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Sex Offenders Are Different: Extending Graham to Categorically Protect the Less Culpable

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SEX OFFENDERS ARE DIFFERENT: EXTENDING *GRAHAM* TO CATEGORICALLY PROTECT THE LESS CULPABLE

INTRODUCTION

Phillip Alpert was seventeen years old when his then-sixteen-year-old girlfriend sent him nude photos.[1] A year later at age eighteen, during a breakup, Alpert made an error in judgment.[2] He went online and forwarded the pictures to his girlfriend's email contact list.[3] He was arrested and charged with seventy-two offenses, including lewd and lascivious battery, possesssion of child pornography, and distribution of child pornography.[4] He pled guilty and is now a registered sex offender.[5] Alpert cannot live near schools or playgrounds and was expelled from school.[6] Barring a change in current law, he will be removed from the sex offender registry when he turns forty-three.[7]

John Doe, on the other hand, has a long history of sexual crimes, typically involving children.[8] He has multiple convictions for molestation, attempted molestation, and exhibitionism.[9] Doe was banned from entering the Lafayette, Louisiana, public parks after a citizen complained that he was cruising parks and watching children.[10] Doe readily admitted that he went to the park to watch children, that he was having sexual urges toward them, and that he thought about exposing himself to them.[11] Doe's psychiatrist testified that Doe had no control over his sexual thoughts and that he would always have inappropriate urges for sexual contact with

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1. Vicki Mabrey & David Perozzi, *"Sexting": Should Child Pornography Laws Apply?*, ABC NEWS/NIGHTLINE, ABCNEWS.COM (Apr. 1, 2010), http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790&page=1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* FLA. STAT. § 943.0435 (2011). At the time of this Note, Alpert still appears on the sex offender registry. *Florida Department of Law Enforcement Sexual Offender/Predator Flyer for Philip Michael Alpert*, FLORIDA DEP'T OF LAW ENF., http://offender.fdle.state.fl.us/offender/flyer.do?personId=60516 (last visited Dec. 27, 2011). Several states—for example, Nebraska, Utah, and Vermont—have already reformed their child pornography laws to prevent teens who "sext" from being charged. *See* Mabrey & Perozzi, *supra* note 1. Florida is considering a similar reform. *Id.*

8. The facts concerning this particular sex offender come from *Doe v. City of Lafayette*, 377 F.3d 757, 758 (7th Cir. 2004). John Doe is a pseudonym used by Doe in filing his suit.

9. *Id.*

10. *Id.* at 759.

11. *Id.* at 759–60.

children.[12] She opined that the park ban helped him to control his urges, but conceded that it was no guarantee he would not reoffend.[13]

These two stories represent two extremes of sex offenders.[14] While Alpert clearly committed a crime and deserved to be punished, he has no other history of sexual violence or pedophilia.[15] Alpert was a minor himself when he received the pictures, and had just turned eighteen when he sent them out.[16] He was motivated by anger after his breakup, not a desire for sex or violence. Doe is a pedophile, and cannot control his thoughts toward children.[17] He readily admits his urges, and his psychiatrist testified that he should be kept away from children.[18] Despite these differences, Alpert and Doe are both registered sex offenders.[19] And, as registered sex offenders, Alpert and Doe would be subject to the same residency restrictions in some states.[20]

First enacted in 1995, residency restrictions have rapidly spread in the last fifteen years.[21] The restrictions prohibit designated sex offenders from residing within certain distances, often 1000 or 2000 feet, of areas where children congregate.[22] The specific details vary from law to law.[23] Some states, such as Florida, seek to regulate only those whose crimes include

12. *Id.* at 760–61.

13. *Id.* at 761.

14. There are, of course, more extreme sexual offenders. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008). *Doe* provides an excellent example of an offender who is very likely to recidivate and has clearly defined sexual urges toward children that he cannot control.

15. *See* Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 517–18 (2007) (contrasting the pedophile rapist image that most associate with sex offenders with many she met in practice, including a high school senior that had sex with his girlfriend when she was a high school freshman, a man in a wheelchair suffering from Parkinson's disease, and many with mental retardation.)

16. Alpert is not alone in making this mistake. "Sexting" is on the rise, and the law has yet to adapt. *See* Riva Richmond, *Sexting May Place Teens at Legal Risk*, N.Y. TIMES GADGETWISE (Mar. 26, 2009), http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/.

17. Doe v. City of Lafayette, 377 F.3d 757, 759 (7th Cir. 2004).

18. *Id.* at 761.

19. While the court's use of a pseudonym prevents a reader from looking Doe up on the register, the crimes he committed in Indiana would require him to register as a sex offender. *See* IND. CODE § 11-8-8-4.5(3) (2007); IND. CODE § 11-8-8-5 (2006). On Alpert, *see supra* note 7.

20. In Florida where Alpert lives, for example, both would be prohibited from residing within 1,000 feet of a school or a place where children congregate. FLA. STAT. § 947.1405(7)(a)(2) (Supp. 2011).

21. David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 607 (2006) (outlining early residency restrictions).

22. Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 617–19 (2009) (describing state and local sex offender residency restrictions).

23. *See id.* at 607–09, 617–19 (comparing moderate schemes to harsher regimes and even stronger local laws).

children.[24] Others only restrict those who have committed more serious sexual crimes or are otherwise classified as dangerous.[25] Louisiana, for example, makes it unlawful for a sexually violent predator to be within 1000 feet of defined areas that children are likely to frequent.[26] Other state laws, however, go further and apply broadly to all registered sex offenders—regardless of the underlying crimes.[27] Residency restrictions may be imposed by either states or municipalities,[28] with many municipalities imposing more stringent restrictions than the states.[29] The most commonly stated reasons for imposing these restrictions are to prevent children from abduction and to prevent pedophiles from "grooming" children.[30]

Though popular, residency restrictions have been consistently criticized in academic literature.[31] Many commentators observe that they are ineffective or unnecessary.[32] Others highlight the extreme loss of liberty these restrictions impose.[33] Still others observe that they often regulate

24. FLA STAT. § 947.1405(7)(a)(2) (Supp. 2011) (imposing residency restrictions where the victim of the predicate crime is under the age of eighteen).

25. *See* IND. CODE § 11-13-3-4(g)(2)(A) (2007) (imposing restrictions on violent sex offenders).

26. LA. REV. STAT. ANN. § 14:91.1 (2004) (defining unlawful presence of a sexually violent predator).

27. KY. REV. STAT. ANN. § 17.554 (West 2006) (requiring that no registrant shall reside within 1,000 feet); OKLA. STAT. ANN. tit. 57, § 570 (West 2003) (forbidding all registered sex offenders from residing within 2,000 feet of areas where children congregate).

28. One very famous example of a municipality enacting a residency restriction can be found in Miami-Dade County's Miami Beach Code of Ordinances § 70-402. The law enacted proved so restrictive that a group of sex offenders had no choice but to take up residence under a bridge. Intense public scrutiny pressured the local government into changing the law and moving the sex offenders in April 2010. For an account, see Rachel J. Rodriguez, Note, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?*, 62 RUTGERS L. REV. 1023, 1038 (2010).

29. Tekle-Johnson, *supra* note 22, at 618–19.

30. Amanda Moghaddam, Comment, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Statutes From an Empirical Perspective*, 40 SW. U. L. REV. 223, 229 (2010).

31. *See* Geraghty, *supra* note 15, at 514 (identifying the lack of evidence in favor of such restrictions and arguing that offenders with stable housing would be less likely to reoffend); Tekle-Johnson, *supra* note 22, at 612–613 (noting the lack of evidence supporting residency restrictions, and suggesting they could make sex offenders more likely to offend by isolating them, removing them from therapeutic influences, and increasing psychosocial stressors that are associated with reoffense).

32. *See, e.g.*, Joseph J. Fischel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 17 DUKE J. GENDER L. & POL'Y 277, 286 (2010) (providing overview of criticisms of sex offender residency restrictions, including that they do not reduce offenses and that they waste resources, encourage violent behavior, and excessively burden offenders).

33. Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 473–74 (2010) ("For sex offenders, the loss of liberty is already being felt."). In this Article, Rayburn describes the hardships that residency restrictions can impose, including physical separation from family and friends, being forced to move, and not being allowed to travel through particular areas.

offenders' interactions with children even when such offenders have not targeted children previously and there has been no finding that these offenders are likely to reoffend.[34] Residency restrictions appear to assume that most sex offenders are violent pedophiles that target strangers, even when reality differs.[35]

Given these criticisms, it is not surprising that residency restrictions have been repeatedly challenged in courts—though they have not yet reached the Supreme Court.[36] Defendants consistently challenge these restrictions by claiming that their imposition constitutes a taking,[37] infringes upon an individual's right to substantive due process,[38] and offends the Eighth Amendment[39] and the Ex Post Facto Clause.[40] The variety of these challenges is not surprising given that residency restrictions are relatively new and do not clearly fit within any one

34. *See, e.g.*, Tekle-Johnson, *supra* note 22, at 615–16.

35. Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1403 (2009) (noting that more than 90 percent of sex crimes against children are perpetrated by trusted figures or acquaintances rather than strangers).

36. Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R-C.L. L. REV. 483, 485 (2007).

37. A takings challenge essentially argues that the restrictions imposed by the law are so severe that the offender has been deprived of his or her property in violation of the Fifth Amendment of the Constitution. There has been one notable success in takings challenges. *See* Mann v. Dep't of Corr., 653 S.E.2d 740 (Ga. 2007). The principle is limited even in Georgia, though. The Georgia Supreme Court had previously rejected Mann's takings challenge when an earlier law forced him to move from his mother's home. Mann v. State, 603 S.E.2d 283, 285 (Ga. 2004). Some laws foreclose a takings challenge by grandfathering in residences owned before a place where children congregate was established. *See, e.g.*, FLA. STAT. § 947.1405 (Supp. 2011). For a more detailed exploration of takings and residency restrictions, see Elissa Zlatkovich, Note, *The Constitutionality of Sex Offender Residency Restrictions: A Takings Analysis*, 29 REV. LITIG. 219 (2009).

38. In a substantive due process challenge, the reviewing court must determine whether a fundamental right is implicated. If the right is fundamental, the court applies strict scrutiny. If it is not, the court applies rational basis review. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997). Courts that have entertained substantive due process challenges have not identified any fundamental rights implicated by residency restrictions, and have upheld them under rational basis review. *See* Doe v. Miller, 405 F.3d 700, 710–716 (8th Cir. 2005) (describing number of asserted rights—including right to live where one wants, right to intrastate travel, and right to family—while holding that they either are not implicated by an Iowa statute or are not fundamental); *see also* Weems v. Little Rock Police Dept., 453 F.3d 1010, 1015 (8th Cir. 2006) (same with respect to Arkansas statute).

39. The Eighth Amendment prohibits cruel and unusual punishment. U.S. CONST. amend. VIII. It was initially interpreted to apply solely against the federal government. *See, e.g.*, Barron v. Baltimore, 32 U.S. 243, 250 (1833). The Eighth Amendment was incorporated against the states via the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962). For simplicity's sake, this Note refers to the Eighth Amendment when discussing challenges brought under cruel and unusual punishment.

40. The Constitution bars both states and the federal government from enacting ex post facto laws. U.S. CONST. Art. I, §§ 9, 10. Ex post facto and Eighth Amendment challenges have been rejected because residency restrictions have not been held to be punishments subject to the Eighth Amendment. *See Miller*, 405 F.3d at 723 n.6. The Supreme Court has not addressed this matter, but did conclude that registration requirements were nonpunitive in *Smith v. Doe*, 538 U.S. 84, 105–06 (2003).

provision of the Constitution.[41] Though punitive in effect, they do not easily fit within the judicial definition of punishment.[42] Thus, courts must attempt to delineate where the laws fit into a given constitutional scheme.[43]

Even with such challenges, residency restrictions have largely been upheld.[44] Indeed, many states and municipalities have passed, or have attempted to pass, increasingly restrictive statutes in recent years.[45] The public hatred towards sex offenders makes statutes like these especially popular.[46]

While the arguments against residency restrictions are compelling, this Note does not call for their abolition. As the *Doe* situation illustrates,[47] there are offenders who should be kept away from children. Instead, this Note argues that the real problem with current residency restrictions is that they are applied too broadly, and against numerous offenders who do not deserve to be so restricted.[48] In lieu of barring them all together, courts should rein in the scope of who can be constitutionally restricted, thereby preventing comparatively innocent conduct from being grouped with sexually dangerous behavior. This Note urges achievement of this objective through the categorical approach to the Eighth Amendment.

The categorical approach to the Eighth Amendment can be adopted in this context through two relatively minor shifts in current doctrine.[49] One

41. *See infra* Part IV.

42. *See infra* Part IV.

43. *See* Weems v. United States, 217 U.S. 349, 373 (1910) ("[Constitutional] legislation . . . should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. . . . This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.").

44. Saxer, *supra* note 35, at 1399 n.6 (describing challenges to residency restrictions and noting that the majority have been unsuccessful).

45. Georgia, for example, attempted to enact one of the most restrictive sex offender residency restrictions in the country in 2006. The law prohibited registered sex offenders from residing or loitering in a location within 1,000 feet of a child-care facility, church, school, or area where minors congregate, including bus stops. That law was struck down by the Georgia Supreme Court as an unconstitutional taking. Mann v. Ga. Dep't of Corr., 653 S.E.2d 740, 745 (Ga. 2007).

46. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6 (2006) ("Foremost among the targets for the nation's punitive zeal have been sex offenders.").

47. *See supra* notes 8–13.

48. *See infra* Part III.C.

49. These shifts certainly would have collateral consequences. *See infra* Part IV. That said, the consequences may be less significant than other solutions to the residency restriction problem. Courts have not struck down these laws under rational basis review. Doe v. Miller, 405 F.3d 700, 710 (8th Cir. 2010). To do so, one would likely have to recognize a fundamental right and apply strict scrutiny. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (describing strict scrutiny as "scrutiny that is strict in theory, but fatal in fact"). Recognizing fundamental rights, however, takes the matter "outside the arena of public debate and legislative action." Washington v.

is via an extension of a recent court decision, *Graham v. Florida*,[50] to allow sex offenders to challenge residency restrictions categorically, rather than individually. The other is for courts to recognize residency restrictions as punishment. This Note proceeds in five parts. The first provides relevant background on the Eighth Amendment. The second explores the meaning of *Graham v. Florida* and how it relates to residency restrictions. The third evaluates residency restrictions under the Eighth Amendment. The fourth explores the meaning of punishment, whether it encompasses residency restrictions, and reasons to redefine it. Part V offers some concluding thoughts.

I. EIGHTH AMENDMENT BACKGROUND

In addition to banning barbarous punishments like torture,[51] the Eighth Amendment requires proportionality between sentences and punishment.[52] A consistent definition of proportionality has proven elusive.[53] The current doctrine consists of two separate types of proportionality analysis.[54] The first type considers the circumstances surrounding a particular defendant and a particular sentence in order to determine if the sentence is grossly disproportionate.[55] The second type allows classes of defendants to challenge a sentencing practice and results in "categorical restrictions" on sentences under the Eighth Amendment.[56] This part will outline the development of these approaches.

Glucksburg, 521 U.S. 702, 720 (1997). The Court has urged extreme caution with recognizing fundamental rights. *Id.* If a court recognized a new fundamental right, it would impact not only residency restrictions, but any other law that arguably infringed upon it. The ultimate effect could be more dramatic than what is proposed in this Note.

50. 130 S. Ct. 2011 (2010).

51. *Id.* at 2021 ("The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances.").

52. *Id.* ("The concept of proportionality is central to the Eighth Amendment.").

53. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1052 (2004) (noting that while the Court always acknowledges the concept of proportionality in the abstract, it has applied it inconsistently).

54. *See Graham*, 130 S. Ct. at 2021 ("The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."); *see also* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case*, 107 MICH. L. REV. 1145 (2009).

55. *Graham*, 130 S. Ct. at 2021.

56. *Id.* at 2022 (noting that this was previously only applied to death penalty cases).

A. Defining Proportionality

The Supreme Court first expressly acknowledged that punishments must be keyed to offenses in *Weems v. United States*.[57] Paul Weems, a public official in the Philippines, was convicted of falsifying a public document and sentenced to a fine and fifteen years of *cadena temporal*, a form of imprisonment that involves hard labor.[58] The Court began its analysis by acknowledging that the full scope of "cruel and unusual" had not been clearly defined.[59] It proceeded to describe a series of decisions, with some suggesting the requirement of proportionality and others disavowing it.[60] Ultimately, the Court expressed its belief that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[61] The Court then struck down Weems' sentence as disproportionate, and thus cruel and unusual.[62]

A series of decisions after *Weems* laid down other basic principles of current Eighth Amendment analysis.[63] *Robinson v. California*[64] held that ninety days' imprisonment was cruel and unusual for the crime of addiction to narcotics.[65] Cruelty, it held, should not be determined in the abstract.[66] The Court illustrated the point by noting that a day in prison would be cruel and unusual if imposed for the crime of having a cold.[67] *Trop v. Dulles*[68] discussed *Weems* and held that the meaning of the Eighth Amendment derives from "the evolving standards of decency that mark the progress of a maturing society."[69] Several cases thereafter have invoked this analysis while striking down application of the death penalty to certain lesser crimes.[70]

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57. 217 U.S. 349, 363 (1910) (citing the Penal Code of Spain Arts. 105, 106).

58. *Id.* at 357–58. Persons punished by *cadena* "shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." *Id.* at 364 (quoting Penal Code of Spain Arts. 105, 106).

59. *Id.* at 368 ("What constitutes a cruel and unusual punishment has not been exactly decided.").

