OUT OF SIGHT, OUT OF MIND: STATE ATTEMPTS TO BANISH SEX OFFENDERS

> We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. . . . 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.
>
> —*Morrissey v. Brewer*, 443 F.2d 942, 953 (8th Cir. 1971) (en banc) (Lay, J., dissenting) (footnote omitted).

TABLE OF CONTENTS

I. INTRODUCTION

The increased fear of sexual predators in recent decades has led to scores of legislatures attempting to make communities safer and bring ill repute and disdain to those who have committed sexual crimes. "While sex offenses are arguably less egregious than other crimes, strong public sentiment against sex offenders remains."[1] Well-intentioned legislatures, responding to public outcry, have sought to confront the serious social issue of sexual crimes and recidivism. Based on statistics, it is difficult to argue with those leading the push for this legislation. In 1992, more than 17,000 girls under age twelve were raped.[2] Furthermore, not only has it been asserted that child sex offenders have increased rates of recidivism, but also that they have longer intervals of time between offenses, thereby leading others to believe that they have been rehabilitated.[3] No matter how persuasive these facts and how well-intentioned the legislation designed to prevent them, all laws must fulfill the requisites of constitutionality. Ultimately it is the judiciary's role in these cases not to make policy, but instead to provide an impartial review of those legislative actions based upon sound constitutional principles.

The influx of legislative enactments began with sex offender registries to help law enforcement keep tabs on sex offenders because of their perceived heightened recidivism rate and for the purposes of expediting and enhancing investigation and apprehension efforts.[4] These programs

1. Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 254 (1995).

2. Charles J. Dlabik, Note, *Convicted Sex Offenders: Where Do You Live? Are We Entitled to Know? A Year's Retrospective of Ex Post Facto Challenges to Sex Offender Community Notification Laws*, 22 NOVA L. REV. 585, 602 (1998).

3. *Id.* at 602-03 (citation omitted).

4. *See* Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1216 (1998) (finding that registries "are most often considered a valuable tool for

quickly evolved into community notification statutes, which allow local law enforcement to inform residents of the identity and location of sex offenders in their neighborhood.[5] The notification statutes gave members of the community hope that "'a sex offender who is [coming] out after serving his time might rethink as to where he is going to relocate,'" and possibly move out of town or out of the state.[6] Fearing that these measures may work only against those offenders deterred by community oversight, states began enacting civil commitment statutes to detain those offenders who, despite having served their sentence, have a high likelihood of recidivism.[7]

Despite all of these governmental efforts to safeguard communities, state legislatures have begun to explore a new area of sex offender control. Some commentators have started to call for alternative methods of dealing with sex offenders, including restricting where they may live even after

---

law enforcement investigations, allowing investigators to quickly identify potential suspects when a sex offense is committed in a particular area"). There is increased fear of sex offenders based on the perception of offenders' high rates of recidivism; however, recent analysis has put into doubt many of the earlier beliefs about sex offender recidivism. *See* Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. MARSHALL L. REV. 73, 99-103 (2003) (examining the problems with early research indicating high rates of recidivism among sex offenders). Even then Attorney General Janet Reno mistakenly cited recidivism rates as high as 40-70%. *Id.* at 103. However, "there is no empirical data that demonstrates that sex offenders have consistently higher or lower rates of recidivism than do other criminal offenders; '[a]t the very least, the data is unclear.'" *Id.* at 102 (quoting Elizabeth P. Bruns, *Cruel and Unusual? Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 173-74 (1995)). Others argue that the data is clear and that when sex offenders' recidivism rates are compared with other criminal offenders, sex offenders' recidivism rates are lower. *See* Eileen Fry-Bowers, Note, *Controversy and Consequence in California: Choosing Between Children and the Constitution*, 25 WHITTIER L. REV. 889, 909 (2004). Fry-Bowers posits:

> [Needless to say, a]lthough one episode of sexual assault is intolerable, it is noteworthy that recidivism rates for sex offenders are lower, in comparison to the general criminal population, a fact that clearly undermines legislative assertions that public notification is "necessary and compelling" because sex offenders have a high risk of re-offending.

Id. at 909-10 (footnote omitted).

5. *E.g.*, ALA. CODE § 15-20-25 (Supp. 2004).

6. Dlabik, *supra* note 2, at 604 (alteration in original) (quoting Doe v. Pataki, 940 F. Supp. 603, 621 (S.D.N.Y. 1996)).

7. *See, e.g.*, KAN. STAT. ANN. § 59-29a01 (Supp. 2003) ("[T]he legislature determines that a separate involuntary civil commitment process . . . is necessary" for "sexually violent predators" "who are likely to engage in repeat acts of sexual violence . . . .").

their sentence has been served[8] because "people feel vulnerable knowing that [a released] sex offender [is] free to move in next door."[9] This possibility, however, may now be less of a concern.

States have begun to enact laws with restrictions ranging from where a released sex offender may live or travel to with whom they may live.[10] Hopefully, these attempts will not mark an entrance into an era of human zoning regulations.[11] While states attempt to force sex offenders to live elsewhere with the intent of making their communities safer, inevitably the new community where the offenders will be living is forced to deal with those problems, which it may be ill-equipped to do.

During the 2002 legislative session, the Iowa Legislature responded to the public's safety concerns by enacting sex offender residency restrictions, adding one more weapon to their arsenal to combat sex criminals.[12] The law explicitly bans sex offenders whose victims were minors from living within a two thousand foot radius of a school or child care facility,[13] which creates zones extending from the property of the school or child care facility over three-quarters of a mile in width. Despite the law's infancy, its effects have already been felt by those who are attempting to rebuild their lives after serving their sentences.[14] Similar to notification provisions enacted by other states, residency restrictions have made finding employment and a new residence extremely difficult.[15] A "close

8. *Cf.* James A. Billings & Crystal L. Bulges, Comment, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?*, 52 ME. L. REV. 175, 256 (2000) (asserting that "'sex offenders should not be living near potential victims'") (quoting Mike Lawlor, *Creating Effective Sex Offender Legislation Requires Collaboration Between Lawmakers and Justice Agencies*, *in* NAT'L CONF. ON SEX OFFENDER REGISTRIES 89-90 (U.S. Dep't of Justice ed., 1998)).

9. Jerusalem, *supra* note 1, at 231.

10. *See infra* note 41 (listing the various state approaches to living and movement restrictions).

11. The State of Iowa, in its defense of the Iowa residency restrictions, has likened the restrictions to zoning, an obvious purview of state and local governments. Brief for Appellant at 14, Doe v. Miller, 405 F.3d 700 (8th Cir. Apr. 29, 2005) (No. 04-1568), *available at* http://www.ca8.uscourts.gov/briefs/04/05/appellant/041568_1br.pdf. United States District Court Judge Robert Pratt denounced such a comparison at the district court level. Doe v. Miller, 298 F. Supp. 2d 844, 873 (S.D. Iowa 2004) (stating that "those who might violate a zoning regulation are not subject to a year in prison for their misdeeds"), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

12. 2002 Iowa Acts ch. 1157 (codified at IOWA CODE § 692A.2A (2005)).

13. IOWA CODE § 692A.2A(2).

14. *See infra* notes 387-93 and accompanying text.

15. *See* Dlabik, *supra* note 2, at 610 (describing the difficulty of reintegration

connection between residence and [employment] means that limiting residential options concurrently limits job options."[16] Due to the characteristics and layout of Iowa's towns and cities, these restrictions have made it virtually impossible for some individuals to find housing in communities throughout the state.[17] This difficulty is compounded by the fact that it is not uncommon for landlords to evict sex offenders, effectively creating homelessness if homeless shelters are within the new prohibited living zones.[18] If sex offenders are forced, because of the residency restrictions, to live in unpopulated rural areas, it is likely that they will have difficulty obtaining and maintaining employment because many will not have transportation following their release from prison.[19] While sympathy for these individuals among the general public is hard to come by, some individuals adversely affected by this law have challenged the law's constitutionality.[20]

Part II of this Note demonstrates how and why the body of law regarding sex offenders has thrived in recent decades. Part III shows how some states across the country have begun to further restrain convicted sex offenders through residency and other restrictions. Part IV specifically sets out the State of Iowa's approach to residency restrictions. Part V analyzes several of the specific constitutional claims being asserted against these restrictions. Part VI looks to the practical and policy implications of the residency restrictions. Before Part VIII concludes this Note, Part VII addresses where states can and should go from here to both increase community safety and eliminate the problems caused by residency restrictions.

The day before this Note was to be sent to the publisher a three judge panel of the Eighth Circuit Court of Appeals issued an opinion in the case

---

for sex offenders into communities with notification provisions).

16. MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 2-3 (2003), *available at* http://www.doc.state.mn.us/publications/legislativereports/default.htm [hereinafter MINN. LEGIS. REPORT].

17. *See infra* notes 62-68 and accompanying text.

18. Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL'Y 569, 580-81 (1995); *see also infra* note 70-71 and accompanying text.

19. *See* MINN. LEGIS. REPORT, *supra* note 16, at 2-3.

20. In Iowa alone there are two ongoing challenges, one in federal and one in state court. Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005); State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894 (Iowa Dist. Ct. Apr. 30, 2003).

of *Doe v. Miller*[21] upholding the constitutionality of the Iowa residency restrictions.[22] To incorporate the decision's holdings, short subsections have been added to several portions of this Note. Immediately following the decision, the plaintiffs in *Doe v. Miller* expressed their intention to seek an en banc review of the case.[23]

II. PROGRESSION OF LEGISLATION

The "not in my backyard" mentality of the American public has marked itself in many areas, most recently in the treatment and release of convicted sex offenders.[24] Victims' advocacy groups and the media have perpetuated a negative image and fear of sex offenders through news accounts and fictionalized entertainment,[25] which in some circumstances is well deserved. This fear and resentment has manifested itself in the actions of both state legislatures[26] and the United States Congress.[27]

These laws have satisfied "a public demand to be stricter on sex offenders" while at the same time establishing "scapegoats for politicians to claim they are protecting our children."[28] Legislation has come in the forms of mandatory registration of sex offenders, community notification,

---

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

22. *Id.* at 704-05.

23. Lee Rood, *Judges OK Limits on Sex Offender Dwellings*, DES MOINES REG., Apr. 30, 2005, at A1.

24. *See generally* Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635 (1999) (analyzing the constitutionality of community notice statutes).

25. Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 569-70 (2002).

26. *E.g.*, ALA. CODE § 15-20-26(a) (Supp. 2004) (restricting sex offenders from residing or accepting employment within 2000 feet of a school or day care facility); *see also* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 881-82 (2000) (describing how fear has driven state response in this area).

27. *See* 42 U.S.C. § 14071(a)(1) (2000) (requiring the Attorney General of the United States to establish guidelines for state programs requiring persons convicted of crimes against minors or crimes of sexual violence to register a current address with state law enforcement officials). Congress amended the federal law in 1996 to provide that the registry information be disclosed for any permissible state law purpose and that information shall be released when necessary to protect the public. Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e)).

28. Van Duyn, *supra* note 24, at 658.

and civil commitment statutes.[29] Both registration and community notification statutes "are designed to manage the risk that sex offenders pose" to the community.[30]

State legislatures' response to public outcry resulted in laws primarily designed with stranger offenders in mind, despite evidence that individuals known by the victim were more likely to be the offenders of concern.[31] Specifically, "[r]elatives, friends, baby-sitters, persons in positions of authority over [a] child, or persons who supervise children are more likely than strangers to commit a sexual assault."[32] Of those children who are sexually abused, it is estimated that eighty percent of girls and sixty percent of boys were abused by relatives or friends.[33] Moreover, one of the inherent flaws in the rush to enact legislation is that these laws have merged all sex offenders into a single category with little chance for individualization, in effect causing "wholesale condemnation."[34] This Note will demonstrate how this flaw has carried over into the new era of sex offender legislation.

III. NEW PUNISHMENT?

It is no longer a concern that a theoretical "'badge of infamy'" will attach to a person subject to a given state law.[35] Instead, it is outright banishment from areas of the community that attaches to certain sex offenders following their convictions, and in most cases, banishment for life. States around the country have started a movement to bar certain

29. *See generally id.* at 643-52 (discussing the range of sex offender regulation laws in various states).

30. Demleitner, *supra* note 25, at 571.

31. Richard Willing, *Albuquerque's Targeting of Sex Offenders Challenged*, USA TODAY, May 12, 2003, at 4A. The Medical Center of the University of South Carolina conducted a "Rape in America" study that found that only 22% of victims were raped by a stranger. *See* Kim English, *The Containment Approach to Managing Sex Offenders*, 34 SETON HALL L. REV. 1255, 1255 (2004) (citing NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992)).

32. CTR. FOR SEX OFFENDER MGMT., COMMUNITY NOTIFICATION AND EDUCATION 14 (Apr. 2001), http://www.csom.org/train/educating/readings/notification_edu.pdf.

33. *See* Billings & Bulges, *supra* note 8, at 180.

34. Demleitner, *supra* note 25, at 570.

35. Doe v. Pryor, 61 F. Supp. 2d 1224, 1230 (M.D. Ala. 1999) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

released sex offenders from living near or visiting schools,[36] playgrounds,[37] and other areas where children congregate.[38] Much of the legislation punishes otherwise innocent conduct in the absence of culpable intent.[39] This effort on the part of states is thought to be necessary because of public sentiment and disturbing incidents—such as a situation in Milwaukee, Wisconsin, where a county judge was forced to order state officials to move a convicted child molester from a house where he was placed, which stood less than one hundred feet from a shelter for sexually abused children.[40]

State laws restricting where sex offenders may live are new to the legal landscape and somewhat unique in other jurisdictions. Currently, twelve states other than Iowa have enacted some form of residency restriction applicable to sex offenders.[41] Wisconsin is not one of those

36. 720 ILL. COMP. STAT. ANN. § 5/11-9.3(a)-(b-5) (West 2002). This Illinois law makes it unlawful for a child sex offender to knowingly be present in a school building or on school grounds, or knowingly loiter on public property within five hundred feet of school grounds when minors are present in the building, unless the offender is a parent of a student present at the school or has permission of the superintendent or principal. *Id.*

37. *See* Billings & Bulges, *supra* note 8, at 256 (describing the Maine Legislature's recent consideration of a bill prohibiting sex offenders from residing or loitering within 1000 feet of a school or day care facility).

38. *See, e.g.*, GA. CODE ANN. § 42-1-13(b) (Supp. 2003) (preventing a sex offender from residing within one thousand feet of a child care facility, a school, or any area where minors congregate); *see also* Willing, *supra* note 31 (describing an Albuquerque, New Mexico ordinance that would prevent convicted sex offenders "from living or owning property near schools," and would require "[t]heir pictures and descriptions of their crimes [to] be posted at the Albuquerque zoo and other places where children gather").

39. *See* People v. Stork, 713 N.E.2d 187, 192 (Ill. App. Ct. 1999) (addressing, and ultimately rejecting, a challenge to an Illinois statute restricting the movement of convicted sex offenders because the statute was "overly broad in that it proscribes conduct without requiring a culpable mental state").

40. Todd Richmond, *Officials: Law Would Ban Sex Offenders to Countryside, Officials say*, CHIPPEWA HERALD, Sept. 2, 2003, *at* http://www.chippewa.com/articles/2003/09/02/news/news3.txt.

41. Doe v. Miller, 298 F. Supp. 2d 844, 848 n.2 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005). Judge Pratt identifies twelve states with sex offender residency restrictions:

> *See* Alabama, [ALA. CODE] § 15-20-26[a] ([Supp. 2004]) (restricts sex offenders from residing or accepting employment within 2000 feet of school or child care facility); Arkansas, [ARK. CODE ANN.] § 5-14-128[(a)] ([Michie Supp.] 2003) (unlawful for level three or four sex offenders to reside within 2000 feet of school or daycare); California, [CAL. PENAL CODE] § 3003[(f)-(g)] ([West 2000 & Supp. 2005]) (parolees may not live within 35 miles of victim or witnesses,

states. In looking at a proposal, however, Wisconsin legislators discovered that it would have cost the state more than $17 million to build new apartments because "there aren't enough rural settings for offenders."[42] Approaches in other jurisdictions have been more restrictive than those created by the Iowa Legislature. An Albuquerque, New Mexico, proposed city ordinance would

> prevent released sex offenders from living or owning property near schools, would inform employers and prospective employers of their status and would require them to leave DNA samples and dental and shoe imprints with city police. Their pictures and descriptions of their crimes would be posted at the Albuquerque zoo and other places where children gather.[43]

Restrictions like those proposed in Albuquerque are obviously aimed at offenders unknown to the victims. As mentioned previously, however, such restrictive laws may "appear well-intentioned but are misdirected.

> and certain sex offenders on parole may not live within a quarter mile from a primary school); Florida, [FLA. STAT. ANN.] § 947.1405(7)(a)(2) ([West Supp. 2005]) (released sex offender with victim under eighteen prohibited from living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate); Georgia, [GA. CODE ANN.] § 42-1-13 (2003) (sex offenders required to register shall not reside within 1,000 feet of any child care facility, school, or area where minors congregate); Illinois, 720 [ILL. COMP. STAT. ANN.] § 5/11-9.3(b-5) ([West 2002]) (child sex offenders prohibited from knowingly residing within 500 feet of schools); Kentucky, [KY. REV. STAT. ANN.] § 17.495 ([Michie 2003 & Supp. 2004]) (registered sex offenders on supervised release shall not reside within 1000 feet of school or child care facility); Louisiana, [LA. REV. STAT. ANN.] § 14:91.1[(A)(2)] [(West 2004 & Supp. 2005)] (sexually violent predators shall not reside within 1,000 feet of schools . . .); Ohio, [OHIO REV. CODE ANN.] § 2950.031[(A)] ([Anderson] 2003) (sex offenders prohibited from residing within 1000 feet of school); Oklahoma, [OKLA. STAT. ANN. tit. 57,] § 590 ([West 2004]) (prohibits sex offenders from residing within 2000 feet of schools or educational institutions); Oregon, [OR. REV. STAT.] §[§] 144.642[(1)(a)], 144.64[4(2)(a)] [(Supp. 2004)] (incorporates general prohibition on supervised sex offenders living near places where children reside); Tennessee, [TENN. CODE ANN.] § 40-39-[2]11[(a)-(b)] (2003) (sex offenders prohibited from establishing residence within 1000 feet of school, child care facility, or victim).

