"THEY SET HIM ON A PATH WHERE HE'S BOUND TO GET ILL"[1]: WHY SEX OFFENDER RESIDENCY RESTRICTIONS SHOULD BE ABANDONED

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INTRODUCTION

"America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life."[2] For an inmate, that anxiously-awaited day when the prison gates finally open is supposed to bring an end to punishment and a renewed chance at freedom. Unfortunately, that renewed chance does not always become a reality, especially for sex offenders. In 2005, one convicted sex offender was forced to remain in prison because an Iowa sex offender residency restriction prevented him from living with his mother in her home.[3] Another remained in prison for four months *after* being granted parole because a residency restriction prevented him from living with his family in Des Moines, Iowa.[4] Still another sex offender was fortunate enough to purchase a home in which he was cleared to live upon his release from prison, only to be informed later that he would have to move out because the home was too close to a school after all.[5] The Iowa residency restriction statute prevented these men from finding homes, and similar laws with similar effects have been and continue to be enacted in many other cities and states throughout the nation. Residency restrictions create substantial roadblocks along a sex offender's path to a better life.

1. BOB DYLAN, *License to Kill*, *on* INFIDELS (Columbia Records 1983).

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2. President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

3. JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 117 (2005).

4. *Id.*

5. *Id.*

Restrictions on sex offenders are not a novel concept. Forced medical treatment is sometimes required as a punishment for sex offenders, especially for those who recidivate. These laws appear in penal codes; they impose punitive sanctions.[6] Every state and the federal government has enacted some variation of a "Megan's Law,"[7] under which sex offenders must periodically register their addresses with the local authorities, who in turn may notify members of the community in which a sex offender lives.[8] States have begun to pass laws under a "regulatory" label that restrict where convicted sex offenders are permitted to live. As of the writing of this Note, at least sixteen states have passed these residency restriction laws and many cities and towns have passed similar ordinances. Meanwhile, other states have considered and then declined to pass residency restriction laws. In particular, the Minnesota[9] and Colorado[10] legislatures conducted detailed studies that investigated the efficacy of sex offender residency restrictions, and decided not to enact such legislation.

The Supreme Court has not yet addressed the constitutionality of residency restrictions, but in *Smith v. Doe*,[11] it upheld sex offender registration and public notification statutes. Because residency restrictions impose a much more onerous burden than registration requirements, a separate inquiry into the constitutionality of residency restrictions is necessary. This is even suggested by language in *Smith v. Doe*, where the Court noted that under a registration requirement, sex offenders nevertheless "are free to move where they wish and to live and work as other citizens, with no su-

6. *See, e.g.*, CAL. PENAL CODE § 645(b) (West 2006) ("Any person guilty of a second conviction of any [specified sex] offense . . . where the victim has not attained 13 years of age, shall, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent. . . .").

7. Maureen S. Hopbell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331, 339 (2004).

8. *See, e.g.*, Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2000).

9. *See* MINN. DEP'T OF CORRS., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE 9 (2003) [hereinafter Minnesota Study] (concluding that living near a school or childcare center was not a contributing factor to re-offense).

10. *See* COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004) [hereinafter Colorado Study] (concluding that residency restrictions should not be considered a method for controlling recidivism).

11. 538 U.S. 84 (2003).

pervision."[12] Sex offenders who are subject to a residency restriction are not free to "move where they wish" or to "live and work" as other citizens.

The practical effects of sex offender residency restrictions are dramatic. For example, in Dubuque, Iowa, approximately ninety percent of the city is off-limits to sex offenders because of the Iowa residency restriction.[13] Twenty-six sex offenders were living in a Cedar Rapids motel in March of 2006.[14] Others found shelter in cars, at trailer parks, at truck stops, or even inside the local sheriff's office.[15] Still others remain homeless.[16] Because of the drastic effects these laws have on the lives of sex offenders, fresh scrutiny of residency restriction statutes—both from a constitutional and a policy standpoint—is urgently needed. This Note argues first that as currently applied, sex offender residency restrictions constitute unconstitutional ex post facto laws because they are punitive in effect. However, a successful ex post facto challenge would only prevent residency restrictions from being applied retroactively. Therefore, this Note next argues that the trend toward sex offender residency restrictions should be abandoned altogether because the laws constitute bad policy. A better policy alternative would be case-by-case determinations by parole officers as to the necessity of a residency restriction.

This Note proceeds in five parts. Part I gives a brief overview of the current law surrounding sex offender residency restrictions and the Ex Post Facto Clause and describes the balancing inquiry, recently applied in *Smith v. Doe*, which courts undertake to determine whether a law that the legislature has labeled "regulatory" is so punitive in effect as to transform it into a criminal statute. Guided by the factors applied in *Smith*, Part II analyzes whether sex offender residency restrictions have such punitive effects as to render them criminal statutes subject to the Ex Post Facto Clause. Part III summarizes the ex post facto analysis under *Smith* and critiques the courts' application of the *Smith* factors to identify criminal statutes disguised as regulatory schemes. Part IV then turns to the policy implications of residency restrictions, which counsel against their prospective application. Finally, Part V concludes this Note by recommending that the categorical judgments made by sex offender

12. *Id.* at 101.

13. Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

14. *Id.*

15. *Id.*

16. *Id.*

residency restrictions be abandoned in favor of case-by-case determinations. Categorical residency restrictions can cause sex offenders to become homeless, making them more difficult to monitor, and can prevent them from living with family members and other support groups that could help to reduce the likelihood of recidivism. Case-by-case restrictions, on the other hand, would provide incentives for sex offenders to seek treatment.

I.
THE STATE OF THE LAW

A. The Current Law Surrounding Residency Restrictions

On April 29, 2005, the Court of Appeals for the Eighth Circuit decided *Doe v. Miller*,[17] upholding against a constitutional challenge an Iowa statute that prohibits sex offenders from residing within 2000 feet of a school or child care facility.[18] In so doing, the Eighth Circuit reversed the District Court for the Southern District of Iowa, which had declared the Iowa statute unconstitutional on several grounds.[19] In particular, the Eighth Circuit found that Iowa Code § 692A.2A created a civil scheme because the statute had a regulatory purpose and was not so punitive in effect as to transform the statute into one that inflicts criminal punishment. Deemed a regulatory rather than a criminal statute, the residency restriction was not subject to the Ex Post Facto Clause, and thus was not unconstitutional when applied to sex offenders who had committed their offenses prior to enactment of the statute.[20]

17. 405 F.3d 700 (8th Cir. 2005), *reh'g denied, reh'g en banc denied*, 2005 U.S. App. LEXIS 13115 (8th Cir. June 30, 2005), *motion to stay denied*, 418 F.3d 950 (8th Cir. Aug 8, 2005), *cert. denied*, 126 S. Ct. 757 (Nov. 28, 2005).

18. *Id. See* IOWA CODE ANN. § 692A.2A(2) (West 2005) ("A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.").

19. *See* Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

20. *Miller*, 405 F.3d at 723. In addition to the as applied ex post facto challenge, the Eighth Circuit rejected several other arguments that the Iowa residency restriction was per se unconstitutional. The lack of individualized determinations of dangerousness under the statute did not violate a sex offender's right to procedural due process. *Id.* at 708-09. The statute did not violate a sex offender's substantive due process right to "personal choice regarding the family," *id.* at 709-11, or to travel, *id.* at 711-13. Nor did the combination of the residency restriction and registration requirement compel self-incrimination in violation of the Fifth Amendment. *Id.* at 716-18. For an extensive discussion of the decisions in *Doe v. Miller*, both in the Southern District of Iowa and in the Eighth Circuit, see Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711 (2005).

After *Miller*'s stamp of approval in April of 2005, residency restrictions have become prevalent throughout the country, both at the state and local levels. Many of these statutes are passed with the hope that they will have the effect of "protecting children while ensuring residential areas near schools are free from such offenders."[21] Proponents of the laws argue that the further sex offenders are forced to live from schools, the fewer opportunities they will have to re-offend against children. There are now sixteen state residency restriction statutes, most of which were enacted within the past three years. The schemes vary in specifics but all have the same broad effect of prohibiting sex offenders from living near places in which children congregate.[22] Statutes in California, Florida, Indiana, and Oregon only apply to sex offenders who are on some type of supervised release.[23] Those in Alabama, Arkansas, Illinois, Michigan, Missouri, and Tennessee apply to sex offenders for the rest of their lives but include a grandfather clause that either exempts those sex offenders who purchased a home before the statute was passed or prior to a school moving near the offender's already-purchased home.[24] Notably, the Iowa statute upheld in *Miller* contains both of these grandfather clauses.[25] Meanwhile, the Georgia, Loui-

21. Lisa Henderson, Comment, *Sex Offenders: You Are Now Free to Move About the Country. An Analysis of* Doe v. Miller*'s Effects on Sex Offender Residential Restrictions*, 73 UMKC L. REV. 797, 798 (2005).

22. A chart attached at the end of this Note summarizes the major provisions of the various state residency restrictions. This Note will focus mainly on the residency restrictions enacted in Iowa, Illinois, and Ohio.

23. *See* CAL. PENAL CODE § 3003 (West 2006); FLA. STAT. ANN. § 947.1405 (West 2001 & Supp. 2006); IND. CODE ANN. § 11-13-3-4(g)(2)(B) (West Supp. 2006); OR. REV. STAT. § 144.642 (2005).

24. *See* ALA. CODE § 15-20-26 (LexisNexis 2006); ARK. CODE ANN. § 5-14-128 (2006); 720 ILL. COMP. STAT. § 5/11-9.3 (West 2006); MICH. COMP. LAWS § 28.735 (2005); MO. ANN. STAT. § 566.147 (West Supp. 2006); TENN. CODE ANN. § 40-39-211 (Supp. 2005). The Oklahoma statute exempts those sex offenders who purchased their homes prior to being convicted of a sex offense. OKLA. STAT. ANN. tit. 57, § 590 (West Supp. 2007).

25. The grandfather clause in the Iowa residency restriction reads as follows:

> A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply: . . . The person has established a residence prior to July 1, 2002, [the effective date of the statute] or a school or child care facility is newly located on or [after] July 1, 2002.

IOWA CODE ANN. § 692A.2A(4) (West 2005). Thus, the Iowa statute does not apply (1) to sex offenders who established residence before the residency restriction was passed, and (2) when a school moves to within 2000 feet of a residence a sex offender has already established.

siana, and Ohio statutes apply to sex offenders for life and contain no grandfather clauses.[26] The statutes also differ in the distance they require sex offenders to live from schools, ranging from 500 feet in Illinois,[27] to 1000 feet in Ohio,[28] to 2000 feet in Iowa.[29]

In *Miller*, the Eighth Circuit rejected a constitutional challenge to the Iowa residency restriction brought by a plaintiff class that included "all individuals to whom Iowa Code § 692A.2A applies who are currently living in Iowa or wish to move to Iowa . . . ."[30] Because such statutes are relatively novel very few other courts have addressed the constitutionality of sex offender residency restrictions. In *State v. Seering*, decided on July 29, 2005, just three months after *Miller*, the Iowa Supreme Court followed the reasoning of the Eighth Circuit and upheld § 692A.2A against several challenges, including an ex post facto challenge.[31] In that case, Mr. Seering had been convicted of lascivious conduct with a minor.[32] Upon his release from a halfway house, Mr. Seering was arrested for living within 2000 feet of a daycare center.[33] He subsequently moved with his wife and daughter into a camper located on a piece of abandoned farm property, where the family remained until the property owner demanded they move.[34] Meanwhile, Mr. Seering filed a motion to dismiss the criminal charge against him for violating § 692A.2A. An Iowa district court granted the motion, finding that § 692A.2A was unconstitutional on several grounds, including ex post facto.[35] The Iowa Supreme Court reversed.

Just prior to the decision in *Miller*, an Illinois state appellate court upheld the Illinois residency restriction against similar challenges in *People v. Leroy*.[36] In that case, Mr. Leroy, a convicted sex offender, was living with his mother in their lifelong home.[37] Because the home was within 500 feet of a school, Mr. Leroy was charged with violating the Illinois residency restriction and was or-

26. *See* GA. CODE ANN. § 42-1-15 (Supp. 2006); LA. REV. STAT. ANN. § 14:91.1 (West Supp. 2006); OHIO REV. CODE ANN. § 2950.031 (West 2006).

27. § 5/11-9.3(b-5).

28. § 2950.031(A).

29. § 692A.2A(2).

30. Doe v. Miller, 405 F.3d 700, 705 (8th Cir. 2005), *reh'g denied*, *reh'g en banc denied*, 2005 U.S. App. LEXIS 13115 (8th Cir. June 30, 2005), *motion to stay denied*, 418 F.3d 950 (8th Cir. Aug 8, 2005), *and cert. denied* 126 S. Ct. 757 (Nov. 28, 2005).

31. State v. Seering, 701 N.W.2d 655 (Iowa 2005).

32. *Id.* at 659.

33. *Id.* at 659-60.

34. *Id.* at 660.

35. *Id.*

36. 828 N.E.2d 769 (Ill. App. Ct. 2005).

37. *Id.* at 775.

dered to move.[38] He appealed, arguing that the statute was unconstitutional on several grounds, but lost.[39]

Meanwhile, in 2004, courts in Alabama[40] and Georgia[41] dismissed challenges to residency restrictions without reaching the ex post facto issue. The District Court for the Southern District of Ohio dismissed a challenge brought in 2005 to the Ohio residency restriction because the plaintiffs lacked standing.[42] In 2006, a court of appeals in New Mexico summarily rejected an ex post facto challenge to an Albuquerque residency restriction;[43] the Eighth Circuit, affirming its decision in *Miller*, has since held the Arkansas residency restriction constitutional;[44] and the District Court for the Northern District of Oklahoma relied on the reasoning in *Miller* to reject a challenge to the Oklahoma residency restriction.[45] Most recently, on October 20, 2006, an Ohio appellate court rejected an ex post facto challenge to the Ohio residency restriction.[46] But on the very same day a different Ohio appellate court held that the Ohio residency restriction was unconstitutional when retroactively applied, not on ex post facto grounds, but rather under a unique provision in the Ohio constitution prohibiting retroactive laws that affect substantive rights.[47] Thus, the constitutionality of the Ohio

38. *Id.*

39. *Id.*

40. *See* Lee v. State, 895 So. 2d 1038, 1044 (Ala. Crim. App. 2004) (holding that without any allegation of proof or any factual basis established, the court could not decide that the residency restriction acts as a punishment).

