BANISHED! – NEW JERSEY'S MUNICIPALITIES' UNCONSTITUTIONAL TREND OF BANISHING SEX OFFENDERS

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* Student, Seton Hall University School of Law, Class of 2007. The author thanks Professor Kip Cornwell for his advisement on this note and Adam Wells for assistance in editing. The author asks the reader to examine this note as a scholarly debate on the balancing of fundamental constitutional principles with the necessity of eradicating recidivism of sex offenders. The author recognizes that sex offenders engage in horrible, atrocious, and deplorable crimes that ruin the lives of children and the children's families, and these criminals should be punished to the fullest extent of the law. However, living under both the United States and New Jersey Constitutions, society must punish these offenders within the bounds of the documents. This note in no way condones the deplorable acts of the offender, but rather, champions punishment that is within the bounds of our Constitutions.

I. Introduction

Across New Jersey, municipalities have taken it upon themselves to banish citizens from public places and even their own homes.[1] A recent trend in municipal ordinances targets sex offenders and is repugnant to the concept of Legislative Field Preemption and goes beyond the regulatory scheme and nonpunitive objective of "Megan's Law."[2] Protecting children from sex offenders is of utmost importance and necessary in society, but it is crucial that the government's action remains within the bounds of the United States Constitution and state constitutions. Although sex offenders' crimes are deplorable, these people are protected under the Constitutions of both New Jersey and the United States from Ex Post Facto

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[1] Herein discussed is a modern-day trend of banishment of sex offenders from communities after their sentences have already been served. The author is reminded of Shakespeare's Romeo and Juliet, where Friar Laurence and Romeo discuss banishment's severity, as such punishment would cause Romeo to no longer live in Verona:

> Romeo:
> Ha, banishment! be merciful, say 'death;'
> For exile hath more terror in his look,
> Much more than death: do not say 'banishment.'
>
> Friar Laurence:
> Hence from Verona art thou banished:
> Be patient, for the world is broad and wide.
>
> Romeo:
> There is no world without Verona walls,
> But purgatory, torture, hell itself.
> Hence-banished is banish'd from the world,
>
> And world's exile is death: then banished,
> Is death mis-term'd: calling death banishment,
> Thou cutt'st my head off with a golden axe,
> And smilest upon the stroke that murders me.

WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 3, sc. 3. (Shakespeare-literature.com 2003).

[2] In New Jersey, "Megan's Law" is codified under N.J. STAT. ANN. § 2C:7 (2005). "Megan's Law" referrers to legislation enacted after a 7-year-old girl from New Jersey, Megan Kanka, was sexually assaulted and murdered by a neighbor who had multiple convictions as a child sex offender. Smith v. Doe, 538 U.S. 84, 89 (2002). Being that Megan's family was unaware of the neighbor's prior convictions, states began passing "Megan's Law" legislation, which requires convicted sex offenders to register with police officials, and in certain instances, the community is notified of the sex offender's presence among them. *Id.* The New Jersey Statute provides for the county prosecutor, where the sex offender was convicted, to determine the status of the offender as a Tier 1, 2, or 3 offender depending on the offender's risk of recidivism. N.J. STAT. ANN. § 2C:7-8d(1) (2005).

punishment.[3] These ordinances, designed to make voters feel safer, may actually subject convicted sex offenders to punishment above and beyond their sentences.[4] These ordinances generally restrict sex offenders from living within 2,500 feet of schools, parks, or other places where children gather.[5] Other versions also create "brown zones," which restrict offenders from accessing public recreation facilities or even convenience stores for an extended period of time.[6]

At first blush, these laws appear to be effective solutions to protect children, but as some commentators have suggested, these laws do nothing to curb recidivism as offenders may continue to victimize children even if they do not live near schools.[7] Rather than discussing the true effect and constitutionality of these ordinances, local politicians have picked an easy target against which to score political points, and sex offenders have been subjected to Ex Post Facto punishment.[8]

A challenge to the constitutionality of these ordinances was recently initiated in Lower Township. There, a former wrestling coach, who served a prison sentence for having sex with a 16-year-old girl, was effectively banished from the township with his family

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[3] Ex Post Facto laws are "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to crime, when committed." Calder v. Bull, 3 U.S. 386, 390 (1798). "The ban on ex post facto laws is necessary to give the citizenry 'fair warning' of the possible punishments for violating government statutes, while allowing reliance on those laws until they are changed. Further, the ban against such ex post facto government action is meant to curtail 'arbitrary and potentially vindictive legislation.'" Robert Lee Hornby, *New Jersey Sexually Violent Predator Act: Civil Commitment of the Sexually Abnormal*, 24 SETON HALL LEGIS. J. 473, 477 (1996) (citing Weaver v. Graham, 450 U.S. 24, 28-29 (1981)).

[4] Fred Snowflack, *Morris towns fall into 'feel-good' trap: Getting tough on pedophiles*, DAILY RECORD, Sept. 21, 2005, at 1.

[5] James A. Quirk, *Manalapan approves sex-offender ordinance*, ASBURY PARK PRESS, Aug. 26, 2005, at B8. The Manalapan ordinance is a 2,500 foot living restriction for sex offenders living near a "school, day care center, day camp, library, park, playground, recreational facility or convenience store." The ordinance also created "brown zones" disallowing sex offenders to "'stop, sit, stand or loiter . . . for any period of time exceeding the amount of time reasonably necessary to engage in a legitimate activity' within a 150-foot radius around such facilities."