Id.

42. Richmond, *supra* note 40 (citing state financial estimates). In Wisconsin, the state helps find housing for sex offenders and people undergoing treatment while on supervised release. *Id*.

43. Willing, *supra* note 31.

'Only about 10% of child molesters molest children they don't know.'"[44] Albuquerque's mayor, a father of two, responds, "[i]t may strike some as harsh, but that's not my concern . . . . This [offender] has 'Danger: Will re-offend' virtually stamped on his forehead. Our job is to protect citizens, especially children, and if we can't use the law to do that, what are we doing here?"[45] Many people, like Albuquerque's mayor, take the view that a sex "offender surrendered his rights when he committed his first attack," and therefore "his rights should not be taken into consideration when formulating a sex offender policy."[46] Despite these clearly understandable emotions, such an approach is neither appropriate nor accurate in light of modern constitutional jurisprudence.[47]

To assure that the appropriate constitutional scrutiny is applied, the American Civil Liberties Union (ACLU) has challenged the constitutionality of the Iowa residency restrictions in both state and federal court.[48] The issues involved in these challenges range from ex post facto violations to infringements upon the fundamental rights of travel and family autonomy.[49] Proponents of such laws retort that while they share "some sympathy with those who protest the proposed law," they are unwilling to do nothing in response to what they deem a "'clear and present danger.'"[50] The final resolution of these constitutional challenges remains unclear because "'[n]othing like this has ever been challenged . . . before, because nothing like this has been seen before.'"[51]

IV. IOWA'S RESIDENCY RESTRICTIONS

Iowa's residency restrictions were passed by the Iowa Legislature in

44. *Id.* (quoting Gene Abel, an Atlanta psychiatrist who has studied more than 4,000 child molesters). "[T]he most common type of victim is one who has a familial relationship to their offender." Doe v. Miller, 298 F. Supp. 2d at 862 (discussing the testimony of Dr. Luis Rosell, a clinical and forensic psychologist with extensive experience in sex offender treatment). "'[S]tranger relationships,' where the offender does not know his or her victim, 'have always been the least common type of relationships.'" *Id.* (quoting Dr. Rosell).

45. Willing, *supra* note 31 (quoting Albuquerque Mayor Martin Chavez).

46. Jerusalem, *supra* note 1, at 250.

47. *Id.*; *see also infra* Part V (questioning the constitutionality of sex offender residency restriction laws).

48. *See, e.g.*, Doe v. Miller, 298 F. Supp. 2d at 847; State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *3 (Iowa Dist. Ct. Apr. 30, 2003).

49. *See infra* Part V.

50. Willing, *supra* note 31 (quoting Albuquerque Mayor Martin Chavez).

51. *Id.* (quoting New Mexico ACLU Director Peter Simonson).

the spring of 2002 and went into effect on July 1, 2002.[52] Iowa Code section 692A.2A reads as follows:

> 1. For purposes of this section, "person" means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.
>
> 2. 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.
>
> 3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or child care facility, commits an aggravated misdemeanor.
>
> 4. 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:
>
> a. The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.
>
> b. The person is subject to an order of commitment under chapter 229A.
>
> c. The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or July 1, 2002.
>
> d. The person is a minor or a ward under a guardianship.[53]

The restrictions provide that "[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."[54] Under Iowa law, residence is defined as "the place where a person sleeps, which may include more than one location, and may be mobile or transitory."[55] In addition to

52. 2002 Iowa Acts ch. 1157 (codified at IOWA CODE § 692A.2A (2005)).

53. IOWA CODE § 692A.2A.

54. *Id.* § 692A.2A(2).

55. *Id.* § 692A.1(8). Other states, such as Ohio, have expanded what is deemed to be a residence within the meaning of a residency restriction. *See* 2005 Ohio Op. Att'y Gen. 2005-001, 2005 WL 263796, at *1 (Jan. 21, 2005) (stating that a residence, under Ohio's version of the statute, will include "premises in a nursing

the law's breadth of meaning, it casts a wide net of possible application: at the close of 2003, there were approximately 5,674 registered sex offenders in Iowa, of which 5,073, or about eighty-three percent, had underage victims.[56]

The Iowa residency restrictions gained national attention when the Iowa ACLU filed what it believed was "the first ever class-action lawsuit of its kind."[57] The law is criticized as "'both poorly conceived and illogical'" because opponents feel that the increased burden on law enforcement does not correspond to increased community safety,[58] which, as noted previously, is the intended goal regarding the regulation of sex offenders.[59] Community safety also is not enhanced for an additional reason: while section 692A.2A has taken control of where an offender may reside, it does not otherwise prevent the individual's presence within the restricted areas.[60] The "affected persons are free to travel, work, or generally move about within any area."[61] However, requiring an individual to reside nearly four-tenths of a mile from every school and daycare facility "makes it all but impossible for offenders to live in many small towns or densely populated cities."[62]

One example of the extensive coverage created by this law is in

---

home, adult care facility, residential group home, homeless shelter, hotel, motel, boarding house, or facility operated by an independent housing agency that is located within 1000 feet of any school premises") (footnote omitted).

56. Doe v. Miller, 298 F. Supp. 2d 844, 852 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005). As of March 1, 2005 there were 6427 offenders on the Iowa Sex Offender Registry; however, there is not specific data about the percentage of those offenders who victimized minors. LEGIS. SERVS. AGENCY, FISCAL NOTE, H.F. 619, 81st. Assembly, 1st Sess. (Iowa 2005), *available at* http://www3.legis.state.ia.us/fiscalnotes/data/81_2527HVv0_FN.pdf.

57. Am. Civil Liberties Union, *ACLU of Iowa Files First Ever Class-Action Lawsuit Challenging Sex Offender "Banishment"*, June 25, 2003, *at* http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=13074&c=15. The decision of the United States District Court for the Southern District of Iowa excluded from the certified class those individuals who were involved in ongoing Iowa state court proceedings for violating § 692A.2A, in accordance with the *Younger* abstention doctrine. Doe v. Miller, 216 F.R.D. 462, 465 (S.D. Iowa 2003) (citing Younger v. Harris, 401 U.S. 37 (1971)).

58. Am. Civil Liberties Union, *supra* note 57 (quoting R. Ben Stone, Executive Director of the ACLU of Iowa (ICLU)).

59. *See supra* note 28 and accompanying text.

60. Doe v. Miller, 298 F. Supp. 2d at 849.

61. Doe v. Miller, 216 F.R.D. at 464.

62. *All Things Considered* (NPR radio broadcast, Jan. 9, 2003), *available at* LEXIS, Nexis Library, NPR File [hereinafter NPR].

Johnson County, Iowa, where a map of Iowa City showing the restricted areas was described as having "virtually no place . . . for a sex offender to live."[63] Additionally, cities like Des Moines, the largest in Iowa, are in effect completely covered by restricted areas.[64] The few areas available in Des Moines for sex offenders include "industrial areas or some of the city's newest and most expensive neighborhoods."[65] Davenport and Bettendorf are almost completely engulfed by restricted areas due to their 344 day care facilities and 34 schools.[66] The only remaining areas in Bettendorf are a golf course, a mall, and a few affluent neighborhoods.[67] The problems created by the residency restrictions are not limited to larger cities. Many smaller cities and towns are also completely engulfed by restricted areas.[68]

Other states, like Minnesota, have contemplated enacting similar laws, but some have expressed reservations about their effect, which, for example, "would exclude every residential area of Minneapolis and St. Paul with minor exceptions."[69] These issues compound the fact that the law is, in certain cases, "making sex offenders basically homeless,"[70] due in part to other restrictions faced by the offenders, mainly that they are "not allowed to sleep in homeless shelters" in cities like Des Moines.[71] Furthermore, some have likened the new residency restrictions to "forced .

63. Doe v. Miller, 216 F.R.D. at 468.

64. Doe v. Miller, 298 F. Supp. 2d at 851.

65. *Id.* At the district court level, maps were presented from larger cities such as Des Moines, Waterloo/Cedar Falls, Clinton, Iowa City, Mason City, and Council Bluffs. Appellee's Brief at 19-20, Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (No. 04-1568), *available at* http://www.ca8.uscourts.gov/briefs/04/07/appellee/041568_1br.pdf. Additional maps were presented to the court of entire counties, including Pottawattamie County, Dubuque County, and Carroll County. *Id.* at 20.

66. Marc Chase, *Sex Offenders in Q-C Have Few Places to Live*, QUAD CITY TIMES, Feb. 8, 2003, at A1.

67. *Id.*

68. *See* Doe v. Miller, 298 F. Supp. 2d at 851 ("In Johnson County alone, the towns of Lone Tree, North Liberty, Oxford, Shueyville, Solon, Swisher, and Tiffen are wholly restricted to sex offenders under § 692A.2A."). The limited housing supply is compounded by the fact that Iowa has many unincorporated areas where farmland and rural areas dominate with very few residences readily available. *Id.*

69. MINN. LEGIS. REPORT, *supra* note 16, at 10. While current California residency restrictions are limited to those offenders who are still on parole, California's legislature has also looked at other broader residency restrictions. Fry-Bowers, *supra* note 4, at 921.

70. Morgan McChurch, *ICLU Challenges Banishment Law for Iowa Sex Offenders*, IOWA ST. DAILY, July 17, 2003, at 1 (quoting R. Ben Stone, Executive Director of the ICLU).

71. *Id.*

. . 'involuntary civil commitment.'"[72] This comparison is appropriate not only because the state has placed affirmative restraints on the movement of individuals, but also because in certain situations parolees remain incarcerated because they have been unable to secure residences which comport with section 692A.2A.[73]

The law's effects on sex offenders have fallen on deaf ears in communities because residents are unwilling to sympathize with individuals who "have dramatically affected their victims' lives."[74] Proponents of the laws give little deference to the rights of sex offenders, because "[when] an individual has chosen, because of life experiences or any other reason, to sexually offend, especially against minors, [proponents] believe that it is constitutionally just to reduce [offender's] freedoms."[75] It is these types of emotions that challengers have sought to temper by ensuring that the Constitution is not forgotten in this emotionally charged debate.

The Iowa ACLU's complaint addressed several constitutional issues, including the right to travel, infringement on the offenders' right to due process, violation of the prohibition on ex post facto laws, Fifth Amendment protection against self-incrimination, Eighth Amendment prohibition on cruel and unusual punishment, and the right to family association and privacy.[76] Perhaps the most potent argument is that the statute is essentially "the functional equivalent [of] the old sanction of banishment."[77]

On July 25, 2003, United States District Judge Robert W. Pratt of the Southern District of Iowa granted the plaintiffs' motion to certify plaintiff and defendant classes,[78] and granted the plaintiffs' motion for a temporary restraining order, which immediately enjoined the named defendants and the members of the certified defendant class of county attorneys from

72. *Id.* (quoting R. Ben Stone, Executive Director of the ICLU).

73. Doe v. Miller, 298 F. Supp. 2d at 853-54 (describing John Doe IV, who resided in prison following multiple drunk driving offenses and was unable to leave due to the residency restrictions, but was then forced to move in with his mother following the placement of an injunction on the law's enforcement).

74. McChurch, *supra* note 70, at 1 (quoting Penny Rice, Director of the Margaret Sloss Women's Center).

75. *Id.* (quoting Penny Rice, Director of the Margaret Sloss Women's Center).

76. Am. Civil Liberties Union, *supra* note 57; Complaint at 2, Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004) (No. 3:03-CV-90067), *available at* http://www.iowaclu.org/pdf/residency_complaint.pdf.

77. Complaint at 9, Doe v. Miller, (No. 3:03-CV-90067).

78. Doe v. Miller, 216 F.R.D. 462, 464-67 (S.D. Iowa 2003).

enforcing the law[79] because "'[a]n individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril.'"[80] In establishing the temporary restraining order, the court acknowledged the threatened harms to the plaintiffs, including "criminal prosecution, continued incarceration, untenable living situations, economic loss, and forced vagrancy."[81] Only two courts have addressed the constitutionality of section 692A.2A: the Iowa District Court for Washington County, where Judge Lucy Gamon found 692A.2A unconstitutional as applied to the defendant in that case,[82] and more recently in the Southern District of Iowa, where Judge Pratt held the law unconstitutional on several grounds.[83]

A similar constitutional challenge was initiated in federal district court in Tennessee.[84] This challenge was based on Tennessee's Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004,[85] which prohibits any sexual offender from "knowingly resid[ing] or work[ing] within one[86] thousand feet . . . of the property on which any public school, private or parochial school, licensed day care center, or any other child care facility is located."[87] The causes of action in the Tennessee challenge are similar to those outlined in the Iowa challenge, including a violation of the Ex Post Facto Clause,[88] an infringement upon a right of family privacy, a violation of procedural due

79. *Id.* at 472.

80. *Id.* at 471 (quoting Edgar v. MITE Corp., 457 U.S. 624, 651 (1982) (Stevens, J., concurring)).

81. *Id.*

82. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *9 (Iowa Dist. Ct. Apr. 30, 2003).

83. Doe v. Miller, 298 F. Supp. 2d at 880.

84. *See* Complaint, Doe v. Bredesen (E.D. Tenn. filed Nov. 30, 2004) (No. 04CV00566), *available at* 2004 WL 3041638 (challenging the constitutionality of the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004).

85. *See* TENN. CODE. ANN. §§ 40-39-201 to -211 (Supp. 2004).

86. The previous version of Tennessee's residency restriction included the term "establish." TENN. CODE ANN. § 40-39-111(a) (2003), *repealed by* 2004 Tenn. Pub. Acts, ch. 921, § 4 (codified at TENN. CODE ANN. § 40-39-2). The Tennessee Attorney General had previously noted that in the case of the Tennessee restrictions, as they existed prior to the 2004 revisions, it was his opinion that the term "establish," as used in the statute, "would not prohibit a sex offender from returning to a residence that he or she occupied before incarceration." Tenn. Op. Att'y Gen. No. 04-053, at 2 (Mar. 25, 2004) (citing difference between "residence" and "domicile").

87. TENN. CODE. ANN. § 40-39-211 (Supp. 2004).

88. U.S. CONST. art. I, § 9, cl. 3.; *id.* art. I, § 10, cl. 1; TENN. CONST. art I, § 11.

process rights, and a violation of the Fifth Amendment's protection against self-incrimination.[89] What is different from *Doe v. Miller*[90] in Iowa, however, is that *Doe v. Bredesen*[91] in Tennessee is an "as applied" constitutional challenge and not a class action suit.[92] Interestingly, though, the plaintiffs in the *Bredesen* case include the wife of the sex offender affected by the Tennessee statute.[93]

V. CURRENT CONSTITUTIONAL ISSUES

Legislative acts, such as residency restrictions, carry with them a strong presumption of constitutionality.[94] "Thus, a statute will not be declared unconstitutional unless it clearly, palpably and without doubt, infringes the constitution."[95] Meeting this standard is undoubtedly a daunting task.

To challenge statutes such as Iowa Code section 692A.2A, a party must first have standing. According to the United States Supreme Court,

> [a] party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.[96]

There is no doubt that those sex offenders who have served their

89. Complaint, Doe v. Bredesen (E.D. Tenn. filed Nov. 30, 2004) (No. 04CV00566), *available at* 2004 WL 3041638. The *Bredesen* complaint described other state constitutional violations which will not be directly discussed in this Note. *See id.* (alleging certain violations of the Tennessee state constitution).

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

91. Complaint, Doe v. Miller (No. 04CV00566).

92. *Id.*

93. *Id.*

94. *See, e.g.*, State v. Duncan, 414 N.W.2d 91, 95 (Iowa 1987) (describing, in the context of criminal statutes, the "heavy burden of rebutting the presumption of constitutionality"). In fact, "[i]f the statute can be made constitutional by a reasonable construction, the court will give it that construction." *Id.* (citation omitted).

95. *Id.* (citing Saadiq v. State, 387 N.W.2d 315, 320 (Iowa 1986)).

96. County Court v. Allen, 442 U.S. 140, 154-55 (1979) (citing Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973)). Iowa courts echo this principle when determining whether individual has standing to challenge a statute on constitutional grounds. *See, e.g.*, State v. Gates, 306 N.W.2d 720, 723-24 (Iowa 1981) (finding standing when "statute impacts adversely on [individual's] rights").

sentences and are now legitimately attempting to forge ahead and construct new lives are feeling the harsh reality of the new residency restrictions. Additionally, one of the Iowa challenges to the law stems out of a criminal prosecution,[97] which undoubtedly effectuates standing in that case.

A. *Prohibition on Ex Post Facto Laws*

The United States Constitution explicitly prohibits Congress and state legislatures from enacting ex post facto laws.[98] An ex post facto law is commonly understood as "[a] law that impermissibly applies retroactively, especially in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed."[99] Consequently, the Ex Post Facto Clause is implicated when the government enacts legislation which imposes a greater punishment upon an individual than the law previously attached at the time when the crime was committed.[100] Here, it is those offenders who committed their crimes prior to the effective date of the residency restriction law who claim such a law is an unconstitutional ex post facto law.

"Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint . . . ."[101] The Ex Post Facto Clause was meant to "restrain[] arbitrary and potentially vindictive legislation."[102] In most challenges to statutes enacted against sex offenders, it is usually undisputed that the laws were passed after the individual committed the sexual offense.[103] Violation of the Ex Post Facto Clause, however, requires that the consequences of the statute at issue be judged a "punishment."[104] If the challenged legislation has a clear punitive purpose, the court should apply

97. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *1 (Iowa Dist. Ct. Apr. 30, 2003).

98. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

99. BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

100. Calder v. Bull, 3 U.S. (3 Dall.) 386, 389-90 (1798).

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

102. *Id.* at 29 (citations omitted).

103. *E.g.*, Cutshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999) (noting that the parties agreed the law had been passed after the offense had been committed and that the statute at issue was designed to apply to offenses committed before the statute's enactment).

104. Smith v. Doe, 538 U.S. 84, 92 (2003) (holding that "[i]f the intention of the legislature was to impose punishment, that ends the inquiry").

the ex post facto analysis.[105]

If, on the other hand, the statute does not have a clear punitive purpose, the court must determine whether the scheme or effect of the statute is punitive in nature, such that its application goes beyond its purely regulatory function.[106] Even if the stated purpose of the legislation is regulatory or procedural, the court must still examine its effect to determine whether in fact the statute is punitive.[107] A law deemed to create a punishment will "impermissibly disadvantage[] sex offenders, by altering the definition of criminal conduct or increasing the onerousness of the punishment for crimes committed before their enactment."[108]

For the Iowa law, "the State argues that the only criminal sanction involved is that imposed for violations of the residency restriction."[109] Therefore, the offender "is not being punished for the prior sex offense, but for residing within a restricted area," which makes the statute like those that prohibit felons from possessing firearms.[110] Such an argument has and will continue to fail because it "fails to consider the fundamental premise of [the offender's] argument, [that] the two thousand foot residency restriction itself constitutes a punishment."[111] Consequently, if the statute is deemed not to be a punishment, and instead is only civil or regulatory, it does not violate the Ex Post Facto Clause.[112]

The argument can also be made that the statute's language itself alleviates any possible ex post facto violation. The Iowa restrictions do contain a limited grandfather clause, allowing those offenders who have established a residence before the effective date to remain there.[113] However, this provision only applies to those who committed their original offense before the effective date of the statute and not to those who

105. De Veau v. Braisted, 363 U.S. 144, 160 (1960) (plurality opinion).

106. United States v. Ward, 448 U.S. 242, 248-49 (1980).

107. *See* Collins v. Youngblood, 497 U.S. 37, 46 (1990) ("[B]y simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones.") (citations omitted).

108. Cutshall v. Sunquist, 193 F.3d at 476.

109. Doe v. Miller, 298 F. Supp. 2d 844, 867 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

110. *Id.*

111. *Id.*

112. *See* Smith v. Doe, 538 U.S. 84, 92-93 (2003) ("A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry . . . .").

113. IOWA CODE § 692A.2A(4)(c) (2005).

committed their offense after the effective date of the statute. The statute itself is also unclear on how it would apply to individuals who committed their crimes at such an early time that they currently do not have a registration obligation under the Iowa Sex Offender Registry. Courts outside of Iowa have taken the position that the "additional punishment" is only applicable to the conduct of moving into or remaining in a restricted area, and therefore, not "additional punishment" for the original underlying offense.[114]

In most cases, courts "'ordinarily defer to the legislature's stated intent'"[115] and "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[116] As is the case in most state legislatures, the Iowa Legislature supplied little indication of the legislative intent for its enacted residency restrictions.[117] However, "where a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise . . . regulatory power, and not a purpose to add to the punishment.'"[118] To transform the purported civil scheme into a punitive one, it must be "'so punitive either in purpose or effect as to negate . . . [the] intention' to deem it 'civil.'"[119] Despite the Iowa Legislature's purported civil (and not punitive) intent, we must nonetheless consider whether the effects of the residency restrictions are so punitive that it negates the legislature's assumed intent.

---

114. *E.g.*, Denson v. State, 600 S.E.2d 645, 647 (Ga. Ct. App. 2004) (holding that a Georgia residency restriction was not an unconstitutional ex post facto law as applied to the defendant because even though the prior conviction was an element of proving a violation of the residency restriction statute, the punishment from the *earlier* conviction was not increased). The *Denson* court made inaction on the part of the defendant the punishable offense, and failed to address the fact that the restriction itself might constitute an unconstitutional ex post facto law. *Id.*; *see also* Thompson v. State, 603 S.E.2d 233, 235 (Ga. 2004) (viewing the Georgia law as not altering the consequences for the defendant's underlying offense of child molestation, but rather creating a new crime based in part on the defendant's status as a sex offender).

115. Smith v. Doe, 538 U.S. at 92 (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

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

117. *See* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 277-78 (2000) ("[D]ocumentation of state legislative activity remains less thorough than at the federal level . . . .").

118. Smith v. Doe, 538 U.S. at 93-94 (quoting Flemming v. Nestor, 363 U.S. 603, 616 (1960)).

119. *Id.* at 92 (quoting Kansas v. Hendricks, 521 U.S. at 361) (internal quotations omitted).

There are two tests for determining whether a provision constitutes punishment.[120] One is the seven factor test enumerated in *Kennedy v. Mendoza-Martinez*.[121] While these factors are "neither exhaustive nor dispositive,"[122] they are "useful guideposts"[123] in this constitutional analysis. Those factors include:

> "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . ."[124]

The second approach, as outlined by the United States Supreme Court in its recent decision *Smith v. Doe*,[125] examines an alleged ex post facto law under five of the enumerated *Mendoza-Martinez* factors.[126] The factors highlighted by the *Smith* Court include: (1) whether the law "imposes an affirmative disability or restraint"; (2) whether the law "has been regarded in our history and traditions as a punishment"; (3) whether the law "has a rational connection to a nonpunitive purpose"; (4) whether the law "is excessive with respect to this purpose"; and (5) whether the law "promotes the traditional aims of punishment."[127] The Court found that the two remaining factors, "whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime," were of little weight because "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime."[128] Judge Pratt in *Doe v.*

120. *See* Van Duyn, *supra* note 24, at 640-41 (outlining the two tests used to determine if a provision punishes those to whom it applies).

121. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). In *Mendoza-Martinez*, the Court examined the constitutionality of a law that stripped two men of their citizenship for leaving the country at a time of war to avoid military service. *Id.* at 146. The Court held that the law was punitive and unconstitutional because it deprived those men of their citizenship without procedural due process. *Id.* at 165-66.

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

123. Hudson v. United States, 522 U.S. 93, 99 (1997).

124. *See* Van Duyn, *supra* note 24, at 640 (quoting Kennedy v. Mendoza-Martinez, 371 U.S. at 168-69) (alterations in original).

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

126. *See id.* at 97-106.

127. *Id.* at 97.

128. *Id.* at 105.

Miller found that this analysis applied to the current residency restrictions as well.[129]

Whether the residency restrictions impose an affirmative disability or restraint is the first factor to consider.[130] Restraint is typically defined as "[c]onfinement, abridgement, or limitation."[131] When "the disability or restraint is minor and indirect, its effects are unlikely to be punitive."[132] However, state-imposed designation and restrictions on where an offender may live is, in and of itself, a restraint and hardly a minor or indirect one at that. Other states have taken restraints further, and have applied them not only to where an offender may reside, but also to where he may work and travel, thereby affecting an offender's right to contract and pursue employment by limiting where he may purchase a home, rent an apartment, and work.[133] Furthermore, these restrictions, in certain circumstances, inflict additional restraint upon family living arrangements and relationships.[134] The Supreme Court, in deciding the constitutionality of sex offender registries, found in *Smith* that "[t]he record . . . contain[ed] no evidence that the Act . . . led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords."[135] If evaluating whether a sex offender had been disadvantaged—either through housing or employment—was a factor in deciding the constitutionality of sex offender registries, then it is a factor to be considered in the residency context as well.

The Iowa statute establishes housing disadvantages for former sex offenders by dictating specifically where they may live and, in turn, affecting what prospects they may have for employment.[136] Consequently,

129. Judge Pratt relied on the five factors used in *Smith v. Doe*. *See* Doe v. Miller, 298 F. Supp. 2d 844, 868-69 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

130. Smith v. Doe, 538 U.S. at 99.

131. BLACK'S LAW DICTIONARY 1340 (8th ed. 2004).

132. Smith v. Doe, 538 U.S. at 100.

133. *See, e.g.*, ALA. CODE § 15-20-26(a) (Supp. 2004) (restricting sex offenders from residing or accepting employment within 2000 feet of "any school or child care facility"); 720 ILL. COMP. STAT. ANN. 5/11-9.3(b-5) (West 2002) (prohibiting child sex offenders from knowingly residing within 500 feet of schools educating persons under age eighteen).

134. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *10 (Iowa Dist. Ct. Apr. 30, 2003) (finding that a sex offender law "shock[ed] the sense of 'fair play'" when it prohibited an offender from living with his wife and family when they could not afford anything else).

135. Smith v. Doe, 538 U.S. at 100.

136. State v. Seering, 2003 WL 21738894, at *11.

"§ 692A.2A imposes exactly the affirmative restraint that the Supreme Court [in *Smith v. Doe*] found lacking in Alaska's sex offender registration scheme."[137]

The second factor used by the Court is whether the law "has been regarded in our history and traditions as a punishment."[138] In our nation's history, "it has historically been regarded as a punishment to banish a person from their family home" and community.[139] The Court reiterated this sentiment by ruling that "banishment and exile have throughout history been used as punishment. . . . Banishment was a weapon in the English legal arsenal for centuries, but it was always 'adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.'"[140] More recently, the Court recalled the colonial history of banishment as punishment, recognizing that "[t]he most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one."[141]

While the language of the Iowa statute is not an explicit and outright banishment of sex offenders and one could find differences in comparison to historical versions of banishment, the practical application of the restrictions has created exactly that.[142] Following their sentences, some offenders are forced to remain

137. Doe v. Miller, 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

138. Smith v. Doe, 538 U.S. at 97.

139. State v. Seering, 2003 WL 21738894, at *11.

140. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.30 (1963) (quoting David W. Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALA. L. REV. 151, 164 (1962)).

141. Smith v. Doe, 538 U.S. at 98.

142. Doe v. Miller, 298 F. Supp. 2d at 869. As the court there recognized:

> Under § 692A.2A, sex offenders are completely banned from living in a number of Iowa's smaller towns and cities. In the State's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited. Although some areas are completely unrestricted, these are either very small towns without any services, or farmland. As well, should anyone in an available area decide that he or she no longer wants sex offenders to have the option of moving into the neighborhood, the individual need only register his or her home as a private child development home and a two thousand foot buffer zone emerges.

Id.

> in prison beyond their parole dates, choosing between living with their families or complying with the Act, going homeless or breaking the law, or simply leaving the State because no community has a legal space for them. 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.[143]

Ultimately, the government "does not have the right to order a defendant to be removed from his county of residence as a condition of probation," let alone remove a defendant—as is the case with section 692A.2A—that is likely neither on probation nor parole.[144]

The third *Mendoza-Martinez* factor directs courts to consider whether the residency restrictions "promote the traditional aims of punishment—retribution and deterrence."[145] The court in *Doe v. Miller* made it known that the State "must concede that § 692A.2A goes even further to deter would-be sex offenders than does a registration and community notification system."[146] Unlike community notification laws, which assert the nonpunitive aims of giving the public an opportunity "to take precautions and protect themselves,"[147] the residency restrictions have the intent to pursue the aim of deterrence against sex offenders.[148] The court in *Doe v. Miller* also pointed out that "§ 692A.2A promotes retribution as the second aim of punishment. Under the Act, sex offenders are subject to the residency restriction regardless of whether they pose a danger to the population."[149] Additionally, the residency restrictions give no time limit on their applicability "and could potentially be enforced for the remainder of the offender's life. The Act, then, goes beyond what is necessary to protect the public and enters into the realm of retribution."[150]

The fourth critical factor is whether the residency restrictions are rationally related to a nonpunitive purpose.[151] The efforts of the state to ensure the nonpunitive purpose of the public's safety may well be

143. *Id.*

144. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *11 (Iowa Dist. Ct. Apr. 30, 2003) (citing Burnstein v. Jennings, 4 N.W.2d 428 (Iowa 1942)).

145. Kennedy v. Mendoza-Martinez, 372 U.S. at 168.

146. Doe v. Miller, 298 F. Supp. 2d at 870.

147. Dlabik, *supra* note 2, at 633.

148. *See* Doe v. Miller, 298 F. Supp. 2d at 870 (stating that § 692A.2A promotes deterrence).

149. *Id.*

150. *Id.*

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

accomplished by separating the public from perceived dangerous offenders. However, despite containing a nonpunitive purpose, the restrictions may be "excessive with respect to this purpose,"[152] therefore fulfilling the fifth factor, if the law is excessive with respect to the nonpunitive purpose.[153] Through admission of the State's own witnesses in *State v. Seering*, it was established that there exists no sociological or empirical proof that *any* restriction, let alone a 2000-foot restriction, enhances the safety of children.[154] The restrictions on the offender are, however, excessive by "severely restricting where [sex offenders] can live."[155] Additionally, the excessiveness is clearly evidenced by the fact that application of "[t]he Act makes no consideration for the type of offender, type of offense, or the offender's risk of reoffending. That is, § 692A.2A applies regardless of whether a particular offender is a danger to the public."[156] Unfortunately, this one possible area of salvage for the Iowa law is no longer available. During the 2004 Iowa legislative session, lawmakers eliminated the risk assessment and community notification requirements entirely,[157] making individualization through the evaluation process an impossible remedy.

In addressing all of the aforementioned factors, the court in *Doe v. Miller* reached the conclusion "that the Act goes beyond the legislature's intent to craft a civil regulatory scheme and is, in fact, punitive."[158] Therefore, the application of the Iowa law "to those who committed their respective crimes before July 1, 2002, constitutes a retroactive punishment forbidden by the Ex Post Facto Clause."[159] This conclusion lies in contrast to other courts that have wrestled with this difficult determination.[160] Despite the appearance in the past that any balancing of the public's right to be free from sexual crimes against the rights of sexual offenders "'will

152. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *12 (Iowa Dist. Ct. Apr. 30, 2003) (finding that a 2000-foot rule may have a rational connection to a nonpunitive purpose, but it is not reasonable when "there is nothing magic about a 2000-foot restriction").

153. Smith v. Doe, 538 U.S. at 97.

154. State v. Seering, 2003 WL 21738894, at *12.

155. *Id*.

156. Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

157. 2004 Iowa Acts ch. 1175, § 466.

158. Doe v. Miller, 298 F. Supp. 2d at 871.

159. *Id.*

160. *See, e.g.*, Lee v. State, No. CR-02-1900, 2004 WL 1909289, at *5 (Ala. Crim. App. Aug. 27, 2004) (holding that the Alabama residency restrictions were nonpunitive, both on their face and in terms of their effects, and therefore, their retroactive application did not violate the Ex Post Facto Clause).

always result in a decisive tipping of the scales of justice in favor of the former,'"[161] there is no place in our Constitution for such an exception to the prohibition of ex post facto laws.[162] There can be no argument that the question remains "whether the law changes the legal consequences of acts completed before its effective date."[163] Based on the current restrictions, the answer is yes. Once an individual has served the sentence originally handed down by the court, he should be afforded, at a minimum, the rights enumerated and guaranteed by the Constitution so as to not have further punishment bestowed upon him by the state. Nor should he have all his basic rights declared null and void upon release.

1. *Eighth Circuit Panel Finds Iowa Law Is Not an Ex Post Facto Law*

Two of the three judges on a panel of the Eighth Circuit Court of Appeals in *Doe v. Miller* declared that they did not find clear proof that the law was "'so punitive either in purpose or effect as to negate' the State's nonpunitive intent."[164] The majority created a presumption that the restrictions were "civil, non-punitive" because the restrictions were located in the Iowa Code among other laws that have been found to be civil and not punitive in nature.[165] The court did employ the guideposts of *Smith v. Doe* in analyzing whether the law was so punitive so as to negate the regulatory intent of the law.[166]

While determining whether the law's effect is historically regarded as a punishment, the majority failed to accept the analogy that the Iowa statute constituted banishment.[167] The majority instead noted that the effects did not rise to the level of banishment because the law "does not 'expel' the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence."[168] Additionally, the majority viewed the law's "'recent origin'" and "novelty" as indicating that it "'was not meant as a

161. Van Duyn, *supra* note 24, at 642-43 (quoting Doe v. Pataki, 940 F. Supp. 603, 605 (S.D.N.Y. 1996)).

162. *Id.* at 643.

163. Weaver v. Graham, 450 U.S. 24, 31 (1981).

164. Doe v. Miller, 405 F.3d 700, 718 (8th Cir. 2005) (quoting Smith v. Doe, 538 U.S. 84, 92 (2003)).

165. *Id.*

166. *Id.* at 719 (citing Smith v. Doe, 538 U.S. at 97).