60. *Id.* at 369–73.

61. *Id.* at 367.

62. *Id.* at 381.

63. That is to say, the Court still frequently refers to the principles these cases identify. Some are applied more frequently than others.

64. 370 U.S. 660 (1962).

65. *Id.* at 667.

66. *Id.*

67. *Id.*

68. 356 U.S. 86 (1958).

69. *Id.* at 101.

70. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that death penalty is grossly disproportionate sentence for the rape of an adult); Enmund v. Florida, 458 U.S. 782

Weems definitively established that sentences must be proportional, but it did not provide a clear test or factors that courts should consider in evaluating sentences.[71] Eighth Amendment cases after *Weems* reaffirmed proportionality, but also did not outline clear guideposts for reviewing courts. Finally, in *Solem v. Helm*, which was decided seventy-three years after *Weems*, the Court began to articulate the standards that inform current proportionality analysis.[72]

Jerry Helm was a career criminal who committed his seventh nonviolent felony by writing a bad check.[73] He was sentenced to life in prison under a recidivist statute.[74] The Court first rejected the State's contention that proportionality was not applicable to a felony prison sentence.[75] Finding that federalism and the need for individual sentencing create a wide range of constitutional sentences, the Court found that some are so disproportionate that they violate the Eighth Amendment.[76]

Objective factors, the Court ruled, should guide the proportionality determination.[77] The Court identified factors used in previous proportionality cases, both capital and noncapital.[78] They included the gravity of the offense compared to the harshness of the sentence, the sentences imposed on other criminals in the same jurisdiction, and the sentence imposed for the same crime in other jurisdictions.[79] Applying these factors, the Court ruled that Helm's sentence was significantly disproportionate to his crime and was therefore unconstitutional.[80]

B. Two Tracks of Proportionality Analysis

Prior to *Solem v. Helm*, the Court had not explicitly distinguished noncapital cases from capital sentences under the Eight Amendment.[81]

(1982) (holding that death penalty is cruel and unusual for felony murder when defendant did not actually kill).

71. The Court in *Weems* weighed the offense and the sentence, but did not elaborate on any factors or considerations that lead to the conclusion. *See Weems*, 217 U.S. at 380–81.

72. 463 U.S. 277 (1983).

73. *Id.* at 279–81.

74. *Id.* at 282.

75. *Id.* at 288–89.

76. *Id.* at 290 n.17.

77. *Id.*

78. *Id.* at 290.

79. *Id.* at 290–92.

80. *Id.* at 303.

81. The Court had acknowledged in *Rummel v. Estelle* that it was possible to argue that prison sentences were within the legislature's prerogative based on precedents. *See* 445 U.S. 263, 274 (1980). *Solem v. Helm* dismissed this acknowledgement as merely recognition of the possibility, and not adoption of it. *See Helm*, 463 U.S. at 288.

After *Helm*, the Court began to distinguish between capital and noncapital sentences,[82] but the analysis for both kinds of sentence was guided by the objective factors outlined above.[83] However, the Court began to apply these objective factors differently in capital and noncapital sentences.[84] Two distinct approaches emerged.[85] The first approach, called gross proportionality, derives from *Helm* but is a more limited form of review developed by *Harmelin v. Kennedy*.[86] Under gross proportionality review, the Court considers a challenge to an individual's sentence given all the circumstances in the particular case.[87] The second approach, embodying categorical challenges, provides rules that define the scope of sentencing under the Eighth Amendment, and previously was limited to use in cases involving capital sentences.[88] As both are relevant to evaluation of residency restrictions, both merit further background.

1. Gross Proportionality

The current standard for gross proportionality analysis comes from Justice Kennedy's concurrence in *Harmelin v. Michigan*.[89] The opinion begins by reiterating that the Eighth Amendment does contain "a narrow proportionality principle," but the exact contours are unclear.[90] The opinion describes the difficulties in judging the prison terms imposed because they involve a "substantive penological judgment" that is "properly within the province of the legislatures, not courts."[91] As such, courts should grant substantial deference to legislatures.[92] The opinion further states that legislatures can rely on any permissible penalogical theory, that federalism is valuable and limits review, and that objective

82. *Helm*, 463 U.S. at 289 ("As a result, 'our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment' in a noncapital case." (quoting *Rummel*, 445 U.S. at 272)).

83. *See Helm*, 463 U.S. at 290 (holding that while successful proportionality challenges will be exceptionally rare in noncapital sentences, the proportionality analysis is still applicable to them).

84. *See* Graham v. Florida, 130 S. Ct. 2011, 2047 (2010) (Thomas, J., dissenting) (noting that the Court "cabined" the reasoning on *Solem v. Helm* at its next opportunity in support of federalism principles).

85. *See id.* at 2021.

86. *See id.* at 2047 (Thomas, J., dissenting).

87. *See id.* at 2021.

88. *Id.*

89. 501 U.S. 957, 996 (1991) (Kennedy, J., concurring). The case was decided by a plurality. Kennedy's opinion is what ultimately shaped the law. *See Graham*, 130 S. Ct. at 2021 (referring to Kennedy's concurrence as the controlling opinion).

90. *Harmelin*, 501 U.S. at 997–98.

91. *Id.* at 998 (quoting Rummel v. Estelle, 445 U.S. 263, 275–76 (1980)).

92. *Harmelin*, 501 U.S. at 999.

factors should guide the analysis where possible.[93] The sum of these observations is that the Eighth Amendment does not require strict proportionality, but forbids only grossly disproportionate sentences.[94] The Court then modifies *Helm* by holding that only in the rare case where the initial comparison results in the "inference of gross proportionality" should courts proceed to compare sentences within or between jurisdictions.[95]

The gross proportionality standard that emerged after *Harmelin* was highly deferential to the state legislatures. Since then, the Court has upheld a life sentence under a "three-strikes" law for stealing golf clubs in *Ewing v. California*,[96] and another life sentence for a similar theft offense in *Lockyer v. Andrade*.[97] These decisions prompted one commentator to observe that meaningful review in a gross proportionality case is essentially dead.[98] Indeed, the Court has ruled no sentence of years grossly disproportionate since *Solem v. Helm*.[99]

2. Categorical Challenges

The second series of Eighth Amendment cases makes use of the categorical approach.[100] In the categorical analysis, the Supreme Court adopts certain categories of lessened culpability, generally regarding the death penalty, to define the scope of sentencing under the Eighth Amendment.[101] When adopting these categories, the Court first considers "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine if there is a national consensus against the sentencing practice at issue."[102] The Court then applies its own independent judgment, taking into account "the Eighth Amendment's text, history, meaning, and purpose."[103] The Court has defined rules on two

93. *Id.* at 999–1001.
94. *Id.* at 1001.
95. *Id.* at 1005.
96. 538 U.S. 11, 20 (2003) (plurality opinion).
97. 538 U.S. 63 (2003).
98. Chemerinsky, *supra* note 53, at 1059 ("In 2003, in *Ewing* and *Andrade*, the Court greatly weakened, if not almost eliminated, proportionality review, as applied to prison sentences.").
99. Graham v. Florida, 130 S. Ct. 2011, 2047 (2010) (Thomas, J., dissenting) (noting that the Court had entertained just three such challenges and rejected all three as not grossly disproportionate).
100. *Graham*, 130 S. Ct. at 2022.
101. *Id.*
102. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).
103. *Id.* (quoting Kennedy v. Louisiana, 554 U.S. 407, 420 (2008)).

bases. One is the nature of the offense. The other revolves around characteristics of the defender.[104]

Kennedy v. Louisiana,[105] for example, invalidated a death sentence because of the nature of the offense, aggravated child rape.[106] The Court acknowledged the anguish and severe impact that rape has, but concluded that the sentence violated the Eighth Amendment.[107] The Court explained that with respect to crimes against the individual, intentional first-degree homicide is categorically different from other crimes.[108] In order to impose the death penalty, the Court required defendants have the highest level of culpability.[109]

Another line of decisions defines the confines of the Eighth Amendment by establishing rules based on characteristics of defendants.[110] In *Atkins v. Virginia*,[111] the Court ruled that executing the mentally retarded is cruel and unusual.[112] Because such individuals intellectually function in a lower range, the Court ruled that they could not act with the appropriate level of moral culpability associated with the most serious adult criminal conduct.[113] This inability, in turn, meant that mentally retarded individuals could not be among the most deserving of execution, and thus the death penalty was inappropriate.[114]

Soon after, in *Roper v. Simmons*,[115] the Court ruled that the Eighth Amendment bars death sentences for those who were juveniles at the time they committed the crime.[116] In so doing, the Court again seemed to separate the death penalty from other sentences, noting that the Eighth Amendment applies to death with special force.[117] After identifying a national consensus against the practice, the Court examined the differences between juveniles and adults.[118] Juveniles, they opined, lack maturity and