[6] *Id.*

[7] *Id.* The functionality of the laws is questionable, as a child molester does not have to be prohibited from living near a school to molest children. *Id.* (citing to comments by John H. White, a criminal law professor at Richard Stockton College who stated that "residency restrictions don't necessarily increase security against pedophiles. But . . . governments and residents push for the riles anyway because 'they feel like doing something about it.'").

[8] Snowflack, *supra* note 4. Daniel Lynn, a Democratic councilman of Randolph, New Jersey, is proposing a living restriction ordinance in his year for re-election. "Randolph is basically a Republican town and for a Democrat to win, he has to try something different." *Id.*

because of a 2,500-foot offender buffer.[9] The offender's attorneys believe that Lower Township's ordinance is over-restrictive and will be declared unconstitutional.[10] This is not merely the opinion of lawyers representing sex offenders, but others as well, including Joseph Del Russo, the Passaic County Chief Assistant Prosecutor, who has also gone on record saying that the first sex offender challenging the ordinances "will probably prevail on a constitutional basis."[11]

Eighteen states presently have living restrictions targeting sex offenders.[12] Of these, an Iowa statute was challenged in the Iowa State Supreme Court, the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit ruled in favor of the state and the United States Supreme Court denied certiorari.[13] Thus, although

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[9] Associated Press, *Sex offender sues over residency: Ordinance called too restrictive*, BERGEN RECORD, Nov. 30, 2006 at A03. Steven Elwell is 34 years old, with a wife and two daughters, and they are essentially being banished from Lower Township because of his prior statutory offense of having sex with a 16 year old girl. Although he has already served one year in prison for his offense, he is restricted from living within the township as the ordinance bans sex offenders from living within 2,500 feet of a school, park, day-care center, or bus stop.

[10] *Id.* Prominent sex offender defense attorney, John S. Furlong, believes that Lower Township's ordinance will be overturned, stating; "I don't think these local ordinances are sustainable...They create a patchwork, they fail to conform with state constitutional principles, and, by the way, they're just stupid. We have this bottomless well of municipal meddling in the private lives of people over whom they shouldn't be allowed to exercise control." *Id.*

[11] Paul Brubaker, *Borough first in county to bar sex offenders; Ban limits where registered felons can live*, HERALD NEWS, Sept. 13, 2005, at A01. The article quotes Joseph Del Russo, Passaic County Chief Assistant Prosecutor, who stated,

> The first sex offender that challenges one of these ordinances will probably prevail on a constitutional basis. It's an area that the state has already acted. . . . Once you start impacting on people's constitutional rights, you better have some sort of due process built into those ordinances. It's legislation that makes us feel good, but its impact and its utility remain to be seen.

Id.

[12] Phil Garber, *Curbs sought against child sex predators*, RANDOLPH REPORTER, September 29, 2005.

[13] Certiorari was denied by the United States Supreme Court in Doe v. Miller, 163 L. Ed. 2d 574 (2005); *see also ACLU Asks U.S. Supreme Court to Review Iowa's Sex Offender Residency Restriction*, Sept. 29, 2005, *available at* http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=19211&c=15 (stating that "[t]he Iowa Civil Liberties Union announced today that it is asking the Supreme Court to overturn Iowa's unprecedented law that restricts where sex offenders with victims under the age of 18 can reside. The Court will likely decide by the end of the year whether to hear the case").

Likewise, Iowa Code § 692A.2A (2004), states that a person commits an aggravated misdemeanor when one has committed an "aggravated offense, sexually violent offense, or other relevant offense that involved a minor" and resides within 2,000 feet of "a public or nonpublic elementary or secondary school, or a child care

the issue has been resolved in the Eighth Circuit, the issue remains unsettled in New Jersey. The New Jersey Legislature has not yet enacted living restrictions for sex offenders; however, bill A639 was recently introduced in the Assembly for the 2006 legislative session.[14] Because municipalities have passed restrictive ordinances and drawn the interest of New Jersey legislators, the constitutionality of these laws must be scrutinized in light of New Jersey law. This note will discuss these ordinances in light of the well-grounded principle of legislative field preemption, and why these ordinances are violative of Ex Post Facto jurisprudence.[15] Regarding an Ex Post Facto analysis, it is necessary to consider the New Jersey Supreme Court decision of *Doe v. Poritz*[16] upholding "Megan's Law" in New Jersey, and the United States Supreme Court decision upholding Alaska's "Megan's Law" statute in *Smith v. Doe*.[17] The main issue underlying this Ex Post Facto analysis is whether the ordinances have a punitive effect.[18]

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facility, commits an aggravated misdemeanor"); *see also* Iowa v. Seering, 701 N.W.2d 655 (Iowa, 2005); Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004), *reversed by* 405 F.3d 700 (8th Cir. 2005) (finding the statute unconstitutional in violation of the ex post facto clause of the United States Constitution, and the Substantive Due Process, Procedural Due Process and Self Incrimination Clauses); Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (finding the statute constitutional, not offending Substantive Due Process, Procedural Due Process and Self Incrimination).

[14] A639, 2006 Leg., 212th Reg. Sess. (N.J. 2006) (sponsored by Assemblyman Brian E. Rumpf and Assemblyman Christopher J. Connors and co-sponsored by Assemblyman Joseph Vas). The bill was reintroduced for the 2006 legislative session as it never went to a vote in the 2005 Session as Assembly Bill A963 and identical Senate Bill S2788. A963, 2005 Leg., 211th Reg. Sess. (N.J. 2005) (sponsored by Assemblyman Brian E. Rumpf and Assemblyman Christopher J. Connors and co-sponsored by Assemblymen Anthony Chiappone, Joseph Azzolina, and Joseph Vas. S2788, 2005 Leg. 211th Reg. Sess. (N.J.2005) (sponsored by Senators Leonard T. Connors and Nicholas Asselta).