167. *Id.*

168. *Id.*

punitive measure, or, at least, that it did not involve a traditional means of punishing.'"[169]

In addressing whether the law promotes the traditional aims of punishment, the majority agreed with the district court that the statute could have a deterrent effect. The majority, however, rejected the notion that the "deterrent effect provides a strong inference that the restriction is punishment."[170] The majority stressed that the law does not "alter the offender's incentive structure by demonstrating negative consequences," but instead "is designed to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime."[171] Moreover, the majority cautioned against overemphasizing the deterrence argument because "'any number of governmental programs might deter crime without imposing punishment.'"[172] Similarly, the majority discredited the "retributive" effect of the law because "any restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect," however, it likened the law to sex offender registries, which have a regulatory objective of protecting children.[173]

During the majority's discussion of whether the Iowa law imposes a restraint upon the offenders, it openly acknowledged that the Iowa law "is more disabling than the sex offender registration law at issue in *Smith v. Doe*, which had not 'led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords.'"[174] The court, however, quickly directed its focus to whether that affirmative disability created by the law could be "rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose."[175]

The majority concluded with what the Supreme Court deemed to be the "'most significant factor'" in the ex post facto analysis.[176] This factor involved whether a regulatory scheme has a "rational connection to a nonpunitive purpose" and whether the scheme is excessive in relation to

169. *Id.* at 720 (quoting Smith v. Doe, 538 U.S. at 97).
170. *Id.*
171. *Id.*
172. *Id.* (quoting Smith v. Doe, 538 U.S. at 102).
173. *Id.* (citing Smith v. Doe, 538 U.S. at 102).
174. *Id.* at 721 (quoting Smith v. Doe, 538 U.S. at 100).
175. *Id.*
176. *Id.* (quoting Smith v. Doe, 538 U.S. at 102).

that purpose, but it does not demand a "'perfect fit'" to the law's purported purpose.[177] Specifically, the majority concluded that the "absence of a particularized risk assessment . . . does not necessarily convert a regulatory law into a punitive measure, for '[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.'"[178] To buttress this assertion, the majority outlined several laws deemed nonpunitive by the Supreme Court despite the absence of particularized determinations, including laws prohibiting felons from practicing medicine, laws prohibiting convicted felons from serving as union officers, and sex offender registries.[179] A lack of individualization in the context of sex offender residency restrictions was found by the majority to be "inconsistent with the Supreme Court's direction that the excessiveness prong . . . does not require a close or perfect fit."[180] In concluding that the law is reasonable and comes close enough to its intended goal, the majority cited the evidence presented at trial indicating a higher recidivism rate among sex offenders and the opinions of sex offender specialists that there is always the concern of reoffending when it comes to sex offenders.[181] The majority made unmistakably clear that "'where a legislative restriction is an incident of the State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'"[182]

2. *Judge Melloy Dissents*

The court's decision in regard to the ex post facto analysis was not unanimous.[183] Judge Melloy disagreed with the majority's emphasis on particular factors of the analysis and the majority's ultimate conclusion.[184] Judge Melloy was reluctant to find that the Iowa law constituted full banishment, however, he did find that its effects were substantially similar to banishment and, therefore, weighed in favor of finding the law punitive.[185] In support of this finding, Judge Melloy focused on the factual

177. *Id.* (quoting Smith v. Doe, 538 U.S. at 103).
178. *Id.* (quoting Smith v. Doe, 538 U.S. at 103).
179. *Id.* at 721-22 (citations omitted).
180. *Id.* at 722 (internal quotations omitted).
181. *Id.* (citing testimony of defense experts Dr. McEchron and Mr. Allison).
182. *Id.* at 718 (quoting Smith v. Doe, 538 U.S. at 93-94).
183. *Id.* at 723 (Melloy, J., concurring in part and dissenting in part).
184. *Id.* (Melloy, J., concurring in part and dissenting in part).
185. *Id.* at 724 (Melloy, J., concurring in part and dissenting in part).

findings of the district court that compliant housing, particularly in towns and cities, is scarce.[186] Judge Melloy also contrasted the effects of the residency restrictions with those of sex offender registries.[187] He made clear that the law fits the Supreme Court's designation of banishment because it "'expel[s] [the offender] from the community.'"[188]

Judge Melloy also disagreed with the majority's attempt to "minimize the deterrent effect of the statute by arguing that the statute does not increase the negative consequences for an action, but merely reduces the opportunity for that action to occur."[189] Because he acknowledged that "[t]here clearly is a deterrent purpose at work," he also found that the Iowa law "promotes a traditional aim of punishment."[190]

Judge Melloy followed the majority in finding that the residency restrictions impose an affirmative disability or restraint by restricting where an offender may live. Judge Melloy placed great importance on the Supreme Court's holding in *Smith v. Doe* that offenders' residences were not being affected due to the registration laws.[191] Consequently, Judge Melloy found "that the affirmative disability or restraint intrinsic in the residence requirement distinguishes it from the sex offender registry in *Smith* [*v. Doe*] and weighs in favor of finding the law punitive."[192]

There was no dissension on the part of Judge Melloy when discussing whether the law has a rational connection to a nonpunitive purpose of protecting the public.[193] Judge Melloy, however, unlike the majority, viewed the excessiveness of the scheme as an important deciding factor on the law's overall characterization.

Because of the dramatic effects of the residency restrictions across the spectrum of offenders, including the inability to live in entire communities or with their families, Judge Melloy recognized the need for individualization.[194] Furthermore, the indefinite nature of the restrictions

186. *Id.* (Melloy, J., concurring in part and dissenting in part).
187. *Id.* (Melloy, J., concurring in part and dissenting in part) (citing Smith v. Doe, 538 U.S. at 98).
188. *Id.* (Melloy, J., concurring in part and dissenting in part) (quoting Smith v. Doe, 538 U.S. at 98).
189. *Id.* at 725 (Melloy, J., concurring in part and dissenting in part).
190. *Id.* (Melloy, J., concurring in part and dissenting in part).
191. *Id.* (Melloy, J., concurring in part and dissenting in part).
192. *Id.* (Melloy, J., concurring in part and dissenting in part).
193. *Id.* (Melloy, J., concurring in part and dissenting in part).
194. *Id.* (Melloy, J., concurring in part and dissenting in part).

also weighed in favor of Judge Melloy's finding of excessiveness.[195] Judge Melloy, after reviewing particular circumstances of some of the plaintiff John Does, concluded that "the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders' lives, makes the restriction excessive."[196]

Judge Melloy ultimately found that four of the five factors weighed in favor of finding the Iowa law punitive.[197] Therefore, "[b]ecause the imposition of the residency requirement '"changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,"' [Judge Melloy found that the Iowa law] is an unconstitutional ex post facto law that cannot be applied to persons who committed their offenses before the law was enacted."[198]

B. *Double Jeopardy*

The Double Jeopardy Clause of the United States Constitution states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[199] This clause has primarily been held to prevent "both 'successive punishments and . . . successive prosecutions.'"[200] In determining whether a double jeopardy violation has occurred, the Supreme Court has advanced a two-part inquiry.[201] The first question is whether the legislature, in establishing the provision, "'indicated either expressly or impliedly a preference for one label or the other.'"[202] Even in those cases where the legislature has indicated its intent for a civil penalty, there is a further inquiry into whether the provision was so punitive either in purpose or effect to convert an intended civil penalty into a criminal one.[203] Second, the Court examines the seven factors previously outlined in *Mendoza-Martinez* to determine if the law, despite its civil label, is in fact

195. *Id.* (Melloy, J., concurring in part and dissenting in part).

196. *Id.* at 726 (Melloy, J., concurring in part and dissenting in part).

197. *Id.* (Melloy, J., concurring in part and dissenting in part).

198. *Id.* (Melloy, J., concurring in part and dissenting in part) (quoting Stogner v. California, 539 U.S. 607, 612 (2003) (quoting Calder v. Bull, 3 U.S. 386, 390 (1798)).

199. U.S. CONST. amend. V.

200. United States v. Ursery, 518 U.S. 267, 273 (1996) (alteration in original) (quoting United States v. Dixon, 509 U.S. 688, 696 (1993)).

201. *See* Hudson v. United States, 522 U.S. 93, 99 (1997) (noting that a double jeopardy problem is only possible in situations where multiple criminal punishments have occurred, and setting forth the two-part inquiry used to determine if a punishment is civil or criminal).

202. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248 (1980)).

203. *Id.*

punitive:

> [(1) w]hether the sanction involves an affirmative disability or restraint, [(2)] whether it has historically been regarded as a punishment, [(3)] whether it comes into play only on a finding of scienter, [(4)] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [(5)] whether the behavior to which it applies is already a crime, [(6)] whether an alternative purpose to which it may rationally be connected is assignable for it, [and (7)] whether it appears excessive in relation to the alternative purpose assigned.[204]

Although section 692A.2A is located in the portion of the Iowa Code with other sex offender provisions which have been deemed to be civil,[205] its location within those sections does not necessarily indicate an intent on the part of the legislature that section 692A.2A is of the same type. For example, the Supreme Court has approved of civil forfeitures after criminal prosecutions even when the provision authorizing forfeiture is located in the same area of the Code as the criminal offense.[206] Therefore, much the same as other courts have concluded, the location of the Iowa residency restriction does not necessarily assist in interpreting whether it was intended to be a civil penalty or criminal punishment.[207] Additionally, the Supreme Court has expressly held that merely "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive."[208]

In determining the purpose of the residency restrictions, it may be useful to compare them to other sex offender legislation, such as registries, which have been held to be civil in nature. Unlike registration statutes, which merely require registrants to supply basic information, indicating a regulatory purpose, the residency restrictions impose affirmative restraints

204. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1997) (footnotes omitted).

205. *See, e.g.*, State v. Pickens, 558 N.W.2d 396, 400 (Iowa 1997) (finding Iowa's sex offender registration statute to not be punitive).

206. *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) (holding "neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges").

207. *See, e.g.*, Cutshall v. Sundquist, 193 F.3d 466, 474 (6th Cir. 1999) (concluding that the location of Tennessee's sex offender registration law in the portion of the Code devoted to criminal procedure did not assist in determining whether the Act was intended to serve as a punishment).

208. Smith v. Doe, 538 U.S. 84, 96 (2003).

on the ability of individuals to conduct their daily lives.[209] Registration statutes' intent to merely "monitor the whereabouts of convicted sex offenders" [210] is vastly surpassed by the intent of the residency restrictions. Additionally, unlike community notification statutes, which are typically limited to situations where disclosure is necessary to protect the public, the residency restrictions have no specialized determination for the dangerousness of the offender.[211]

The second inquiry under the double jeopardy analysis begins with the first *Mendoza-Martinez* factor, which is whether section 692A.2A "involves an affirmative disability or restraint."[212] When describing other laws, such as sex offender registration statutes, courts have noted that an offender is "free to live where he chooses, come and go as he pleases, and seek any employment he wishes."[213] The Iowa residency restrictions explicitly take away those freedoms. The question then is whether this approach has crossed the line from acceptable regulation to punishment.[214]

According to the Supreme Court's recent opinion regarding this question (as it related to registration statutes), the Iowa approach would seem to violate the principle of "not restrain[ing] activities [of sex offenders,] . . . leav[ing] them free to change jobs or residences."[215] Justice Kennedy took this view when analyzing the effects of the Alaska registration scheme because the Court was concerned with, among other things, the "occupational [and] housing disadvantages for former sex offenders."[216] It is hard to imagine, especially when considering community backlash, that such concerns over the effects on sex offenders would be swept aside when examining a law which allows the state to do exactly what the Court had feared. Unlike the registration statutes, which have

209. *E.g.*, IOWA CODE § 692A.3 (2005).

210. Cutshall v. Sundquist, 193 F.3d at 474.

211. *Compare* N.J. STAT. ANN. § 2C:7-8 (West 1995) (outlining factors to consider in determining the level of community notification), *with* IOWA CODE § 692A.2A (containing no such specialized determination).

212. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1997).

213. Cutshall v. Sundquist, 193 F.3d at 474.

214. Even if the effect is viewed by the court as punishment, some courts will shift the focus to the current violation by an offender's choice to move into or refuse to move out of a restricted area, and will not view the consequences of that choice as an increased punishment for their original crime. *E.g.*, Thompson v. State, 603 S.E.2d 233, 236 (Ga. 2004) (holding that the defendant's decision to remain in a prohibited place was not punishment arising out the offender's original transgression, but was instead punishment for the offender's violation of a second statute).

215. Smith v. Doe, 538 U.S. 84, 100 (2003).

216. *Id*.

consequences "flow[ing] not from the Act's registration and dissemination provisions, but from the fact of [the] conviction, already a matter of public record,"[217] the residency restrictions are the *actual source* of the consequences and restraints. So it is unmistakable that the offenders subject to section 692A.2A are no longer "free to move where they wish and live and work as other citizens," and are subject to an affirmative restraint.[218]

The second *Mendoza-Martinez* factor is whether, from a historical perspective, the sanction has been viewed as punishment.[219] Banishment and pillory have historically been deemed to be punishment.[220] The Court in *Smith v. Doe* openly acknowledged that public expulsion and banishment exceeded that which was challenged under the registration statutes.[221] What is inflicted upon these individuals under this new form of punishment exceeds a mere "dissemination of truthful information in furtherance of a legitimate governmental objective," which the Court views as not punishment,[222] but instead goes further in its purposes and effects to the level of modern-day banishment.

Under the third *Mendoza-Martinez* factor, a court considers whether scienter is required to convict under the statute.[223] Scienter "means 'knowingly' and is used to signify a defendant's guilty knowledge."[224] The application of the residency restrictions are triggered by a conviction for a sex offense against a minor.[225] Such a conviction will likely require a finding of knowingly wrongful action, and this finding is indicative of the punitive effect of the laws. This shifts the conclusion in favor of finding that the restrictions are punitive. The states would argue alternatively that

217. *Id.* at 101.

218. *Id.*

219. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

220. Cutshall v. Sundquist, 193 F.3d 466, 475 (6th Cir. 1999).

221. *See* Smith v. Doe, 538 U.S. at 98 (drawing a distinction between a sex offender registration statute and "punishments [like] public shaming, humiliation, and banishment," because the latter "involved more than the dissemination of information").

222. *Id.*

223. Kennedy v. Mendoza-Martinez, 372 U.S. at 168.

224. Cutshall v. Sundquist, 193 F.3d at 475 (quoting Herbert v. Billy, 160 F.3d 1131, 1137-38 (6th Cir. 1998)).

225. *See* IOWA CODE § 692A.2A(1) (2005) (making the residency restrictions applicable to "a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor").

the scienter need not be found for the underlying offense, but instead the offense of living within a protected area. Such an approach, however, should also require a showing by the state of a mens rea component of knowledge of the offender's restricted residence. This component may not easily be evidenced, due in large part to the ineffectiveness of the current maps available to offenders.[226]

The fourth *Mendoza-Martinez* factor is "whether [the law's] operation will promote the traditional aims of punishment—retribution and deterrence."[227] Section 692A.2A clearly satisfies this factor because Iowa's purported rationale for the restrictions is to safeguard the community,[228] and such a rationale can arguably only be effectuated by the other goal of promoting deterrence. While "'[t]o hold that the mere presence of a deterrent purpose renders . . . sanctions "criminal"'" for double jeopardy purposes "'would severely undermine the Government's ability to engage in effective regulation,'"[229] the residency restrictions go far beyond the limited regulatory purposes of the sex offender registry or other community notification efforts, and instead move to an approach directed only at the offender by not informing the public of possible danger.[230]

The fifth *Mendoza-Martinez* factor examines "whether the behavior to which [the statute] applies is already a crime."[231] Other than in the cases of these particular statutes, there is virtually no criminal activity involved when an individual merely resides in the same neighborhood as a school or daycare facility.

The sixth and seventh *Mendoza-Martinez* factors analyze "whether an alternative purpose to which [the statute] may rationally be connected is assignable for it, and whether [the statute] appears excessive in relation to the alternative purpose assigned."[232] While the remedial purpose behind the residency restrictions are much the same as other registration and

226. *See infra* notes 401-05 and accompanying text.

227. Kennedy v. Mendoza-Martinez, 372 U.S. at 168.

228. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *6 (Iowa Dist. Ct. Apr. 30, 2003).

229. Smith v. Doe, 538 U.S. 84, 102 (2003) (quoting Hudson v. United States, 522 U.S. 93, 105 (1997)). This argument was offered in the context of an ex post facto analysis; however, the same factors apply in the double jeopardy context.

230. *See* IOWA CODE § 692A.2A (2005) (containing no community notification provisions).

231. Kennedy v. Mendoza-Martinez, 372 U.S. at 168.

232. *Id.* (footnote omitted).

notification statutes—namely, protection of the public—the residency restrictions do have consequences for offenders beyond the burdens from the "potential abuse of registry information by the public."[233] Consequently, the "gravity of the state's interest in protecting the public from recidivist sex offenders" [234] is tempered by the increased direct burden of the statute upon the lives of those offenders trying to reintegrate into society.

The residency restrictions' likelihood of success under a double jeopardy analysis seems to run concurrently with the ex post facto analysis. Those individuals who were convicted before the enactment of the law will have their fate put in the hands of judges who must simultaneously determine whether a second *punishment* is being administered by the State to a person who has already served their sentence.

C. *Substantive Due Process*

The Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."[235] This declaration includes not only a guarantee of fair procedure, but also a substantive element "which forbids the government to infringe certain 'fundamental' liberty interests *at all* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[236] "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[237] Protected liberty interests can be divided into three groups: freedom from physical restraints,[238] exercises of fundamental rights,[239] and other forms of choice and action.[240] We begin with whether the hindered right is fundamental. Rights that are fundamental are those

233. Cutshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999).

234. *Id*.

235. U.S. CONST. amend. XIV, § 1.

236. Reno v. Flores, 507 U.S. 292, 302 (1993).

237. Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972).

238. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 356-57 (1997) (recognizing that freedom from physical restraint by arbitrary government action is a protected liberty interest).

239. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (listing, among others, the right of free speech, free press, assembly, and freedom of worship and religion as fundamental).

240. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) (including homosexual conduct in the category of fundamental constitutional rights).

"that neither liberty nor justice would exist if they were sacrificed."[241] The two primary areas of liberty that have been affected since the enactment of the various residency restrictions have been family autonomy and freedom of movement.

