the country.¹⁰⁵ Legislatures typically enact these statutes on public-policy grounds, arguing that such laws will prevent future victimizations at the hands of prior offenders.¹⁰⁶ Unlike the statute found to be civil under the *Smith* test in *R.W. v. Sanders*, which required mere registration of prior sex offenders, statutes like Section 566.150 place physical restrictions on the actions and movements of such offenders.¹⁰⁷ Although *Honeycutt* itself dealt with a statute restricting firearm possession of felons rather than actions of convicted sex offenders, its thorough discussion of retrospective and *ex post facto* laws, together with its consideration of the *Smith* test, provided the

98. *Honeycutt*, 421 S.W.3d at 425 (citing *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. 2006) (en banc)).

99. MO. REV. STAT. § 566.150 (Cum. Supp. 2013).

100. § 566.150.1.

101. § 566.150.2.

102. MO. REV. STAT. § 558.011.1(4) (Cum. Supp. 2013).

103. § 566.150.3.

104. § 558.011.1(3).

105. Daskal, *supra* note 8, at 328. For example, in Oklahoma, registered sex offenders are prohibited from "living with a minor . . . ; living within 2000 feet of any school, childcare center, playground, or park; loitering within 500 feet of any school, childcare center, or park; working in any capacity with children; engaging in ice cream truck vending; or living in a residence with another convicted sex offender." *Id.* at 349 (citations omitted); *see also, e.g.*, 720 ILL. COMP. STAT. ANN. 5/11-9.3 (West 2014) (prohibiting certain sex offenders from knowingly being present in any school zone, childcare facility, playground, or public park); OKLA. STAT. ANN. tit. 57, § 582 (West 2014) (defining class of offenders to whom restrictions apply).

106. *See* Daskal, *supra* note 8, at 328-29.

107. *See* *State v. Wade*, 421 S.W.3d 429, 438 (Mo. 2013) (en banc) (citing *R.W. v. Sanders*, 168 S.W.3d 65, 69 (Mo. 2005) (en banc)); *see also supra* note 97.

framework for the court to analyze the sex offender restriction statute in *Wade* and decide that Section 566.150 is criminal in nature and therefore is not subject to Article I, Section 13's prohibition on laws retrospective in their operation.¹⁰⁸

IV. THE INSTANT DECISION

In *Wade*, the Supreme Court of Missouri, while reaffirming *Honeycutt*'s holding that the retrospective clause of Article I, Section 13 does not apply to criminal laws,¹⁰⁹ held in a 4-3 decision that Section 566.150 is a criminal statute and, therefore, was not subject to Article I, Section 13's ban on laws retrospective in their operation.¹¹⁰

A. The Majority Opinion

Before deciding whether Section 566.150 was criminal or civil, the court first addressed the defendants' argument that *Honeycutt* was ineffective because it relied on *Bethurum*, which had been overruled by the court in the *R.L.* and *F.R.* decisions.¹¹¹ Because the defendant in *Honeycutt* had raised the argument that *R.L.* and *F.R.* had overruled *Bethurum sub silentio* and extended the ban against retrospective laws to apply to criminal laws, the court quoted extensively from that decision, stressing that "the language used and authorities cited in each case demonstrate[d] that the Court presumed the particular laws invalidated were civil laws without consideration or analysis of the issue."¹¹² Thus, because the court had not determined that the sex offender registration statutes in those cases were criminal in nature, *R.L.* and *F.R.* could not have extended *Bethurum* to apply the ban on retrospective laws to criminal statutes.¹¹³

The court then considered the critical issue of whether Section 566.150 was a criminal statute free from application of Article I, Section 13's ban on

108. *Wade*, 421 S.W.3d at 432-40. Although *Smith* had first been adopted and applied by the Supreme Court of Missouri in *R.W.*, *Honeycutt* – decided in the same term as *Wade* – provided a more expansive discussion of retrospective and *ex post facto* laws than did *R.W.*. Compare *R.W.*, 168 S.W.3d at 68-69, with *State v. Honeycutt*, 421 S.W.3d 410, 414-23 (Mo. 2013) (en banc). *Honeycutt* also made clear that courts must always apply *Smith* when considering an Article I, Section 13 challenge. *Honeycutt*, 421 S.W.3d at 425.