41. *See* Denson v. State, 600 S.E.2d 645, 647 (Ga. Ct. App. 2004) (holding the Georgia statute constitutional on grounds that it imposes punishment only for a future offense, that is, violation of the residency restriction itself). The court in *Denson*, however, begged the question of whether subjecting a sex offender to residency restrictions is a punishment in the first place, which would trigger an ex post facto inquiry. *See* Duster, *supra* note 20, at 729 n.114.

42. Coston v. Petro, 398 F. Supp. 2d 878, 887 (S.D. Ohio 2005).

43. *See* ACLU of N.M. v. City of Albuquerque, 137 P.3d 1215, 1231 (N.M. Ct. App. 2006) ("Although the requirements of ASORNA may have adverse consequences on offenders . . . , they do not rise to the level of punishment. Therefore, since ASORNA is a regulatory scheme that is not punitive in intent or effect, the retroactive application of the ordinance does not violate the Ex Post Facto Clause . . . ."). *See also* Carswell v. State, 721 N.E.2d 1255, 1259-60 (Ind. Ct. App. 1999) (voiding for vagueness a particular Indiana probation condition restricting a sex offender from living within two blocks of "any area where children congregate," but simultaneously approving of the policy behind Indiana's mandatory 1000-foot residency restriction for sex offenders on probation).

44. Weems v. Little Rock Police Dep't, 453 F.2d 1010, 1016-17 (8th Cir. 2006).

45. Graham v. Henry, 2006 WL 2645130, at *4-5 (N.D. Okla. Sept. 14, 2006).

46. Hyle v. Porter, 2006 WL 2987735, at *2 (Ohio Ct. App. Oct. 20, 2006).

47. Nasal v. Dover, 2006 WL 3030789, at *3 (Ohio Ct. App. Oct. 20, 2006).

residency restriction is unclear pending a decision by the Ohio Supreme Court.

The opinions in *Miller*,[48] *Seering*,[49] and *Leroy*,[50] which are the focus of this Note, were decided within four months of each other in 2005. Significantly, dissents were issued in each case, arguing that because the statute at issue was punitive in effect, it was an unconstitutional ex post facto punishment.[51] Accordingly, the question of whether sex offender residency restriction statutes are unconstitutional when applied retroactively is far from settled. As more and more legislatures and city councils are lobbied to pass even more restrictive residency restrictions, further reducing the housing options available to sex offenders, courts will likely be presented with many more constitutional challenges to these statutes. Having triggered dissenting opinions in *Miller*, *Seering*, and *Leroy*, the ex post facto challenge to sex offender residency restrictions appears to be one of the most promising arguments against their constitutionality.

B. The Ex Post Facto Clause

The United States Constitution prohibits both the states and Congress from passing ex post facto laws.[52] In 1798, the Supreme Court first stated in *Calder v. Bull* that "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed" is an ex post facto law.[53] Subsequently, laws altering statutes of limitations,[54] evidentiary requirements,[55] and sentencing guidelines[56] provide a few examples of laws that have been deemed to be unconstitutional ex post facto laws. The Court has also instructed that in determining whether a law violates the Ex Post Facto Clause, one must look to the "standard of punishment proscribed by a statute, rather than to the sen-

48. Doe v. Miller, 405 F.3d 700 (8th Cir. 2005).

49. State v. Seering, 701 N.W.2d 655 (Iowa 2005).

50. People v. Leroy, 828 N.E.2d 769 (Ill. App. Ct. 2005).

51. *See Miller*, 405 F.3d at 723 (Melloy, J., concurring and dissenting); *Seering*, 701 N.W.2d at 671-72 (Wiggins, J., concurring in part and dissenting in part); *Leroy*, 828 N.E.2d at 793 (Kuehn, J., dissenting).

52. U.S. CONST. art. I, § 10, cl. 1 (states); *Id.* § 9, cl. 3 (Congress).

53. 3 U.S. 386, 390 (1798). *See* Weaver v. Graham, 450 U.S. 24, 30 (1981) ("[T]he *ex post facto* prohibition . . . forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred.").

54. Stogner v. California, 539 U.S. 304 (2003).

55. Carmell v. Texas, 529 U.S. 513 (2000).

56. Miller v. Florida, 482 U.S. 423 (1987).

tence actually imposed," such that a law that increases the *possible* penalty can be ex post facto as well.[57] For example, although the Ohio statute permits prosecutors to decide which of the sex offenders who are in violation of § 2950.031 to evict,[58] such prosecutorial discretion would not preclude a finding that the statute is an ex post facto law.

The rationale underlying the Ex Post Facto Clause stems from the notion that there is something deeply unsettling about permitting legislatures to impose punitive sanctions retroactively. In the words of legal philosopher H. L. A. Hart, "the reason for regarding retrospective law-making as *unjust* is that it disappoints the justified expectations of those who, in acting, have relied on the assumption that the legal consequences of their acts will be determined by the known state of the law established at the time of their acts."[59] As the Supreme Court has explained, "Critical to relief under the Ex Post Facto Clause is . . . the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."[60] One commentator concluded that "ex post facto laws are especially unfair because they deprive citizens of notice of the wrongfulness of behavior, and thus result in unjust deprivations."[61]

The Ex Post Facto Clause was also motivated by a "fear of arbitrary and vindictive lawmaking."[62] This makes it especially significant in the context of sex offender residency restrictions. First, sex offenders who invest in and purchase homes prior to the implementation of a residency restriction statute that lacks a grandfather clause are deprived of the notice that they may later have to leave their homes because they are located too close to a school, and are thus potentially subject to an "unjust deprivation." Second, given

57. Lindsey v. Washington, 301 U.S. 397, 401 (1937).

58. *See* OHIO REV. CODE ANN. § 2950.031 (West 2006).

59. H. L. A. HART, THE CONCEPT OF LAW 276 (2d ed. 1994) (emphasis added). This notion of injustice, along with the potential promise of the ex post facto challenge, motivated this author to focus on the ex post facto argument, to the exclusion of the other constitutional arguments that were presented in *Miller*, *Seering*, and *Leroy*.

60. Weaver v. Graham, 450 U.S. 24, 30 (1981).

61. Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1276 (1998).

62. *Id.* at 1277. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) ("[A legislature's] responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."); Fletcher v. Peck, 10 U.S. 87, 138 (1810) (noting the "violent acts which might grow out of the feelings of the moment").

the stigma of continued dangerousness that attaches to sex offenders, the fear of "vindictive lawmaking" is a legitimate concern.

Yet the Ex Post Facto Clause applies only to criminal penalties, making the distinction between criminal and civil statutes very important. The fair notice protected by the Ex Post Facto Clause is of "particular importance in the context of the criminal law, where the deprivations . . . are the greatest."[63] "[T]he principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to *criminal penalties*—is fundamental to our concept of constitutional liberty."[64] By contrast, legislatures have more liberty to legislate in the regulatory sphere. For example, it is "appropriate for the legislature to establish qualifications" for public office or for practitioners in other vocations,[65] even if they apply retroactively. The essential inquiry in determining whether the Ex Post Facto Clause applies thus becomes whether sex offender residency restrictions impose punishment or are merely regulatory.

C. The Ex Post Facto Inquiry

In *Smith v. Doe*, a leading case on ex post facto laws decided in 2003, the Supreme Court summarized the relevant inquiry for determining whether a law is ex post facto, an inquiry whose framework was already "well established."[66] First, a court must determine whether the legislature intended that the statute establish "civil proceedings."[67] If the legislature did intend to enact a civil, nonpunitive, regulatory scheme, the court must next examine whether the statutory scheme is nevertheless so punitive in effect as to trump the legislative intent.[68] The Court noted that because it ordinarily defers to the stated legislative intent, only the "clearest proof" will suffice to override such intent and transform the statute into a criminal penalty.[69] Thus, satisfying the "clearest proof" standard is the touchstone for demonstrating that an otherwise regulatory statute has such punitive effects that it must be deemed criminal.[70]

63. *See* Logan, *supra* note 61, at 1276.

64. Marks v. United States, 430 U.S. 188, 191 (1977) (emphasis added).

65. *See* Francis D. Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603, 605 (1961).

66. Smith v. Doe, 538 U.S. 84, 92 (2003).

67. *Id.*

68. *Id.*

69. *Id.* (citations omitted).

70. *See, e.g.*, Roe v. Office of Adult Prob., 125 F.3d 47, 55 (2d Cir. 1997) (vacating district court judgment because plaintiffs did not demonstrate by the "clearest proof" that a sex offender public notification provision was punitive in effect); Doe

To determine whether the effects of a statute that the legislature intended to be civil are so punitive as to transform the statute into a criminal penalty, the *Smith* Court gleaned from precedent a five-factor balancing test which, if satisfied, would constitute "clearest proof" that a statute was criminal, notwithstanding a stated legislative intent to the contrary.[71] Although "neither exhaustive nor dispositive,"[72] these factors are frequently considered relevant, and thus form the crux of the effects-based ex post facto balancing inquiry. The five *Smith* factors ask whether the regulatory scheme: (1) "has been regarded in our history and traditions as a punishment"; (2) "imposes an affirmative disability or restraint" on its intended target; (3) "promotes the traditional aims of punishment," which include retribution and deterrence; (4) "has a rational connection to a nonpunitive purpose"; or (5) "is excessive with respect to this [alternative nonpunitive] purpose."[73] Although the Supreme Court has not required it explicitly, lower courts have required satisfaction of the five *Smith* factors to achieve "clearest proof."[74] If, on balance, these five factors indicate that a given statutory scheme is punitive in effect, courts must find the "clearest proof" standard to be satisfied and hold that the statute creates a criminal sanction, and that it is subject to the Ex Post Facto Clause.

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v. Pataki, 120 F.3d 1263, 1284 (2d Cir. 1997) (same); State v. C.M., 746 So. 2d 410, 416-17 (Ala. Crim. App. 1999) (applying the "clearest proof" standard to a public notification statute). *But see* Artway v. Attorney Gen. of N.J., 81 F.3d 1235, 1263 (3d Cir. 1996) ("A measure must pass a three-prong analysis—(1) actual purpose, (2) objective purpose, and (3) effect—to constitute non-punishment."). However, the *Artway* analysis of New Jersey's sex offender registration requirement preceded the Supreme Court's authoritative use of the "clearest proof" standard in *Smith*.

71. The Court in *Smith* incorporated five of the seven factors that had originally been considered in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), where the Court found that stripping one's citizenship for draft evasion was a punitive sanction. Characterizing the *Kennedy* factors as a "useful framework," *Smith*, 538 U.S. at 97, the Court disregarded the remaining two *Kennedy* factors: whether the statutory scheme "comes into play only on a finding of *scienter*" and whether the behavior to which the statute applies is already a crime, *Kennedy*, 372 U.S. at 168, as irrelevant within the context of residency restrictions.

72. United States v. Ward, 448 U.S. 242, 249 (1980).

73. *Smith*, 538 U.S. at 97.

74. *See, e.g.*, Hudson v. United States, 522 U.S. 93, 115 (1997) (Breyer, J., concurring) (arguing that the "clearest proof" standard is not really the standard used in practice, but rather, "the Court has simply applied factors of the *Kennedy* variety to the matter at hand"); Commonwealth v. Williams, 232 A.2d 962, 973 (Pa. 2003) (stating that while a precise definition of "clearest proof" is rarely articulated, it is understood to indicate that the "factors must weigh heavily in favor of a finding of punitive purpose or effect in order to negate the . . . intention that the Act be deemed civil").

The outcomes in the Eighth Circuit in *Miller*,[75] the Iowa Supreme Court in *Seering*,[76] and the Illinois appellate court in *Leroy*,[77] turned on an analysis of these five *Smith* factors, and so this Note will focus on the same. Applying the ex post facto framework, each court found that the residency restrictions were intended by the legislatures to be regulatory—that is, to protect the health and safety of citizens, rather than to inflict criminal sanctions—and then analyzed the effects of the restrictions under the *Smith* factors and found "clearest proof" to be lacking.[78] However, as will be discussed below, each court essentially ignored the fact that the first three *Smith* factors demonstrate that residency restrictions impose prototypically punitive sanctions. Instead, the courts proceeded in a rather perfunctory way to the final two factors and decided that because the residency restriction statutes at issue were rationally related to and not excessive with respect to a nonpunitive purpose, the statutes created regulatory schemes, rather than criminal penalties. Each court's analysis of the *Smith* factors was flawed, rendering the "clearest proof" test useless in its purpose of identifying criminal statutes passed under a regulatory façade.

II.
ANALYZING RESIDENCY RESTRICTIONS UNDER THE SMITH FACTORS

This Note now turns to an analysis of whether residency restrictions constitute criminal sanctions because of the punitive effects they impose on sex offenders. If residency restrictions are punitive in effect, the Ex Post Facto Clause applies and the restrictions cannot be applied to sex offenders who committed their crimes prior to the enactment of the statutes.

A. Have Residency Restrictions Historically Been Regarded as Punishment?

The first *Smith* factor in the balancing test to determine whether there is the "clearest proof" that an otherwise regulatory statute is punitive in effect asks whether residency restrictions have historically been regarded as punishment. One historical form of punishment is banishment. "[T]he banishment of a citizen is pun-

75. Doe v. Miller, 450 F.3d 700 (8th Cir. 2005).
76. State v. Seering, 701 N.W.2d 655 (Iowa 2005).
77. People v. Leroy, 828 N.E.2d 769 (Ill. App. Ct. 2005).
78. *See* discussion *infra* Section II.

ishment, and punishment of the severest kind."[79] *Smith* recognized that in the colonial days, the most serious offenders were banished.[80] Not only could these offenders not return to their original communities, but their reputations, now tarnished, prevented them from being easily admitted into new communities.[81] Thus, banishment is a severe penalty.[82] The Ninth Circuit, for example, has characterized banishment as either a cruel and unusual punishment or a denial of due process.[83] This Note argues that residency restrictions effectively banish sex offenders from communities throughout the country, and thus constitute a historical form of punishment.