1. *Family Autonomy*

The Supreme Court has been unmistakably clear that the freedoms of family autonomy are fundamental rights protected by the Due Process Clause.[242] The Court in *Roberts v. United States Jaycees*[243] opined that

> because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . .
>
> The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives.[244]

It is clear that "[a]ll citizens, including convicted sex offenders released from prison after serving their sentences, possess a constitutionally-protected right of autonomy in making certain personal decisions in their lives, including child rearing, procreation, contraception, marriage, and abortion."[245] "Arguably, any restrictions placed on a sex offender that limits where he can live . . . do affect his right to make personal decisions about his life."[246] More than affecting the ability to

241. Palko v. Connecticut, 302 U.S. 319, 326 (1937) (citing Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

242. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 375-77 (1978) (declaring unconstitutional a Wisconsin statute which required residents to obtain court approval before they could be married to ensure the payment of delinquent child support); Moore v. City of East Cleveland, 431 U.S. 494, 495-96, 505-06 (1977) (holding unconstitutional a city ordinance that made it a crime for a homeowner to have her extended family living with her); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (preventing Wisconsin from compelling Amish parents to require their children to attend formal high school).

243. Roberts v. United States Jaycees, 468 U.S. 609 (1984).

244. *Id.* at 618-19.

245. Debra L. Weiss, Comment, *The Sex Offender Registration and Community Notification Acts: Does Disclosure Violate an Offender's Right to Privacy?*, 20 HAMLINE L. REV. 557, 583 (1996).

246. *Id.* at 587.

enter into a relationship, however, the residency restrictions affect the ability of a person to "establish a home."[247] The protection of this right is mentioned many times alongside the rights of family autonomy.[248] The intention and effect of the residency restrictions are in and of themselves an infringement upon this fundamental right.

While the right to marry is fundamental, the Supreme Court has held that not every action by a state legislature that relates to the incidents of or the prerequisites for marriage must be analyzed under strict scrutiny.[249] "[R]easonable regulations that do not interfere significantly with the decision to enter into" marriage may legitimately be imposed.[250] Therefore, whether the residency restrictions are reviewed under a rational basis or strict scrutiny analysis depends upon whether interference with the right is significant.[251]

The infringement of a fundamental right has been held to require more than a de minimis incursion before strict scrutiny will prove fatal to a statute.[252] While the Iowa residency restrictions do not rise to the explicit prohibition on marriage that was condemned in *Loving v. Virginia*,[253] they are also not remediable like the restriction placed on individuals in *Zablocki v. Redhail*.[254] In *Zablocki*, individuals were required to obtain a court order after demonstrating that the children they were responsible for

247. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that "[w]ithout doubt" the liberty guaranteed by the Fourteenth Amendment Due Process Clause includes the right to "establish a home").

248. *See id.* (collecting cases guaranteeing rights to family autonomy and to establish a home).

249. *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (holding that while the right to marry has a "fundamental character," the Court did "not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny").

250. *Id*.

251. *Cf. id.* at 387 (holding that a "serious intrusion into [a] freedom of choice in an area in which [the] freedom [is] fundamental" is not constitutional).

252. *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 967 (1982) (plurality opinion) (holding that the State's interests were sufficient to warrant a de minimis interference with First Amendment rights).

253. Loving v. Virginia, 388 U.S. 1, 2, 4, 5 (1967) (declaring unconstitutional a Virginia antimiscegenation statute that made interracial marriages punishable as felonies).

254. Zablocki v. Redhail, 434 U.S. at 386-87 (declaring unconstitutional a Wisconsin statute that required residents to obtain a court order before they could marry to ensure payment of delinquent child support).

were supported and not likely to become wards of the state.[255] Under the current language of Iowa's residency restrictions, there is no exclusion provision that would allow an individual to enjoy the right of family integrity. Furthermore, the Iowa residency restrictions are indefinite because they impose a restraint that cannot be corrected by time. As it was asserted in *State v. Seering*[256] and *In re J.L.N.*,[257] the plaintiffs in *Doe v. Miller* provided evidence that the residency restrictions infringed upon their right to live with their families.[258] In *In re J.L.N.*, the State of Alabama asserted that, under one of its provisions for living restrictions, an offender was not deprived of his right to marry because the offender's right to marry "is in no way contingent on the two of them residing within 1,000 feet of each other."[259] This absurd assertion by the State runs counter to common sense and was accordingly rejected by the Alabama Court of Criminal Appeals.[260] That case on appeal, however, was reversed and remanded when the Alabama Supreme Court ruled that the individual challenging the law did not have standing.[261]

Residency restrictions have created problems for several types of offenders, including those already released from prison and those who are supposed to be released from prison. Examples proffered by the plaintiffs in *Doe v. Miller* include offenders who remained in prison due to the restrictions, as well as others who were forced to move from their families despite their families' and supervising parole officers' acceptance of them

255. *Id.* at 375.

256. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *5 (Iowa Dist. Ct. Apr. 30, 2003). For the offender in *Seering*, living with his wife and children in their home was impossible because of the 2000 foot residency restriction. *Id.*

257. *In re* J.L.N., 894 So. 2d 751, 752-54 (Ala. 2004). This case involved unusual facts where the offender was convicted of second degree rape for having a sexual relationship with an underage female. *Id.* at 752. The girlfriend and her mother later moved into the offender's residence and indicated that the girlfriend was engaged to be married to the offender. *Id.* at 752, 754. This was a violation of an Alabama statute restricting residence of sex offenders to outside a perimeter of 1000 feet from the residence of their victim. *Id.* at 752.

258. Doe v. Miller, 298 F. Supp. 2d 844, 873-74 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

259. J.L.N. v. State, 894 So. 2d 738, 747 (Ala. Crim. App. 2002), *rev'd sub nom. In re* J.L.N., 894 So. 2d 751.

260. *Id*.

261. *In re* J.L.N., 894 So. 2d at 755. The Alabama Supreme Court acknowledged that though "there may be parties whose constitutional rights may be harmed by [the residency restrictions,] J.L.N. . . . failed to demonstrate that he [was] such a party." *Id.*

living there.[262] In particular, John Doe IV in *Doe v. Miller* was paroled but remained incarcerated because he wished to live with his mother whose home was within a restricted area.[263] Similarly, John Doe III will be unable to live in the house owned by his fiancée following their marriage because her home falls within a restricted area.[264]

Other problems are evident among those offenders who are minors because the restrictions prevent them from residing with their parents if that residence is within the restricted zone. Such application of these residency laws implicates not only the offenders' rights, but also the rights of their parents, who are void of culpability.[265] Furthermore, the residency restrictions infringe upon those protected family relationships without regard to any determination of a threat posed by the registrant. Making the determining factor of applicability whether the victim was a minor does not necessarily indicate that the offender is a threat specifically to minors. If the offender is also a minor at the time he was convicted, his conviction may have much less to do with a compulsion for children, but rather, simply an act against someone his own age.

Most fundamental to the right of family autonomy asserted by the plaintiffs in *Doe v. Miller* is a right to "choose how they want to conduct their family affairs. Included in this right is the right to determine those members of the family with whom one wants to reside."[266] While this Note explained earlier that many offenders have victimized family members rather than strangers,[267] this is not always the case; nonetheless, all offenders are subject to the restrictions.[268] Such evidence only adds to the argument that the Iowa law, to be valid, needs to be narrowly tailored through individualization. By viewing the totality of effects upon offenders and their families attempting to live under section 692A.2A, it is difficult to think that a court could minimize the importance of familial relationships by calling these infringements de minimus. "If an offender's family wishes

262. Doe v. Miller, 298 F. Supp. 2d at 873.

263. *Id.* at 853-54.

264. *Id.* at 853.

265. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (holding that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). In *Doe v. Miller*, the Iowa residency restrictions would have prevented John Doe IV from living with his mother as a result of a conviction he received at the age of fourteen. Doe v. Miller, 298 F. Supp. 2d at 853-54.

266. Doe v. Miller, 298 F. Supp. 2d at 873.

267. *See supra* notes 31-33 and accompanying text.

268. Doe v. Miller, 298 F. Supp. 2d at 873.

their relative to return, and the individual is not dangerous, then the choice should be theirs to make."[269] The United States Supreme Court has acknowledged its own adherence to the protection of close personal relationships by stating that "the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[270] These choices include those family members affected by residency restrictions, which lie at the foundation of individual autonomy and self-definition.

2. *Freedom of Movement*

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union."[271] While it has long been settled that the right to *inter*state travel is fundamental,[272] the notion of the right to *intra*state travel remains unsettled.[273] This issue is once again emerging in the appellate courts.[274] Examination of the right to intrastate travel, however, is noticeably absent in Supreme Court jurisprudence, but it has been noted by members of the Court in the past that individuals "possess[] the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom."[275] It is time that this concept is resurrected from judicial obscurity. The Sixth Circuit took this approach and found that the right to intrastate travel was fundamental and

269. *Id.*

270. Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).

271. United States v. Guest, 383 U.S. 745, 757 (1966).

272. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 n.21 (1974) (applying strict scrutiny to a statute impinging "on the right of interstate travel"). The plaintiffs in *Doe v. Miller* asserted that section 692A.2A infringed on their constitutional right to travel because those individuals included in the class action suit who desired to return or move to Iowa were unable to do so because of the lack of acceptable housing under the law. Doe v. Miller, 298 F. Supp. 2d at 874.

273. State v. Khamjoi, No. 03-0254, 2003 WL 22089748, at *2 (Iowa Ct. App. Sept. 10, 2003).

274. *E.g.*, Johnson v. City of Cincinnati, 310 F.3d 484, 507-08 (6th Cir. 2002), *cert. denied*, 539 U.S. 915 (2003).

275. United States v. Wheeler, 254 U.S. 281, 293 (1920). The Court has subsequently digressed from the approach in *Wheeler*. United States v. Guest, 383 U.S. at 759 n.16 (limiting *Wheeler*'s applicability to the facts of that case).

secured by the Constitution.[276] In doing so, the court aligned its position with that of Justice Douglas:

> Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.[277]

The court in *Doe v. Miller* agreed with the proposition that

> [p]rotecting a right to intrastate travel comports with the principles behind the right to interstate travel. Whether an individual travels across many states or a single county, the right to be free to enter, leave, or remain in a place, and to be treated as an equal with current denizens, is a fundamental liberty guaranteed by our constitution.[278]

Specifically, the Iowa statute restricts offenders' residences. The term "residence" is defined under applicable Iowa law as "the place where a person sleeps, which may include more than one location, and may be mobile or transitory."[279] Therefore,

> a person may have innumerable transitory residences that are newly established each time he is unfortunate enough to fall asleep. Literal application of the Act would result in the great majority of the State's hotels and motels being restricted to traveling sex offenders. As well, community centers such as homeless shelters and missions will most likely be unavailable to sex offenders because of location. A sex

276. Johnson v. City of Cincinatti, 310 F.3d at 498.

277. Aptheker v. Secretary of State, 378 U.S. 500, 519-20 (1964) (Douglas, J., concurring).

278. Doe v. Miller, 298 F. Supp. 2d 844, 874 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005). State courts have also, in the context of probation conditions effectuating banishment, identified intrastate travel as a fundamental right. *See, e.g.*, People v. Beach, 195 Cal. Rptr. 381, 386 (Cal. Ct. App. 1983) (finding "[a] citizen has a basic constitutional right to intrastate as well as interstate travel"); *In re* J.W., 787 N.E.2d 747, 763 (Ill. 2003) (recognizing a fundamental constitutional right to intrastate travel when considering probation conditions and their implications upon such rights); State v. Franklin, 604 N.W.2d 79, 83-84 (Minn. 2000) (emphasizing the need to consider one's constitutional rights when imposing geographical restrictions upon probationers).

279. IOWA CODE § 692A.1(8) (2005).

> offender simply wanting to travel through the State might be compelled to avoid Iowa altogether lest he stop for the night at an acquaintance's home or a motel and thereby establish an unlawful residence by unwittingly falling asleep. Under § 692A.2A, sex offenders would appear to be able to travel Iowa freely only so long as they do not stop.[280]

While it is unlikely that such a strict interpretation would be applied, the restrictions do have an effect on sex offenders moving in and around the state.[281] The statute makes the right to freely travel and move nonexistent for offenders subject to the residency restrictions. This argument is expanded by the fact that the right to interstate travel is also implicated. John Doe XIII, in *Doe v. Miller*, has been directly affected in his desire to move back from Indiana to Iowa because of an inability to find legal housing.[282] Certainly, informing both in-state and out-of-state offenders that they cannot live in most urban areas of the state affects their fundamental constitutional right to travel.

3. *Fundamental Rights Analysis*

Because fundamental rights are involved, section 692A.2A must survive the strict scrutiny standard of review.[283] The State of Iowa must show that the statute furthers a compelling state interest, is narrowly tailored to meet that interest, and uses the least restrictive means available.[284] The Supreme Court has made clear that a statute will be considered "narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[285] An overly broad statute may prove to be fatal when infringing upon constitutionally protected conduct; however, recent court decisions on this topic have failed to appreciate effects felt by individuals subject to the restrictions.[286]

In applying strict scrutiny to section 692A.2A, we must first identify

280. Doe v. Miller, 298 F. Supp. 2d at 875.

281. *Id.*

282. *Id.* at 856.

283. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (applying strict scrutiny when there is an infringement upon a fundamental right).

284. Doe v. Miller, 298 F. Supp. 2d at 875 (citing Roe v. Wade, 410 U.S. 113, 155-56 (1973)).

285. Frisby v. Schultz, 487 U.S. 474, 485 (1988).

286. *See, e.g.*, Mann v. State, 603 S.E.2d 283, 286 (Ga. 2004) (finding that the Georgia residency statute did not unnecessarily reach constitutionally protected conduct).

Iowa's interest in enacting this legislation. The court in *State v. Seering*, had problems finding legislative history evidencing the State's interest in section 692A.2A,[287] which forced it instead to rely on testimony of State witnesses to derive that the "governmental interest behind the statute was 'public safety' and the 'protection of children from potential harm by convicted sex offenders.'"[288] This interest has been proffered for virtually all other state enactments involving registration and notification of sex offenders.[289] Undoubtedly, this concern is a compelling state interest and no one would argue to the contrary. However, experts claim that "'it doesn't matter if it was a two mile radius that [offenders] could not be close to. If [offenders] want to take someone, they will.'"[290]

Nonetheless, with the interest requirement fulfilled, a court must then determine whether the means chosen by the legislature are narrowly tailored to effectuate the state's objectives.[291] This forces the State to demonstrate that mere proximity of a residence to schools and child care facilities increases the risk of harm or recidivism.[292] Currently there are no studies showing a relationship between a residence, distance from a school or child care facility, and an increased likelihood of recidivism.[293] Though psychologists with sex offender specialization maintain that "it is reasonable to restrict access to children if the sex offender ha[s victimized children]," they qualify this recommendation by reiterating that "[t]here are no good hard data on what is the 'safe distance' for sex offenders to stay away from children."[294] Some even state, "'I don't even think it would really make that much of a difference . . . . I don't believe that residential

287. *See* State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *6 (Iowa Dist. Ct. Apr. 30, 2003) (finding "no legislative history in this case to provide the Court with information as to the compelling State need for the 2000-foot rule").

288. *Id.* (quoting prosecution trial witnesses).

289. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 99 (2003) ("The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender.").

290. Doe v. Miller, 298 F. Supp. 2d 844, 865 (S.D. Iowa 2004) (quoting the testimony of plaintiffs' expert witness Dr. Luis Rosell), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

291. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

292. *Cf. id.* at 728-35 & n.20 (collecting the "legitimate interests" and "important interests" served by a Washington statute barring assisted suicide).

293. *See* State v. Seering, 2003 WL 21738894, at *6, *8 (noting a complete lack of studies showing a connection between the distance of an offender's residence from schools or day care centers and the risk to reoffend).

294. *Id.* at *7 (discussing the testimony of Dr. Dave McEchron, a psychologist who has over twenty-five years of experience treating sex offenders).

proximity makes that big of a difference. If an individual wants to offend, he will offend. It doesn't really matter how close the school is.'"[295]

A report by the Minnesota Department of Corrections found that in an examination of high risk reoffenders, "there were no examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses."[296] The report cited two examples of reoffending in a park, but it is also noted that those parks were several miles away from where the individuals lived, concluding that an "offender attracted to such locations . . . is more likely to travel to another neighborhood in order to act in secret rather than in a neighborhood where his or her picture is well known."[297] Furthermore, it has even been suggested that the residency restrictions may hinder, rather than further the statute's objective due to the life-long applicability of the statute and the lack of provisions for positive responses to treatment, leaving the sex offender unmotivated to behave in a law-abiding manner.[298] Additionally, such restrictions have the effect of producing "high concentration[s] of offenders with no ties to the community; isolation; [and] lack of work, education, and treatment options."[299] One of the most important ways to help sex offenders prevent recidivist acts is to strengthen family bonds. Conversely, residency restrictions "could lead sex offenders to reoffend because of the lack of family support to encourage self control."[300] The imposed separation from both their family and society could lead to depression and drastically increase the likelihood of reoffending.[301]

The State of Iowa should use its power and pursue its goal of protecting the community. However, this can be achieved through measures similar to the sex offender civil commitment process, which has been held to be narrowly tailored to protect the public from those offenders deemed to be the most serious and untreatable sex offenders.[302]

---

295. Doe v. Miller, 298 F. Supp. 2d at 864 (omission in original) (quoting the testimony of plaintiffs' expert Dr. Luis Rosell, a clinical and forensic psychologist).

296. *See* MINN. LEGIS. REPORT, *supra* note 16, at 9.

297. *Id.*

298. State v. Seering, 2003 WL 21738894, at *7.

299. MINN. LEGIS. REPORT, *supra* note 16, at 9.

300. State v. Seering, 2003 WL 21738894, at *7 (discussing the testimony of the State's expert witness Dr. Dave McEchron).