109. *Wade*, 421 S.W.3d at 432. Because the court had decided *Honeycutt* less than one month before *Wade*, it simply restated the key holding and then referred readers to *Honeycutt* for a more thorough analysis of that holding. See *id.*

110. *Id.* at 439.

111. *Id.* at 432-33.

112. *Id.* at 434 (quoting *Honeycutt*, 421 S.W.3d at 423); see *supra* Part III.B, for a more complete analysis of the *Honeycutt* decision.

113. *Wade*, 421 S.W.3d at 433-34.

retrospective laws.¹¹⁴ The court began by explaining that it would employ the two-part test from *Smith* as embodied in *Honeycutt*.¹¹⁵ Accordingly, the court would first make a determination as to “whether the legislature intended the statute to affect civil rights and remedies or criminal proceedings,” and “[i]f the legislature intended to impose punishment,” then the court would not need to consider the matter any further.¹¹⁶ Alternatively, “if the Court [were to] determine that the legislature intended the law to be civil, [it would then have to] determine whether the statutory scheme is so punitive in purpose or effect as to negate the intention to affect civil rights or remedies.”¹¹⁷

Although all members of the court agreed on the relevant test in general (i.e., *Smith* as embodied in *Honeycutt*), they disagreed as to how much weight to afford certain parts of the analysis. In particular, in listing the criteria to be considered in determining legislative intent as to the statute’s civil or criminal status, the majority opinion, penned by Judge Zel Fischer,¹¹⁸ indicated that an “express legislative finding” or other “formal attributes of a legislative enactment, such as the manner of its codification,” should be considered.¹¹⁹ Then, if necessary, the majority maintained, the other *Smith* factors should be utilized to evaluate whether a civil statute’s scheme was so punitive that it is considered criminal.¹²⁰

As for the first part of the test, regarding legislative intent, the majority began its analysis with heavy reliance not on any express legislative finding, but on the formal attributes of a legislative enactment.¹²¹ Specifically, the majority noted that the statute is located in Title XXXVIII of the Revised Statutes of Missouri, named “Crimes and Punishment; Peace Officers and Public Defenders,” under a chapter titled “Sexual Offenses.”¹²² Further, the statute itself had been “written in the style of all other provisions of the criminal code” and “use[d] the language of a criminal provision, providing a requisite mental state for the offense” (i.e., “*knowingly*”) while prescribing a felony penalty for a violation.¹²³ In summary, the majority reasoned that because violation of the statute “does not depend on a sex offender’s registra-

114. *Id.* at 435.

115. *Id.*

116. *Id.*

117. *Id.*

118. Judge Fischer was joined by Chief Justice Mary Russell and Judge Patricia Breckenridge. *Id.* at 440. Although Judge Wilson wrote a separate concurrence, he also agreed with the reasoning and conclusions of Judge Fischer’s opinion, thus allowing Judge Fischer’s opinion to represent a majority of the court. *See id.*

119. *Id.* at 435.

120. *Id.*; see *supra* Part III.B, for a more detailed explanation of the *Smith* factors.

121. *Wade*, 421 S.W.3d at 436.