104. *Id.*
105. 554 U.S. 407 (2008).
106. *Id.* at 413.
107. *Id.* at 435.
108. The Court had previously struck down death sentences for the rape of an adult woman in *Coker v. Georgia*, 433 U.S. 584 (1977), and for felony murder in *Enmund v. Florida*, 458 U.S. 782 (1982).
109. *Kennedy*, 554 U.S. at 538.
110. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).
111. 536 U.S. 304 (2002).
112. *Id.* at 321.
113. *Id.* at 306, 321.
114. *Id.* at 319.
115. 543 U.S. 551 (2005).
116. *Id.* at 573–74.
117. *Id.* at 568 (citing Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring)).
118. *Roper*, 543 U.S. at 569–70.

have an undeveloped sense of responsibility, are more vulnerable to negative influences and outside pressures, and feature less defined personality traits.[119] These characteristics mean that juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult."[120] Therefore, justifications for the death penalty apply with less force.[121] While admitting it was not perfect, the Court argued that the reasons for drawing the line at which the death penalty could be applied at eighteen were not arbitrary.[122]

After *Roper*, *Atkins*, and *Kennedy*, the Eighth Amendment confines the scope of the death penalty to homicide crimes and to those over eighteen who function within a normal level.[123] The then-oft-repeated explanation for the categorical approach is that the death penalty is to be confined to a narrow category of the most morally responsible criminals, and some groups simply cannot qualify among the most morally reprehensible.[124]

It is understandable, then, that most commentators assumed there were two tracks for Eighth Amendment analysis: one for capital cases and one for noncapital cases.[125] Capital sentences were to be subjected to a searching review; noncapital sentences were not.[126] If that assumption were true, residency restrictions could be challenged as grossly disproportionate, but would not be subject to categorical challenges.[127] The 2010 case *Graham v. Florida*, however, challenges this assumption.[128]

C. Graham v. Florida

Graham v. Florida[129] involved a challenge to a life sentence without the possibility of parole by a juvenile offender.[130] Terrance Jamar Graham

119. *Id.*
120. *Id.* at 553 (quoting *Thompson*, 487 U.S. at 835).
121. *Roper*, 543 U.S. at 571.
122. *Id.* at 574.
123. The goal of the Court's narrowing in the death penalty arena is to ensure that only the most deserving of execution are put to death. *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002); *Roper*, 543 U.S. at 568 (holding that capital punishment must be limited to only the most deserving who have "extreme culpability").
124. *Roper*, 543 U.S. at 568.
125. *See, e.g.*, Barkow, *supra* note 54, at 1146 ("In capital cases . . . the Court will scrutinize whether the death sentence is proportionate to the crime and the defendant. . . . In noncapital cases, in contrast, the Court has done virtually nothing to ensure that the sentence is appropriate.")
126. *Id.*
127. Though the two tracks are often described as term-of-years sentences or capital cases, the real distinction seems to be between capital sentences and everything else.
128. *See infra* Part II.
129. 130 S. Ct. 2011 (2010).
130. *Id.* at 2017–18.

was arrested for robbery at sixteen and charged as an adult.[131] He agreed to a plea bargain and was sentenced to three years' probation.[132] Graham then committed another robbery before he turned eighteen and was charged with the new crime and a probation violation.[133] He was sentenced to life in prison, and because Florida had abolished parole, it was without the possibility of release.[134]

The Court first described both the gross proportionality approach and the categorical approach, which it acknowledged previously had been applied only in the capital context.[135] Graham challenged his sentence on a categorical basis, though, rather than under gross proportionality.[136] The Court agreed and analyzed his sentence under this approach.[137] Gross proportionality was not appropriate in evaluating Graham's sentence because it was the entire life without parole sentence as applied to juveniles that was in question.[138] The practice, rather than the particular details of Graham's case, was challenged. The Court held that where "[the] case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes," the appropriate standard is the categorical approach.[139] Under this standard, the Court ruled that life sentences for juveniles without the possibility of parole violated the Eighth Amendment.[140]

II. THE MEANING OF *GRAHAM*: WHAT IS DIFFERENT?

The decision in *Graham* answers the potentially narrow question of "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime."[141] But, the case implies a great deal more. *Graham v. Florida* may ultimately prove more significant for changing the underlying rationale behind the Court's approach to the Eighth Amendment. The Court had long held that the death penalty was different, "not in degree but in kind."[142] Previous

131. *Id.* at 2018.
132. *Id.*
133. *Id.* at 2018–19.
134. *Id.* at 2020.
135. *Id.* at 2021–24.
136. *Id.* at 2022–23.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 2034.
141. *Id.* at 2017–18.
142. Solem v. Helm, 463 U.S. 277, 289 (1983) (citing Furman v. Georgia, 408 U.S. 238, 306 (1976) (Stewart, J., concurring)).

decisions that confined the application of the death penalty could all be justified by claiming the Eighth Amendment required that death be reserved for the highly culpable, those most deserving of death.[143] After *Graham*, this distinction cannot justify the different approach the Court takes when applying categorical rules.[144] Some commentators have already suggested interpretations.[145] This part addresses three possible understandings and their applications.

A. Juveniles are Different

One interpretation of *Graham v. Florida* is that not only is death different, but juveniles are different as well.[146] Under this interpretation, sentences that meet the requirements outlined in the majority opinion will be evaluated categorically if they involve a sentencing practice relating to either the death penalty or juveniles.[147] An adult that is sentenced to life without parole would not be evaluated under the categorical standard, but instead under gross proportionality.[148] The Court does cite a number of studies regarding the culpability of juveniles in the opinion, which would not be relevant if the Court intended to expand categorical challenges broadly.[149]

Categorical challenges have been applied in nonjuvenile contexts previously, though.[150] Thus, there does not seem to be any reason to evaluate only death penalty cases and juvenile cases in one way and not

143. *See* Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting).

144. *Id.* at 2046 ("'Death is different' no longer. The Court now claims not only the power categorically to reserve 'the most severe punishment' for those that the Court thinks are 'the most deserving of execution,' *but also* to declare that 'less culpable' persons are categorically exempt from the 'second most severe penalty.'") (emphasis in original) (citations omitted).

145. For early impressions, see *Redefining Cruel Punishment for Juveniles*, N.Y. TIMES ROOM FOR DEBATE BLOG (May 17, 2010, 6:27 P.M.), http://roomfordebate.blogs.nytimes.com/2010/05/17/redefining-cruel-punishment-for-juveniles/?scp=3&sq=graham%20v.%20florida&st=cse.

146. Stephen St. Vincent, Commentary, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9, 12 (2010) ("Another approach is that death is still different in the traditional sense, but that the Court now recognizes that kids are different as well. The Court could try to maintain separate jurisprudences for adult and juvenile sentencing.").

147. *Id.* ("In fact, Justice Kennedy seemed to be fighting against the idea that the approach in *Graham* should be extended to adult offenders. . . . The fact that the Court did not [invalidate all life without parole sentences] suggests that the Court intends to treat juvenile sentencing differently from adult sentencing.").

148. *See* United States v. Scott, 610 F.3d 1009 (8th Cir. 2010) (rejecting extension of *Graham* that would prohibit life sentences without parole for a defendant whose sentence was increased because of previous juvenile offense, but whose current offense was committed as an adult).

149. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles.").

150. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002).

others.[151] Presumably, if one does not have the requisite level of culpability, the punishment should be unconstitutional regardless of why that culpability is not present.

B. Life without Parole is Different Enough

A second interpretation of *Graham v. Florida* is that life without parole is less different than death but is more different than any other prison sentence.[152] After all, life without parole does ultimately result in the end of a person's life.[153] Life without parole represents a judgment, which is not subsequently reviewed, that a person is irredeemable.[154] This determination arguably is entitled to greater protections than the gross proportionality afforded other Eighth Amendment cases, but fewer than those provided in capital cases.[155] This interpretation has not carried the day at the appellate level so far.[156] If this is the understanding of *Graham v. Florida* that ultimately prevails, the Court extended the traditional capital analysis, but in a fairly limited way. For now, it would prevent sex offenders from using categorical challenges.[157]

C. The Textual Approach

A third approach is the interpretation of *Graham v. Florida* suggested by a literal reading of the Court's explanation for the categorial approach. The majority opinion explains that it chose categorical analysis over gross

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151. While the previous justification of "death is different" had support, the majority opinion in *Graham* does not offer any justification for when categorical challenges should be applied other than the one stated. *See Graham*, 130 S. Ct. at 2023.

152. William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1112 (2010) ("[This Article] argues that *Graham* does not eviscerate the death-is-different distinction but instead offers a new category of Eighth Amendment review: life without parole. In other words, the bifurcated death-is-different approach is not being collapsed by *Graham*, but trifurcated.").

153. *Id.* ("A sentence of life imprisonment without the possibility of parole is in many ways no more than a death sentence without an execution date.").

154. *Id.*

155. *Id.* at 1113 ("Specifically, the Article argues that 'life without parole' merits its own category of heightened review in the application of the Eighth Amendment, requiring perhaps fewer categorical limitations than the death penalty but certainly greater protections than the 'narrow proportionality' limitations previously applied in non-capital cases.").