301. *Id.*

302. *See* Kansas v. Hendricks, 521 U.S. 346, 350, 356-71 (1997) (upholding the Kansas Sexually Violent Predator Act which civilly committed individuals with a "mental disability" or "personality disorder" who were likely to engage in "predatory acts of violence" as constitutional vis-à-vis due process, double jeopardy, and ex post

The current residency restrictions lie in stark contrast and are not narrowly tailored. Provisions of section 692A.2A restrict only where a sex offender sleeps at night, not where he can work or travel.[303] Therefore, the statute does not provide restrictions for offenders who might better be served by restricting their work environment rather than where they live. Ultimately, the statute applies broadly to all offenders without respect to whether they have been deemed a continuing threat to minors.[304]

The Iowa residency restriction's use of an "offense-based" rather than an "offender-based" approach[305] raises questions of constitutionality. It is estimated that forty percent of sex offender registrants in Iowa have yet to be assessed because of a lack of funding.[306] Those who work with sex offenders stress the need for individualization in treatment in many aspects, including the appropriateness of a residence.[307] While experts identify "opportunity" and "temptation" as critical elements in assessing the risk of reoffending, the "biggest risk [i]s 'what's going on inside the individual'"[308] because "[r]isk assessments . . . show that not all sex offenders are made alike."[309]

The Iowa residency restrictions fail in much the same way as those from other states. Neither Iowa nor the other states have an exemption

---

facto challenges) (internal quotation marks omitted).

303. IOWA CODE §§ 692A.8, .2A(2) (2005).

304. *Id.* § 692A.2A(1).

305. *See* Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1325 (2003) (describing Minnesota's use of an "offender-based" system in its community notification program).

306. *Id.* at 1341 n.373 (citing Dave Morantz, *Sex Offenders' Risk Status Often Slow to Be Assessed*, OMAHA WORLD-HERALD, Oct. 28, 2001, at 1A). This evaluation process is no longer an option in Iowa, however, because in 2004 the Iowa Legislature repealed the section pertaining to the evaluation of sex offenders prior to release. 2004 Iowa Acts ch. 1175, § 466.

307. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *8 (Iowa Dist. Ct. Apr. 30, 2003) (citing the testimony of Ron Mullen, a parole and probation officer with experience in working with sex offenders). Commentators have also acknowledged the importance of individualization and allowing professionals to respond to each offender's high risk situations. *See* English, *supra* note 31, at 1260-61 (encouraging offenders to share details of their history in order to increase professionals' knowledge, enhancing their ability "to minimize the offender's access to victims and high-risk situations").

308. Doe v. Miller, 298 F. Supp. 2d 844, 860-61 (S.D. Iowa 2004) (quoting State's expert witness Dr. William McEchron, an educational psychologist), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

309. *Id.* at 876.

from the restrictions imposed by the statute and the corresponding severe punitive consequences for noncompliance, and fail to provide for a procedure by which a convicted sex offender can petition the court for an exemption.[310] The statutes construct a conclusive presumption that there exists no set of circumstances in which a convicted sex offender might be capable of interacting in society while living within the restricted areas. This presumption exists despite the fact that it has been "found that in a four- to five-year follow-up, 13.4 percent of child molesters re-offended and about 18.9 percent of adult rapists re-offended."[311] Through these statistics, it appears that a significant portion of offenders should at least be entitled to an individualized dangerousness determination before they are wholly condemned under the Iowa law. Even those individuals who are civilly committed have, under other states' statutes, the ability to demonstrate that they are "'safe to be at large,'" requiring immediate release.[312] Moreover, while civil commitments are "only *potentially* indefinite,"[313] statutes like Iowa's residency restrictions have no limits on the length of their applicability.[314] Additionally, the Iowa statute is potentially applicable to individuals who have received a deferred judgment and have had their conviction expunged.[315] The statute applies to individuals who have only been convicted of a misdemeanor.[316] The statute applies to those individuals previously deemed to be low risk.[317]

Unlike restrictions from other jurisdictions,[318] the Iowa statute does not allow for judicial discretion in applying the residency restrictions. [319]

310. *See, e.g.*, ALA. CODE § 15-20-20.1 to -38 (Supp. 2004) (containing no provision for petitioning the court for an exemption from the residency restrictions).

311. Doe v. Miller, 298 F. Supp. 2d at 863.

312. *See* Hendricks v. Kansas, 521 U.S. 346, 353 (1997) (quoting KAN. STAT. ANN. § 59-29a07(a) (1994)).

313. *Id.* at 364.

314. IOWA CODE § 692A.2A (2005).

315. *Id.* (providing no exception for individuals who have been given a deferred judgment or subsequently had their conviction expunged).

316. *Id.* § 692A.2A(1) (drawing within the residency restriction statute those who commit "a criminal offense against a minor," including misdemeanors).

317. *Id.* (grouping all types of offenders together for the purposes of the residency restrictions provision).

318. *See* ALA. CODE § 15-20-20.1 (Supp. 2004) (providing in the statutes legislative finding, discretion to judges for application of the restrictive sex offender provisions).

319. IOWA CODE § 692A.2A(2) ("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.") (emphasis added).

Iowa has instead decided that the residences of all included sex offenders, regardless of their current dangerousness, fall under the statute.[320] In the context of other sex offender management systems, the Supreme Court has held that "[t]he magnitude of the restraint made individual assessment appropriate" for purposes of civil commitment[321] but, by contrast, a registration and notification scheme imposed a much smaller condition upon the offender with virtually no individualization.[322] The level of restraint imposed via the residency restrictions falls closer to that of the civil commitment systems and should therefore be accompanied by greater individualization.

Additionally, section 692A.2A likely includes a significant number of prior offenders who pose no real threat to the community and it would be those individuals who would be best served through individualization. This broad application increases the suspicion that community safety is not the only motivating factor behind the statute. When a lawmaking body 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."[323] Clearly, the residency restrictions should minimally be viewed in the same respect as the community notification statutes which usually require that the individual "pose[] a high risk to the community."[324] In the past, Iowa used an individualized approach in some aspects of managing sex offenders,[325] particularly to make a determination as to whether an offender would be listed on the Iowa Sex Offender Registry.[326]

"While [an] individualized risk assessment approach is costly and time consuming, compared to an 'offense-based' regime that automatically

320. *Id.* § 692A.2A(1).

321. Smith v. Doe, 538 U.S. 84, 104 (2003).

322. *See id.* (allowing the state to "dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause").

323. *Id.* at 109 (Souter, J., concurring).

324. Weiss, *supra* note 245, at 595.

325. IOWA CODE § 692A.13A, *repealed by* 2004 Iowa Acts ch. 1175, § 466.

326. Doe v. Miller, 298 F. Supp. 2d 844, 859 (S.D. Iowa 2004) ("[L]ow risk individuals [released before the enactment of § 692A.2A] are subject to fewer community notification requirements and do not appear on the [Iowa Sex Offender] website."), *rev'd*, 405 F.3d 700 (8th Cir. 2005). Several states, such as Arkansas and Louisiana, place restrictions only on offenders who are high risk or sexually violent predators. *See* ARK. CODE ANN. § 5-14-128(a) (Michie Supp. 2003); LA. REV. STAT. ANN. §§ 14:91.1, 15:541(16) (West 2004 & Supp. 2005).

requires notification based on the commission of particular crimes, it does have significant benefits."[327] Individualization restricts the number of offenders targeted by an already burdened system, thereby reserving enforcement resources for those individuals who are deemed to be of greatest danger.[328] Moreover, the individualized approach would better achieve the goals of the legislature because "variables differ based on the individual offender, [so] restrictions and limitations would also be individualized to address the specific needs of a given offender."[329] By addressing the specific needs of the offender, public safety would be enhanced because of the ability of the offender to avoid potentially "dangerous situations," that may be determined by factors including, but not limited to, type of victim, the risk assessment, and type of offense.[330]

The Iowa residency restrictions have been shown to directly and substantially interfere with the integrity of the family unit and destroy protected relationships.[331] Furthermore, the residency restrictions interfere with these relationships without regard to any potential threat the sex offender poses to anyone, including children.[332] Consequently, the residency restrictions are far more extensive than necessary to promote the proffered purposes of the legislature. Restrictions placed more in tune to those areas where the danger of recidivism is high are likely to have more effect than simply that area where an offender picks up his mail. Psychologists have deemed it beneficial for an offender to have the ability to be in certain areas and be able to demonstrate his ability to manage impulses and help integrate himself back into society.[333]

---

327. Logan, *supra* note 305, at 1327.

328. *Id.*

329. Doe v. Miller, 298 F. Supp. 2d at 859. Factors that would go into an individualized assessment of dangerousness or likelihood of reoffending "would include prior history, prior criminal history, the number of offenses, the number of sexual offenses, the victim's age, the victim's sex, the relationship to the victim, whether alcohol was involved, and whether mental illness was involved." *Id.* at 861 (paraphrasing testimony of Dr. McEchron, who described the factors involved in assessing a sex offender, and noted "that he had not seen a variable that consists of the distance that one resides from a school or daycare" and was not aware of "any studies that have presented evidence of recidivism rates that specifically look at the distance sex offenders live from a school or child care facility").

330. *Id.* at 859.

331. *See supra* Part V.C.1.

332. *See supra* Part V.C.1-3.

333. *See, e.g.*, Doe v. City of Lafayette, 334 F.3d 606, 607 n.2 (7th Cir. 2003), *rev'd en banc*, 377 F.3d 752 (7th Cir. 2004) (describing testimony of Doe's psychologist that Doe's "ability to go to the park and manage his impulses [constituted] a positive step in his treatment"). According to one psychologist, it is a "good thing" to place

4. *Rational Basis*

If the rights to family autonomy and intrastate travel do not compel the application of strict scrutiny, application of the rational basis standard would not be fruitless. To pass rational basis, all that is required is a legitimate governmental purpose and that the means be rationally related to such a purpose;[334] however, the standard is not toothless.[335] It may very well be argued that the lack of a rational nexus between the distance one lives from a school or day care facility and the risk of reoffending would constitute a failure under the rational basis test. Additionally, in *State v. Seering*, the State's own witnesses voiced considerable concerns about the effectiveness of the residency restrictions.[336] Also, in certain circumstances, not only are these types of laws being applied to individuals who have victimized minors, but some have restricted offenders' right to live with children, even when those offenders have no history of offending against children.[337]

One of the most important ways to reduce recidivism among sex offenders is to strengthen family bonds.[338] Restrictions "which prevent sex offenders from living with their families[] could lead sex offenders to reoffend because of the lack of family support to encourage self control."[339] Separation from both family and society could lead to depression, which could also increase the likelihood of reoffending.[340] It could hardly be doubted that some restrictions are necessary, but whether the residency restrictions are actually effectuating the goals of the legislature is up for

offenders in situations where they have opportunities to employ relapse prevention techniques and learn their limits. Doe v. City of Lafayette, 377 F.3d 757, 761 (7th Cir. 2004).

334. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (outlining the traditional rational basis standard).

335. Mathews v. Lucas, 427 U.S. 495, 510 (1976).

336. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *7 (Iowa Dist. Ct. Apr. 30, 2003) (citing the testimony of state witness Dr. Dave McEchron).

337. *See, e.g.*, TENN. CODE ANN. § 40-39-201(b)(1) (Supp. 2004) (extending statute's reach beyond "offenders who prey on children" to any "[r]epeat sexual offenders" and "sexual offenders who use physical violence"); *see also Suit Challenges Residence Restrictions of Sex Offender Registry*, *at* http://www.wsmv.com/Global/story .asp?S=2133257 (Aug. 4, 2004) (describing the situation of Lonnie Long, who pleaded no contest to attempted rape of his adult-aged girlfriend but is now prevented from living with his stepdaughter).

338. State v. Seering, 2003 WL 21738894, at *7.

339. *Id.* (discussing the testimony of Dr. McEchron).

340. *Id.* (citing the testimony of Dr. McEchron).

debate.

5. *Eighth Circuit Panel Finds Iowa Law Does Not Violate Substantive Due Process*

The three judge panel was quick to dismiss the claim that Iowa Code section 692A.2A implicated any fundamental right, which would trigger strict scrutiny review.[341] Central to their conclusion was the "doctrine of judicial self-restraint," which requires judges "'to exercise the utmost care whenever [they] are asked to break new ground in th[e] field [of substantive due process].'"[342] The panel made clear that while the asserted right need not "be defined at the most specific level of tradition," the plaintiff's characterization of a "fundamental right to 'personal choice regarding the family' is so general that it would trigger strict scrutiny of innumerable laws and ordinances that influence 'personal choices' made by families on a daily basis."[343] The panel also emphasized that "the Iowa statute does not operate directly upon the family relationship" and is, therefore, different than cases like *Griswold v. Connecticut*[344] and *Moore v. City of East Cleveland*[345] where specifically defined rights like the "'intimate relation of husband and wife,'" and the "'intrusive regulation' of 'family living arrangements'" were implicated.[346] Consequently, the court was unwilling to require strict scrutiny in a situation where a law has only "an incidental or unintended effect on the family, or that 'affects or encourages decisions on family matters' but does not force such choices."[347]

In similar fashion, the panel refused to recognize the plaintiff's asserted constitutional right to travel. The panel first questioned whether the source of such a right would even be the due process clause.[348] The panel noted that most of the right to travel jurisprudence has been derived from the Privileges and Immunities Clause and examination of the Articles of Confederation, not the Due Process Clause.[349] Despite this stance taken

341. Doe v. Miller, 405 F.3d 700, 710 (8th Cir. 2005).

342. *Id.* (quoting Reno v. Flores, 507 U.S. 292, 302 (1993) (quotation omitted)).

343. *Id.* (citation omitted).

344. Griswold v. Connecticut, 381 U.S. 479 (1965).

345. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

346. Doe v. Miller, 405 F.3d at 710 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion)).

347. *Id.* (citations and quotation omitted).

348. *Id.*

349. *Id.* (citing Saenz v. Roe, 526 U.S. 489, 501 (1999)).

by the panel, it went further and announced that while "the statute may deter some out-of-state residents from traveling to Iowa because of the prospects for a convenient and affordable residence" such an impediment "does not implicate a fundamental right recognized by the Court's right to travel jurisprudence."[350]

The panel was also unwilling to extend recognition of a constitutional right to *intra*state travel.[351] The panel was unwilling to rely upon Supreme Court language from a case, *United States v. Wheeler*,[352] which the panel thought was tainted by the "general spirit of *Lochner v. New York*" because of its chronological proximity.[353] Additionally, the panel distinguished the recent recognition of a constitutional right of intrastate travel by the Sixth Circuit.[354] The panel distinguished the Iowa law by stating that assuming such a right exists, it exists only as a "'right to travel locally through public spaces and roadways.'"[355] "The Iowa residency restriction does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility, and it does not erect any actual barrier to intrastate movement."[356]

Because the plaintiffs were unable, according to the panel, to develop any argument that the right to "live where you want" is deeply rooted in the nation's history or implicit in the concept of ordered liberty, the panel was unable to examine the statute under strict scrutiny.[357] Despite the plaintiff's assertion of no rational connection through scientific study or data, the panel found the law constitutional under rational basis analysis.[358] The panel rejected the plaintiff's contention because it thought such a finding would "understate[] the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable."[359]

350. *Id.* at 712.
351. *Id.* at 713.
352. United States v. Wheeler, 254 U.S. 281 (1920).
353. Doe v. Miller, 405 F.3d at 712 (citing Lochner v. New York, 198 U.S. 45 (1905)).
354. *Id.* at 712-13 (citing Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002)).
355. *Id.* at 713 (quoting Johnson v. City of Cincinnati, 310 F.3d at 498).
356. *Id.*
357. *Id.* at 714.
358. *Id.* at 716.
359. *Id.* at 714.

D. *Procedural Due Process and Notice*

Procedural due process, guaranteed by the Fifth and Fourteenth Amendments, is required whenever the government deprives an individual of life, liberty, or property.[360] What process is due and what procedures are fair relate directly to the situation involved.[361] Where fundamental rights are at stake, an individual's interest is necessarily great, and procedural protections must therefore be substantial to sufficiently protect individuals from an erroneous deprivation.[362] Therefore, to establish a protected interest, an offender must be able to identify "a right conferred by state law or the Constitution that supports his contention."[363]

Procedural due process is protected through a three factor analysis: (1) determining "the private interest that will be affected;" (2) evaluating "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) evaluating "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[364]

Foremost, "[i]t is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law."[365] Under section 692A.2A, that constitutional guarantee against physical punishment is most certainly implicated where residency restraints are placed upon an individual.

The Iowa residency restrictions do not authorize any court or other official to investigate and grant an exemption to a sex offender so he may live with his family in "the only home available and affordable to them."[366] According to the court in *State v. Seering*, procedural due process was violated because the statute at issue provided "'no procedure by which a

360. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

361. Cohen v. Hurley, 366 U.S. 117, 130 (1961).

362. *Cf.* Santosky v. Kramer, 455 U.S. 745, 769-70 (1982) (holding that in a termination of parental rights proceeding, due process requires a state to support allegations by at least clear and convincing evidence).