122. *Id.*

123. *Id.* at 437 (noting in particular that the statute was similar to Section 571.070, which criminalizes the possession of a firearm by a convicted felon and which the court in *Honeycutt* held was a criminal statute).

tion as a sex offender,” and because it carries a “very severe punishment,” the legislature intended the statute to be a criminal law.¹²⁴

The majority next held that even if the legislature had intended the statute to be civil in nature, its effect was so punitive that such intent had been negated.¹²⁵ Evaluating the *Smith* factors, the court first found that that statute’s purpose, “to punish conduct that necessarily occurs subsequently to the conviction of a prior offense,” had been “regarded as punishment throughout our history.”¹²⁶ Second, the majority determined that the statute served two of the “traditional aims of punishment,” namely “deterrence of future crimes and retribution for past crimes.”¹²⁷ Third, the majority found that “unlike a registration statute that requires only that the defendant register and does not prohibit or restrain particular future conduct,” Section 566.150 “impose[d] a direct and affirmative restraint on a certain class of defendants,” thus making it punitive as opposed to merely regulatory.¹²⁸ Fourth, but relatedly, the majority determined that “the rational connection [of Section 566.150] to a non-punitive purpose is more attenuated than it is with purely sex offender registration statutes” because Section 566.150 actually punishes and deters conduct instead of merely informing the public about sex offenders.¹²⁹ Finally, the majority found that Section 566.150 “is excessive with respect to any regulatory purpose” because it “does not aid in the investigation of future crimes” by requiring mere registration but instead “creates a new crime for those with prior convictions for certain crimes based on certain future conduct.”¹³⁰

B. *The Concurring Opinion*

Although joining the majority opinion in full, Judge Paul Wilson, joined by two other judges, wrote a concurring opinion expressing unease over “the [c]ourt’s increased willingness to draw inferences as to legislative intent from the codification (i.e., the structure and placement by title, chapter and Section) of new provisions enacted by the General Assembly.”¹³¹ Judge Wilson warned that “[s]uch inferences are of doubtful validity and should be indulged, if at all, only after careful analysis of the codification process and its effect on the language actually voted upon and approved by the legislature.”¹³²

124. *Id.*

125. *Id.*

126. *Id.* at 438.

127. *Id.* (quoting *R.W. v. Sanders*, 168 S.W.3d 65, 69 (Mo. 2005) (en banc)).

128. *Id.*

129. *Id.* at 439.

130. *Id.*

131. *Id.* at 440 (Wilson, J., concurring). Chief Justice Mary Russell and Judge Patricia Breckenridge joined Judge Wilson’s concurring opinion. *Id.*; see also *supra* note 118 (discussing the court’s voting results).

132. *Wade*, 421 S.W.3d at 440 (Wilson, J., concurring).

The concurrence began by pointing out that the majority had cited *R. W. v. Sanders*, in which the court had applied *Smith* to a Missouri case for the first time, for the premise that codification and location of a statute can have probative effect.¹³³ However, the court in *R. W.* had found that the codification of the statute in that case, which was similar to the *Wade* statute's codification, "was *not* a reliable indicator" of the legislature's intent that the statutes were not criminal.¹³⁴ The concurrence argued that the court's "increasing[] and unquestioning[] willing[ness] to draw critical inferences" regarding the legislature's intent solely from the location and codification is disconcerting because "[t]he process that newly enacted language undergoes after it leaves the General Assembly and before it appears in the Revised Statutes precludes any reasonable reliance on placement or structure of a new enactment, standing alone, as indicating anything at all about the General Assembly's intent regarding that language."¹³⁵

The concurrence pointed out, for instance, that even though the actual language of a statute is written by the legislature as a whole, the location of statutes and the structure in which the language is published are controlled by the Joint Committee on Legislative Research.¹³⁶ The concurrence then claimed that the Supreme Court of Missouri was forsaking its "long and unblemished record of refusing to recognize any probative value in the codification or structure of legislative enactments on the question of statutory interpretation."¹³⁷ For example, the court had previously found that "bold-faced headings (or 'catch words') assigned to each title, chapter and individual section throughout the Revised Statutes are the work solely of [the] codification process and, therefore, shed no light whatsoever on the General Assembly's purposes or intent."¹³⁸ Additionally, the court had previously "recognized that the placement and structure of newly enacted language is no more probative of the legislature's intent than the bold-faced headings added to the Revised Statutes by the Committee and the Revisor."¹³⁹ Therefore, the concur-

133. *Id.*

134. *Id.* (citing *R. W. v. Sanders*, 168 S.W.3d 65, 69 (Mo. 2005) (en banc)).