The key point of disagreement between the majorities and dissents in *Miller*, *Seering*, and *Leroy* was whether to adopt a per se view of banishment or an effects-based approach. The per se view argues that because residency restrictions do not affect where sex offenders may *go*, they do not constitute banishment. The problem with this view is that it fails to provide a limiting principle. By holding that sex offender residency restrictions do not amount to banishment because sex offenders remain free to enter and leave a given state as they please, even if they are prohibited from residing in much or all of that state, the courts have announced that prohibiting a class of people from living in a given area within a state is not severe enough to amount to banishment. In *Leroy*, for example, an

79. United States v. Ju Toy, 198 U.S. 253, 269 (1905) (Brewer & Peckham, JJ., dissenting).

80. Smith v. Doe, 538 U.S. 84, 98 (2003). *See* Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (recognizing the governmental power to banish criminal offenders); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 896-97 (2d Cir. 1996) (observing that banishment has in the past been imposed as a punitive sanction, in the United States and elsewhere).

81. *Smith*, 538 U.S. at 98. *See* Doe v. Miller, 450 F.3d 700, 724 (8th Cir. 2005) (Melloy, J., concurring and dissenting) (citing *Smith*); People v. Leroy, 828 N.E.2d 769, 786 (Ill. App. Ct. 2005) (Kuehn, J., dissenting) (noting that banishment is the traditional punishment; having one's reputation tarnished is merely a consequence of banishment, and not itself a traditional punishment).

82. For a discussion of banishment law in the United States, see generally Jason S. Alloy, Note, *"158-County Banishment" in Georgia: Constitutional Implications under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1089-95 (2002).

83. *See* Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962); *see also* State v. Sanchez, 462 So. 2d 1304, 1310 (La. Ct. App. 1985) (vacating a sentence imposing banishment to Honduras as unconstitutional). Several states explicitly forbid banishment in their state constitutions. *See* Alloy, *supra* note 82, at 1089. Many states even prohibit intrastate banishment. *See* Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 470 (1998).

Illinois appellate court contrasted the limited evidence in the record before it with the practical effect of Iowa's 2000 foot restriction, at issue in *Miller* and *Seering*, which completely banned sex offenders from living in a number of Iowa's cities and towns.[84] Because a 2000-foot restriction with severe practical effects did not constitute banishment, *a fortiori*, the 500-foot restriction enacted in Illinois was not banishment either.

The Eight Circuit also took a per se approach to banishment in reversing the district court's ruling in *Doe v. Miller*. Observing that banished offenders historically could not even return to their original communities, let alone reside there, the court noted that the Iowa residency restriction only affected where sex offenders reside, and that it did not expel sex offenders from any community.[85] In short, residency restrictions restrict where sex offenders may *live*, not where they may *go*, and thus do not constitute banishment. The court also found support in the relative novelties that are sex offender residency restrictions. Because they are fairly new, the court wrote, they "[do] not involve a traditional means of punishing."[86]

The Iowa Supreme Court followed suit in *Seering*.[87] Notwithstanding the fact that the Iowa residency restriction made it difficult for Mr. Seering, his wife, and his daughter to live together and forced them to erect a mobile camper on abandoned property, whose owner eventually demanded the family vacate,[88] Iowa's highest court held that Seering had not been banished because he remained free to engage in most community activities.[89] "[T]rue banishment . . . 'works a destruction on one's social, cultural, and political existence.'"[90]

Miller, *Seering*, and *Leroy* failed to address the reality that their per se approach to banishment lacks a limiting principle; when taken to its logical extreme, their approach authorizes the effective

84. *Leroy*, 828 N.E.2d at 780. *See* State v. Seering, 701 N.W.2d 655, 670-71 (Iowa 2005) ("We also observe that the United States Eighth Circuit Court of Appeals recently rejected similar challenges to section 692A.2A under the Constitution of the United States.").

85. *Miller*, 405 F.3d at 719.

86. *Id.* at 720.

87. In *Leroy*, because the court had no evidence of the practical effect of the Illinois residency restriction on sex offenders, it found that the statute did not amount to banishment. *Leroy*, 828 N.E.2d at 781.

88. *Seering*, 701 N.W.2d at 660.

89. *Id.* at 667.

90. *Id.* (citing Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 897 (2d Cir. 1996)).

banishment of sex offenders. This Note urges courts in the future to adopt the effects-based approach to banishment advocated by the dissenting opinions of *Miller*, *Seering*, and *Leroy*. An effects-based approach would permit courts to examine the practical effects of residency restrictions, and to find that they constitute banishment when sex offenders are effectively prohibited from living in a given area due to a lack of available housing, such as is the case in the state of Iowa.

Taking an effects-based view, Judge Kuehn, in his 2005 *Leroy* dissent, framed the issue as whether residency restrictions "resembled" banishment, not whether a given sex offender was in fact banished from a given area.[91] In that case, Mr. Leroy had been expelled from the family home in which he had lived almost his entire life, banned indefinitely from ever living there again, separated from his family members, and forced to find a home in a new city.[92] For Judge Kuehn, these effects of the residency restriction made the Illinois statute "decidedly similar to banishment."[93] Likewise, the dissenting judge in *Seering* found that the Iowa residency restriction imposed onerous obligations on sex offenders, resulted in "community ostracism, and mark[ed]" sex offenders as people who "should be shunned by society;" effects which, when combined, effectively amounted to banishment.[94]

The evidence before the Iowa District Court in *Doe v. Miller* demonstrated that most of Des Moines and Iowa City were off-limits to sex offenders, leaving only industrial areas or new, expensive neighborhoods available for sex offenders to live in.[95] Several smaller towns with a school or child care facility excluded sex offenders completely.[96] Meanwhile, unincorporated farmland and towns without schools remained available to sex offenders, though the court noted that housing in such areas was not necessarily available.[97] In Carroll County, for example, only 139 residential units,

91. *See Leroy*, 828 N.E.2d at 787 (Kuehn, J., dissenting). *See also Miller*, 450 F.3d at 724 (Melloy, J., concurring and dissenting) (finding that the Iowa residency restriction sufficiently resembles banishment to weigh the first *Smith* factor in favor of a determination that the statute is punitive).

92. *Leroy*, 828 N.E.2d at 784-85 (Kuehn, J., dissenting).

93. *Id.* at 787. The eviction of Leroy also occurred almost eighteen years after his conviction for a sex offense. "As far as I know, our colonial ancestors would not have contemplated the banishment of people from their midst almost 18 years after they offended some colonial law." *Id.* at 787-88.

94. *Seering*, 701 N.W.2d at 671-72.

95. Doe v. Miller, 298 F. Supp. 2d 844, 851 (S.D. Iowa 2004).

96. *Id.*

97. *Id.*

out of a total of 9,019 in the county, were available to sex offenders who wanted to live in an incorporated area in which educational services were available.[98] Taking an effects-based approach, the district court found that the Iowa residency restriction was a traditional form of punishment. As the lower court in *Miller* said, "The differences between a law that would leave a man in prison or cause him to go homeless rather than have him reside in the community, and an order forever banishing him, are very slight."[99]

In 2006, the District Court for the Northern District of Georgia indicated acceptance of the effects-based approach. Although the court rejected the argument that the Georgia residency restriction banished a sex offender who had already found alternative housing, it wrote:

> The Court takes judicial notice that Cobb County is primarily a suburban county where it would be relatively easy to find an affordable residence that is more than 1000 feet from a school or daycare center. . . . *A more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment* which would result in an ex post facto problem if applied retroactively to those convicted prior to its passage.[100]

Because this view avoids the problem created by the lack of a limiting principle that is inherent in the per se view of banishment, and instead considers the practical effects of residency restrictions, future courts should follow the Georgia court's lead.[101]

98. *Id.* at 852. Note also that of the 139 units potentially available to sex offenders in Carroll County, other factors affecting the reality of housing availability might include which units are not currently occupied, the price of those units, their proximity to a sex offender's place of work, or, for rental units, the willingness of a landlord to rent to a convicted sex offender.

99. *Id.* at 869. Dissenting Judge Melloy of the Eighth Circuit also took an effects-based approach and agreed that the lack of housing options for sex offenders forced them to choose between living in rural areas or leaving Iowa. This effectively prevents sex offenders from living in many Iowa communities, which effectively results in banishment. Doe v. Miller, 450 F.3d 700, 724 (8th Cir. 2005) (Melloy, J., concurring and dissenting).

100. Doe v. Baker, 2006 WL 905368, at *4 (N.D. Ga. Apr. 5, 2006) (emphasis added).

101. Consider a final argument that has not yet been addressed by the courts. Residency restrictions are a type of restriction often imposed by parole and probation officers on the convicted criminals that they supervise. *See Miller*, 298 F. Supp. 2d at 859 ("Allison testified that, as a parole and probation officer, he has the ability to place restrictions and limitations on the activities of the offenders he supervises."). Supervised release, such as probation or parole, is a form of continuing punishment. *See, e.g.*, Stinson v. United States, 508 U.S. 36, 41 (1993) (citing

B. Do Residency Restrictions Impose an Affirmative Disability or Restraint?

The second *Smith* factor asks whether residency restrictions impose an affirmative disability or restraint on sex offenders. Because such restraints tend to be characteristic of punitive sanctions, their presence helps tip the balance toward finding an otherwise regulatory statute to be punitive.

Although sex offender registration requirements of the kind upheld in *Smith* do not directly restrain sex offenders from living or working in a given area, residency restrictions do. Under this prong, the Supreme Court in *Smith* considered how the effects of registration requirements are felt by sex offenders, identifying imprisonment as "the paradigmatic affirmative disability or restraint."[102] In rejecting the argument that registration requirements imposed an affirmative disability or restraint on sex offenders, the Court observed that registration statutes did not restrain the activities sex offenders could pursue, but left offenders free to *change residences* and *live and work* as other citizens.[103] Sex offender residency restrictions, by contrast, severely limit where sex offenders may live and relocate, as well as where they may work, given potential difficulties in arranging transportation. They restrict sex offenders from living in certain areas, especially in population centers.[104] Further, the *Smith* Court found it significant that there was no evidence presented indicating that registration requirements led to increased occupational or housing disadvantages.[105] As already mentioned, residency restrictions do create housing disadvantages. The record before the Iowa district court in *Doe v. Miller* indicated explicitly that sex offenders face "substantial housing disadvantages" due to the Iowa residency restriction.[106] The affirmative disability imposed by residency restrictions is much greater than that imposed by registration requirements.

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the Guidelines Manual promulgated pursuant to the Sentencing Reform Act of 1984 as providing direction as to the appropriate type of punishment to be imposed: probation, fine, or term of imprisonment). Thus, being subjected to residency restrictions for life is analogous to being subjected to the historical punishment of parole or probation for life.

102. Smith v. Doe, 538 U.S. 84, 100 (2003). In addition to imprisonment, the Court suggested that under certain circumstances, causing someone to become unemployable, in-person reporting requirements, and conditions of supervised release could also constitute an "affirmative disability or restraint." *Id.* at 100-02.

103. *Id.* at 100-01.

104. *Miller*, 298 F. Supp. 2d at 869.

105. *Smith*, 538 U.S. at 100.

106. *Miller*, 298 F. Supp. 2d at 870.

Mr. Leroy, whose challenge to the Illinois residency restriction was rejected, was prohibited from living in his lifelong family home by a newly-imposed residency restriction. Judge Kuehn, dissenting in *Leroy*, found the disability to be substantial. The policy rationale behind the Illinois statute's grandfather clause exempting sex offenders who owned their homes prior to enactment of the statute supports the proposition that forcing a person out of an established home imposes a substantial disability.[107] Similarly, the *Seering* dissent argued that a residency restriction imposes an affirmative disability or restraint when it prohibits a family from living within walking distance of the local school.[108]

Unlike the banishment argument, this factor was less straightforward for the majorities in *Miller*, *Seering*, and *Leroy*. The *Leroy* court noted: "Although we would not characterize the disability or restraint . . . as minor or indirect, we are not convinced that the presence of this factor alone is sufficient to create a punitive effect . . . ."[109] Upholding the Iowa residency restriction, the Eighth Circuit in *Miller* observed that although residency restrictions are more restrictive than the registration requirements upheld in *Smith*, they are less restrictive than mandatory civil commitment of the mentally ill upheld in the 1997 decision in *Kansas v. Hendricks*.[110] In *Hendricks*, the Supreme Court upheld a Kansas statute that provided for civil commitment upon a showing of a mental abnormality that made it difficult for a sexually violent predator to control his or her future dangerousness,[111] notwithstanding that civil commitment "does involve an affirmative restraint."[112] The Eighth Circuit stated that, like in *Hendricks*, the Iowa residency restriction's disa-

107. People v. Leroy, 828 N.E.2d 769, 789 (Ill. App. Ct. 2005) (Kuehn, J., dissenting). Judge Kuehn also cited the great value the United States Constitution places on a person's choice of residence, as evidenced by the heightened protection of privacy interests within the home under the Fourth Amendment and by the Takings Clause of the Fifth Amendment. *Id.* These protections indicate the significance of the disability imposed on someone who is forced to leave his or her home. For Judge Kuehn, the disability imposed by the Illinois residency restriction, given its similarity to a restraint on physical freedom, alone made the statute punitive. *Id.* at 789-90.

108. State v. Seering, 701 N.W.2d 655, 672 (Iowa 2005) (Wiggins, J., concurring in part and dissenting in part).

109. *Leroy*, 828 N.E.2d at 781. *See Seering*, 701 N.W.2d at 668 (recognizing that the Iowa residency restriction "clearly" imposes a form of disability, but given its alternate nonpunitive purpose, some degree of disability does not constitute punishment).

110. 521 U.S. 346 (1997).

111. *Id.* at 350.

112. *Id.* at 363.

bling aspect is not punitive given its rational relationship to the nonpunitive objective of protecting the public.[113] While the statute does impose an element of affirmative disability or restraint, "this factor ultimately points us to the importance of . . . whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose."[114] In other words, any affirmative disability imposed by residency restrictions could be outweighed as long as they are rationally connected to the nonpunitive end of protecting children.

The civil commitment statute upheld in *Hendricks* can be significantly distinguished from sex offender residency restrictions. The former statute required civil commitment of only those people who were both convicted of a sexually violent offense *and* who suffered from a mental abnormality,[115] and thus "narrow[ed] the class of persons eligible for confinement to *those who are unable to control their dangerousness*."[116] A new judicial proceeding was required each year to determine beyond a reasonable doubt that a given person continued to suffer from a mental abnormality, such that the danger of recidivism remained.[117] To be subjected to a residency restriction, however, one need not suffer from any mental abnormality, nor even be judged to pose a future danger.[118] And unlike in *Hendricks*, residency restrictions apply indefinitely, regardless of future dangerousness.[119] Thus, residency restrictions lack the narrowing fea-

113. Doe v. Miller, 405 F.3d 700, 720-22 (8th Cir. 2005).

114. *Id.* at 721.