[15] *See* Plaza Joint Venture v. City of Atlantic City, 416 A.2d 71, 75 (N.J. Super. Ct. App. Div. 1980); *see also* Dome Realty, Inc. v. City of Paterson, 416 A.2d 334, 342 (N.J. 1980).

[16] 662 A.2d 367 (N.J. 1995). The New Jersey Supreme Court in *Doe*, used an ex post facto analysis, herein referred to as the "*Doe* test," explicitly rejecting the analysis that was later used by the United States Supreme Court in *Smith*, also known as the "Mendoza-Martinez" test. This note attempts to illustrate how the New Jersey Supreme Court should apply an Ex Post Facto analysis in light of *Smith*.

[17] 538 U.S. 84 (2003).

[18] JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 70 (West Group, 3d ed. 1999).

> The ex post facto clause of the Constitution, which prohibits retroactive legislation and legislative expansion of existing statutes, and the due process clause, which concerns retroactive judicial lawmaking, 'safeguard common interests – in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of laws.

Id.

Conceding that these ordinances were imposed as regulatory provisions, this note examines whether these provisions exceed their purpose to curb recidivism and actually punish offenders after they have already served their respective sentences.

Part II of this note examines the ordinances and proposed Assembly Bill A639.[19] Here, an analysis of legislative field preemption is discussed as applicable to the ordinances.[20] Part III explains the

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[19] Considering that there are 566 municipalities in New Jersey, many of which have passed living restrictions for sex offenders, only a number of ordinances will be herein discussed, using recurring themes from each ordinance as a basis for discussion. The discussion of Assembly Bill A639, 2006 Leg., 212th Reg. Sess. (N.J. 2006), will be limited to the discussion of preemption and the reasonableness of the proposed Bill as compared to the municipal ordinances.

[20] There are two types of home rule impacting field preemption, which depends upon the State's granting of power to municipalities. A state is either an "Imperio" state or a "National Municipal League" (hereinafter, "NML") state. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT 282 (West Group, 6th ed. 2001).

> By combining initiative and immunity, imperio home rule provisions establish extensive local autonomy. In practice, however, the scope of that autonomy is often quite limited. With basic terms like 'local' and 'municipal' usually left undefined, imperio home rule provisions effectively turn the substantive scope of home rule into a question for the courts," usually leading to "narrow judicial interpretations of 'local' or 'municipal' in immunity cases.

Id. NML states, also known as "'legislative' home rule" states are

> usually [the product of] amendments to state constitutions and not the products of state legislation. Rather, the 'legislative' label refers to the theory underlying the . . . NML approach – to shift the determination of whether a matter is "local" or "municipal" from the courts to the state legislature. Legislative home rule presumes that a home rule local government has a power to act unless and until the power is taken away from the locality by the state legislature acting pursuant to general law. In other words . . . NML home rule creates a presumption in favor of the home rule iniative but at the price of providing no home rule immunity.

Id. New Jersey follows the NML approach under the New Jersey Constitution. N.J. CONST. art. IV, § VII, para. 11. It states,

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

Id. Field preemption comes in three forms: outright conflict, express preemption, and implied preemption. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 361 (West Group, 6th ed. 2001). "Outright conflict will be found if the local government purports to require something that the state forbids." *Id.* at 362. Express and implied preemption occurs "when the state expressly prohibits local governments from adopting laws concerning an area subject to state regulation, even if the local law is not in conflict

current Ex Post Facto analysis applied by the United States Supreme Court in *Smith.*[21] Part IV explains the now outdated Ex Post Facto analysis used by the New Jersey Supreme Court in *Doe.* In light of the court's holding and application of *Doe,* Part V will suggest how the *Smith* standard should be applied to the ordinances at hand. As an alternative argument to Field Preemption and Ex Post Facto punishment, Part VI details the doctrine of fundamental fairness to protect those subject to "oppression, harassment, or egregious deprivation" under the ordinances.[22] Part VII concludes the discussion emphasizing the duty to uphold the Constitution even when the challenged law is meant to protect innocent children. Finally, Part VIII gives recommendations and suggestions to municipalities and the Legislature for drafting sex offender laws, while also encouraging the court to strike down excessive ordinances in light of *Smith.*

II. Municipal Ordinances, Assembly Bill A639 and Preemption

A. *Municipal Ordinances*

Under most of the ordinances in question, sex offenders are restricted from living within 2,500 feet of schools, parks, playgrounds, and day-care centers.[23] The penalties include $1,250 fines, ninety

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with the state law." *Id.* Implied preemption "results in the displacement of an otherwise valid local law even in the absence of an express state prohibition...it is usually more uncertain whether a state law impliedly preempts a local measure than whether it does so expressly." *Id.*

[21] The New Jersey Supreme Court is bound by the determination of *Smith.* Both the New Jersey Constitution, at N.J. Const. art. IV, § 7, para. 3, and the United States Constitution, at U.S. CONST. art. I, § 9, cl. 3 and art. I, § 10, cl. 1, forbid the legislative branch from passing ex post facto laws. New Jersey's ex post facto clause shares the same philosophical underpinning as its federal counterpart, and the New Jersey Supreme Court therefore interprets the state provision as providing at least as much protection as its federal counterpart.