135. *Id.* at 440-41.

136. *Id.* at 441.

137. *Id.*

138. *Id.* (citing *State ex rel. Agard v. Riederer*, 448 S.W.2d 577, 581 (Mo. 1969) (en banc)).

139. *Id.* (citing *In re Marshall*, 478 S.W.2d 1, 3 (Mo. 1972) (en banc); *Chicago, Burlington & Quincy R.R. Co. v. N. Kan. City*, 367 S.W.2d 561, 563 (Mo. 1963)). The committee on legislative research is responsible for publishing laws passed by the Missouri General Assembly. MO. REV. STAT. § 3.010 (Supp. 2014). In doing so, the committee has authority to "renumber sections and parts of sections thereof, change the wording of headnotes, rearrange sections, . . ." and make other non-substantive changes so long as such changes do not "alter the sense, meaning, or effect of any legislative act." MO. REV. STAT. § 3.060.1 (Cum. Supp. 2013). The committee appoints a "revisor" to carry out these and other necessary and permitted duties. MO. REV. STAT. § 3.070 (Cum. Supp. 2013).

rence cautioned, the court should rely on such codification and location in reaching its conclusion only if necessary and done in a comprehensive manner.¹⁴⁰

Nevertheless, the concurrence agreed that, based on an evaluation under *Smith*, Section 566.150 is a statute so punitive that it has criminal effect and, therefore, is not subject to Article I, Section 13's prohibition on retrospective laws.¹⁴¹ The concurrence sought instead to stress that, in examining the codification process, the majority had unnecessarily abandoned the court's "long-held skepticism of such a dubious indicator" and given its findings "unwarranted probative value concerning the General Assembly's intent."¹⁴² Although the concurrence stopped short of concluding that such calculations were *never* appropriate, it maintained that such inferences should not be made without a "far more compelling case" than had been made in *Wade*.¹⁴³

C. *The Dissenting Opinion*

The dissenting judges disagreed entirely with the majority,¹⁴⁴ contending that Section 566.150 is a civil law and, therefore, subject to Article I, Section 13's prohibition on laws retrospective in application.¹⁴⁵ The primary rationale offered by the dissent was that the statute is "part of the unique statutory scheme that has its genesis in the sex offender registrations statutes, which [the court had] determined to be, and which clearly are, civil in nature."¹⁴⁶

The thrust of the dissent's argument was that the court, following the *Smith* test as first adopted by Missouri by *R.W. v. Sanders*, must "look at a law's substantive effect rather than its nominal label."¹⁴⁷ The dissent began by recounting the decision in *R.W.*, where the court found that a weighing of the *Smith* factors indicated that the Missouri's sex offender registration statute was a civil law.¹⁴⁸ The dissent went on to explain how the court in *R.L. v. State of Missouri Department of Corrections* had found that Section 566.147 violated the constitutional prohibition against the enactment of retrospective

140. *Wade*, 421 S.W.3d at 442 (Wilson, J., concurring).

141. *Id.* at 441.

142. *Id.* at 442.

143. *Id.*

144. The dissent, authored by Judge George Draper and joined by Judges Laura Stith and Richard Teitelman, disagreed with the majority on two grounds. *See id.* (Draper, J., dissenting). Because this Note focuses on the evaluation of a statute's civil or criminal status rather than on matters of judicial review and *stare decisis* in general, the first argument – that the majority's failure to overrule explicitly *R.L.* and *F.R.* was erroneous – is not discussed in this Part. *See id.*

145. *Id.*

146. *Id.* at 443-44.

147. *Id.* at 444.