115. Thus Justice Stevens, in his dissent in *Smith v. Doe*, distinguished the punishment at issue in *Hendricks* from sex offender registration requirements. *See* Smith v. Doe, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting and concurring). He observed that conviction of a sexually violent offense was not sufficient for civil commitment in *Hendricks*; one also needed to suffer from a mental disorder creating a likelihood to re-offend. *Id.* Nor was conviction of a sex offense necessary for civil commitment, as those people found not guilty by reason of insanity would likewise be committed. *Id.* In *Smith*, however, conviction of a sex offense was both necessary and sufficient to subject someone to the mandatory registration requirements. "[A] sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment." *Id.*

116. *Hendricks*, 521 U.S. at 358 (emphasis added).

117. *Id.* at 363-64.

118. *See, e.g.*, ALA. CODE § 15-20-26 (LexisNexis 2006); OHIO REV. CODE ANN. § 2950.031 (West 2006). These statutes provide just two examples of how such restrictions apply categorically to all sex offenders, and thus fail to consider factors relevant to whether residency restrictions are necessary in a given case, such as an ex-offender's likelihood of future dangerousness.

119. *See, e.g.*, OHIO REV. CODE ANN. § 2950.031 (West 2006); IOWA CODE ANN. § 692A.2A (West 2005). Notwithstanding the lack of individual consideration af-

ture that mitigated the element of affirmative restraint imposed in *Hendricks*:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards . . . recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.[120]

Residency restriction statutes lack these mitigating characteristics, and thus *Miller*'s reliance on *Hendricks* is unconvincing.

Finally, as long ago as 1867, in *Ex parte Garland*, the Supreme Court recognized that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct" is punishment.[121] In 1946, the Court again held in *United States v. Lovett* that a permanent prohibition on working for the government is punishment "of a most severe type."[122] Thus, the Court has recognized that a categorical prohibition of a class of people from a given profession can constitute punishment.[123] A residency restriction that prohibits sex offenders from living in certain cities, towns, or states is even more restrictive than a prohibition on working in a given profession. While a prohibition on work is certainly restrictive, a housing restriction can prevent sex offenders from living with their families, from living in homes from which they can find transporta-

forded by the statutes, once a person is convicted of a sex offense, he or she is deemed a "sex offender" and is subject to a residency restriction for life.

120. *Hendricks*, 521 U.S. at 368-69 (internal citation omitted).

121. *Ex parte* Garland, 71 U.S. 333, 377 (1867) (recognizing that a pardon for treason now permitted petitioner to practice law).

122. United States v. Lovett, 328 U.S. 303, 316 (1946) (holding that an act prohibiting government employment of those named as subversives by the Committee on Un-American Activities imposed punishment). Likewise, in *Cummings v. Missouri*, 71 U.S. 277 (1866), the Supreme Court held that a prima facie regulatory statute barring former Confederate sympathizers from certain professions was punitive because it targeted the individual, rather than assessing the qualifications of a given person for the particular job. *Id.* at 319-20.

123. *But see* De Veau v. Braisted, 363 U.S. 144, 160 (1960) (upholding a prohibition of convicted felons from working for a union); Hawker v. New York, 170 U.S. 189, 197 (1898) (upholding a prohibition of convicted felons from practicing medicine). However, the distinction is not that there was a greater disability or restraint imposed on the affected class in *Garland*, *Lovett*, and *Cummings* than in *Hawker* and *Braisted*. Rather, the cases are distinguishable because the former group addressed "a legislative determination of fault or culpability in the persons disqualified," an inappropriate judgment for legislatures to be making categorically. Wormuth, *supra* note 65, at 614-15.

tion to work, or from finding any home to live in at all.[124] And the Supreme Court found it significant in *Smith v. Doe* that "offenders subject to the Alaska [registration requirement] statute are free to move where they wish and to live and work as other citizens . . . ."[125] Residency restrictions, however, infringe upon sex offenders' freedoms to "move where they wish" and "live . . . as other citizens," making the restrictions more disabling than other categorical lifelong restrictions, including registration requirements, work prohibitions, and voter disenfranchisement.[126] *Miller*, *Seering*, and *Leroy* simply glossed over this *Smith* factor.[127]

C. Do Residency Restrictions Promote the Traditional Aims of Punishment?

If residency restrictions promote the traditional aims of punishment, this would add significant support to the notion that there is the "clearest proof" under *Smith* balancing that such statutes are punishments in disguise. The third *Smith* factor asks whether residency restrictions promote the traditional aims of punishment, specifically retribution and deterrence.[128] As with their analyses of the affirmative disability or restraint prong, the majorities in *Miller*, *Seering*, and *Leroy* each recognized that to some extent, this prong is satisfied as well.

In his dissent in *Leroy*, Judge Kuehn argued that residency restrictions directly promote retribution. He observed that the Illinois residency restriction imposes a blanket restriction on all sex offenders that applies forever, regardless of future dangerousness

124. As demonstrated by the record in *Doe v. Miller*, some residency restrictions can even deprive sex offenders of shelter, which the Supreme Court has named as one of the "necessities of life." Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (saying that a requirement that new residents in the District of Columbia wait a year before receiving welfare assistance could potentially deprive them of shelter and other necessities of life). *A fortiori*, a residency restriction that deprives a sex offender of shelter would impose a punishment.

125. Smith v. Doe, 538 U.S. 84, 101 (2003).

126. *Id.* at 87. The Fourteenth Amendment has been read to sanction affirmatively disenfranchisement of felons. Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

127. Note also that in assessing whether residency restrictions impose an affirmative disability or restraint under *Smith*, courts need not necessarily declare the restrictions punishment. At this stage, all courts are asked to do is recognize the affirmative disability or restraint that is imposed by sex offender residency restrictions. The determination of punishment comes only after all five *Smith* factors are balanced with each other. There is no justification for refusing to recognize the affirmative disability or restraint imposed by sex offender residency restrictions.

128. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

to children, the age of the offender, the nature of the offender's crime, or the characteristics of the offender's victim.[129] Thus, "[s]ince we neither know nor care whether Leroy's removal from his home advances the safety of children . . . , we need to acknowledge that the automatic eviction, at least to a degree, promotes retribution for wrongdoing."[130] Judge Kuehn also noted that there was no legitimate purpose to the restriction *other* than retribution, given the fact that Mr. Leroy had lived in his home near a school for ten years without re-offending.[131]

The Eighth Circuit in *Miller* considered this argument, but nonetheless upheld the Iowa residency restriction. The court recognized that "any restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect. . . ."[132] This potentially retributive effect was deemed consistent with—and justified by—the residency restriction's objective of protecting public health and safety.[133]

This argument advanced by *Miller*, in speaking of a retributive *effect*, rather than a retributive *purpose*, confuses the essence of retribution. Retribution is "[p]unishment imposed *as repayment or revenge* for the offense committed . . . ."[134] Consistent with the notion that retribution is a purpose, the *Hendricks* Court had earlier found that the civil commitment statute's "*purpose* is not retributive."[135] By speaking in terms of retributive *effect*, the Eighth Circuit failed to meaningfully inquire into the legislative intent behind the residency restriction. This relaxed inquiry into legislative purpose is disturbing, given that "American legislatures with lightning speed have moved to impose novel new post-confinement methods of so-

129. People v. Leroy, 828 N.E.2d 769, 790 (Ill. App. Ct. 2005) (Kuehn, J., dissenting). *See* Doe v. Miller, 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004) (noting that the Iowa residency restriction applied for life regardless of future dangerousness, the nature of any prior offenses, or the type of victim, thus going beyond what is necessary to protect the public, and entering the realm of retribution).

130. *Leroy*, 828 N.E.2d at 791 (Kuehn, J., dissenting). *See Smith v. Doe*, 538 U.S. 84, 116 (2003) (Ginsburg, J., dissenting). Justice Ginsburg would have found the sex offender registration requirements at issue in *Smith v. Doe* to be unconstitutional ex post facto laws. *Id.* She wrote, in dissent, that past crime alone, rather than current dangerousness, is the "touchstone" triggering the registration requirement, which "adds to the impression that the Act retributively targets past guilt. . . ." *Id.*

131. *Leroy*, 828 N.E.2d at 791 (Kuehn, J., dissenting).

132. Doe v. Miller, 405 F.3d 700, 720 (8th Cir. 2005), *reh'g denied, reh'g en banc denied*.

133. *Id.*

134. BLACK'S LAW DICTIONARY 1318 (7th ed. 1999) (emphasis added).

135. Kansas v. Hendricks, 521 U.S. 346, 362 (1997) (emphasis added).

cial control that strain our historic understandings of 'punishment.'"[136] The observation has particular force in the context of sex offender laws, where legislation is even more likely to be motivated by "heat of the moment" animus, and thus is more likely to have a retributive *purpose*.[137] One commentator pointed out that "because of the way in which sexual crimes against women and children have captured the national consciousness, they have triggered a strong response by the state . . . . The emphasis has been on retributive, deterrent and incapacitative sanctions . . . ."[138]

Dr. McEchron, a psychologist, testified in *Doe v. Miller* that because the residency restriction applies for life, regardless of sex offender treatment, the statute does nothing to promote or encourage such treatment.[139] Ironically, Dr. McEchron admitted, it may actually impede such treatment.[140] Rather than motivating sex offenders to rehabilitate and seek more treatment, Dr. McEchron stated that a residency restriction may act as a setback by creating in sex offenders a negative view of authority, preventing them from living with a support group, and possibly "spiral them into [a state of] depression."[141] Another witness, Dr. Rosell, went further, stating that "'if an individual hasn't recidivated after 10 or 15 years, obviously they have learned the right way to go and that likelihood [of recidivism] is decreased.'"[142] This testimony provides further

136. Logan, *supra* note 61, at 1267. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1413 (1991) ("Law enforcement authorities are no longer content to fight crime with the traditional methods of arrest, prosecution, and jailing.").

137. *See, e.g.*, *Alabama Strengthens Restrictions on Sex Offenders*, 119 HARV. L. REV. 939, 946 (2006) (referring to chemical castration laws and a proposed Ohio bill to force sex offenders to use pink license plates as representing "reflexive legislative reactions to public hysteria, not rational policy decisions").

138. Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 570 (2002).

139. Doe v. Miller, 298 F. Supp. 2d 844, 861 (S.D. Iowa 2004). *See* Smith v. Doe, 538 U.S. 84, 116-17 (2003) (Ginsburg, J., dissenting). Justice Ginsburg, dissenting in *Smith*, argued that the sex offender registration requirement was excessive in relation to its nonpunitive purpose, and therefore punitive, because it applied to all convicted sex offenders, regardless of future dangerousness or risk of recidivism. *Id.* Nor could sex offenders reduce the duration of their registration requirements by demonstrating rehabilitation. *Id.* While sex offenders are not necessarily subject to registration requirements for life, however, they are subject to many residency restrictions for life.

140. *Miller*, 298 F. Supp. 2d 844 at 861.

141. *Id.*

142. *Id.* at 863 (quoting the testimony of clinical psychologist Dr. Rosell).

evidence of the retributive *purpose* of sex offender residency restrictions. Rather than ensuring that sex offenders are placed into an environment in which they are best able to rehabilitate and become productive members of society, residency restrictions impose categorical restrictions on sex offenders based on their past conduct. Justice Souter, concurring in *Smith v. Doe*, wrote:

> The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.[143]

Properly focusing on retributive *purpose* would require courts to consider the likelihood that residency restrictions are passed under a façade of protecting society, which allows legislatures to continue punishing sex offenders, long after their release from prison.[144]

The other traditional aim of punishment typically considered by the courts is deterrence. In *Smith v. Doe*, the Supreme Court conceded that sex offender registration requirements might deter future crimes.[145] Again, because residency restrictions are more restrictive than registration requirements, they go further in promoting deterrence.[146] In addition, since "parole boards have broad discretion in formulating and imposing parole conditions,"[147] residency restrictions may be one condition of supervised release. Thus, automatically subjecting sex offenders to a residency restriction is comparable to subjecting them to conditions of lifelong supervised release, a purpose of which is deterrence.[148] In holding in *Smith* that a sex offender registration requirement was not parallel to supervised release, the Supreme Court noted that under the registration requirement, sex offenders "are free to move where they

143. *Smith*, 538 U.S. at 109 (Souter, J., concurring).

144. *See, e.g.*, Henderson, *supra* note 21, at 806-07 ("Collectively, society demands justice for victims, is unmoved by an offender's completion of his sentence for the crime committed, and likely is in search of additional modes of punishment.").

145. *Smith*, 538 U.S. at 102.

146. *See* Doe v. Miller, 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004) ("Defendants must concede that § 692A.2A goes even further to deter would-be sex offenders than does a registration and community notification system.").

147. Morrissey v. Brewer, 408 U.S. 471, 496 (1972).

148. *See* State v. Seering, 701 N.W.2d 655, 672 (Iowa 2005) (Wiggins, J., concurring in part and dissenting in part).

wish and to live and work as other citizens, with no supervision."[149] Under a residency restriction, by contrast, sex offenders are not free to move where they wish, nor are they free to live and work as other citizens without supervision.

Like the retribution argument, the deterrence argument received only a cursory analysis by the courts in *Miller*,[150] *Seering*,[151] and *Leroy*.[152] The Illinois appellate court in *Leroy* found it reasonable to believe that the Illinois residency restriction would reduce the amount of contact sex offenders have with children, and thus that the opportunity to commit sex offenses would be reduced as well.[153] The court concluded that "[a]ccordingly, it is possible that the subsection might deter future crimes."[154] But the "mere presence of a deterrent purpose" does not render a statute criminal.[155] Many government-imposed regulations might have the effect of deterring crime,[156] so, "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation."[157] One wonders, however, what amount of deterrence *Leroy* would require before this factor is given the weight it is due.

Even if *Leroy* is correct that residency restrictions are not intended to deter sex offenses, but that they simply deter crime as a byproduct, the courts have failed to consider an additional tradi-

149. *Smith*, 538 U.S. at 101.