State v. Natale, 878 A.2d 724, 742 (N.J. 2005).

[22] *Doe,* 662 A.2d 367, 421.

[23] *See e.g.,* Paul Brubaker, *Borough First in County to Bar Sex Offenders; Ban Limits Where Registered Felons Can Live,* HERALD NEWS, Sept. 13, 2005, at A1 (stating that "Prospect Park prohibits sex offenders from living within 2,500 feet of a school, park, playground or day-care center – effectively banning them from living in the half-square-mile borough" with penalties of $1,250 and ninety days jail); Garber, *supra* note 12. (noting that Randolph Township's proposed plan bars offenders from living within 1,000 feet of schools, playgrounds, parks and day care centers, while Mount Olive Township's proposal restricts offenders from living within 2,500 feet); Thomas J. Walsh, *Sex Offender Ordinance Advances,* COURIER-POST, Sept. 27, 2005, at 1G (reporting that Cherry Hill preliminarily approved an ordinance with a living

days in jail, and community service.[24] Brick Township's ordinance, for example, restricts offenders from living near bus stops.[25] This makes it effectively illegal for a convicted sex offender to live within the Township.[26] As mentioned above, Manalapan has even created "brown zones," imposing $500 fines and thirty days of community service for merely being found within a 150-foot radius of certain facilities in excess of "the amount of time reasonably necessary to engage in legitimate activity."[27] Such facilities include convenience stores and public parks.[28] Some ordinances, including Vineland's, only apply to Tier Two and Three offenders.[29] Other ordinances, such as Hamilton Township's, apply to all sex offenders regardless of Tier level.[30] As one can see, these ordinances implicate an array of other legal issues beyond the scope of this note, including overbreadth, vagueness, and the issues surrounding loitering and

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restriction of 2,500 feet from where children "regularly meet and congregate," with up to a $1,250 fine, jail and community service); Editor, *Cherry Hill Approves Sex-Offender Law*, COURIER-POST, Oct. 13, 2005, at 4G (stating that "[t]he Cherry Hill ordinance does not apply to convicted sex offenders who already have established residence in the township"); Paul Brubaker, *Haledon Seeks to Bar Residency by Sex Abusers*, BERGEN RECORD, Sept. 30, 2005, at L02 (observing that Haledon's proposed ordinance mimics Brick Township's enacted ordinance, providing a restriction of 2,500 feet from schools, parks, day care centers, playgrounds, and approved bus stops); Anna Nguyen, *Medford Limits Sex Offenders*, COURIER-POST, Oct. 12, 2005, at 3G (noting that Medford Township's ordinance bans all sex offenders, not only child offenders, from living 2,500 feet from schools, parks, and day care centers, imposing a $1,250 fine, community service, or 90 days jail); Giselle Sotelo, *Ordinance Aims to Separate Molesters from Kids*, DAILY JOURNAL, Sept. 14, 2005, at 1A (writing that Vineland introduced an ordinance with a 2,500 foot living restriction from churches, parks, playgrounds, schools, and "other places where children congregate," and does not require offenders currently living in a restricted zone from moving); Arielle Levin Becker, *Sex-Offender Limits Weighed Carteret Plans to Vote on Setting Boundaries*, HOME NEWS TRIBUNE, Sept. 7, 2005, at B1 (conveying that Carteret Borough's proposed ordinance has a living restriction of 1,000 feet from schools, playgrounds, parks, or childcare requiring offenders living in the zone to "relocate within 60 days or by the end of an already-signed lease," but not applying to owners of property before the ordinance is in effect); Quirk, *supra* note 5, at B8 (stating that Manalapan Township's ordinance restricts sex offenders from residing within 2,500 feet of a library, park, playground, school, day care, day camp, convenience store or recreational facility, imposes a fine of $1,250 and 90 days community service, and if found in one of these "brown zones," for an improper period of time, a fine of $500 and 30 days community service).

[24] *See* discussion, *supra* note 23.

[25] Brubaker, *supra* note 23, at L02.

[26] *Id.*

[27] Quirk, *supra* note 5, at B8.

[28] *Id.*

[29] Giselle Sotelo, *Ordinance aims to separate molesters from kids*, DAILY JOURNAL, Sept. 14, 2005, at 1A.

[30] Garber, *supra* note 12.

thought crime prosecutions.[31] Considering all of the legal impediments against these laws, the court may use its power to strike down these laws or the Legislature may act to expressly preempt the ordinances.[32]

B. *Assembly Bill A639*

New Jersey Assembly Bill A639 prohibits sex offenders with Tier Two or Tier Three status from residing within 500 feet of an "elementary or secondary school, child care center or playground."[33] The bill punishes violations as disorderly persons offenses, including up to six months imprisonment in addition to or in place of imposing a fine not exceeding $1,000.[34] The bill does not apply retroactively to offenders who resided within 500 feet of a named facility prior to the

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[31] Loitering and similar crimes such as vagrancy "have been attacked on constitutional grounds because such offenses give virtual unfettered discretion to the police and prosecutors to arrest those whose conduct or lifestyle bother them, or because the police have a hunch that the individual, left to his own devices, will commit some crime in the future." DRESSLER, *supra* note 18, at 70. A crime consists of both a mens rea element, the mental component, and the actus reus, a physical component. *Id.* When issues of loitering are present, such as in "brown zones," there is no evidence of the mens rea component to commit a crime, but rather, only the element of being present on public property for a certain period of time. A simple stroll in the park, trip to the convenience store for food or doing research at the library may subject an individual to punishment after already serving a sentence in the past.