148. *Id.*

laws.¹⁴⁹ The dissent pointed out that even though the statute in *R.L.* did not expressly refer to the offender's registration status or the state's registration list, all of the enumerated sex offenses contained in the statute required compliance with the state's sex offender registration law.¹⁵⁰ Therefore, the statute effectively applied only to registered sex offenders.¹⁵¹

The dissent maintained that because the statute in *R.L.* was found to be unconstitutionally applied as a civil law even though it contained no express reference to the sex offender registry, there was support for the argument that "the fact that the laws at issue [in *Wade*] are codified in the portion of the statutes governing criminal rather than civil laws does not call for" finding Section 566.150 to be criminal.¹⁵² The dissent then cited several Missouri and U.S. Supreme Court cases upholding the following general proposition: "[T]he fact that an act resulted in criminal sanctions if violated was not dispositive where it had even broader regulatory effects."¹⁵³ The dissent stated that the penalty or location of codification was not as important as the fact that "all of [the statutes it discussed], including Section 566.150, are designed to protect the public from harm and *derive from offenders having been required to register*, which has been deemed nonpunitive and civil in nature."¹⁵⁴ Of course, noted the dissent, "[w]hile it is true [Section 566.150] does not require an offender to register . . . [the statute] only captures and burdens those individuals required to comply with Missouri sex offender registration laws."¹⁵⁵

Finally, the dissent concluded that because Section 566.150 is civil in nature, and because it "clearly imposes a new obligation and duty on sex offenders to locate public parks and public swimming pools within the communities in which they reside, visit or pass through in Missouri," the statute, as applied to the *Wade* defendants, violated Article I, Section 13's prohibition on laws retrospective in their operation.¹⁵⁶

V. COMMENT

The court provided the correct result in this case, but in reaching its conclusion, it unnecessarily relied on the circumstances surrounding the statute's codification. This Part discusses why the majority's reliance on codification elements was weak, why its evaluation of the *Smith* factors was rea-

149. *Id.* at 445.

150. *Id.* The dissent made a similar observation about one of the statutes involved in the *F.R.* decision. *Id.*

151. *Id.*

152. *See id.*

153. *Id.* at 445-46.

154. *Id.* at 446 (emphasis added).

155. *Id.* at 446-48.

156. *Id.* at 447-48.

sonable, why the dissent's argument must fail, and why the court's decision may result in uncertainty for advocates bringing similar cases in the future.

A. *Discerning the Legislature's Civil or Criminal Intent*

Because all members of the court agreed that *Bethurum*, as reinforced via *Honeycutt*, distinguished between *ex post facto* laws and retrospective laws and held that the constitutional ban on retrospective laws applies only to civil laws, the key issue in this case was whether Section 566.150 is properly classified as a civil or criminal law.¹⁵⁷ The most problematic part of the majority's holding, as the dissent thoroughly pointed out,¹⁵⁸ is that it placed far too much emphasis on uninformative materials in discerning the legislature's intent. To be sure, there is precedential support for the majority's reliance on the statute's codification and its location among other statutes as evidence of the legislature's intent.¹⁵⁹ However, rather than first seeking sources more indicative of the legislature's intent, the majority mechanically treated the codification evidence as a surefire indicator of such intent.¹⁶⁰ Such reliance is unpersuasive not only because of the court's historical reluctance to consider that type of evidence as indicative of the legislature's intent,¹⁶¹ but also because there was other, more reliable evidence at hand that the majority could have used to buttress its holding, including the title of the House Bill from which the statute originated.¹⁶² Whereas a statute's location and other aspects of the codification process cannot be credited to the entire legislature, the bill title must be attributed only to the legislature as a whole rather than to the Joint Committee on Legislative Research and the Revisor.¹⁶³

Additionally, the majority's reliance on the statute's use of "the language of a criminal provision"¹⁶⁴ offers only weak support for finding that the statute is criminal. Although Section 566.150 indisputably utilizes such language, the U.S. Supreme Court has previously held that a legislature "may impose both a criminal and a civil sanction in respect to the same act or omission."¹⁶⁵ Therefore, as the dissent pointed out, the fact that a statute is codified in the portion of the statutes governing criminal – rather than civil – laws is not dispositive of a law being criminal.¹⁶⁶ Thus, although the majority had some evidence supporting its conclusions regarding criminal legislative intent, none of it was dispositive, and the evidence's combined probative value

157. *See id.* at 432, 434-35 (majority opinion).