150. Doe v. Miller, 405 F.3d 700, 720, 725 (8th Cir. 2005).

151. *Seering*, 701 N.W.2d at 668.

152. People v. Leroy, 828 N.E.2d 769, 780-81 (Ill. App. Ct. 2005).

153. *Leroy*, 828 N.E.2d at 777. One must note, however, that sex offender residency restrictions do not restrict where sex offenders may convene, they simply target where sex offenders may reside. The court in *Leroy* also failed to consider the increase in sex offender homelessness that the statute might cause, and what effect that could have on a sex offender's contact with school children. Finally, since school is generally in session during the day, and presumably many sex offenders are awake during the day, is it not just as reasonable to conclude that a *residency* restriction will have absolutely no effect on the amount of contact sex offenders have with children?

154. *Id.* at 781. *See Miller*, 405 F.3d at 720 (recognizing that although the Iowa residency restriction could have a deterrent effect, this effect does not transfer the restriction into a punishment because the purpose of the statute is to limit temptation and opportunity, not to alter incentives via negative consequences).

155. *Leroy*, 828 N.E.2d at 781.

156. *Miller*, 405 F.3d at 720.

157. Smith v. Doe, 538 U.S. 84, 102 (2003) (quoting Hudson v. United States, 522 U.S. 93, 105 (1997) (Breyer, J., concurring)).

tional aim of punishment: incapacitation.[158] One goal of imprisonment is to incapacitate prisoners and prevent re-offense by confining inmates in a controlled area. Likewise, residency restrictions incapacitate sex offenders: they restrict where sex offenders may live in an attempt to deprive them of the opportunity to recidivate, and thereby protect children and society in general. "[A] stringent residential restriction . . . takes away a portion of the opportunity.'"[159] The courts in *Miller*, *Seering*, and *Leroy* upheld the constitutionality of residency restrictions without addressing this traditional aim of punishment, marking a deficiency in the application of the *Smith* test to identify criminal statutes passed under a regulatory façade.

D. Do Residency Restrictions Have a Rational Connection to a Nonpunitive Purpose?

The first three *Smith* factors considered are relevant to the "clearest proof" standard because they strongly suggest that the statute is punitive. A sanction that is a historical form of punishment imposes an affirmative restraint, and promotes the traditional aims of punishment necessarily creating a strong aura of punishment. In *Smith v. Doe*, however, the Supreme Court dubbed the "rational connection to a nonpunitive purpose" prong a "most significant factor" in the ex post facto analysis.[160] Thus, the Court concluded that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance."[161]

Notwithstanding this very deferential view of what satisfies a rational connection, much of the testimony in *Doe v. Miller* aimed to show that the residency restriction at issue did not satisfy even the simple demands of rationality. Mr. Allison, an Iowa probation and parole officer, testified that in practice, he concerns himself more with the circumstances into which a probationer or parolee is placed than with the specific distance the client lives from any given location, such as a school or child care center.[162] Dr. McEchron, a psychologist, testified that if residency restrictions were one of the

158. *See* Ewing v. California, 538 U.S. 11, 35 (2003) (Stevens, J., dissenting) (recognizing that the justifications for punishment include deterrence, incapacitation, retribution, and rehabilitation).

159. Henderson, *supra* note 21, at 799 (citation omitted).

160. *Smith*, 538 U.S. at 102. *See Miller*, 405 F.3d at 721 (citing *Smith*, the court labeled this factor as the "most significant").

161. *Miller*, 405 F.3d at 721 (quoting *Smith*, 538 U.S. at 103).

162. Doe v. Miller, 298 F. Supp. 2d 844, 859 (S.D. Iowa 2004).

conditions of a person's probation, ideally those restrictions would be removed *prior to* the probationer's release from probation, so that the probation officer could monitor the client's conduct.[163] Further, Dr. McEchron had never seen the distance a sex offender resides from a school included as a variable that could affect an offender's likelihood to re-offend.[164] Clinical psychologist Dr. Rosell pointed out that in fact there is no evidence that residential proximity to schools affects the rate of sex offender recidivism.[165] Finally, a report to the Minnesota legislature concluded that in order to determine the risk of re-offense posed by sex offenders, it is best to place them into categories based on the nature of the crime they committed, since most sex offenders know their victims and thus do not pose a threat to strangers.[166]

While all of this evidence calls into question the rationality of residency restrictions, a "close or perfect fit" is not required to satisfy the rational connection prong. Rather, the inquiry under this prong is whether there is *some* rational connection to a nonpunitive end, an inquiry the courts have uniformly responded to in the affirmative, citing child safety as that end. For instance, the Eighth Circuit in *Miller* upheld the Iowa residency restriction, citing other evidence presented in the district court that indicated that as a class, sex offenders are more likely to re-offend against minors and that any sex offender could re-offend again at any time.[167] Dr. Rosell admitted before the Iowa district court that there was no way to predict whether a sex offender would re-offend against a different age group.[168] Given the high risk of recidivism and the difficulty in predicting how best to prevent it, the Iowa residency restriction was deemed rationally related to the very important nonpunitive purpose of protecting children.[169] If just one child is saved from sexual abuse by a residency restriction, the statute has, at least to some extent, satisfied its purpose.

Whether a tighter connection than mere rationality to some nonpunitive purpose should be required under the *Smith* balancing test is beyond the scope of this Note. However, it is important to recognize that under this prong, there are reasons to question whether there is a rational connection to the non-punitive purpose

163. *Id.* at 860.
164. *Id.* at 861; *see also* Minnesota Study, *supra* note 9, at 9.
165. *Miller*, 298 F. Supp. 2d at 864 (citing Minnesota Study, *supra* note 9).
166. *Id.* at 862.
167. *See* Doe v. Miller, 405 F.3d 700, 722 (8th Cir. 2005).
168. *Id.*
169. *See id.* at 722-23.

at all. When taken in the context of the *Smith* balancing test—and the other factors that already suggest residency restrictions are criminal statutes—this potential lack of a rational connection lends additional credence to the notion that the "clearest proof" that such residency restrictions are punitive has been established. Recall that thus far, the restrictions have been acknowledged to involve elements of banishment, affirmative restraint, retribution, and incapacitation. Perhaps the Supreme Court was premature in deeming the rationality prong such a significant factor. Doing so provided an escape for lower courts—as demonstrated by the decisions in *Miller*, *Seering*, and *Leroy*—to disregard the first three prongs of the analysis and place dispositive weight on the rationality prong. The purpose of the *Smith* analysis as a whole to identify those statutes that are characteristically criminal has therefore been distorted.

E. Are Residency Restrictions Excessive with Respect to their Nonpunitive Purpose?

The final *Smith* factor relevant to whether there is the "clearest proof" that an otherwise regulatory statute is punitive in effect involves an excessiveness inquiry into "whether the regulatory means chosen are reasonable in light of the nonpunitive objective."[170]

Named plaintiffs in the *Doe v. Miller* class action included John Doe I, who was convicted in Wisconsin for having sex with a fourteen-year-old when he was eighteen, which is not a crime in Iowa;[171] John Doe XII, who pled guilty to misdemeanor assault with intent to commit sexual abuse when he and the intended victim were each seventeen;[172] and John Does VIII and IX, who were convicted of possessing inappropriate pictures of minors from the internet.[173] John Doe II pled guilty to having sex with a fifteen-year-old when he was twenty; John Doe VII was convicted for statutory rape under Kansas law for conduct not criminalized in Iowa; John Doe XIV pled guilty to a misdemeanor after "expos[ing] himself at a party at which a thirteen-year-old was present" when he was nineteen.[174] Broad, nondiscriminatory residency restrictions apply to each of

170. Smith v. Doe, 538 U.S. 84, 105 (2003).

171. *Miller*, 298 F. Supp. 2d at 852.

172. *Id.* at 856.

173. *Id.* at 855.

174. *Miller*, 405 F.3d at 726 (Melloy, J., concurring and dissenting). Judge Melloy, in dissent, labeled these plaintiffs as "not the most serious sex offenders." *Id.* at 725. Note also that the majority of the named plaintiffs mentioned above did not commit crimes that involved young children.

these sex offenders. Yet Mr. Allison, the parole and probation officer who testified in *Doe v. Miller*, stated that when deciding what restrictions to place on his sex offender clients, he individualizes the restrictions to the circumstances of each offender.[175] For example, a twenty-year-old who had consensual sex with his fifteen-year-old girlfriend would likely not pose a danger to young children and would likely not be prohibited from living near a child care center.[176] Dr. Rosell acknowledged that it contradicted common sense to apply the statute to all sex offenders, since not all are a threat to children or public safety.[177] This over-inclusiveness presents a strong argument that residency restrictions are excessive.[178]

In *Seering*, the Iowa Supreme Court responded that given the statute's purpose to protect children, "it is more difficult to conclude that the restrictions are excessive."[179] The Eighth Circuit, meanwhile, practically conceded that there was no scientific evidence to suggest that a residency restriction prevents recidivism.[180] However, the test for excessiveness is reasonableness, which does not require a perfect fit between the statute and its nonpunitive purpose, and therefore the Iowa residency restriction was not deemed excessive.[181] The Eighth Circuit's rationale under this prong went as follows. The court found that sex offenders as a class are more likely to offend against minors.[182] It then noted that there are no guarantees that sex offenders will not reoffend and that there is no way to predict whether sex offenders will choose subsequent victims of a different age.[183] Thus, the court concluded, "[i]n view of the higher-than-average risk of reoffense

175. *Miller*, 298 F. Supp. 2d at 859. This implies that parole and probation officers may themselves be able to address dangerous living situations created by sex offenders without the aid of a residency restriction statute. In fact, Allison stated that he could address dangerous living situations without the Iowa statute. *See id.*

176. *See id.*

177. *Id.* at 864.

178. *See id.* at 871; s*ee also Miller*, 405 F.3d at 725 (Melloy, J., concurring and dissenting) ("The statute limits the housing choices of all offenders identically, regardless of their type of crime, type of victim, or risk of reoffending . . . . [M]any offenders cannot live with their families and/or cannot live in their home communities.").

179. State v. Seering, 701 N.W.2d 655, 668 (Iowa 2005).

180. *Miller*, 405 F.3d at 722.

181. *Id.* at 722-23.

182. *Id.* at 722.

183. *Id.* There are never guarantees that former prisoners, now released, will not reoffend, nor are there generally ways to predict who a subsequent victim will

posed by convicted sex offenders, and the imprecision involved in predicting what measures will best prevent recidivism," restricting all sex offenders alike does not constitute punishment.[184] The Eighth Circuit went on to reason that reducing the frequency of contact between sex offenders and children reduces opportunity, and since nobody has articulated a precise distance that best balances reduction of risk with the burden felt by sex offenders, Iowa's decision to impose a 2000 foot restriction was reasonable and "clearest proof" of excessiveness had not been demonstrated.[185]

There are at least two flaws in the Eighth Circuit's reasoning. First, the court cited *Hawker v. New York*,[186] *De Veau v. Braisted*,[187] and *Smith v. Doe*[188] for the proposition that "[t]he absence of a particularized risk assessment . . . does not necessarily convert a regulatory law into a punitive measure . . . ."[189] In *Hawker*, decided in 1898, the Court upheld a law that prohibited doctors who had been convicted of a felony from practicing medicine.[190] In *Braisted*, decided in 1960, the Court upheld a law that prohibited convicted felons from working as representatives in certain trade unions.[191] These two cases upheld categorical restrictions on where convicted

be, yet convicted criminals are released from prison, parole, and probation all the time.

184. *Id. See* McKune v. Lile, 536 U.S. 24, 33 (2002) (noting that sex offenders are much more likely to be rearrested for a new sex-related crime than other offenders are likely to be rearrested for a crime similar to their previous crime) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, 6 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf).

185. *Miller*, 405 F.3d at 722-23. First, as discussed above, there has been no evidence presented as to why a residency restriction will actually reduce the frequency of contact between sex offenders and children. Under the residency restrictions, sex offenders can still *go* wherever they want, they just cannot *live* wherever they want. Second, the court's use of the "clearest proof" standard seems misplaced in this context. The burden is to show by "clearest proof," meaning through the *Smith* factors collectively, that residency restrictions are punitive. Their burden is not to show by "clearest proof" that the residency restrictions alone are excessive. Conceivably, a non-excessive statute should still be deemed punitive if it imposes a historical punishment and/or an affirmative disability and/or promotes the traditional aims of punishment to a sufficient degree.

186. Hawker v. New York, 170 U.S. 189 (1898).

187. De Veau v. Braisted, 363 U.S. 144 (1960).

188. Smith v. Doe, 538 U.S. 84 (2003).

189. *See Miller*, 405 F.3d at 721. *See Smith*, 538 U.S. at 103-04 ("The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.").

190. *See* Hawker v. New York, 170 U.S. 189, 197 (1898).

191. *See* De Veau v. Braisted, 363 U.S. 144, 160 (1960).

felons could work, not on where they could live. Most recently in 2003, the Court in *Smith*, citing *Hawker* and *Braisted*, upheld the categorical application of a registration requirement to all sex offenders.[192] However, like restrictions on where sex offenders can work, a registration requirement is much less onerous than a residency restriction. Sex offenders subject to the registration requirement in *Smith* remained free to "live and work as other citizens."[193] Convicted felons affected by *Hawker* and *Braisted* were likewise free to live as other citizens. But by definition, sex offenders subject to residency restrictions are *not* free to live as other citizens. This distinguishes the laws at issue in *Hawker* and *Braisted* and renders the cases inapposite to support upholding the much more severe restriction imposed by sex offender residency restrictions. When choice of residence is implicated, the argument that categorical restrictions are excessive is much stronger.[194]

Second, the state residency restrictions range from 500 feet[195] to 2000 feet.[196] Several of the statutes contain grandfather clauses exempting sex offenders who had established residence before the statute was enacted[197] and/or prior to a school's moving to within the given distance of their home.[198] Meanwhile, four of the thirteen residency restrictions apply only to sex offenders while they are subject to some form of supervised release.[199] Louisiana's statute applies only to "sexually violent predators;"[200] Oklahoma's restriction does not apply to sex offenders who owned their homes

192. *See Smith*, 538 U.S. at 104.

193. *Id.* at 101.