156. *See, e.g.*, U.S. v. Scott, 610 F.3d 1009 (8th Cir. 2010).

157. The Eighth Amendment depends on evolving standards of decency. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958). So even if this or another more limited holding is the ultimate result of *Graham*, the holding could be extended further as decencies evolve and more information about the effectiveness or ineffectiveness about residency restrictions becomes available.

proportionality because the case questioned a particular sentence as it applied to an entire class of defendants who committed a range of crimes.[158] The opinion does not offer any restrictive language suggesting that sentences must be of a particular type or offenders must be juveniles in order to qualify for categorical challenges.[159] Without the "death is different" justification, little prevents the Court from expanding categorical challenges into other penalties that it feels are imposed on groups not sufficiently deserving.[160]

Though this interpretation is potentially expansive, the case does offer some limitations and safeguards. Even taking *Graham* to its furthest logical extension, categorical challenges are still restricted to one sentencing practice that is applied to an entire class who have committed various crimes.[161] Additionally, in order for a court to impose a categorical rule, a challenger would have to establish that not only is his or her own sentence disproportionate, but any instance of that sentence applied to members of his or her class would be as well.[162] This rigorous requirement likely forecloses many categorical challenges and secures a continued need for gross proportionality analysis.

It is this third interpretation of *Graham* that would apply to residency restrictions. This approach conforms to the opinion's text and would provide for a coherent doctrine.[163] Beyond the text, though, there are policy reasons why the Court should extend *Graham* at least to sex offender residency laws as well. Namely, sex offenders are so hated, and politicians so eager to restrict them, that deference is inappropriate.

D. Rationale for Extending the Third Approach to Sex Offender Residency Restrictions

Courts often seem reluctant to extend categorical challenges and traditionally defer the state legislature's judgement in proportionality

158. Graham v. Florida, 130 S. Ct. 2011, 2022–23 (2010).

159. *Id.*

160. *Id.* at 2046 (Thomas, J., dissenting) ("No reliable limiting principle remains to prevent the Court from immunizing any class of defenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well."). Though Thomas uses this argument to oppose the majority's decision, the slippery slope argument does support the notion that *Graham* could eventually be read broadly into new areas—for instance, sex offender residency restrictions.

161. *Id.* at 2022–23.

162. *Id.* at 2048 (Thomas, J., dissenting). Thomas points this out as an objection to the majority's adoption of a categorical rule, arguing that the petitioner had failed to carry this burden.

163. Eighth Amendment analysis has been consistently incoherent. *See* Chemerinsky, *supra* note 53.

cases.[164] The main justifications for this deference and reluctance are the doctrines of federalism and judicial restraint.[165] The Court believes sentencing decisions are better left to legislatures.[166] Judicial intervention in this area could be inconsistent because of the difficulties in comparing sentences of term-of-years.[167] Additionally, varying sentences in different jurisdictions have been acknowledged as beneficial.[168]

These rationales, and the conclusion that categorical challenges should be curtailed, are weaker in the context of residency restrictions, though. Sex offenders are among the most hated criminals.[169] Pedophiles inspire fear and reactionary legislation.[170] While some of this legislation may be effective, there is little motivation for politicians to consider the constitutional rights of offenders when responding to an emotional and horrible attack.[171] Residency restrictions represent one area where judicial intervention may be necessary in order to balance out the hysteria and "race to the harshest" that sex offenders motivate.[172] Municipalities sometimes implement these laws only to keep up, and not because they independently support them.[173] The ultimate results can be perverse.[174] Legislators either explicitly or implicitly attempt to banish sex

164. *See* Ewing v. California, 538 U.S. 11, 24 (2003) (identifying tradition of deference).

165. Harmelin v. Michigan, 501 U.S. 957, 999 (1991) ("[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure.").

166. *Id.* at 998 ("The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature.").

167. Solem v. Helm, 463 U.S. 277, 294 (1983) ("It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not.") (citation omitted).

168. *Harmelin*, 501 U.S. at 999 (noting that different local attitudes could mean different sentences in different jurisdictions that are all rational).

169. *See* Geraghty, *supra* note 15, at 514 ("Sex offenders are arguably the most despised members of our society, and states and municipalities are in a race to the bottom to see who can most thoroughly ostracize and condemn them.").

170. *See* Catherine L. Carpenter, *Legislative Epidemics, A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 18 (2010) (describing tragic murders and the "epidemic" of legislation designed to protect children that followed).

171. *See* Logan, *supra* note 46, at 19–20 ("In voicing their support for such laws, state and local politicians are refreshingly unabashed in identifying their ultimate desire: to purge their domains of ex-offenders. They feel free to speak with such candor, confident in the widespread public appeal of their positions, despite the dubious practical effects of the laws.").

172. *See* Carpenter, *supra* note 170, at 53. Carpenter identifies several issues with sex offender legislation. States and local governments engage in a race to the bottom, passing increasingly strict laws. These laws push offenders out of one area and into another. Neighboring jurisdictions then pass stricter laws in order to keep up. Communities that resist risk a major influx of sex offenders. *Id.*

173. *Id.*

174. *Id.* at 55.

offenders.[175] As a result, many do not register, and those that do may be more likely to recidivate.[176] The judicial branch, by articulating rules, can confine legislatures and municipalities within acceptable ranges that protect both citizens and offenders.[177]

While the decision in *Graham v. Florida* may ultimately be limited, there is no textual or logical reason to assume it will be. The justification put forth by the Court, along with the particular nature of sex-offender legislation, suggest that categorical challenges could be particularly useful in this area.

III. EVALUATING RESIDENCY RESTRICTIONS UNDER THE EIGHTH AMENDMENT

Currently, residency restrictions are not evaluated under the Eighth Amendment because they are not considered punitive. Part IV of this Note addresses this barrier. Assuming this barrier is removed, this part addresses how challenges might proceed if residency restrictions were subjected to Eighth Amendment scrutiny. Residency restrictions are likely not torturous and barbarous in the traditional sense, so proportionality review is appropriate.[178] The Court would apply either the gross proportionality standard or outline categorical rules regarding their permissiblility.[179]

A. Gross Proportionality

The gross proportionality standard is the default analysis, and previously has been applied in circumstances other than term-of-years sentences.[180] While review of any sort could represent a moral victory, gross proportionality analysis is unlikely to find any residency restrictions

175. *Id.* ("Clearly, the public intends the isolation. It intends to force sex offenders to live anywhere but in their own communities.").

176. *Id.* at 55; *see also* Tekle-Johnson, *supra* note 22.

177. *See infra* Part III.C.

178. Residency restrictions can have fairly dramatic effects on offenders. Kevin Morales, one of the offenders who lived under the Julia Tuttle Causeway in Miami, described the experience as "mental torture." *See* Gigi Stone, *Sex Offenders Forced Under Miami Bridge*, ABCNEWS.COM (May 6, 2007), http://abcnews.go.com/WNT/LegalCenter/Story?id=3096547. Nonetheless, the Court seems more focused on inherently barbaric punishments. *See* Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

179. *See supra* Part I.B.

180. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958) (reviewing denaturalization as a punishment under a proportionality standard).

unconstitutional.[181] It is true that residency restrictions in some instances can be imposed for comparatively minor crimes.[182] And the effects of residency restrictions can be quite severe.[183] They are undoubtedly less severe, though, than the prison sentence upheld in *Ewing*.[184] In fact, under this review, the Court has not struck down any prison sentence since *Solem v. Helm*.[185] The rare opinion that does consider residency restrictions under gross proportionality has found them constitutional.[186] There is no reason to suspect that courts will revive this analysis into anything meaningful, despite the urging of scholars.[187]

B. The Categorical Approach

Applying the categorical approach to residency restrictions, on the other hand, could significantly reshape the inquiry. The reasons the Court articulated for accepting *Graham*'s use of the categorical challenge support applying it to residency restrictions as well. If accepted as a punitive sentencing practice,[188] sex residency restrictions are applied to a broad group of offenders who have committed a range of offenses.[189] Many such restrictions do not divide defenders by offense or by personal

181. The court in *Doe v. Miller* expressed its belief that residency restrictions are not grossly disproportionate, albeit without explanation. Doe v. Miller, 405 F.3d 700, 723 n.6 (8th Cir. 2005) ("Even assuming § 692A.2A were punitive, we would agree with the district court that the law is neither barbaric nor grossly disproportionate to the offenses committed by the Does.").

182. Phillip Alpert's case provides one example. Other examples of relatively innocent behavior that can lead to registration and thus residency restrictions can be found in Brennon Slattery, *So-Called 'Sexting' Laws Too Muddy*, ABCNEWS.COM (Mar. 13, 2009), http://abcnews.go.com/Technology/PCWorld/story?id=7072039.