158. *See id.* at 442-48 (Draper, J., dissenting).

159. *See Smith v. Doe*, 538 U.S. 84, 94 (2003).

160. *See Wade*, 421 S.W.3d at 436 (majority opinion).

161. *See* discussion *supra* Part IV.

162. *See Wade*, 421 S.W.3d at 441 n.1 (Wilson, J., concurring).

163. *See id.*

164. *Id.* at 437 (majority opinion).

165. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 359 (1984) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

166. *Wade*, 421 S.W.3d at 445 (Draper, J., dissenting).

was insufficient on its own to justify the majority's finding.¹⁶⁷ This seems especially obvious in light of the fact that the majority gave in-depth consideration to *Smith's* second-prong factors, concluding that any intent from the legislature that the statute be civil was negated by its punitive effect.¹⁶⁸ Such an evaluation begs the question of why the majority even felt it necessary to address the statute's codification circumstances in the first place.

B. Excessive Punitive Effect Negates Civil Intention

Although the majority's discernment of legislative intent by examination of the codification process is unpersuasive, based on evaluation of *Smith's* second prong, the court ultimately reached the correct conclusion. Although all such factor-weighting tests are arbitrary to a certain extent, the court's analysis is reasonable given the evidence before it. In particular, it is hard to argue that the State did not seek to deter future crime and pursue retribution for past crimes or that such goals are not quintessential and traditional aims of criminal punishment.

Additionally, the majority and dissent agreed that the statute places an affirmative burden on a class of defendants.¹⁶⁹ The dissent proposed that this burden was indicative of a civil statute because the burden is similar to that of registering as a sex offender due to conviction for certain crimes and because the purpose of such legislation is to protect the public from harm.¹⁷⁰ However, as the majority countered, Section 566.150's burden is more punitive because it mandates, above and beyond mere registration, restrictions on an offender's particular movements and activities.¹⁷¹ Because of this additional punitive aspect, and because a law is not civil in nature merely because it has a "positive impact on public safety" – indeed, all criminal statutes inherently have such an impact – it is reasonable to conclude that the statute is criminal in nature.¹⁷²

As for the fourth factor, the majority's argument that the statute has only an attenuated connection to a non-punitive purpose is reasonable because violators are punished for committing a felony if they fail to adhere to the statute's requirements.¹⁷³ Unlike sex offender registration statutes, which seek to protect the public by providing it with information, the thrust of Section 566.150 is to penalize its violators.¹⁷⁴ For similar reasons, the majority employed sound reasoning when it concluded that the statute's penalty was

167. *See id.* at 445.

168. *See id.* at 437-39 (majority opinion) (discussing and analyzing the instant case utilizing the *Smith* factors, thereby indicating that proof beyond legislative codification was necessary to support the majority's ultimate conclusion).

169. *Compare id.* at 438, *with id.* at 447 (Draper, J., dissenting).

170. *Id.* at 446-76 (Draper, J., dissenting).

171. *See id.* at 438 (majority opinion).

172. *See id.* at 437.

173. MO. REV. STAT. § 566.150.2-.3 (Cum. Supp. 2013).

174. *See Wade*, 421 S.W.3d at 439 (majority opinion).

excessive to any regulatory purpose.¹⁷⁵ For instance, if the statute's purpose were truly civil and regulatory, then assisting law enforcement and informing the public would be sufficient, and no felony punishment would be necessary.