194. The Supreme Court has recognized that the right to choose one's place of residence is vital. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality op.) (discussing the importance of the right to live together as a family); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257-58 (1974) (striking a statute that potentially deterred the right to migrate and resettle); Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972) (same); Shapiro v. Thompson, 394 U.S. 618, 621, 629 (1969) (same). Not only do residency restrictions deter resettlement, they can potentially prevent it altogether, thereby preventing continued cohabitation with a family member, as in *Leroy*.

195. *See, e.g.*, 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (West 2006). The *Leroy* court noted that a 500-foot restriction seemed reasonable compared to lengthier distances. People v. Leroy, 828 N.E.2d 769, 777 (Ill. App. Ct. 2005).

196. *See, e.g.*, IOWA CODE ANN. § 692A.2A(2) (West 2005).

197. *See, e.g.*, ALA. CODE § 15-20-26 (LexisNexis 2006).

198. *See, e.g.*, TENN. CODE ANN. § 40-39-211 (Supp. 2005).

199. *See* CAL. PENAL CODE § 3003 (West 2006); FLA. STAT. ANN. § 947.1405 (West 2001 & Supp. 2006); IND. CODE ANN. § 11-13-3-4(g)(2)(B) (West Supp. 2006); OR. REV. STAT. § 144.642 (2005).

200. LA. REV. STAT. ANN. § 14:91.1 (West Supp. 2006).

prior to being convicted of a sex offense.[201] Notwithstanding this wide variation, each residency restriction has the same nonpunitive purpose potentially assignable to it: to protect children. But if a 500-foot restriction is sufficient to promote this nonpunitive end, why is a 2000-foot restriction to promote the same end not excessive? If public safety can still be furthered even though sex offenders who already own a home are not required to move, why is a sex offender who just moved to the countryside to comply with the statute, only to see a preschool built next door, required to move again? If it is sufficient to protect children by imposing restrictions on only parolees, why must other sex offenders comply with residency restrictions for life? The Eighth Circuit's rationale reduces simply to a decision that a legislature's inability to determine which sex offenders are dangerous and what restricted distance is safe justifies categorical restrictions for life. This argument does not suggest that residency restrictions are not excessive, but rather that legislatures are not the most competent branch to address sex offender recidivism.

Certainly legislatures from different states are free to experiment, and slight differences in pursuit of a nonpunitive purpose are not necessarily indicative of irrationality or excessiveness. But now the problem created by the courts' failure to provide a limiting principle resurfaces. Theoretically, at least, there must be some residency restriction that would be too broad to pass the excessiveness test. But the courts have given no indication of any limiting principle. Consider a hypothetical raised by the Third Circuit:

> [T]he legislature, with the purest heart(s), could extend the prison sentences of all previously convicted sex offenders for the sole reason of protecting potential future victims. It was simply not understood how dangerous they would be when released, the legislators could truthfully explain, and society would be safe only if sex offenders were kept behind bars. This remedial purpose would thus fully explain the continued incarceration . . . the continued imprisonment would be "rationally related" to the goal of protecting vulnerable citizens. But no Justice has ever voted to uphold a statute that retroactively increased the term of imprisonment for a past offense.[202]

201. OKLA. STAT. ANN. tit. 57, § 590 (West Supp. 2007).

202. Artway v. Attorney Gen. of N.J., 81 F.3d 1235, 1261 (3d Cir. 1996) (upholding New Jersey's sex offender registration law). *See* Miller v. Florida, 482 U.S. 423 (1987) (holding that application of revised sentencing requirements to prisoners previously sentenced violated the Ex Post Facto Clause). To clarify, the point here is not that residency restrictions are directly analogous to prison terms, but

An ordinance recently enacted in Orange Beach, Alabama prohibits sex offenders from living or working within four miles of schools, day cares, parks, and public beaches.[203] By dismissing the excessiveness argument simply because residency restrictions are intended to serve the very important purpose of protecting children,[204] rather than seriously investigating the practical consequences of the statutes, courts have erected no barrier to the extension of sex offender residency restrictions.

III.
REFLECTIONS ON *SMITH* AND THE "CLEAREST PROOF" STANDARD

To avoid finding that sex offender residency restrictions amounted to banishment, a historical form of punishment, the 2005 decisions in *Miller*, *Seering*, and *Leroy* adopted a per se view of banishment that lacks a limiting principle. Each court recognized that the residency restrictions impose an element of affirmative disability or restraint and that they promote some amount of deterrence and retribution. When retributive *purpose* is distinguished from retributive *effect*, and incapacitation is acknowledged as another purpose of residency restrictions, the traditional aims prong more strongly favors a finding that the statutes impose punishment. The courts have justified these punitive effects, however, by reference to an alleged rational, non-excessive relationship between the statutes and their non-punitive purpose of protecting children. Yet the excessiveness of the residency restrictions is illustrated by their categorical, over-inclusive application. Therefore, application of the *Smith* factors creates a strong feeling that sex offenders are being retroactively punished by these statutes.

The reasoning employed by *Miller*, *Seering*, and *Leroy* to uphold sex offender residency restrictions deprived the *Smith* factors of their content and turned the *Smith* analysis into a simple excessiveness inquiry. The courts disregarded the first three *Smith* factors, which each suggest punishment to varying degrees, and instead just applied a test of rationality, thereby permitting over- and underinclusiveness and upholding "civil" sanctions that strongly resemble punishment. As Justice Marshall observed in 1979, because the ef-

rather that the courts have given no indication as to why *any* restriction on sex offenders would be excessive, and this is problematic.

203. *See* Ryan Dezember, *City Tightens Sex Abuser Restrictions*, MOBILE REGISTER, Sept. 8, 2005, *available at* http://www.al.com/news/mobileregister/index.ssf?/base/news/112617104141070.xml&coll=3.

204. *See, e.g.*, State v. Seering, 701 N.W.2d 655, 668 (Iowa 2005).

fects-based factors, as originally enunciated in *Kennedy v. Mendoza-Martinez*[205] in 1963, and later applied by *Smith v. Doe*,[206] rely on a determination of excessiveness, they forego an inquiry into less restrictive alternatives.[207] In other words, the *Smith* factors ultimately ask whether a given sanction is excessive in relation to its nonpunitive purpose. Because an over-inclusive residency restriction, for example, is not necessarily irrational or excessive,[208] it can withstand the "clearest proof" scrutiny of the *Smith* factors, even though a less restrictive alternative might be available that would still protect children. Thus, Marshall observed, "the test lacks any real content."[209] Since *Kennedy v. Mendoza-Martinez*, the Supreme Court has never found that a statute that the legislature intended to be civil was, in fact, criminal under the factors enunciated in *Kennedy* and later adopted in *Smith*.[210] The *Smith* effects-based analysis, intended as a safeguard against legislatures enacting punitive sanctions hidden behind stated regulatory intent, has failed.

Neither the majorities nor the dissents in *Miller*, *Seering*, and *Leroy* questioned the capacity of the *Smith* factors to serve their purpose. However, the legitimacy of the "clearest proof" standard, as applied in *Smith v. Doe*, as the benchmark to overcome a stated legislative intent has not been quite so straightforward.[211] Some members of the Court encouraged reconsideration of the "clearest proof" standard in *Smith* itself. Justice Souter explained in his concurring opinion that because it was unclear whether the Alaska sex offender registration statute was intended to be punitive or regulatory, a formal statement that the statute is regulatory should not be determinative of the legislative intent. Thus Justice Souter could not justify invoking the "clearest proof" standard.[212] There are "strong incentives [for legislatures] to avoid labeling a given sanc-

205. 372 U.S. 144 (1963).

206. 538 U.S. 84 (2003).

207. Bell v. Wolfish, 441 U.S. 520, 564-65 (1979) (Marshall, J., dissenting). For a brief explanation of the Supreme Court's incorporation of the *Kennedy* factors in *Smith*, see *supra* note 71 and accompanying text.

208. *Cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 592-93 (1979) (holding that over-inclusiveness is permitted under the Equal Protection Clause's rational basis review).

209. *Wolfish*, 441 U.S. at 565 (Marshall, J., dissenting). *See* Logan, *supra* note 61, at 1282 (acknowledging criticism that the *Kennedy v. Mendoza-Martinez* factors are "meaningless").

210. Logan, *supra* note 61, at 1282.

211. For a discussion of the Supreme Court's jurisprudence surrounding the "punishment question" and legislative intent, see generally Logan, *supra* note 61, at 1280-96.

212. Smith v. Doe, 538 U.S. 84, 110 (2003) (Souter, J., concurring).

tion as 'criminal,'" including that criminal statutes trigger various substantive and procedural constitutional protections, including the prohibition on ex post facto laws.[213] But, as Justice Souter has pointed out, "Simply by labeling a law . . . a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."[214] This reasoning likewise motivated Justice Ginsburg to opine that she "would not demand 'the clearest proof' that the statute is in effect criminal rather than civil."[215]

That the "clearest proof" standard has, in practice, served as a rubber stamp of legislative intent is alarming and violates the very purposes underlying the Ex Post Facto Clause. Sex offender residency restrictions are certainly motivated, at least in part, by the fear that every sex offender will recidivate if given the chance. That, however, is an inaccurate picture of sex offenders.[216] United States Department of Justice reports have commented that "[sex offender] laws and the decisions that they require are often based on assumptions about sex offenders that are, at best, misleading and, at worst, erroneous."[217] But what elected judge or representative would want to be known among his or her constituents as being soft on sex crime?

Similar to ethnic minorities in the equal protection context, unpopular criminals like sex offenders, who are most likely to raise "colorable ex post facto claims . . . [,] historically have faced animus within society, and thus have been subject to animus-driven legislative enactments."[218] Sex offenders are particularly at risk of being subjected to ex post facto punishments disguised as civil regulations because of the fear in society they so often provoke. Therefore, sex offender legislation demands sincere judicial scrutiny of stated legislative intent, rather than the reduced scrutiny that has been permitted by the "clearest proof" standard.[219] The Supreme Court's

213. Logan, *supra* note 61, at 1288-89. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777-78 (1997).

214. Collins v. Youngblood, 497 U.S. 37, 46 (1990).

215. *Smith*, 538 U.S. at 115 (Ginsburg, J., dissenting).

216. *See, e.g.*, Brady Dennis & Matthew Waite, *Where is a Sex Offender to Live?*, ST. PETERSBURG TIMES, May 15, 2005, at A1 ("[S]ome of the angst may be a bit overblown. . . .").

217. NAT'L INST. OF JUSTICE RESEARCH REPORT, U.S. DEP'T OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 15 (1997) [hereinafter Research Issues].

218. *See* Logan, *supra* note 61, at 1298.

219. *See id.* at 1291; *see also* Marbury v. Madison, 5 U.S. 137 (1803) (establishing judicial review); *cf.* Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting) (calling for heightened review of ex post facto laws when applied to "multiple murderers").

application of the Bill of Attainder Clause has been guided by an attempt "to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate."[220] As previously discussed, the motivations behind the Ex Post Facto Clause include the protection against vindictive, "heat of the moment" legislation. This concern is especially relevant in the context of sex offender laws, as "it is difficult to inform constituents that there is nothing more that can be done to protect the public from past offenders who are now being or soon will be released from prison."[221] In short, the often ambiguous overlap between criminal sanctions and regulatory restrictions, along with the incentive for legislators to act under a pretext in the context of sex offender legislation, suggests that, at the very least, the "clearest proof" standard must be more judiciously applied than it was in *Miller*, *Seering*, and *Leroy*.[222]

IV.
POLICY IMPLICATIONS

Once a court does hold a sex offender residency restriction to be punitive, the restriction can no longer be applied retroactively. This would considerably reduce any effectiveness the residency restriction might otherwise have had. Now all sex offenders who committed the crime of which they were convicted prior to enactment of the statute would be exempt from the restriction—most sex offenders would remain free to live wherever they wanted. If the court concluded that the residency restriction effectively banished sex offenders, a legislature that continued to enforce the statute would be sanctioning banishment. But, the ex post facto issue in this context is narrow as it only prevents criminal punishment from applying retroactively. If the legislature wished, it theoretically could still apply the restriction prospectively. While winning an ex

220. United States v. Brown, 381 U.S. 437, 442 (1965). *See* Logan, *supra* note 61, at 1286-87.

221. Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 434 (1997).

222. *See* Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL RTS. J. 439, 506-07 (2004) ("Along with the strategic benefit of camouflaging punitive laws as civil ones, which functions to avoid ex post facto coverage altogether, legislatures wishing to pass retroactive criminal laws have every incentive to package and portray laws as procedural."). *See generally* David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600 (2006) (arguing for heightened scrutiny of sex offender residency restrictions, given that their passage is motivated primarily by fear).

post facto challenge would be an important step toward eliminating sex offender residency restrictions, it would not necessarily resolve the problem. Instead, it would likely shift the battle against residency restrictions from the courthouse to the legislature.

Sex offender residency restrictions do have several negative policy consequences of which legislatures should be aware. These consequences strongly suggest that legislatures and city councils nationwide should discontinue prospective application of residency restrictions, notwithstanding the outcome of the ex post facto battle in the courts. Specifically, residency restrictions permit cities and states to impose externalities on other cities and states, leading to poor interstate relations. Residency restrictions are drastically over-inclusive and under-inclusive. Again, residency restrictions lack a limiting principle, which leads to the conclusion that a state may sanction banishment of its own citizens. Legislatures would be well-advised to abandon their residency restriction statutes in favor of a less restrictive, yet more effective alternative, such as imposing restrictions on an individualized basis.

A. The Imposition of Externalities

"To permit one state to dump its convict criminals into another is not in the interests of safety and welfare; therefore, the punishment by banishment to another state is prohibited by public policy."[223] By preventing sex offenders from living within given geographical areas, residency restrictions effectively "dump" one state's criminals into another state that either has more housing available or has elected not to pass a residency restriction. For example, officials in Nebraska cities that border Iowa have expressed concern that Iowa sex offenders, unable to find housing in Iowa, will migrate to Nebraska.[224] The chief of police of East Dubuque, Illinois reported receiving an "appalling number" of phone calls from sex offenders from Iowa wanting to know if they could find housing in Illinois.[225]

223. Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979). *See* People v. Baum, 231 N.W. 95, 96 (Mich. 1930) ("To permit one state to dump its convict criminals into another . . . would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself.").

224. *See* Frank Santiago, *Nebraska City Aims to Thwart Iowa Sex Offenders*, DES MOINES REGISTER, Sept. 21, 2005, *available at* http://www.dmregister.com/apps/pbcs.dll/article?AID=/20050921/NEWS01/509210345/1001.