183. *See* Caleb Durling, Comment, *Never Going Home: Does it Make us Safer? Does it Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk-Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 318–19 (2006) (describing Patrick Leroy, a sex offender who after his offense lived with his mother for more than a decade without reoffending, and was subsequently forced to move after Illinois passed a new residency restriction).

184. Even the most restrictive residency restrictions do not restrict movement as severely as prison. Residency restrictions can be as effective, though, in keeping a sex offender from communities, family, and friends. *See supra* note 33.

185. Graham v. Florida, 130 S. Ct. 2011, 2047 (2010) (Thomas, J., dissenting).

186. *Miller*, 405 F.3d at 723 n.6 (rejecting Eighth Amendment challenge because residency restrictions are not punitive, but noting that even if they were, they would not be grossly disproportionate).

187. *See, e.g.*, Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527 (2008).

188. *See infra* Part IV.

189. Oklahoma's statute, for example, includes people who were convicted of indecent exposure and downloading child pornography, as well as for child exploitation and child rape. OKLA. STAT. ANN. tit. 57, § 582, 590 (West 2003).

characteristics.[190] The likelihood of recidivism among sex offenders, however, is very dependent on characteristics of the offender and of the crime.[191] As a result, categorical challenges would allow the Court to limit the scope of residency restrictions to those that are most deserving or likely to reoffend without prohibiting them all together.[192] By determining whether a particular class has the requisite level of culpability to be punished in the manner the state wishes, the Court could protect those least likely to be protected by the democratic branches.[193]

C. Application of Graham

When applying the categorical approach, the Court first attempts to determine whether there is a national consensus against the sentencing practice.[194] National consensus is established by looking at state legislation.[195] The Court then determines in its "own independent judgment" if the punishment violates the Eighth Amendment.[196]

Several classes of offenders could attempt to challenge residency restrictions. One obvious category after *Graham* would be juveniles.[197] As *Roper* noted, juveniles are categorically less morally culpable than adults.[198] They may lack the requisite moral culpability to be banished from large areas indefinitely.[199] Other potential classes could challenge as well. Offenders whose crimes did not involve children, for example, could challenge restrictions that ban them from areas where children congregate. Other possibilities include those who did not commit violent offenses or are unlikely to reoffend.[200]

Determining national consensus regarding residency restrictions poses challenges. Previous cases have noted the importance of state legislatures

190. *See supra* notes 24–28.

191. U.S. DEP'T OF JUSTICE CTR. FOR SEX OFFENDER MGMT., MYTHS AND FACTS ABOUT SEX OFFENDERS (2000), http://www.csom.org/pubs/mythsfacts.html. Among the listed myths is that sex offenders are likely to reoffend. Overall recidivism rates are lower than the general criminal population. Studies have found that one group of offenders, pedophiles, is more likely to reoffend and is resistant to treatment. *See* Tekle-Johnson, *supra* note 22, at 616.

192. *See supra* Part I.B.

193. *See supra* Part II.C.

194. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010)

195. *Id.*

196. *Id.*

197. Juveniles may now be different. *See supra* Part II.B.

198. Roper v. Simmons, 543 U.S. 551, 567 (2005).

199. For example, Oklahoma's statute does not have any built-in term, and seems to be an indefinite requirement. *See* OKLA. STAT. ANN. tit. 57, § 590 (West 2003). Under § 590.2, minors who commit a statutory rape may petition for removal, but courts are not compelled to grant the request.

200. *See supra* note 191 for statistics on reoffenders.

as the guidepost.[201] Residency restrictions, however, can also be enacted by local governments.[202] Though looking at both could provide a larger sample of national thought, the Court may wish to continue looking only to the states. As pointed out earlier, municipalities may enact laws in response to other cities' restrictions—to prevent becoming a safe haven for sex offenders—rather than because of a national consensus in favor of the policy.[203] States may at times have similar motives, but they are less likely to be able to banish sex offenders to the next state over.[204]

The trend does point toward additional restrictions, rather than repeals.[205] More than half the states now have residency restrictions.[206] Some states, though, only apply such restrictions to offenders with a specific risk level or who committed particular crimes.[207] People who committed lesser offenses could plausibly argue there is at least no national consensus in favor of regulating them.

The Court grants consensus great weight, but such consensus is not conclusive.[208] The second step of the inquiry is application of independent judicial judgment.[209] The Court looks to the culpability of the defendant along with the severity of the sentence.[210] Here, the diminished culpability of juveniles may warrant a categorical rule against the imposition of residency restrictions for juveniles. Offenders who did not commit violent crimes also may be less culpable, perhaps below the level of culpability necessary to support residency restrictions.

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201. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

202. Suffolk County, for example, has generated controversy with its restrictive statute. *See* Corey Kilgannon, *Suffolk County to Keep Sex Offenders on the Move*, N.Y. TIMES, Feb. 17, 2007, at B3, *available at* http://www.nytimes.com/2007/02/17/nyregion/17sex.html.

203. The "not in my backyard" mentality of residency restrictions is problematic. *See* Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 104 (2007) ("Further, when one jurisdiction restricts the residency of its sex offenders by creating exclusion zones, neighboring communities are pressured to follow suit to avoid becoming a haven for local sex offenders.").

204. *See infra* note 270 and accompanying text.

205. Paula Reed Ward, *Residency Restrictions for Sex Offenders Popular, but Ineffective*, PITTSBURGH POST-GAZETTE, Oct. 26, 2008, at B1, *available at* http://www.post-gazette.com/pg/08300/922948-85.stm ("Despite research that shows sex offender residency requirements actually hamper the rehabilitation of offenders, jurisdictions across the country continue to pass them, including Allegheny County last year.").

206. Yung, *supra* note 33, at 448 (finding residency restrictions in thirty states).

207. A 2006 study by the Connecticut government found that eight out of twenty-two residency restrictions limited their application to those adjudged violent or required a group to decide whether or not to impose the restrictions. *See* Sandra Norman-Eady, Chief Atty., *Sex Offenders Residency Restrictions*, CT GEN. ASSEMB. (May 23, 2007), http://www.cga.ct.gov/2007/rpt/2007-R-0380.htm.

208. Kennedy v. Louisiana, 554 U.S. 407, 434 (2008).

209. *Id.*

210. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

The Court also looks at whether the punishment serves "legitimate penological goals."[211] The purpose or effect may be any one of the goals of punishment: retribution, deterrence, incapacitation, or rehabilitation.[212] The results of this analysis are somewhat difficult to predict because residency restrictions are arguably nonpunitive.[213] As such, the motivating factor is most often phrased in terms of the safety of children, rather than any particular penological goal.[214] Regardless of how it is framed, though, it may be difficult for any of the goals to fully support current residency restrictions.

Retribution requires that a sentence be "directly related to the personal culpability of the criminal offender."[215] Residency restrictions often do not make any determination regarding culpability, though, and apply across a broad group of offenders who have committed different underlying offenses.[216] In reality, the laws are imposed with the stranger sex predator in mind.[217] The personal culpability of these comparably rare offenders may justify the restrictions imposed upon them. Of course, if the challenging class were juveniles, retribution would be even less likely to support the sentence.[218] Similarly, if the justification were deterrence, it would also apply with less force to juveniles.[219] Legislators have not expressed deterrence purposes when enacting these laws, though.[220]

Incapacitation would likely be cited as a motivating factor behind residency restrictions.[221] Recidivism is a risk with some sex offenders, and incapacitating them makes sense.[222] Residency restrictions do not prevent sex offenses, though, and they may actually increase recidivism in some cases.[223] The suggested classes for categorical challenges are not particularly likely to reoffend anyway, so imposing severe restrictions to

211. *Id.* at 2028.
212. *Id.* at 2028 (citing Ewing v. California, 538 U.S. 11, 25 (2003)).
213. *See infra* Part IV.
214. Moghaddam, *supra* note 30, at 229.
215. *Graham*, 130 S. Ct. at 2028 (citing Tison v. Arizona, 481 U.S. 137, 149 (1987)).
216. *See supra* notes 24–27
217. Yung, *supra* note 33, at 453 ("In particular, some myths such as stranger danger, unusually high post-release recidivism, sex offender homogeneity . . . have served as cornerstones to America's sex offender policy. Together, the myths support political efforts to vilify and restrict the liberties of sex offenders even when such policies are ultimately counterproductive.").
218. Roper v. Simmons, 543 U.S. 551, 571 (2005).
219. *Id.* (noting that juveniles, because of the same characteristics that make them less culpable, are less influenced by attempts to deter).
220. *See infra* note 270.
221. It is, at least, the goal that most closely correlates with protecting children.
222. *See* Tekle-Johnson, *supra* note 22, at 616 (pedophiles are likely to reoffend and resist treatment).
223. *See supra* note 31 and accompanying text.

incapacitate them does not make sense.[224] Rehabilitation, likewise, is unlikely to support residency restrictions. Residency restrictions are more likely to prevent offenders who need treatment from effectively obtaining it.[225]

In sum, residency restrictions on severe sex offenders may be justified by retributive purposes. For nonviolent offenders, juveniles, or others who are unlikely to recidivate, the justifications are strained at best. Between this and other reasons to doubt the culpability of many classes of offenders, the Court's independent judgment likely would lean toward implementing rules that excluded some offenders from restriction. In the absence of a clear national consensus, that may be sufficient to categorically protect certain classes of sex offenders from the irrational hatred of their communities.