Although the majority ultimately reached the correct conclusion, the dissent raised some important arguments. At the heart of these arguments is the following proposition: because Section 566.150 applies only to convicts of certain crimes who would be required to register as sex offenders, the statute is an extension of the sex offender registry statute, which has been held to be civil in nature.¹⁷⁶ Therefore, it follows that Section 566.150 must also be civil.¹⁷⁷

The argument is reasonable on its face; however, what is conspicuously missing from the dissenting opinion is an explicit evaluation of the *Smith* factors that can negate civil intent of the legislature.¹⁷⁸ Assuming, for the sake of argument, that Section 566.150 had been found to be a civil law under the first prong of *Smith*, the statute would still need to be evaluated under the second prong to determine whether its effect was so punitive that it was criminal in nature. The dissent thought that Section 566.150 was "part of the unique statutory scheme that has its genesis in the sex offender registrations statutes."¹⁷⁹ However, Section 566.150 is a separate enactment from the general sex offender registry statute and must be evaluated as such. Thus, the fact that Section 566.150 applies only to convicts who would be required to register as sex offenders is insufficient, on its own, to demonstrate in a dispositive way that Section 566.150 is civil. Because the dissent failed to explicitly address the factors of *Smith*'s second prong, it effectively conceded that the *Smith* factors support the majority's conclusion that the legislature had negated any purported civil intent in enacting the statute. Because the majority thoroughly evaluated those factors, and because the evaluation was reasonable, its decision was correct.¹⁸⁰

C. Practical Implications

Undoubtedly, it is the task of the judiciary to interpret legislative intent when considering whether a statute is civil or criminal,¹⁸¹ and there will not

175. *Id.*

176. *See id.* at 443-49 (Draper, J., dissenting).

177. *Id.* at 448.

178. *See id.* at 442-48. Although the dissent generally compared Section 566.150 to statutes found to be civil in *Smith, R.W.*, and other cases, it did not specifically assess Section 566.150 under each factor of *Smith*'s framework. *See id.* at 443-48.

179. *Id.* at 443.

180. This Note makes no comment about whether, as a matter of public policy, Section 566.150 and similar statutes are a valuable addition to Missouri's statutory code. While such a topic merits discussion, it was beyond the court's decision in *Wade* – which decided merely whether, under the applicable precedents of *Smith* and *Honeycutt*, such a statute is civil or criminal – and is beyond the scope of this Note.

181. *See Smith v. Doe*, 538 U.S. 84, 92-94 (2003).

always be an express declaration from the legislature stating its intent. The problem in this case was that the majority stepped onto shaky ground when it relied so heavily on codification as a justification for its decision. In future challenges to the constitutional application of statutes, one potential difficulty will be the uncertainty that challengers and advocates face in anticipating the weight that codification will carry in persuading the court in its decisions of whether a statute is civil or criminal. Although the majority opinion indicates that codification is quite useful in determining the civil or criminal status of a statute, the three-judge concurrence indicates that advocates should be wary about codification's influence on the court's future decisions.¹⁸²

In addition to concerns for challengers and advocates, the legislature will need to be especially careful in drafting and enacting future statutes if it wants them to have a different effect than that which the court gave in *Wade*. If indeed the dissent is correct, and Section 566.150 was intended merely to be part of a larger civil regulatory scheme for sex offender registration, then the legislature will need to be particularly keen in expressly stating its intent for similar statutes to be interpreted as such going forward. Alternatively, if the legislature approves of the court's decision in this case, then *Wade* may simply be an indicator that Missouri's sex offender restriction statutes have taken on a more punitive slant than the general registration statute.

VI. CONCLUSION

Because of the Missouri Constitution's ban on laws retrospective in their operation and its applicability only to civil laws, the decision whether any given statute has a civil or criminal nature is crucial. Although the decision in *Wade* was a narrow one in that only a single statute's status as civil or criminal was determined, the court's method for making its decision will impact many future cases. Given the prevalence of sex-offender-related statutes in Missouri and across the nation, future constitutional challenges like that in *Wade* seem all but certain. Only time will tell whether, in upcoming decisions, the Supreme Court of Missouri will full-heartedly embrace *Wade*'s utilization of circumstances surrounding a statute's legislative enactment procedures or whether it will make use of more concrete indicators of legislative intent.

182. *Wade*, 421 S.W.3d at 442 (Wilson, J., concurring).