225. Davey, *supra* note 13, at A1 (reporting that "new sex offenders rarely moved to town in the past, but that since last fall, 28 had arrived").

Rather than being required by the courts to develop an alternative way to address the threat of sex offender recidivism, states have been permitted to force sex offenders elsewhere via residency restrictions. By not identifying this phenomenon as banishment, courts allow states to impose costs on other states, rather than forcing states to internalize those costs. In short, states with residency restrictions are saying, "we don't want to deal with convicted sex offenders here in State X, so we're not going to let them live here. States Y and Z, you deal with them." This in turn provokes states Y and Z to institute restrictions and pass the externalities elsewhere. In justifying the passage of his town's residency restriction, the mayor of Galena, Illinois maintained, "We don't want to be the dumping ground for their sex offenders."[226] In the interest of promoting interstate relations, therefore, residency restrictions should be abandoned in favor of a less restrictive and more effective alternative.

B. Over-Inclusiveness and Under-Inclusiveness

Sex offender residency restriction statutes are over-inclusive in that they apply to *all* sex offenders and make virtually no distinctions based on past crime or likelihood of re-offense. For example, Ohio's residency restriction reads, in pertinent part:

> No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises.[227]

Essentially, a "sex offender" for purposes of the Ohio residency restriction means anyone eighteen years or older convicted of a sexually-oriented offense, excluding first time offenders convicted of sexual imposition, voyeurism, and stalking, when the victim was eighteen years or older.[228] Thus, the statute applied to a seventy-five year-old man who had pled guilty to attempting to touch a thirteen-year-old, over her clothing, as she assisted him down some bleachers; a prosecutor sought to evict the man and his ninety-one year-old wife from their home of over thirty years.[229]

226. *Id.*

227. OHIO REV. CODE ANN. § 2950.031(A) (West 2006).

228. *See id.* § 2950.01(P).

229. Nasal v. Dover, 2006 WL 3030789, at *1 (Ohio Ct. App. Oct. 20, 2006).

Iowa's residency restriction applies only to an individual "who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor."[230] Even this slightly more discriminating Iowa statute does not significantly change the over-inclusion analysis, since it still applies categorically to anyone convicted of a sexually-oriented offense against a minor. For example, the named plaintiffs in *Miller* included sex offenders convicted of statutory rape in a consensual setting, sex offenders whose crimes in other states were not criminal in Iowa, sex offenders convicted of possessing inappropriate pictures of minors, and a sex offender who exposed himself in the presence of a teenager.[231] Each was subject to the Iowa residency restriction even though many of their crimes did not involve young children.

Judge Kuehn's dissent in *Leroy* zealously challenged the over-inclusiveness and under-inclusiveness of the Illinois residency restriction. He began by noting that the statute permits some sex offenders to stay in their homes, even if they are located within 500 feet of where children gather, as long as the homes had been purchased prior to the effective date of the statute.[232] If sex offenders living close to schools threaten public safety, why would a statute whose purpose is to protect public safety allow some sex offenders to remain living near schools? Further, the statute treats all offenders alike, with no consideration of future dangerousness or past crimes.[233] Judge Kuehn found it odd that a sex offender who was convicted of statutory rape eighteen years ago for having had sex with his seventeen-year-old girlfriend and who had not re-offended since then should be forced to move from a lifelong residence located 499 feet from a child daycare.[234]

230. IOWA CODE ANN. § 692A.2A(1) (West 2005). Each state statute varies in specifics, but for the purposes of this Note, "sex offender" is used in the same broad sense as it is used in the Ohio statute. That is, "sex offender" includes any non-minor convicted of a sexually-oriented offense, regardless of the age of the victim, the characteristics of the crime, the offender's prior record, or propensity to re-offend.

231. Doe v. Miller, 298 F. Supp. 2d 844, 853-58 (S.D. Iowa 2004).

232. People v. Leroy, 828 N.E.2d 769, 785 (Ill. App. Ct. 2005) (Kuehn, J., dissenting).

233. *Id.* at 791.

234. *See id.* at 792-93. Judge Kuehn ends his hypothetical there, but it could be extended. The sex offender could be in his eighties and in a wheelchair, and his home, although 499 feet from a daycare center, could be across a river from that daycare center, requiring him to travel several miles to cross a bridge before actually getting to the daycare center. The fact patterns are numerous but the point remains that residency restrictions are too broad to constitute good policy.

Consider the case of an Ohio sex offender ordered to vacate his home pursuant to Ohio's 1000-foot residency restriction. The ex-offender's house, in which he had lived for fourteen years, sat farther than 1000 feet from the nearest school. However, measured from his backyard, his property was only 983 feet from the school.[235] Thus, he, his wife, and his two sons had to vacate the home, even though the offender's crimes, committed in 1995 and 1999, were against relatives.[236] Meanwhile, a recently released pedophile with a history of molesting young children could live in a house located 1,001 feet from that same daycare center.[237] And under a residency restriction statute, an evicted sex offender remains free to visit the home from which he has been evicted, and thereby remain close by the school in the morning when children arrive and in the afternoon when they leave.[238]

Now consider Patrick Leroy himself. He was convicted of sexual assault in 1988 for raping a nineteen-year old girl and served seven years in prison. Upon release from prison, he returned to the home in which he was raised to live with his mother, who was his only family member and needed care in her old age. In 2005, he was convicted of violating the Illinois residency restriction because his mother's home was located too close to an elementary school. Mr. Leroy's victim was nineteen at the time of the offense; he had committed the offense eighteen years ago, and there was no evidence that he had a propensity to re-offend. Nevertheless, he was prohibited for life from ever living in his mother's home again.[239]

This over-inclusiveness can render residency restrictions counterproductive: the additional hardships a sex offender faces once his support group is taken away may actually increase the like-

235. Tony Cook, *Sex Offender Must Vacate His Home*, CINCINNATI POST, Sept. 29, 2005, at A1.

236. *Id.* Nor would the more judicious exercise of prosecutorial discretion provide a satisfactory solution to this problem. The lingering possibility that one could be evicted provides a strong disincentive to invest in a home within a given residency restriction.

237. *Cf. Leroy*, 828 N.E.2d at 769 (Kuehn, J., dissenting).

238. *Cf. id.*

239. *See id.* at 785. After serving eight months for living too close to a school, Leroy was released from prison on October 7, 2005, because the Illinois statute applies only to sex offenders whose victims were under eighteen at the time of the offense. Leroy's victim was nineteen. *See* Doug Moore, *Case Casts Doubt on Registration of Sex Offenders*, ST. LOUIS POST-DISPATCH, Oct. 10, 2005, at B1. Patrick Leroy, however, is the exception. Alter the victim's age slightly or the state in which the crime was committed, and Leroy's case becomes representative of cases that could potentially arise nationwide.

lihood of re-offense.[240] Research has shown that a "lack of positive social support and depress[ion]" increase the likelihood of recidivism,[241] yet a 2005 study found that nearly half of sex offenders surveyed in Florida were prevented from living with their families due to Florida's residency restriction.[242] Because residency restrictions often leave sex offenders homeless, they become more difficult to monitor. In Iowa, for example, almost three times as many registered sex offenders are now missing than before the restriction took effect in 2002.[243]

Finally, a study of sex offenders released from prison in 1994 determined that only 2.2% of the 9,691 offenders observed were rearrested for a sex crime against a child within three years of their release.[244] Residency restrictions assume that all convicted sex offenders pose an equal risk of recidivism. A study in 2000 found that of juveniles who were victims of a sexual assault, only 7% were victimized by a stranger; the remaining 93% were either related to or acquainted with their assailant.[245] But residency restrictions, by their very nature, target strangers. In sum, residency restrictions are highly over-inclusive, and yet are also very under-inclusive in achieving their purpose of protecting children.

This over-inclusiveness and under-inclusiveness is especially problematic in the arguably punitive context of sex offender residency restrictions. While legislatures are free to make strict cate-

240. Doe v. Miller, 298 F. Supp. 2d 844, 864-65 (S.D. Iowa 2004). *See* Rita Price & Tom Sheehan, *Sex-Offender Zoning Faulted*, COLUMBUS DISPATCH, Oct. 16, 2005, at C1 (quoting Jill Levenson, a sexual-violence researcher, "No one has found any connection between proximity to schools and recidivism or sex offending."). Levenson stated that communities with residency restrictions may be more at risk because they can get lulled into a "false sense of security" and prevent sex offenders from living with their support groups. *Id.*

241. Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 175 (2005).

242. *Id.* at 172.

243. Davey, *supra* note 13, at A1. *See* Brett Jackson Coppage, *Balancing Community Interests and Offender Rights: The Validity of Covenants Restricting Sex Offenders From Residing in a Neighborhood*, 38 URB. LAW. 309, 324-25 (2006) ("[W]hen offenders are pushed outside of many of the more populated areas, 'they lose access to jobs and treatment, and it makes them harder to track;' which, ironically, defeats one of the reasons offender registrations were created in the first place." (footnote omitted)).

244. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, 30 (2003).

245. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS, 10 (2000).

gorical judgments in the regulatory context,[246] such judgments are inappropriate in a criminal context founded on notions of individualized justice.[247] It is true that legislatures have broad discretion to create sentencing schemes, subject to a fairly undemanding Eighth Amendment requirement that the sentence be proportional to the crime committed.[248] Still, judges generally remain vested with sentencing discretion, to be guided by statutory minimums and maximums.[249] Even "Three Strikes" laws, which enhance sentences for repeat offenders, retain some judicial discretion.[250] "'The purpose of the trial judge's sentencing discretion' to downgrade certain felonies is to 'impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require or would be adversely affected by, incarceration in a state prison as a felon.'"[251]

As Professor Rachel Barkow has noted, criminal defendants are not politically powerful, whereas "the voices in favor of broader laws and longer punishments are powerful."[252] The separation of powers doctrine is designed to overcome this legislative bias toward more severe punishments.[253] Because they apply categorically,

246. *See, e.g.*, Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003).

247. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 311-12 (1987) ("[T]he capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.'") (citations omitted).

248. Lockyer v. Andrade, 538 U.S. 63, 76 (2003). Justice Kennedy described the Eighth Amendment proportionality principle as not requiring "strict proportionality between crime and sentence," but forbidding "only extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (internal citations omitted). Kennedy's description of the proportionality principle was adopted by the majority of the Court in *Ewing v. California*, 538 U.S. 11, 23-24 (2003). Although a residency restriction, once deemed punitive, would likely not constitute a per se cruel and unusual punishment, the problem of the Legislative Branch removing sentencing discretion from the Judicial Branch remains.

249. *See* Mistretta v. United States, 488 U.S. 361, 396 (1989) ("[S]ubstantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch.").

250. For example, under California's "Three Strikes" scheme upheld in *Ewing*, a sentencing court could still refrain from imposing an enhanced "Three Strikes" sentence in two ways. First, it could reduce to misdemeanors past felonies that could have originally been charged as misdemeanors, because misdemeanors do not trigger the "Three Strikes" law. Second, it could vacate allegations associated with prior felony convictions, based on the nature of the defendant's crimes and character. *Ewing*, 538 U.S. at 17.

251. *Id.* at 29 (citation omitted).

252. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1030 (2006).

253. *Id.* at 1030-31.

however, punitive residency restrictions foreclose the check of judicial discretion that principles of separation of powers require.[254] The categorical, over-inclusive application of arguably punitive residency restrictions counsels against their continued use by legislatures.

C. The Lack of a Limiting Principle

The decisions in *Miller*, *Seering*, and *Leroy* have a tremendous impact on state legislatures and city councils. Armed with the approval of the courts, local governments are free to pass ordinances further restricting sex offender housing options, a phenomenon that has already begun.[255] The Township Committee of Manalapan, New Jersey recently approved an ordinance prohibiting sex offenders from living within 2,500 feet of schools, day care centers, day camps, parks, playgrounds, theaters, bowling alleys, sports fields, exercise facilities, convenience stores, and public libraries.[256] The City Council of Hialeah, Florida passed an ordinance restricting sex offenders from living within 2000 feet of schools, parks, day care centers, and school bus stops.[257] Extending the distance even further, the City Council of Orange Beach, Alabama has approved an ordinance that prohibits sex offenders from living or working within four miles of schools, day cares, parks, and public beaches.[258] An Issaquah, Washington ordinance requires that sex offenders live only in commercially and industrially zoned neigh-

254. *Cf. id.* at 1043 ("[T]he danger of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a sufficient judicial check . . . the key problem with these laws is their *mandatory* nature . . . ." (emphasis in original)).

255. Referring to two local ordinances in Iowa that prohibit sex offenders from living within 2000 feet of public parks, public swimming pools, public libraries, and multi-use recreational trails,

> Local municipalities have reacted to *Doe v. Miller* by utilizing the case as authority to support the enactment of ordinances that not only restrict residency options for sex offenders, but also extend the restricted areas to other facilities such as public pools or libraries. The ordinances provide a purpose statement outlining the objective of protecting the health and safety of children including a reference to *Doe v. Miller* as precedent for the enactment.

Megan McCurdy, Case Note, Doe v. Miller, 38 URB. LAW. 360, 361 (2006).

256. TOWNSHIP OF MANALAPAN, N.J., MUN. CODE § 187-01 (2005), *available at* http://www.twp.manalapan.nj.us (follow "Code Book" hyperlink).

257. Rebecca Dellagloria, *Law Restricting Sex Offenders Passes*, MIAMI HERALD, Aug. 28, 2005 (noting, however, that 2,500 feet was the standard distance for most other municipalities).