363. Cutshall v. Sundquist, 193 F.3d 466, 478 (6th Cir. 1999).

364. Matthews v. Eldridge, 424 U.S. at 335.

365. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

366. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *9 (Iowa Dist. Ct. Apr. 30, 2003).

convicted sex offender can petition the Court for an exemption—from the restrictions imposed by the statute and the corresponding severe punitive consequences for noncompliance.'"[367] The practical effect in many situations will be to render a sex offender homeless, "a result which shocks the sense of 'fair play.'"[368]

Although the residency restrictions imposed under section 692A.2A do not amount to a complete deprivation of liberty as would institutionalization, the restrictions significantly inhibit the individual's familial and living conditions to such an extent that correspondingly extensive procedural due process is warranted.[369]

Procedurally, whether or not there must be a further reason beyond a conviction itself to impose the statute upon an individual is mixed in regard to past attempts to regulate sex offenders. In *Kansas v. Hendricks*,[370] the Court upheld a law that permitted the civil commitment of past sex offenders.[371] The civil commitment statute required a showing of "'mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence,'"[372] while the Iowa residency restrictions require no other showing of the offender's likelihood of reoffending or individual predisposition.[373] It is clear from *Hendricks* "that a conviction standing alone did not make anyone eligible for the burden imposed by that statute."[374]

Coupled with the earlier determination that offenders' fundamental rights are being infringed,[375] the individual interest affected is substantial. "Because the goal of § 692A.2A is to protect children, adding a process that would allow for an individual determination of whether a given offender poses a threat would greatly bolster the procedural safeguard against unnecessary deprivation of . . . fundamental rights."[376] At the time

367. *Id.* (quoting J.L.N. v. State, 894 So. 2d 738, 749 (Ala. Crim. App. 2002)).

368. *Id.* at *10.

369. *See id.* at *9-10 (finding that the statute's adverse effects on the individual violate "fundamental fairness").

370. Kansas v. Hendricks, 521 U.S. 346 (1997).

371. *Id.* at 371.

372. *Id.* at 352 (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

373. *See* IOWA CODE § 692A.2A(2) (2005).

374. Smith v. Doe, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting) (discussing *Hendricks*).

375. *See supra* Part V.C.1-3.

376. Doe v. Miller, 298 F. Supp. 2d 844, 877 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

of the district court decision in *Doe v. Miller*, Iowa had a process already in place which would have easily allowed for an individualized determination of dangerousness.[377] Without an individualized determination—where the offender is given a meaningful opportunity to be heard—the law undoubtedly infringes upon the offender's right to procedural due process.

Not only do the residency restrictions clearly interfere with fundamental rights in their normal application as proscribed, but it is also difficult to determine when the statute will actually apply. "Procedural due process 'insists that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'"[378]

Much the same as when states undertake a regulatory scheme, it should also be logical for criminal schemes "to provide those persons subject to it with clear and unambiguous notice of the requirements and the penalties for noncompliance. . . . Timely and adequate notice serves to apprise individuals of their responsibilities and to ensure compliance with the . . . scheme."[379] The plain language of section 692A.2A states that the statute is applicable to any "'person' . . . who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor."[380] Despite this broad and vague language, this provision has been recognized as being "applicable to individuals who have committed sex crimes against minors."[381] The statute does not specifically lay out which offenses are included in the broad language used. However, the terms "criminal offense against a minor," "aggravated offense," "sexually violent offense," and "other relevant

377. *Id.* Judge Pratt expressed his concern with Iowa's failure to incorporate the individualization process:

> Sex offenders are classified according to risk at the time of their release from state custody. Because the determination of whether the offender is classified as a high, low, or moderate risk to re-offend affects a number of registration requirements under Iowa Code Chapter 692A, the Court is at a loss to understand why the State would do away with these classifications when imposing the most severe of restrictions on sex offenders.

Id.

378. *Id.* (quoting Grayned v. Rockford, 408 U.S. 104, 108-09 (1972)).

379. Smith v. Doe, 538 U.S. at 96 (discussing notice requirements of a regulatory scheme).

380. IOWA CODE § 692A.2A(1) (2005).

381. Doe v. Miller, 216 F.R.D. 462, 464 (S.D. Iowa 2003).

offense" are specifically defined in other portions Chapter 692A.[382] When individuals are subject to this law for committing crimes such as consensual statutory rape,[383] possession of child pornography,[384] or exposing one's self at a party where a minor happens to be present,[385] the result will only be an increased sense of fear in the community, without a corresponding increase in community safety.[386]

Deficiencies in the residency restrictions' implementation can also be seen in the efforts of one sex offender, referred to only as "Doug."[387] Doug was one of the first sex offenders to be charged under section 692A.2A.[388] Upon being released, Doug attempted to comport with the law and contacted local law enforcement to determine whether his chosen residence was acceptable.[389] Two months passed and no word came from the authorities as to whether he could live at his residence, until one day he was arrested for violation of section 692A.2A.[390] Doug's chosen residence was within 2000 feet of a school, but was on the other side of a heavily wooded area.[391] Doug had measured the distance to the school twice in his car and thought is was acceptable, but upon his arrest, he was told that the distance was to be measured "as the crow flies."[392] Because of this incident, Doug was forced from the town where he had spent the majority of his life because there was no legal place for him to live.[393] Doug is merely one example of what will eventually become many individuals who will be

382. *See* IOWA CODE § 692A.1(1), (5), (7), (9).

383. *See, e.g.*, Doe v. Miller, 298 F. Supp. 2d 844, 852 (S.D. Iowa 2004) (describing application of residency restrictions to John Doe I, who was convicted for having consensual sex with a fourteen year old minor in Wisconsin when he was eighteen, which would not have constituted a crime under Iowa law), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

384. *See, e.g.*, *id.* at 855 (describing John Doe VIII and John Doe IX, who were convicted for possessing improper pictures from the internet).

385. *See, e.g.*, *id.* at 856 (describing John Doe XIV, who was convicted of a serious misdemeanor when he was nineteen after exposing himself at a party where a thirteen-year-old girl was present).

386. *See id.* at 864 ("[T]he two thousand foot restriction is too restrictive, and the law does not adequately address the danger to public safety.") (citing sex offender specialist Dr. Luis Rosell).

387. NPR, *supra* note 62.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

unable to secure housing or told their residence is unacceptable after they have obtained it. The Attorney General of the State of Iowa identified Carroll and Johnson counties as counties that have created maps showing the restricted areas, giving offenders "adequate information and a reasonable opportunity to comply."[394] However, these counties are only two of ninety-nine in the state, which, if illustrative of providing the information needed to comply, hardly constitutes adequate notice to the affected persons.

While it may be relatively easy for state officials to identify the locations of schools, it is much more difficult to determine where child care facilities are located. The Arkansas Attorney General admitted that determination of whether a facility constituted a "daycare facility" within the meaning of the Arkansas residency restrictions could only be done "on a case-by-case basis in light of the nature of each facility and its activities."[395] Under Iowa law, "child care facility" is defined as "a child care center, preschool, or a registered child development home."[396] The Iowa Department of Human Services possesses the only available list of child care facilities in the state.[397] It is not published.[398] Additions and removals from the list of over 7,000 facilities are frequent, including 1,921 new listings between 2002 and 2003.[399] Not only are the number of facilities difficult to track, some may be impossible to locate because "[i]n several instances, the listings contain no physical address or only a post office box number."[400]

In Iowa there are very few maps available indicating what areas of the state are unavailable for sex offenders to reside.[401] For example, the cities of Cedar Rapids, Newton, Burlington, Davenport, and Fort Dodge are

394. Brief for Appellant at 26-27, Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (No. 04-1568).

395. Ark. Op. Att'y Gen. No. 2003-354, 2003 WL 23101603, at *2 (Dec. 23, 2003).

396. IOWA CODE § 237A.1(5) (2005).

397. Doe v. Miller, 298 F. Supp. 2d 844, 849 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

398. *Id.* The plaintiffs in *Doe v. Miller* obtained "a copy of the list only after filing an open records request and paying a seventy dollar fee." *Id.*

399. *See id.* ("The 2002 list contains 7462 daycare locations and is 258 pages long. Although the 2003 database lists only 7172 locations, 1921 of these are new from the 2002 database.") (citation omitted).

400. *Id.*

401. *Id.* at 850.

without maps.[402] These few cities alone comprise almost ten percent of the state's population.[403] Even maps that are available are "not accurate to the foot" and "'were not meant to be to exact scale,' but 'a reasonable way to provide general guidance.'"[404] Additionally, those offenders who live in rural areas may be without any maps because many localities lack countywide maps.[405] It seems contrary to our system of justice to impose a penalty upon someone who was unable to receive notice despite due diligence.

The difficulties with ascertaining where schools and day care facilities are located is clearly a problem; however, other state statutes have taken the restrictions one step further. Georgia is an example of a state in which the residency restrictions also include "areas where minors congregate."[406] The statute itself is without a clear definition of what those areas might be. "Area where minors congregate" is defined to include "all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, and *similar facilities providing programs or services directed towards persons under 18 years of age*."[407] The Georgia Supreme Court was presented with an opportunity to examine this language, but it instead declared that the defendant was without standing to challenge the vagueness of the "areas where minors congregate" provision of the statute because he had only the day care restriction applied to him.[408] Through this restriction, it might be easy to have a sex offender removed from a neighborhood when he or she is not in

402. *Id.*

403. The total population of Cedar Rapids, Davenport, Burlington, Newton, and Fort Dodge, according to the 2000 United States Census, is 286,671. *See* Iowa's Bigger Cities, http://www.city-data.com/city/Iowa.html (last visited Apr. 27, 2005) (Cedar Rapids, 120,758; Davenport, 98,359; Burlington, 26,839; Newton, 15,579; Fort Dodge, 25,136). Iowa's total population as reported by the 2000 United States Census is 2,926,324. U.S. CENSUS BUREAU, IOWA QUICK FACTS, http://quickfacts.census.gov/qfd/states/19000.html (last revised Apr. 19, 2005). Only about two percent of residences in Carroll County, Iowa, are available to persons affected by § 692A.2A. Doe v. Miller, 298 F. Supp. 2d at 852.

404. Doe v. Miller, 298 F. Supp. 2d at 850 (quoting Carroll County Attorney John Werden). Werden admitted at trial that errors were made in producing the map and a previously omitted day care, when added to the map, created restricted areas covering the entire town of Breda. *Id.*

405. *See id.* (naming Johnson County as an example of a county lacking such a map at the time of the opinion).

406. GA. CODE ANN. § 42-1-13 (Supp. 2003).

407. *Id.* § 42-1-13(a)(1) (emphasis added).

408. Mann v. State, 603 S.E.2d 283, 286 (Ga. 2004).

violation of the school or day care provisions. Knowledgeable parents need only tell their children to go hang out on the sidewalk near the offender's home so they then establish that the offender is near a location where "minors congregate."

The lack of exemption petition procedures, individualization, and adequate notice of restricted areas poses a huge hurdle for statutes like Iowa's in demonstrating adherence to the constitutional requirement of procedural due process.

1. *Eighth Circuit Panel Finds Iowa Law Does Not Violate Procedural Due Process*

The panel began its analysis by recognizing "the judicial doctrine of vagueness, which requires that a criminal statute 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'"[409] The panel, however, limited its application of this doctrine to "the words of the statute" and disagreed with the plaintiffs' assertion that potential problems with identification of compliant housing renders the statute unconstitutional on its face.[410] The panel stated that a criminal statute will not be "vague on its face unless it is 'impermissibly vague in all of its applications,' and the possibility that an individual might be prosecuted in a particular case in a particular community despite his best efforts to comply with the restriction is not a sufficient reason to invalidate the entire statute."[411] The panel did leave open the possibility that "[a] sex offender subject to prosecution under those circumstances may seek to establish a violation of due process through a challenge to enforcement of the statute as applied to him in a specific case."[412]

The panel also ruled against the plaintiffs in their attempt to assert a procedural due process violation because the Iowa statute foreclosed their opportunity to be heard, and did not provide any process for individual determinations of dangerousness.[413] The panel relied upon *Connecticut*

409. Doe v. Miller, 405 F.3d 700, 708 (8th Cir. 2005) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

410. *Id.*

411. *Id.* (quoting Vill. Of Hoffman Estates v. Flipside, 455 U.S. 489, 497 (1982)).

412. *Id.*

413. *Id.* at 709.

Department of Public Safety v. Doe[414] to reestablish the principal that "[s]tates 'are not barred by principles of "*procedural due process*" from drawing' classifications among sex offenders and other individuals."[415] Therefore, unless the plaintiff's "can establish that the *substantive* rule established by the legislative classification conflicts with some provision of the Constitution, there is no requirement that the State provide a process to establish an exemption from the legislative classification."[416]

E. *Fifth Amendment Protection Against Self-Incrimination*

The Fifth Amendment to the United States Constitution states that an individual "shall [not] be compelled in any criminal case to be a witness against himself."[417] Examination of Fifth Amendment jurisprudence finds that the prohibition on self-incrimination protects an individual from answering "official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[418] Because the privilege is violated if the government "compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered,"[419] the privilege encompasses not only a statement by the individual that he wishes to refrain from answering but also the decision to remain silent altogether.

In addition to the residency restrictions themselves, sex offenders have an additional registration requirement.[420] Failure to comply with the registration requirements presents the possibility of the offender being charged with an aggravated misdemeanor for the first offense, and a class D felony for any subsequent offense.[421] However, if an individual does register and is in violation of the residency restrictions he faces an aggravated misdemeanor charge.[422] One piece of information the registering defendant is required to provide on the registration form is an

414. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

415. Doe v. Miller, 405 F.3d at 709 (quoting Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003) (quoting Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (plurality opinion) (emphasis in original))).

416. *Id.* (citing Conn. Dep't of Pub. Safety v. Doe, 538 U.S. at 7-8).

417. U.S. CONST. amend. V.

418. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

419. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977).

420. *See* IOWA CODE § 692A.2(1) (2005) (requiring persons convicted of criminal offenses of the type identified in § 692A.2A(1), among others, to register).

421. *Id.* § 692A.7.

422. *Id.* § 692A.2A(3).

address.[423] This piece of information alone is enough to prove (or lead to proof) that he or she is in violation of the residency restrictions.[424] In *Doe v. Miller*, the court found that because a sex offender must notify local authorities of a change of address, the required notice constituted self-incrimination if the reported residence is within the 2000 foot restricted area.[425]

Before a court will invalidate a law on self-incrimination grounds, it must be clear that compliance with the law creates a "real and appreciable" danger of incrimination.[426] The combination of a registration requirement and the residency restrictions will, for many offenders, create such a danger. The Supreme Court in *Albertson v. Subversive Activities Control Board*[427] provided two factors in determining whether a law creates such a danger of incrimination.[428] First, does the reporting requirement involve an area that is essentially noncriminal and regulatory, or "an area permeated with criminal statutes"?[429] Undoubtedly, the breadth of legislation pertaining to sex offenders typically contains criminal penalties for violations, not to mention the underlying offenses themselves. Second, is the group targeted for reporting a group "inherently suspect of criminal activities"?[430] This question can also be answered affirmatively. It is the professed reason of government officials that the perceived high rate of recidivism of sex offenders is why these laws are needed.[431] To further demonstrate the violation of an individual's right against self-incrimination, the Court examines whether the information provided will be "a significant 'link in the chain' of evidence tending to establish . . . guilt."[432] Under the residency restrictions, the location of an offender's residence may be the

423. *Id.* § 692A.9.

424. *See, e.g.*, Doe v. Miller, 298 F. Supp. 2d 844, 878 (S.D. Iowa 2004) ("If a sex offender is living in violation of the two thousand foot residency restriction, completing the registration would mean admitting to a criminal act."), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

425. *See id.* at 879 (holding Iowa's registration requirement unconstitutionally requires self-incrimination because "sex offenders living in violation of § 692A.2A must either provide information that explicitly admits the facts necessary to prove the criminal act or refuse to register and be similarly prosecuted").

426. Marchetti v. United States, 390 U.S. 39, 48 (1968) (internal quotation marks omitted).

427. Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

428. *See id.* at 79.

429. *Id.*

430. *Id.*

431. *See supra* note 45 and accompanying text.

432. Marchetti v. United States, 390 U.S. 39, 48 (1968) (footnote omitted).

only evidence needed to establish guilt other than the requisite underlying conviction triggering the applicability of the law.[433]

In *Doe v. Miller*, the State of Iowa relied on *Pennsylvania v. Muniz*[434] to establish that the mere address of an individual is basic information required in a normal police booking procedure.[435] However, such an assertion is absurd when the address itself is likely the only disputed element of the criminal offense.[436] Upon registering, pursuant to the sex offender registry, an individual could assert his Fifth Amendment rights. However, by doing so, the individual has given notice to law enforcement that the individual is in violation of the residency restrictions.[437] Undoubtedly, in the context of registering, any sex offenders in violation of the residency restrictions are compelled to testify regarding their living arrangements, thereby incriminating themselves.[438] The situation for an affected sex offender most certainly creates a Hobson's choice, and places them in the most undesirable of circumstances.

The State of Iowa asserted an additional faulty argument in *Doe v. Miller*. The State claimed that even assuming the registration requirement in coordination with the residency restrictions implicated an individual's right to be free from self-incrimination, the appropriate remedy for such statements would be to "exclu[de] . . . those statements [during] a subsequent criminal trial"—not to invalidate the statute.[439] The only way this approach would be effective in a trial context would be for any

433. *See* Doe v. Miller, 298 F. Supp. 2d 844, 878 (S.D. Iowa 2004) (finding that a sex offender admits to a criminal act regardless of whether he completes registration if he resides within 2,000 feet of a restricted area), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

434. Pennsylvania v. Muniz, 496 U.S. 582, 590-602 (1990) (holding that the government can elicit certain biographical information without informing a suspect of his or her *Miranda* rights, even where the information subsequently turns out to be incriminating to the defendant).

435. Doe v. Miller, 298 F. Supp. 2d at 878-79 (discussing Pennsylvania v. Muniz, 496 U.S. at 589-97).

436. *Id.* at 879 ("Under the registration requirements of Iowa Code Chapter 692A, sex offenders living in violation of § 692A.2A must either provide information that explicitly admits the facts necessary to prove the criminal act or refuse to register and be similarly prosecuted.").

437. *See, e.g.*, *id.* at 878 (holding a defendant who does not volunteer residence information as part of Iowa's registration requirement subjects himself "to serious criminal charges and substantial jail time").

438. *See id*. (holding that the information required under the registration statute is testimonial in nature for the purposes of § 692A.2A).