IV. THE MEANING OF PUNISHMENT: A POTENTIAL BARRIER

The last part showed how an approach previously reserved for the death penalty could be used to ensure residency restrictions are only applied to those with the requisite level of culpability. This part identifies a barrier to this use of the Eighth Amendment. While the Supreme Court has not addressed it, residency restrictions may not comprise punishments—rendering them outside the scope of the Eighth Amendment. This part will briefly address the meaning of punishment and where residency restrictions fit in, provide additional reasons why residency restrictions should be considered punitive, and touch on collateral concerns.

A. Defining Punishment

The text of the Eighth Amendment limits its application to "punishments."[226] What constitutes a punishment has been characterized variously by scholars as "vexing"[227] and "conceptually muddled."[228] The definition of punishment is a potential barrier to the suggested approach to

224. *See supra* note 191.

225. *See supra* note 31 and accompanying text.

226. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

227. Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 117 (2005).

228. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781 (1997).

residency restrictions. Residency restrictions could be characterized as nonpunitive.[229] On the other hand, if residency restrictions are considered punishment, many of them would be invalid as ex post facto laws.[230] A brief background on punishment is necessary.

Punishment was initially defined in *Trop v. Dulles*.[231] The Court held that whether a law was punitive depended not on how Congress classified it, but rather on the substance of the statute.[232] If the statute imposed a disability for the purpose of punishment—for example, to reprimand an offender—then the statute was penal and thus punitive.[233] If another legitimate government purpose motivated the statute, then the Court said it would not be punitive.[234] Where there are mixed purposes, the stated intent of the legislature controls.[235] The Court did not outline any particular test or factors to determine the purpose of a statute.[236]

Relevant factors were outlined later in *Kennedy v. Mendoza-Martinez*.[237] To determine the purpose of a statute, courts should consider seven listed factors, but the Court noted that no particular factor is dispositive and the list is not exhaustive.[238] The Court held that absent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face.[239] The burden in *Mendoza-Martinez*, then, is on Congress to conclusively establish a penal purpose if it does not wish for courts to consider the other relevant factors.[240]

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229. The seminal federal case found residency restrictions to be nonpunitive. Several state cases disagree. *See infra* notes 257–63.

230. *See supra* Part IV.C.

231. 356 U.S. 86 (1958).

232. *Id.* at 95 ("Doubtless even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute. . . . The inquiry must be directed to substance.").

233. *Id.* at 96.

234. *Id.*

235. *Id.*

236. *See id.* at 97 (determining purpose without reference to any other factors).

237. 372 U.S. 144 (1963).

238. The factors are: "whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned" *Id.* at 168–69 (citations omitted).

239. *Id.* at 169.

240. The opinion does not mention that courts should defer to Congress's interpretation.

United States v. Ward[241] revisited the same test, but clarified that the test actually included an additional first step.[242] As before, prior to applying the factors listed in *Mendoza-Martinez*, courts should determine whether Congress has indicated a preference for labeling the statute as punitive or not.[243] If Congress indicates that it intends a statute to be nonpunitive, the Court uses the *Mendoza-Martinez* factors to determine whether it is so punitive in purpose or effect to negate that intention.[244] After *Ward*, though, it is clear that "only the clearest proof could suffice" to make a statute punitive that was not so intended.[245] The burden is now on a challenger to definitively demonstrate the punitive purpose or effect.[246]

The Court hinted at some deviations from this definition in *Austin v. United States*.[247] In determining whether a statute was punitive in the context of the Excessive Fines Clause of the Eighth Amendment, the Court did not apply the *Mendoza-Martinez* test.[248] Instead, it sought to determine whether the statute could be explained as serving in part to punish.[249] The Court explained that a statute that "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either a retributive or deterrent purposes, is punishment, as we have come to understand the term."[250] The Court did not require the clearest proof of a statute being so punitive in purpose or effect as to

241. 448 U.S. 242 (1980).

242. *Id.* at 248 (noting that the Court's inquiry has traditionally proceeded in two steps. It first must determine if Congress has expressed a preference for one label or the other. It then proceeds to determine if a statute, by the clearest proof, is "so punitive either in purpose or effect as to negate that intention."). While the Court describes this approach as traditional, it does not require the clearest proof required *Mendoza-Martinez* to determine when a statute is punitive. *See Mendoza-Martinez*, 372 U.S. at 169.

243. *Ward*, 448 U.S. at 248.

244. *Id.*

245. *Id.*

246. Smith v. Doe, 538 U.S. 84, 105 (2003) (stating that the respondent cannot show by the clearest proof that the law is so punitive in effect to overcome the legislature). The Court explicitly characterizes it as challenger's burden. *Id.*

247. 509 U.S. 602 (1993).

248. The Court specifically rejects the argument that the Eighth Amendment can only apply when a civil proceeding is so punitive that it is criminal under *Kennedy v. Mendoza-Martinez*. Under *Austin*, then, it seems like the factors from *Mendoza-Martinez* are used to determine whether something is criminal, rather than whether it is punishment. *See id.* at 607. This understanding is clearly in conflict with the Court's previous announcement that the Eighth Amendment only applies to criminal punishments. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (opining that the Eighth Amendment is only meant to protect those that are convicted of a crime).

249. *Austin*, 509 U.S. at 610.

250. *Id.* at 610 (quoting United States v. Halper, 490 U.S. 435 (1993)).

negate the purpose of Congress, but instead held that any statute that serves in part to punish is punitive.[251]

This approach was clearly foreclosed in sex offender cases in *Smith v. Doe*.[252] There, the Court determined whether a sex offender registration requirement was punitive.[253] The Court's opinion applied the *Mendoza-Martinez* standard without mention of *Austin v. United States*.[254] While *Austin* could have represented a new direction for punishment, it now appears to be more of an anomaly, or potentially limited to only the Excessive Fines Clause of the Eighth Amendment.[255] The challengers in *Smith v. Doe*, the Court concluded, were not able to demonstrate by the clearest proof that the purpose or effect of registration requirements was punitive.[256]

B. Are Residency Restrictions Punitive?

The Supreme Court has not directly addressed residency restrictions, but appellate circuits have. In *Doe v. Miller*,[257] the Eighth Circuit evaluated Iowa's residency restrictions under the *Mendoza-Martinez* test.[258] The court held that the stated purpose was regulatory, not punitive, and that the challengers had not provided the clearest proof necessary to overcome that presumption.[259]

While this holding could foreclose the Eighth Amendment approach this Note supports, other courts have not been so quick to reject the challenge.[260] State courts applying an equivalent to the *Mendoza-Martinez* standard have found sufficient reason to find residency restrictions punitive.[261] Many commentators have also called for residency restrictions

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251. *Austin*, 509 U.S. at 610.
252. 538 U.S. 84 (2003).
253. *Id.* at 92.
254. *Id.* at 97.
255. *Austin v. United States* is still good law, but its precedential value is unclear. *United States v. Halper*, which *Austin* quotes on the definition of punishment, was abrogated by *Hudson v. United States*, 522 U.S. 93 (1997).
256. *Smith*, 538 U.S. at 105.
257. 405 F.3d 700 (8th Cir. 2005).
258. *Id.* at 719.
259. *Id.* at 722.
260. *See* State v. Pollard, 908 N.E.2d 1145, 1154 (Ind. 2009) (holding that clearest proof exists showing effect of Indiana residency restriction statute is punitive and ruling that it violates the Ex Post Facto Clause as a result); *see also* Commonwealth v. Baker, 295 S.W.3d 437, 447 (Ky. 2009) (holding similarly).
261. *See supra* note 260. Kentucky specifically identified *Mendoza-Martinez* as the source of its standard. *Baker*, 295 S.W.3d at 443.

to be classified as punishment.[262] The Supreme Court may ultimately have to rule definitively on the issue.[263]

If the Court so decides, the outcome could differ from *Smith v. Doe*.[264] A number of justices on the *Smith* court took issue with some potential flaws in the majority's logic. One major issue of contention would be whether residency restrictions are clearly intended to be civil as opposed to criminal.[265] Justice Souter expressed his belief that the registration requirement was not clearly intended to be civil.[266] He argued that the statute's use of a previous crime "as a touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on."[267] In his opinion, the severity of the burden imposed by registration was also reminiscent of a punishment.[268] If the legislatures did not clearly intend the laws to be civil and regulatory, then the "clearest proof" standard is not appropriate for establishing whether the statutes are punitive.[269] The motivation behind many residency restrictions is similarly conflicted.[270]

Justice Ginsburg, joined by Justice Breyer, dissented in *Smith v. Doe*, citing her belief that the act was excessive in relation to its nonpunitive purpose.[271] Justice Ginsburg acknowledged the purposes, but argued that the scope was excessive.[272] The registration requirement did not call for any determination of dangerousness.[273] Additionally, the act did not key the duration of the requirement to the defender's risk of reoffending.[274]

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262. *See* Bret R. Hobson, Note, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away From Children?*, 40 GA. L. REV. 961, 990–92 (2006) (applying the *Mendoza-Martinez* test and arguing that residency restrictions should be characterized as punishments); Sarah E. Agudo, Comment, *Irregular Passion: The Unconstitutional and Inefficacy of Sex Offender Residency Laws*, 102 NW. U. L. REV. 307, 323–26 (2008) (arguing similarly).