258. Dezember, *supra* note 203.

borhoods, in addition to 1000 feet from schools or daycares.[259] Finally, in response to the Iowa residency restriction upheld by *Miller* in 2005, and in anticipation of sex offender migration, South Sioux City, Nebraska, located just across the border from Iowa, adopted an ordinance barring sex offenders from living within 2000 feet of a school, child care center, or library.[260]

These statutes vividly illustrate the problem created by the failure of the *Miller*, *Seering*, and *Leroy* courts to provide a limiting principle. The Iowa residency restriction "has set off a law-making race in the cities and towns of Iowa, with each trying to be more restrictive than the next . . . ."[261] Because the courts have held that residency restrictions do not amount to banishment since they restrict only where sex offenders may live, and not where they may travel to and from, legislatures and city councils may further extend the distance encompassed by residency restrictions in order to better appease their constituents. The restrictions have extended to distances of up to four miles, have applied to virtually any place children might congregate, and have triggered a domino effect causing neighboring towns to pass their own restrictions to protect against sex offender migration.[262] With no limiting principle, the possibilities are endless.[263]

With this proliferation of sex offender residency restrictions, sex offenders are being forced out of towns and cities throughout the country.[264] Once pushed out, sex offenders need somewhere

259. Pamela A. MacLean, *Suit Tests Power of Sex Offender Bans: Six Cities Want to Copy Law; They Wait for Result*, 28 NAT'L L.J. 6 (2005) ("[A]t least six nearby cities say they want to copy Issaquah's ordinance.").

260. Santiago, *supra* note 224.

261. Davey, *supra* note 13, at A1.

262. *See, e.g.*, ACLU of N.M. v. City of Albuquerque, 137 P.3d 1215, 1233 (N.M. Ct. App. 2006) (Robinson, J., specially concurring) (suggesting that smaller communities could pass their own residency restrictions to counteract the problem of sex offender migration, "so that the sex offender would find no advantage in moving to a smaller town or city").

263. Hillsborough County, Florida developed yet another approach to sex offender residency restrictions. Local officials there banned sex offenders from public hurricane shelters. *See* Robert F. Worth, *Exiling Sex Offenders From Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1.

264. The Orange Beach police chief summed up the effect of its ordinance: "It'd be real difficult for [sex offenders] to establish residency in Orange Beach." Dezember, *supra* note 203. Hialeah's City Council Vice President said that the rationale behind its ordinance was to prevent Hialeah from becoming "a haven for offenders who would be all but pushed out of many communities in South Florida." Dellagloria, *supra* note 257. The sheriff of Sioux City acknowledged that "[w]hen you take 2000 feet in each direction from a school, you just about take up the whole community. Even in Sioux City, finding anything beyond 2000 feet is a

else to live. More restrictions are likely to be enacted in the future, given that the statutes are often knee-jerk reactions to public outrage following a highly publicized sex offense. For example, the federal sex offender registration law and AMBER Alerts system were passed in response to offenses against children.[265] The Georgia residency restriction was introduced in February 2003 and became law by April of the same year.[266] Elected legislators have incentives to respond in this fashion. As one commentator has argued, "[S]uch platforms and campaigns easily rally votes . . . . As no elected legislator wishes to be viewed as sympathetic to sex offenders, such legislation is swiftly ratified . . . ."[267]

Entire cities, like Orange Beach, Alabama for instance, may now become off-limits to sex offenders to live in due to a complete lack of legal housing. As the number of cities prohibited to sex offenders accumulates, this in turn could cause entire states to become off-limits, which in turn could cause the entire country, piece by piece, to eventually become off-limits for sex offenders. By adopting a per se view of banishment, glossing over the excessiveness argument, and not seriously considering the practical effects of residency restrictions, the courts have created this possibility and have failed to provide a limiting principle to prevent it from obtaining. In such an extreme yet logically possible scenario, the courts would then be faced with the following dilemma: either maintain that even though sex offenders cannot live anywhere in the United States, they have not been banished because they can still travel through the country or else reverse course and adopt an effects-based approach to banishment. If the latter option is adopted, such that prohibiting someone from living *anywhere* in a city, state, or country is banishment and thus punitive, why is it not punishment to prohibit someone from living *almost anywhere*, a situation that has already obtained in Iowa? The courts have yet to provide an answer.

problem." Santiago, *supra* note 224. An ACLU attorney stated that in Issaquah, "[l]ess than 5% of the city's housing is within the permitted living area." MacLean, *supra* note 259.

265. Henderson, *supra* note 21, at 800 ("'[E]motionally charged reactions to sex crimes often lead to legislation that is not driven by data or science but rather by outrage and fear.'") (quoting Jill Levenson, Editorial, *Isolation Also a Risk*, S. FLA. SUN-SENTINEL, July 5, 2004, *available at* 2004 WL 82606854).

266. *See* Samantha Imber, *Sexual Offenses: Prohibit Sexual Predators from Residing Within Proximity of Schools or Areas Where Minors Congregate*, 20 GA. ST. U. L. REV. 100, 102 (2003).

267. Henderson, *supra* note 21, at 802.

These negative policy implications associated with applying residency restrictions prospectively, coupled with the ex post facto problems associated with applying them retroactively, suggest that residency restrictions should be abandoned altogether. This Note concludes by proposing a less restrictive, yet more effective alternative through which legislatures can address the risk of sex offender recidivism.

V.
A LESS RESTRICTIVE, MORE EFFECTIVE ALTERNATIVE

"There is no single 'profile' that accurately describes or accounts for all child molesters,"[268] and sex offenders as a whole comprise a much larger and more diverse group than "child molesters." Nevertheless, blanket residency restrictions imposed on all sex offenders for life treat all sex offenders the same, even though a less restrictive and more effective alternative is available. Residency restrictions, if used at all, should be imposed only on a case-by-case basis via supervised release programs, such as probation or parole.

Parole and probation officers have the luxury of knowing unique details about each offender's case—knowledge a legislature certainly does not have. So parole officers, such as Mr. Allison who testified in *Doe v. Miller*, are much more institutionally competent than legislatures to make decisions about the dangers posed by individual sex offenders. Under this proposal, sex offenders not deemed likely to recidivate would not be subjected to residency restrictions that unnecessarily interfered with their choice of housing. Still, those sex offenders who are deemed to pose a continuing threat to children can be monitored and restricted in ways each offender's parole officer deems necessary. Thus, separation of powers principles support giving probation and parole officers the discretion to impose restrictions on individual sex offenders, rather than permitting blanket legislative judgments based on limited information.[269]

Certainly there are problems with parole officer discretion, but these problems can also be solved on a case-by-case basis. The problem of a parole officer abusing his or her discretion, for example, would need to be challenged by the individual parolee. Still,

268. Research Issues, *supra* note 217, at v.

269. *See also* Research Issues, *supra* note 217, at 8-9. This report argues that any community-based program for child sex offenders must include "[c]oordination by highly trained and well-supervised parole agents and probation officers who carry small caseloads" and mandatory sex offender treatment. *Id.*

these problems are much less severe than those posed by categorical residency restrictions. Parole officers remain the most institutionally competent actors to make residency restriction determinations and should be trained with this in mind.

One immediate objection to this proposal is that once free from supervised release sex offenders would be unrestricted. However, that objection is more properly targeted at the criminal justice system itself. Offenders are freed from prison and supervised release when they have completed the punishment to which they were sentenced. At that point, the punishment ends. If a given offender presents too much of a danger of recidivism, perhaps he or she should not be out of prison in the first place, or perhaps the prison should focus more on rehabilitation. Alternatively, perhaps his or her supervised release term should have been longer.

This solution would also create an incentive for sex offenders to get treatment. "Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism."[270] For instance, in 1988, the rate of recidivism of sex offenders who had undergone treatment was estimated to be at about 15%, while those who had gone untreated recidivated at a rate up to 80%.[271] Therapy and medication have been identified as "the most effective intervention" and "ha[ve] reduced recidivism among child molesters."[272] While categorical residency restrictions provide no incentive to undergo such treatment, parole officers deciding whether to impose restrictions on a case-by-case basis could take treatment and rehabilitation into account, thus providing sex offenders with incentives to get treatment.

Categorical residency restrictions are also in tension with the notion that ex-offenders can serve the time to which they are sentenced, via prison, parole, or probation, rehabilitate themselves as is (ideally) the prerogative of the criminal justice system, and then

270. McKune v. Lile, 536 U.S. 24, 33 (2002).

271. *Id.* (citing U.S. DEPT. OF JUSTICE, NAT. INST. OF CORR., A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER xiii (1988)). The practitioner's guide notes that even if these figures are exaggerated, they demonstrate the significant difference in recidivism rates between treated and untreated individuals. *Id.*

272. Research Issues, *supra* note 217, at vi. More recent studies have also acknowledged the positive effect sex offender treatment can have on recidivism. *See, e.g.*, Friedrich Losel & Martin Schmucker, *The Effectiveness of Treatment For Sexual Offenders: A Comprehensive Meta-Analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 117, 134-38 (2005) ("Overall, there is evidence for a positive effect of sexual offender treatment. Cognitive-behavioral and hormonal treatment are most promising.").

continue on with the rest of their lives, having served their time for the crime they committed. Permitting parole and probation officers to impose residency restrictions, on the other hand, furthers the interests of the criminal justice system in rehabilitating and reintegrating ex-offenders into society.[273] This solution overcomes the problem of over-inclusiveness by allowing residency restrictions to be tailored to the unique needs of individual sex offenders, such as Patrick Leroy. It also avoids the problem of counter-productiveness associated with categorical restrictions, which force sex offenders into less than ideal living situations, such as homelessness or the inability to live with family members.[274] Yet this solution still furthers the very important state interest in protecting child safety by permitting residency restrictions to be placed on those sex offenders whose case-specific characteristics, such as the type of past victims and the offender's lack of treatment, make them the most likely to recidivate.

Finally, this alternative avoids the problem of banishment illustrated above. Whereas the practical effects of residency restrictions on housing options can vary greatly from place to place, depending on how many schools are present in the area and how far the statute requires sex offenders to live from a given area in which children congregate, parole and probation officers are able to consider these circumstances on a case-by-case basis. Just as the legislatures in Minnesota and Colorado have concluded, sex offender residency restrictions rely on an unsupported generalization that the proximity between a sex offender's home and a school affects the likelihood of recidivism.[275] Thus, imposing residency restrictions on a case-by-case basis would avoid banishing people without compromising public safety.

Judge Lay of the Eighth Circuit once wrote,

273. *See* S. REP. NO. 98-225, at 124 (1983) (stating that the goal of supervised release is to "ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release").

274. *See* Research Issues, *supra* note 217, at 9 (referring to community notification of sex offenders' addresses, "the general notification of laypersons outside the criminal justice system may increase, rather than decrease, the risk of recidivism by placing extreme pressures on the offender; examples of stressors include threats of bodily harm, termination of employment, on-the-job harassment, and forced instability of residence").

275. *See* Minnesota Study, *supra* note 9, at 9; Colorado Study, *supra* note 10, at 4.

> It is sad 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison; it cares even less for his future when he is released from prison. He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime.[276]

Courts, senators, and congressmen should heed this call and abandon the trend toward sex offender residency restrictions[277] in favor of case-by-case determinations by parole and probation officers.[278] This way, sex offenders will truly be set on a path bound for a better life.

276. Morrissey v. Brewer, 443 F.2d 942, 952-53 (8th Cir. 1971) (Lay, J., dissenting) (internal citations omitted), *rev'd*, 408 U.S. 471 (1972).

277. The Iowa County Attorneys Association has released a statement that advocates replacing the Iowa residency restriction with more effective measures to control recidivism. The arguments presented include the following: there is no correlation between residence and recidivism; most sex crimes against children are committed by relatives; restrictions cause sex offenders to become homeless and unable to be monitored; sex offenders who pose no risk of re-offense are affected for life; options for affordable housing and work are very limited; treatment is compromised; and overall, enforcement is very difficult. IOWA COUNTY ATTORNEYS ASSOC., STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA 1-4 (Jan. 2006).

278. For a discussion of other potential solutions to the problem of sex offender recidivism, including better use of specialized sex offender treatment programs and halfway houses, see Henderson, *supra* note 21, at 823-40. Once residency restrictions are abandoned for case-by-case determinations by parole officers, some of these alternatives might supplement a sex offender's successful reintegration into society.

Major Provisions of the State Sex Offender Residency Restriction Statutes

State	*Statute*	*Who is affected*	*Distance of restricted zone*	*Places triggering the restricted zone*	*Grandfather exception if: (a) residence predated statute or (b) a school moved after residence was established*
AL	ALA. CODE § 15-20-26 (2005)	Adult criminal sex offenders	2000 feet	Schools, child care facilities	(b)
AR	ARK. CODE ANN. § 5-14-128 (2006)	Level 3 or 4 sex offenders	2000 feet	Elementary, secondary, and daycare schools	(a) and (b)
CA	CAL. PENAL CODE § 3003 (2006)	Child sex offenders on parole	1/4—1/2 mile	Schools	
FL	FLA. STAT. § 947.1405 (2005)	Child sex offenders on parole	1000 feet	Schools, day cares, parks, playgrounds, bus stops, places children regularly congregate	
GA	GA. CODE ANN. § 42-1-13 (2005)	Sex offenders and child-victim offenders subject to Georgia's registration requirement	1000 feet	Child care facilities, schools, parks, recreation facilities, playgrounds, skating rinks, neighbor-hood centers, gymnasiums	
IL	720 ILL. COMP. STAT. 5/11-9.3 (2005)	Child sex offenders	500 feet	School buildings	(a)
IN	IND. CODE ANN. § 11-13-3-4 (2005)	Sex offenders on parole	1000 feet	School property	
IA	IOWA CODE § 692A.2A (2005)	Child-victim offenders	2000 feet	Elementary and secondary schools, child care facilities	(a) and (b)

KY	KY. REV. STAT. ANN. § 17.545 (2006)	Registering sex offenders	1000 feet	High, middle, elementary, pre, and daycare schools, playgrounds	
LA	LA. REV. STAT. ANN. § 14:91.1 (2005)	Sexually violent predators	1000 feet	Elementary, secondary, and daycare schools, playgrounds, youth centers, swimming pools, video arcades	
MI	MICH. COMP. LAWS § 28.735 (2005)	Child sex offenders	1000 feet	Schools	(a)
MO	MO. REV. STAT. § 566.147 (2005)	Sex offenders	1000 feet	Schools, child care facilities	(b)
OH	OHIO REV. CODE ANN. § 2950.031 (2006)	Sexually oriented and child-victim offenders	1000 feet	Schools	
OK	OKLA. STAT. tit. 57, § 590 (2005)	Registering sex offenders	2000 feet	Schools, educational institutions	Exempted if home was owned prior to conviction
OR	OR. REV. STAT. § 144.642 (2003)	Sex offenders on supervised release	Parole board's discretion	Locations where children are the primary users	
TN	TENN. CODE ANN. § 40-39-211 (2005)	Child sex offenders	1000 feet	Schools, day cares, child care facilities	(b)