Overbreadthness refers to the principle that "a governmental purpose to control or prevent activities constitutionally subject [to] regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." KATHLEEN M SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1334 (Robert C. Clark ed., Foundation Press, 15th ed. 2004); NAACP v. Alabama, 357 U.S. 449 (1964).

[32] Summer v. Township of Teaneck, 251 A.2d 761, 764 (N.J. 1968). The Court stated that:

> A municipality may not contradict a policy the Legislature established. Hence an ordinance will fall if it permits what a statute expressly forbids or forbids what a statute expressly authorizes. Even absent such evident conflict, a municipality may be unable to exercise a power it would otherwise have if the legislature has preempted the field. But an intent to occupy the field must appear clearly. It is not enough that the legislature has legislated upon the subject, for the question is whether the legislature intended its action to preclude the exercise of delegated police power. The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.

[33] A639, 2006 Leg., 212th Reg. Sess. (N.J. 2006).

[34] *Id.*

bill's enactment.[35] The bill differs from the above municipal ordinances as it does not entirely banish offenders from residing in towns, and it only applies to Tier Two and Tier Three offenders. With these limits, the bill is protected from being too broad and expansive, allowing an opportunity to withstand constitutional challenge.

C. *Field Preemption*

The Legislature has given municipalities the ability to enact ordinances in line with local police powers; this power is known as Legislative Home Rule.[36] This power creates a rebuttable presumption that municipal ordinances are valid, enacted with factual support, and ordained on a rational basis.[37] However, these powers are limited and "invalid if [they] intrude upon a field preempted by the Legislature."[38] To determine whether a municipality has infringed on a field preempted by the Legislature, a court will apply a three-step analysis, which was articulated by the New Jersey Supreme Court.[39] First, the court will ask whether the New Jersey Constitution prohibits municipal action on a certain subject.[40] Second, the court will determine whether the Legislature granted the municipality the power to act in a certain area of the law.[41] Finally, the court will analyze whether the Legislature divested authority from a municipality, scrutinizing whether the municipality "has been preempted by other State statutes dealing with the same subject matter."[42] This final element is the relevant and determining factor of the sex offender restrictions as the Legislature has enacted much Legislation concerning sex offenders.[43]

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[35] *Id.*

[36] N.J. STAT ANN. § 40:48-2 states:
> Any municipality may make, amend repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the Unites States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

[37] *Plaza Joint Venture*, 416 A.2d at 75.

[38] *Id.*

[39] *Dome Realty, Inc.*, 416 A.2d at 342.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] The discussion excludes the first two elements because the New Jersey

Preemption was particularly discussed by the court in *Plaza Joint Venture v. City of Atlantic City* where an ordinance regarding the sale and conversion of rental units into condominiums was preempted because the Legislature had enacted "comprehensive legislation regulating condominiums."[44] With the Legislature's extensive statutory action regarding conversion of rental units, the court ruled that preemption clearly occurred; the court stated that "the Legislature has provided a *broad integrated plan* to balance the rights of tenants with the rights of owners and potential purchasers of condominiums."[45] The clear conflict of laws provided further support for the Court,because the ordinance placed time restrictions on the conversion of rental units, while no such restriction was enacted in the condominium conversion statute.[46] This same analysis is summarized in *Dome Realty, Inc. v. City of Paterson*, where the court asked if it was the Legislature's intent to preclude a municipality from exercising police powers in a particular field of law.[47]

The Legislature created a *broad integrated plan* to enact legislation commonly known as "Megan's Law," explicitly stating in the findings and declarations that the law serves to reduce the danger of recidivism among sex offenders.[48] The Legislature made specific findings of how to address the problem of recidivism and chose to

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Constitution does not preclude a municipality from creating ordinances regarding sex offenders, but rather grants municipalities "a broad grant of police power" under N.J. CONST. art. IV, § VII, para. 11. Summer v. Teaneck, 251 A.2d 761, 763 (N.J. 1969). Secondly, the Legislature has explicitly given municipalities the power to enact ordinances regarding police powers under N.J. STAT. ANN. § 40:48-2. These presumptive powers are taken from the municipalities as the Legislature has "preempted the field" regarding sex offenders.

[44] *Plaza Joint Venture*, 416 A.2d at 75. The legislation regulated development, sale, requirements of developers to file with state agencies, remedies for violations of disclosure, structural guidelines for condominiums, and safeguards for tenants living in apartment buildings being converted. *Id.*

[45] *Id.* at 76 (emphasis added).

[46] *Id.* at 77.

[47] 416 A.2d 334 (N.J. 1980).

[48] Megan's Law, N.J. STAT. ANN. § 2C:7-1 to 19 (2005) states:

> The Legislature finds and declares:
> a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.
> b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

implement "Megan's Law" as the appropriate method.[49] The Legislature created a highly technical system of sex offender registration and notification containing nineteen subchapters in the Criminal Code.[50] Much like the court in *Plaza Joint Venture*, the legislature created a "broad[ly] integrated plan" for the treatment and punishment of sex offenders.[51] Rather than allowing municipalities to initiate their own programs to reduce recidivism, the Legislature chose to approach the problem with a statewide statutory initiative, mandating a registration and notification system. By retaining this power for itself, the Legislature occupied the field and preempted municipalities seeking to regulate sex offenders.