263. It has declined to do so at least once. *See* Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

264. The factors apply differently to residency restrictions than to registration requirements. For sources that go through this analysis, see *supra* note 262.

265. Smith v. Doe, 538 U.S. 84, 106–07 (2003) (Souter, J., concurring).

266. *Id.* at 110.

267. *Id.* at 109.

268. *Id.*

269. *Id.* at 110. Souter voted to uphold the law because of the presumption of constitutionally that is normally given to a state's law. He did not feel the statute was clearly valid.

270. Comments made during the passage of the Georgia residency restriction law, for example, sound like at least some lawmakers intended retributive purposes. At the very least, they deliberately intended to banish sex offenders. *See* Geraghty, *supra* note 15, at 515–18.

271. *Smith*, 538 U.S. at 114 (Ginsburg, J., dissenting).

272. *Id.* at 116.

273. *Id.*

274. *Id.* at 116–17.

The same issues that Ginsburg identified in the registration requirement are present and more severe in residency restriction statutes. Many do not require a determination of dangerousness, nor any indication that the offender is likely to be a risk to children.[275] Some impose residency restrictions for indefinite durations, regardless of the underlying crime.[276]

Despite these objections, the Court could hold that residency restrictions are nonpunitive under the current test.[277] Even so, strong arguments have been advanced that the current test should be reformed.[278] Justice Stevens, also dissenting in *Smith v. Doe*, expressed his dissatisfaction with the *Martinez-Mendoza* test: "No matter how often the Court may repeat and manipulate multifactor tests . . . it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and *on no one else* as a result of their conviction are not part of their punishment."[279] Stevens went on to express his belief that a sanction imposed on everyone who commits a certain criminal offense, but is not imposed on others, and severely impairs a person's liberty interests is punishment.[280] Residency restrictions meet the first two requirements of Stevens' test, and there is compelling evidence of the third.[281] Under this test, residency restrictions would almost certainly be punishment.

Justices Ginsburg and Justice Souter in their dissents both argued that the intent of the legislature was not clear. Ginsburg said she would neutrally evaluate the act based on the seven factors and not place the burden on the challenger. Policy reasons also suggest that deference to legislatures' stated intents is inappropriate here. As Part II.C discussed, there is little political incentive for legislators to guard the constitutional rights of a group that their constituents wish to cast out.[282] Many sex

275. *See supra* note 207.

276. *Id.*

277. For example, the Court held the registration requirement nonpunitive despite the arguments in *Smith v. Doe*. Residency restrictions are sufficiently different from registration requirements that the analysis could vary significantly, even if the Court came to the same result.

278. Scholars, in addition to the Justices, have made this argument. For one proposed test, see Wilkins, *supra* note 227, at 129–31.

279. Smith v. Doe, 538 U.S. 84, 113 (2003) (emphasis in original).

280. *Id.*

281. *See supra* note 33.

282. *See* Tekle-Johnson, *supra* note 22, at 638 ("Because this group is one of the least defensible populations, legislators understand that there is little political price to be paid for mandating increasingly severe constraints on these individuals and much to be gained from voters who desire tough restraints."); *see also* Joel. A. Sherwin, Comment, *Are Bills of Attainder the New Currency? Challenging the Constitutionality of Sex Offender Regulations that Inflict Punishment Without the "Safeguard of a Judicial Trial"*, 37 PEPP. L. REV. 1301, 1320–24 (2010).

offender laws have been passed quickly in the wake of violent attacks amidst public outcry.[283] Granting deference to a local government's stated intent allows it not only to severely curtail the liberty of their most hated citizens, but also to prevent most challenges to that curtailment.[284] Scholars have suggested other, lesser standards of proof that may be more appropriate in the residency restriction context.[285]

If residency restrictions are definitively nonpunitive, then Eighth Amendment analysis is not possible.[286] The results have been mixed in courts so far. Some recent state court decisions suggest residency restrictions may already fall under the definition of punishment. Scholars and dissenting judges likewise argue for rules or standards that would include residency restrictions. Whether or not the current definition encompasses residency restrictions, policy reasons again suggest the Court should reconsider its deference.

C. A Brief Note on Ex Post Facto Laws

One collateral effect of recognizing residency restrictions as punitive would be to bring them within the purview of the ex post facto challenge. Federal courts have rejected ex post facto challenges of residency restrictions so far because the statutes have been considered nonpunitive.[287] As such, the prohibition on ex post facto laws does not apply to them. If the prohibition did apply, residency restrictions are

283. *See* Fischel, *supra* note 32, at 283 (describing the "moral panic" surrounding sex offenders and comparing it to previous sexual threats embodied by, among others, Jewish men, black men, and gay men); Hobson, *supra* note 262, at 962–63 (describing numerous tragic sex crimes and the statutes they inspired); *see also* Geraghty *supra* note 15, at 515 (explaining that impetus for Georgia's 2006 residency restriction was a brutal child abduction by a repeat offender).

284. For a different view, see Christopher Moseng, Note, *Iowa's Sex Offender Residency Restrictions: How the Judicial Definition of Punishment Leads Policy Makers Astray*, 11 J. GENDER RACE & JUST. 125, 136–37 (2007) (arguing that deference courts grant the legislative label ultimately means that punishment means whatever lawmakers think it means, without a distinct separate definition).

285. *See* Tekle-Johnson, *supra* note 22, at 626 (arguing for a more lenient standard of proof, or that of "substantial or reasonable proof," in order to require courts to analyze more carefully the actual effects of potentially punitive laws).

286. Even if the Court declined to evaluate residency restrictions under the Eighth Amendment, principles from *Graham* or gross proportionality could inform its decision. *See* Sheldon Bernard Lyke, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633 (2009) (arguing that while the Court claimed to be applying substantive due process analysis in *Lawrence v. Texas*, it was actually conducting Eighth Amendment analysis).

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

almost certainly ex post facto laws.[288] The state courts that have actually reached the substance of the challenge have found them to be impermissibly ex post facto.[289] As a practical matter, this result may make courts leery of recognizing residency restrictions as punishment. Even if the current laws were considered ex post facto, it would not ban residency restrictions altogether. It would merely prevent them from being applied retroactively.[290]

CONCLUSION

Phillip Alpert will not be the last teen to make a sexting mistake,[291] and John Doe will not be the last pedophile unable to reform his sexual urges.[292] Society needs to adapt its laws and crime prevention strategies to fit both. Residency restrictions may ultimately be discredited, wholly struck down, or abandoned, but until that happens they must at the very least be confined to those deserving of such pervasive regulation.

While there are other means of challenging these statutes, the practical reality of residency restrictions fit squarely within the type of sentencing practice that the majority opinion in *Graham* notes should be evaluated under the categorical approach to the Eighth Amendment. This type of challenge would be effective at confining the scope of residency restrictions in a way that ensures only those people with the requisite moral culpability are subjected to them. Juveniles, nonviolent offenders, those who are unlikely to recidivate, and those who did not direct their

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288. The definitive case on ex post facto law is *Calder v. Bull*, decided over 200 years ago. The opinion identifies four types of laws that are ex post facto:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3 U.S. 386, 390. Residency restrictions, if punitive, fall squarely within the third category.

289. *See, e.g.*, State v. Pollard, 908 N.E.2d 1145, 1153 (Ind. 2009); Commonwealth v. Baker, 295 S.W.3d 437, 447 (Ky. 2009).

290. For a more detailed discussion of ex post facto laws and residency restrictions, see Michelle Olson, Comment, *Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois Under the Ex Post Facto Clause*, 5 NW. J. L. & SOC. POL'Y 403 (2010).

291. Sexting is on the rise among teens. There is pressure to reform child pornography laws to prevent situations like Alpert's from reoccurring. *See* Tamar Lewin, *Rethinking Sex Offender Laws for Youth Texting*, N.Y. TIMES, Mar. 20, 2010, at A1, *available at* http://www.nytimes.com/2010/03/21/us/21sexting.html. Of course, reforming child pornography laws as they relate to sexting does not resolve the larger issues raised in this Note.

292. *See supra* note 191.

crimes at children may all have reason to argue that they should not be regulated in this manner. Clarifying punishment and expanding *Graham* could be a solution to an area that is fraught with potential for abuse and overzealousness.

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