439. Appellant's Brief at 30, Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (No. 04-1568) (citing Minnesota v. Murphy, 465 U.S. 420, 426 (1984)).

derivative evidence to be excluded as well, including evidence of a defendant's actual residential address.

1. *Eighth Circuit Panel Finds Iowa Law Does Not Violate Self-Incrimination Clause of Fifth Amendment*

The panel's holding that the Iowa law is not unconstitutional under the Fifth Amendment rests upon their assertion that the law "does not compel a sex offender to be witness against himself of any kind."[440] The panel instead noted that it is a separate provision in the Iowa Code which requires a sex offender to register his address; therefore, because the plaintiffs did not allege a constitutional violation under the registration requirement, or seek an injunction against its enforcement, the panel could not justify the invalidation of the residency restriction.[441] Ultimately, the panel concluded that there is no support for the "invalidation of a substantive rule of law because a reporting requirement allegedly compels a person in violation of that substantive rule to incriminate himself."[442]

The panel did acknowledge, however, that "had the [plaintiffs] challenged the sex offender registration statute, . . . a self-incrimination challenge to the registration requirements would not be ripe for decision."[443] The record in this case was void of any evidence which demonstrated that the registration of an address led to or furthered a criminal prosecution.[444] The panel left open the possibility for such a challenge "[i]f and when there is a prosecution for violation of the residency restriction in which the prosecution makes use of a sex offender's registration, a prosecution for failure to register a prohibited address, or some other basis . . . to say that the dispute is ripe."[445]

VI. MOVING FORWARD: POLICY CONCERNS

Even more so than previous attempts to regulate sex offenders through registries and community notification, residency restrictions "mark a significant break from the recognized concept that once a person 'pays his debt to society' he should be free to reintegrate himself" back into

440. Doe v. Miller, 405 F.3d 700, 716 (8th Cir. 2005).
441. *Id.*
442. *Id.*
443. *Id.* at 717.
444. *Id.*
445. *Id.* at 717-18.

society.[446] "'If an offender is already hostile to society, it can do a lot more harm than good. Shaming is punitive justice; we'd rather see restorative justice.'"[447] Common effects of legislative enactments on sex offenders following release have been "harassment and physical abuse by the community, loss of employment, and loss of housing."[448]

With these effects already in place, states should not, in their "zeal to protect [themselves] and [their] children, . . . enact measures that [will] do more harm tha[n] good."[449] "'The intent of the law is to protect kids. Will it? [It is uncertain] how big an impact it can have. If it protects a couple of kids in our state, let's do it, but let's come up with something a little more workable.'"[450] While "'[h]erding former offenders into penal colonies may help get politicians re-elected, . . . it is a poor use of law enforcement dollars. The unfortunate families who happen to live in the few areas where these former offenders can live aren't too thrilled about it either.'"[451] One court has made clear that "[t]o permit one state to dump its convict[ed] 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."[452] Some of the residency law's harshest critics include law enforcement and prosecutors.[453] They argue that the determined distance is arbitrary and fails to protect people from child molesters, as legislators had hoped.[454]

---

446. G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1635 (1995).

447. Michael Grunwald, *Shame Makes Comeback in Courtrooms*, BOSTON GLOBE, Dec. 28, 1997, at A1 (quoting Jenni Gainsborough, policy director for the National Prison Project of the ACLU).

448. Van Duyn, *supra* note 24, at 649-50.

449. Mel L. Greenberg, *Just Deserts in An Unjust Society: Limitations on Law As A Method of Social Control*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 333, 337 (1997).

450. NPR, *supra* note 62 (quoting Des Moines Police Sergeant Barry Arnold). The debate about whether laws regulating sex offenders are effective and desirable is not limited to the realm of residency restrictions. *See, e.g.*, Fry-Bowers, *supra* note 4 (indicating, for example, that California's sex offender registration and notification act classifies offenders, but opponents argue that empirical data regarding sex offender recidivism does not correspond).

451. Am. Civil Liberties Union, *supra* note 57 (quoting R. Ben Stone, Executive Director of the ICLU).

452. Rutherford v. Blankenship, 468 F. Supp. 1357, 1358, 1360-61 (W.D. Va. 1979) (striking a banishment provision of a plea agreement that would have required the defendant to move out of the state after serving a one-year sentence).

453. Chase, *supra* note 66.

454. *Id.*

An area's safety may be compromised and property values may be adversely affected because of the unpopular stigma that attaches to areas in which sex offenders reside.[455] Many real estate professionals feel that "communities should not be provided with . . . information" about sex offenders living in the area.[456] Real estate agents have "indicated that the presence of [high risk] sex offenders tends to have the greatest effect on prospective buyers with young children."[457] These laws will inevitably create high concentrations of sex offenders, making it difficult for some communities "to maintain housing and economic stability."[458]

To counteract such effects, a concerned citizen need only register her home as a child care facility to create a restricted zone.[459] That citizen does not even have to care for a child in that home.[460] Apart from the direct effect upon those citizens living in areas with high concentrations of sex offenders is the likelihood that "'if you put individuals together with like interests, and those interests are negative or deviant, then potentially they could be negative influences on each other.'"[461] Of course, many of these concerns are predicated on the assumption that sex offenders will continue to register despite the new residency restrictions. At least one law enforcement officer views the statute as theoretically "an important tool for enhancing public safety by reducing sex offender recidivism. In practice, however, [one officer's] concern is that sex offenders will simply choose not to register at all, knowing that they may be prosecuted for revealing their residence."[462] Consequently, the law may lead to a higher number of unregistered sex offenders as well as less accurate information

455. *See* Weiss, *supra* note 245, at 580-82 (describing the negative impacts of sex offender laws on both sex offenders and the community).

456. *Id.* at 581.

457. *See* MINN. LEGIS. REPORT, *supra* note 16, at 8.

458. *Id.*

459. *See* Doe v. Miller, 298 F. Supp. 2d 844, 869 (S.D. Iowa 2004) (explaining that a concerned "individual need only register his or her home as a private child development home and a two thousand foot buffer zone emerges"), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

460. *Id.* at 849 (citing IOWA CODE § 237A.1(7) (2003), which defines a child development home as a facility that "*may* provide child care to six or more children") (emphasis added).

461. *Id.* at 859 (quoting testimony of Dudley Allison, an Iowa Department of Corrections parole and probation officer specializing in the supervision of sex offenders).

462. State v. Seering, No. CRIM. AGIN006718, 2003 WL 21738894, at *8 (Iowa Dist. Ct. Apr. 30, 2003) (citing testimony of Sergeant Lyle Hansen, a detective for the Washington, Iowa Police Department).

about those already registered.[463]

One of the most apparent policy problems with the Iowa residency restrictions is that the punishment is indefinite. Many feel indefinite punishment is warranted due to research that has shown that "'[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.'"[464] Some professionals who have extensive experience working with sex offenders believe that some external controls, such as living restrictions, can be imperative in the treatment of sex offenders, but note that it is also important that those external controls be relaxed "so that the sex offender can gain more internal controls."[465] The residency restrictions affect not only offenders released without parole, but also the treatment and oversight of offenders subject to parole and probation.[466] Not being able to find suitable residences for parolees has made the job of parole and probation officers more difficult because they have not had the "'opportunity to see [the sex offender] function in the community before they leave probation,'" nor have these officers had an opportunity to ensure the offender has acquired the necessary internalized controls.[467] At least one individual in the field of sex offender treatment believes that parole and probation officers are able to handle oversight of dangerous situations without section 692A.2A.[468]

Proponents of the restrictions argue the mere presence of these offenders near schools will "whet[] the appetite[]" of sex offenders and increase the likelihood of reoffending.[469] The Supreme Court, however, has expressly rejected this theory because the government "cannot constitutionally premise legislation on the desirability of controlling a

463. *Id.*

464. Smith v. Doe, 538 U.S. 84, 104 (2003) (alteration in original) (quoting R. PRENTKY ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

465. State v. Seering, 2003 WL 21738894, at *7 (discussing the testimony of Ron Mullen, a parole and probation officer with experience working with sex offenders).

466. *Id.* at *8.

467. *Id.* (quoting the testimony of Ron Mullen).

468. *See* Doe v. Miller, 298 F. Supp. 2d 844, 859 (S.D. Iowa 2004) (summarizing the testimony of Dudley Allison, an Iowa Department of Corrections parole and probation officer specializing in supervision of sex offenders), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

469. Doe v. City of Lafayette, 334 F.3d 606, 610 (7th Cir. 2003), *rev'd en banc*, 377 F.3d 757 (7th Cir. 2004).

person's private thoughts."[470] The maxim *cogitationis poenam nemo patitur* (no one is punishable solely for his thoughts) is a cornerstone of the American criminal justice system.[471] Many registered sex offenders have not had any subsequent complaints filed against them,[472] so the apparent effect of the statute is to control their thoughts when they are in the restricted areas. Even assuming that offenders within the restricted areas intend to molest children, their "mere presence is not enough to constitute a 'substantial step' towards an attempted sex offense."[473]

More than anything, the individual circumstances of a particular offender need to be taken into account when imposing such a broad restriction on his or her life. Even those who see the exile of sex offenders as a viable governmental option cite the need for individual determination of the offender's likelihood of reoffending.[474] Is it enough when an offender engages in "psychiatric brinkmanship"[475] by placing himself in situations that substantially increase the possibility of his acting on impulse, or does our criminal justice system require more?

VII. RECOMMENDATION

While it used to be the position of several courts that the postsentence regulation of sex offenders was limited because the laws do "not by [themselves] restrict where sex offenders may live and work,"[476] the onset of statutes restricting residence locations clearly evidences state legislatures' new attempts to stretch those acceptable boundaries. Obviously, concerns over offenders with high rates of recidivism are warranted, but efforts to control such situations should come in the form of increased prison sentences and development of mandatory and comprehensive treatment programs:[477]

---

470. Stanley v. Georgia, 394 U.S. 557, 565-66 (1969).

471. Doe v. City of Lafayette, 377 F.3d at 782 (en banc).

472. *Id.* at 779 (citing no complaints from people in the park of an offender's presence).

473. *Id.* at 783 ("The law has long recognized that not every individual is equally capable of controlling his desires and preventing them from becoming actions which injure others.").

474. *See, e.g.*, *id.* at 767.

475. *Id.* at 773.

476. People v. Stead, 66 P.3d 117, 121 (Colo. Ct. App. 2002); *see, e.g.*, State v. Manning, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995) (holding that the registration provisions were not an affirmative disability because they did not "restrain [offenders'] movement").

477. The Iowa Legislature is currently examining a similar proposal, which

> Sentences must be "fair" in light of the harm committed and the individual culpability of the offender. That aspect of "fairness" appears to have been lost in current law-and-order politics which has led to the imposition of increasingly harsher penalties on all sex offenders, independent of culpability and likelihood of re-offending.[478]

Living restrictions cause offenders to be separated from the community and family support structures that are vital in being reintroduced into society. "'The last thing you would want to do is alienate these guys, because they'll believe they are the victims. Under a law like this, they'll go underground, and then we're not going to be safe.'"[479]

Even those who sponsored the legislation in Iowa say they are willing to modify the statute to make the situation more workable.[480] Iowa State Senator Jerry Behn remarked that if the courts rule that the current distance is too restrictive, he would change the law to adhere to that ruling.[481] One sex offender subject to the law understands why parents would be uneasy having him live nearby, and admits that he would not want an offender living near where his children attended school.[482] However, despite all the efforts of state legislatures, both good and bad, "[t]he first line of prevention still must rest with educating youths to be wary of strangers and unfamiliar situations."[483]

The rationale and general intent of residency restrictions is not in question, but the restrictions must be made to actually fit the purpose for which they were intended. The most important aspect is to make the individual characteristics of the offender a significant factor in determining the statute's applicability. For example, "[i]f the sexual offender is psychologically evaluated and the evaluator is reasonably certain that the

---

includes increases prison sentences for particular sex offenses, increases the use of electronic monitoring for those offenders on probation or parole, and more stringent sex offender treatment programs. S.F. 619, 1st Sess. (Iowa 2005). This bill, however, does retain the residency restrictions in the form of a 1000 foot restriction. *Id.*

478. Demleitner, *supra* note 25, at 583.

479. Frank Santiago, *Judge Blocks Law that Restricts Where Sex Offenders May Live*, DES MOINES REG., July 26, 2003, at A1 (quoting Randall Wilson, Legal Director, ICLU).

480. *See* NPR, *supra* note 62 (stating that State Senator Jerry Behn, the lawmaker who sponsored the measure, would "change the law" if the 2,000 foot residency restriction is too restrictive, because "the last thing he ever wanted to do was to make anyone see the offenders as victims").

481. *Id.*

482. *Id.*

483. Logan, *supra* note 305, at 1293.

offender has not been rehabilitated, then the high risk offender should be restricted in the area in which he can reside."[484] In cases where the offender has victimized a minor and is determined to pose a significant risk to minors in the future, "the offender should be restricted from living in places where large numbers of children are present, such as near schools or day care centers. This restriction will further the government's interest in maintaining safety in the community, even though it implicates some constitutional concerns."[485]

Other states, in evaluating released sex offenders, have taken the approach of individualizing the factors taken into consideration when an offender is paroled.[486] In the case of the Iowa residency restrictions, applicability of the restrictions is not limited to an individual's time on parole, but instead remains with the individual offender indefinitely. It would seem irrational not to offer at least the same individualistic approach to those who are otherwise free citizens. Any restrictions, when properly assigned to dangerous individuals, "will be outweighed by the governmental interest in maintaining community safety."[487] These measures are vital for the protection of children in communities throughout the nation.

Additionally, the residency restrictions do not call for an alternate imposition of punishment if the offender is a minor. Granted, it is of utmost importance that those who commit these acts be punished; however, it will be an unfortunate outcome if those individuals who commit offenses in their youth are never given the opportunity to become productive citizens. Furthermore, there are situations when imposing such severe penalties on a minor offender would seem completely irrational, such as where two minors are engaged in consensual sexual conduct.[488]

---

484. Weiss, *supra* note 245, at 600.

485. *Id.*

486. *See* Humma Rasul, *Danger in Numbers: California Updates Its Version of Megan's Law and Steps Further to Protect Our Children from Sex Offenders Living Together in Groups*, 30 MCGEORGE L. REV. 528, 540 (1999) (discussing the factors a parole officer must be aware of when approving a released sex offender's residence, including the location of schools).

487. Weiss, *supra* note 245, at 600.

488. *See, e.g.*, *In re* Pima County Juvenile Appeal No. 74802-2, 790 P.2d 723, 724-25 (Ariz. 1990) (involving a sixteen-year-old boy who was required to register as a sex offender because he was convicted for fondling the chest of his fourteen year old girlfriend). Abrogation of this case has been recognized by the courts of Arizona. *See* State v. Getz, 944 P.2d 503 (Ariz. 1997); *In re* Maricopa County Juvenile Action No. JV-121430, 838 P.2d 1365 (Ariz. App. 1992).

VIII. CONCLUSION

"No matter how repulsed society is concerning sex offenders, we cannot place offenders in a unique, separate class bereft of constitutional rights."[489] "[A]lthough the public has an undeniable interest in ensuring public safety and in having the laws of the State enforced, the public has an even greater interest in assuring that constitutional violations are remedied."[490] Moreover, it is completely illogical for Iowa, or any other state, to pass legislation for the purported interest of protecting the public from dangerous individuals but construct legislation without regard to actual dangerousness.

Our criminal justice system should be void of any attempt to banish individuals as potential criminals. "Offenders need an acceptable point of re-entry"[491] because "a focus on reintroduction into society and reintegration, rather than stigmatization, may be more likely to reduce [recidivism] rates of sex offenders"[492] than residency restrictions.

While it is clear that the judiciary recognizes the broad powers of a legislature in protecting the health, safety, and welfare of citizens, it must not lose sight of its judicial function—even in the face of public outcry. While many will say that sex offenders have no right to blame the residency restrictions for their hardships,[493] a state statute designed to protect the community from sexual offenders and criminal sexual activity, no matter how horrendous the crime, must comport with constitutional guarantees.

The existing body of law and statutes, while well-intentioned, have missed their mark. "In attempting to identify all those prone to abuse children, the states have labeled minor crimes as sex offenses[,] . . . accepted the questionable data on the untreatability of all offenders,"[494]

489. Van Duyn, *supra* note 24, at 659. This sentiment is not shared by some judges, and has been evidenced by recent decisions both upholding the Iowa residency restrictions and denying an injunction on the restrictions in Ohio. *See* Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (reversing the district court's ruling of unconstitutionality); Doe v. Petro, No. 1:05-CV-125, 2005 WL 1038846 (S.D. Ohio May 3, 2005) (denying request for injunction on an Ohio law prohibiting sex offenders from living within 1,000 feet of school premises).

490. Doe v. Miller, 216 F.R.D. 462, 471 (S.D. Iowa 2003).

491. Richmond, *supra* note 40 (quoting Charles Onley, a research associate at the Center for Sex Offender Management).

492. Billings & Bulges, *supra* note 8, at 257.

493. *Cf.* Dlabik, *supra* note 2, at 631 ("Sex offenders have no right to blame the community notification laws for their hardships.").

494. Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The*

and swept away constitutional protections of substantive due process, the prohibition on ex post facto laws, and adequate notice guaranteed by procedural due process. Much the same as the registration laws, if the residency restrictions are supposed to exist to protect children, they must be redrafted.[495]

Michael J. Duster[*]

Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s, 90 NW. U. L. REV. 788, 861 (1996).

495. *Cf. id.* at 862 ("For the sake of the children the registration laws are designed to protect, if the laws are to exist, the laws must be redrafted.").

[*] B.S. University of Iowa, 2002; J.D. Candidate, Drake University Law School, 2005.