In 1998, the Legislature also enacted the New Jersey Sexually Violent Predators Act, providing for civil commitment of persons convicted of certain sexual crimes.[52] These detailed statutes provide further evidence of the Legislature's intent to preempt municipalities from passing ordinances concerning sex offenders.[53] As in *Plaza Joint Venture*, the explicit regulations promulgated by the Legislature show that the Legislature has taken sole responsibility for legislating in the field of sex offender regulation.

Ordinances explicitly in conflict with legislative action are also preempted under the New Jersey Constitution. As seen in *Summer v. Township of Teaneck*, a municipality cannot contradict a state legislative policy.[54] The court stated that "an ordinance will fall if it permits what a statute expressly forbids or forbids what a statute expressly authorizes."[55] As municipalities pass living restrictions, a burden is directly placed on the tracking, registration, and notification mechanisms of the existing and state-wide "Megan's Law." These ordinances create more procedural hurdles to tracking, registering, and notifying communities of sex offenders.[56] These steps are then multiplied for every new community that the offender is forced into, until that community adopts living restrictions of its

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[49] *Id.*

[50] *Id.*

[51] Plaza Joint Venture, 416 A.2d at 6.

[52] New Jersey Sexually Violent Predator Act, N.J. STAT. ANN. § 30:4-27.4 to 27.38. (2005).

[53] *Id.*

[54] *Summer*, 251 A.2d at 764.

[55] *Id.*

[56] Robert F. Worth, *Exiling Sex Offenders From Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1 (citing to a.2003 Minnesota study published by the Minnesota State Department of Corrections that "concluded that new restrictions would make it harder to track offenders and would 'not enhance community safety.'").

own, and this cycle repeats.

In effect, municipalities are hindering the purpose of "Megan's Law" by banishing offenders rather than engaging in registration and notification. The ordinances go against the mandate of "Megan's Law" by creating further complexities in the tracking, registration, and notification of sex offenders because their known locations are being eradicated as they seek new homes in different unknown communities. Although it is less expensive and quicker to banish offenders, municipalities cannot neglect "Megan's Law" because banishment is an easier means.[57] In doing so, municipalities are "forbidding what a statute expressly authorizes," and thus, legislating in a field expressly preempted by the Legislature. The New Jersey Supreme Court should not tolerate municipal interference with a state program and should find that municipal living restrictions on sex offenders are unconstitutional.

III. The Ex Post Facto Analysis under Smith v. Doe

The United States Supreme Court in *Smith v. Doe* upheld Alaska's "Megan's Law" statute by using a standard articulated in *Kennedy v. Mendoza-Martinez*.[58] This standard was recently applied by the Southern District of Iowa[59] and the Eighth Circuit[60] in determining the constitutionality of Iowa's sex offender restriction statute. The *Mendoza-Martinez* standard consists of seven factors, five of which were used in *Smith* to determine whether registration and notification provisions constituted punishment of sex offenders or whether such actions were merely "incident of the State's power to protect the health and safety of citizens."[61]

Before reaching the *Mendoza-Martinez* factors, the Court first asks whether the "intention of the legislature was to impose punishment."[62] If punishment was intended, the inquiry ends and the law is considered "retroactive punishment forbidden by the Ex Post

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[57] *Id.* Laura A. Ahern, director of Parents for Megan's Law, states how restriction laws are being implemented because "longer prison sentences and some form of supervision for like...are expensive, and have been less popular with legislators for that reason." *Id.* at ¶ 21.

[58] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (holding that United States citizens successfully challenged the constitutionality of statutes revoking their citizenship after residing outside of the United States during a time of war, as the statutes were punitive without due process of law).

[59] *Doe*, 298 F. Supp. 2d at 868.

[60] *Doe*, 405 F.3d at 719.

[61] *Smith*, 538 U.S. at 93 (*quoting* Flemming v. Nestor, 363 U.S. 603 (1960)).

[62] *Id.* at 92.

Facto Clause."[63] The Court uses a statutory construction analysis to determine if punishment was expressly or impliedly intended.[64] However, if the intention was a civil, regulatory, and nonpunitive scheme, five *Mendoza-Martinez* factors apply: (1) Are the State's actions regarded as punishment in our history and traditions? (2) Do the State's actions impose an "affirmative disability or restraint?" (3) Do the State's actions promote traditional aims of punishment? (4) Is there a "rational connection to a nonpunitive purpose?" (5) Finally, is the punishment excessive to its purpose?[65] These factors are balanced by the Court and do not strictly reveal whether a statute is exclusive or dispositive. Rather, they are "'useful guideposts' for determining whether a law has a punitive effect."[66] The Court must therefore examine and weigh each factor accordingly.

The *Smith* Court found that the "Megan's Law" statute was intended to protect children, and not to impose punishment on sex offenders.[67] Thus, the Court applied the *Mendoza-Martinez* factors to determine whether the civil statute was so punitive as to constitute a criminal penalty.[68] First, the Court rejected the argument that registration and notification were similar to the colonial punishment of shaming.[69] The requirements were not sufficiently harmful to rise to the level of "shaming, humiliation and banishment," but rather, were a non-punitive measure of notifying citizens of public information.[70]

Next, the Court determined whether an "affirmative disability or restraint" was imposed.[71] The Court stated that if restraints are minor, the statute is unlikely to be punitive.[72] The Court held that no restraint was present because there was nothing resembling imprisonment, and it was less punitive than occupational debarment.[73] The Court's rationale stated that sex offenders

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[63] *Id.*

[64] *Id.* at 92-93.

[65] *Id.* at 97.

[66] *Miller*, 405 F.3d at 719.

[67] *Smith*, 538 U.S. at 93.

[68] *Id.* at 97.

[69] *Id.* at 98.

[70] *Id.* at 98-99.

[71] *Id* at 99.

[72] *Smith*, 538 U.S. at 99.

[73] *Id.* The Court has held that occupational debarment sanctions are nonpunitive. *See, e.g.*, Hudson v. United States, 522 U.S. 93, 104 (1997) (restriction from continuing to work in the banking industry was nonpunitive); DeVeau v. Braisted, 363 U.S. 144 (1960) (restricting work for a union official was nonpunitive); Hawker v. New York, 170 U.S. 189 (1898) (revoking a practitioner's medical license

remained "free to change jobs and residences" and were "free to live and work as other citizens."[74]

Third, the Alaska statute did not accomplish a traditional aim of punishment, but rather, it was a nonpunitive program intended to deter crime.[75] The mere presence of deterrence does not give rise to punishment, as shown by Alaska's "Megan's Law" statute.[76] Because the requirements of notification and registration were reasonably related to reducing recidivism, and because the statute had a regulatory objective, there was no traditional aim of punishment present.

For the Court, the "most significant" factor was whether the statute had a "rational connection to a nonpunitive purpose."[77] The Court concluded that the regulations were related to the state's goal of preventing recidivism.[78] The Court was not persuaded that the statute was unconstitutional because the statute applied to all convicted offenders without concern for their individual risk of recidivism.[79] Because Alaska could conclude that a conviction alone is sufficient to indicate a substantial risk of recidivism, the Court held that a regulatory program to prevent recidivism was not punishment.[80] The Court found that there was no Ex Post Facto Clause violation merely because the State allowed citizens to assess "future dangerousness" by relaying public information about past convictions.[81] Because the magnitude of the restraint was minor, the Court did not require an individual assessment of the offender.[82]

Finally, the Court asked if the punishment was "reasonable in light of the nonpunitive objective."[83] The Court sided with Alaska, holding that dissemination of registrant information via the internet was not punishment because it only served informative, non-punitive

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was nonpunitive).

[74] *Smith*, 538 U.S. at 100-01. The Court further stated, "The record in this case contains no evidence that the Act has 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." *Id.* at 100.

[75] *Id.* at 102.

[76] *Id.*

[77] *Id.* at 102.

[78] *Id.* at 103.

[79] *Smith*, 538 U.S. at 103.

[80] *Id.* at 104.

[81] *Id.*

[82] *Id.; see also* Kansas v. Hendricks, 521 U.S. 346, 357-58 (1997) (finding an individual assessment proper where the State's confinement of dangerous individuals was involuntary and possibly indefinite).

[83] *Smith*, 538 U.S. at 105.

purposes.[84] Alaska's posting of sex offender status was not excessive, but rather, in sync with the mobility of modern society.[85]

Although *Smith* applied a five part test, each factor can be variably interpreted depending on how much deference the court is willing to give to the state's regulation. This is evident in the dissenting opinions by Justices Ginsburg and Breyer.[86] The dissenters used the same *Mendoza-Martinez* test as the majority, but concluded that the statute violated the Ex Post Facto clause.[87] The dissent found that the Alaska statute imposed an "affirmative disability or restraint" and caused sex offenders to be ostracized from the community.[88] Furthermore, the dissenting Justices found that disseminating the information was equivalent to the historical punishment of shaming.[89] The dissent placed emphasis on past guilt over present risk of recidivism in applying the factors.[90] The dissent found that any regulatory "non-punitive" purpose of the statute was exceeded by continually having to register without escape from humiliation, even though the offenders may not pose a future danger.[91]

How should the New Jersey Supreme Court apply the *Smith* test? In *Doe v. Portiz*, which was decided before *Smith*, the Court explicitly rejected applying the *Mendoza-Martinez* factors for an Ex Post Facto analysis.[92] Since the court is bound to follow the test adopted by *Smith*, it is now necessary to scrutinize the *Doe* rationale to determine how the court will apply the *Smith* decision.

IV. The New Jersey Supreme Court's Outdated Ex Post Facto Analysis Under Doe v. Poritz

In *Doe v. Poritz*, the New Jersey Supreme Court held that

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[84] *Id.* at 105-106; *see also* Doe v. Otte, 259 F.3d 979 (9th Cir. 2001).

[85] *Smith*, 538 U.S. at 105.

[86] *Id.* at 117.

[87] *Id.* at 117.

[88] *Id.* at 115.

[89] *Id.* at 115-16.

[90] *Smith*, 538 U.S. at 116.

[91] *Id.* at 116-17.

[92] *Doe*, 662 A.2d at 399. The court refused to apply the Mendoza-Martinez factors as the case did not involve Ex-Post Facto questions, but rather, it questioned whether a proceeding should be civil or criminal, and also involving questions of Due Process and a bill of attainder violation. *Id.* at 405. The court stated that the Mendoza-Martinez test did not apply and completely rejected its application in an Ex Post Facto context. However, the dissent disagreed and sought the application of the factors. *Id.* at 424.

"Megan's Law" is a constitutional regulation of sex offenders.[93] In the court's analysis, as in *Smith*, the first determination was whether the legislature intended to create a punitive law.[94] Considering the legislative history and the plain text of the statutes, the *Doe* court found a remedial legislative intent, to protect society from dangerous sex offenders.[95] The court focused on the "implementing provisions" to determine whether the regulatory impact exceeded its purpose.[96] If the impact was "excessive" and punitive, the statute was considered punishment in violation of the Ex Post Facto Clause.[97]

In light of the facts in *Doe*, the court stated that deterrence is not achieved by the goals of registration and notification, as "the threat of long-term incarceration" already achieves that goal.[98] Also, the law did not apply to all sex offenders but only to more serious offenders, did not "excessively" intrude on the offender's anonymity and although the statute may have some punitive impact, such impact does not equal punishment.[99] The court stated that the provisions were regulatory, provided that they were "*likely to achieve* that regulatory purpose."[100]

It is clear that the New Jersey Supreme Court in *Poritz* was very deferential to the Legislature's purpose in achieving a regulatory goal, protecting children. Provided that any punitive effects of legislation are not "excessive," deference is given to the Legislature provided that the legislation is "likely to achieve" an overall regulatory goal.[101] Although the tests used in *Smith* and *Doe* are strikingly different, the last factor in *Smith*, questioning whether the statute is rationally connected to a "nonpunitive purpose"[102] through deciding whether the statute is reasonable in relation to the "nonpunitive objective,"[103] is similar to the questions of "likely to

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[93] *Id.* at 372.

[94] *Id.* at 404.

[95] *Id.*

[96] *Id.* at 404-05.

[97] *Doe*, 662 A.2d at 404-05. The court continued to state that:

> The fact that some deterrent punitive impact may result does not, however, transform those provisions into 'punishment' if that impact is an inevitable consequence of the regulatory provision, as distinguished from an impact that results from 'excessive' provisions, provisions that do not advance the regulatory purpose.

Id. at 405.

[98] *Id.* at 404.

[99] *Id.* at 404-05.

[100] *Id.* at 405.

[101] *Id.*

[102] *Smith*, 538 U.S. at 102.

[103] *Id.* at 105.

achieve" a regulatory purpose and excessiveness explained in *Doe*. It is clear, however, that the *Smith* standard is not as deferential as the standard applied in *Doe*, and that the court must now include a balancing of other factors in its decision.

V. Applying Smith in New Jersey

Because *Smith* is binding precedent on the New Jersey Supreme Court, the *Doe* standard must be abandoned. The first portion of the test consists of determining whether the ordinances intend to punish sex offenders, but it is conceded that the ordinances are regulatory and seek to protect children from recidivism.[104] To determine whether the regulatory and civil objective imposes an unintended punishment, the *Smith* standard is applied, determining whether the ordinances are so punitive as to constitute being Ex Post Facto punishment.[105] In *Doe*, the Court stated that it was concerned with "the literal use, of *Mendoza-Martinez*," and therefore, it follows that the Court will not strictly apply the factors, but balance the factors accordingly.[106] These factors are to be "useful guideposts," being "neither exhaustive nor dispositive."[107] Each factor is discussed below, keeping in mind the emphasis that the New Jersey Supreme Court placed upon the regulatory purpose and excessiveness factors in *Doe*, and how the Court may be more likely to consider these factors as being the most important of the five *Mendoza-Martinez* factors.

A. *Banishment*

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[104] The Court uses a statutory construction analysis to determine if punishment was expressly or impliedly intended. *Smith*, 538 U.S. at 93 (quoting Flemming v. Nestor, 363 U.S. 603 (1960)). Here, the author concedes that the ordinances are regulatory in nature and does not expressly or impliedly intend to punish sex offenders as the goal is to protect children from becoming victims of recidivist offenders.

[105] *Id.* at 92.

[106] The court stated its particular concern over the *Mendoza-Martinez* test in:

> the weighing of each [factor], and the unguided indeterminate balancing of the various weights. . . distracting a court from significant analysis of issues, distracting it from an analysis of the regulatory intent of the statute or sanction, the societal goals served by the regulation, the extent to which its punitive consequences are but an inevitable result of the statute or sanction, and ultimately from an evaluation of the fair characterization of the statute to decide whether the purposes served by the constitutional provisions require its invalidation.

Doe, 662 A.2d at 403.

[107] *Smith*, 538 U.S. at 97.

For centuries, banishment, the practice of excluding convicted individuals from the community, had been a common form of punishment.[108] Banishment is "punishment inflicted upon criminals by compelling them to quit a city, place or country for a specified period of time, or for life."[109] Banishment is considered an incapacitative sanction, eliminating behavior of individuals by expelling a person from a geographical area.[110] It is deeply embedded in the history of the United States and other countries such as England as a means of social control; it was and remains an economical means of dealing with crime.[111] A court may not adhere to the idea of comparing modern ordinances to the colonial punishment, but it is a very important evaluation of the ordinances' underpinnings.[112] Although the United States Supreme Court did

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[108] BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA: 1606-1660, at 53 (University of Georgia Press 1983). For example, "Massachusetts banished persons who threatened church and state." *Id.* In 1644, a statute called for the banishment of "Incendiaries of Commonwealth. . . Infectors of persons in main matters of Religion. . . [and] Troublers of churches." *Id.*

[109] United States v. Ju Toy, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting) (citation omitted).

[110] Incapacitative sanctions are "sanctions that confine individuals or limit their physical opportunities for unacceptable behavior are ubiquitous over time and geographical context. TERANCE D. MIETHE & HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE 30 (Cambridge University Press 2005). These incapacitative sanctions may be justified solely on their preventative value, but they can also serve multiple functions when the conditions of confinement are so deplorable that they deter the individual from future deviant behavior." *Id.*

[111] Miethe and Hong Lu explain that:

> Banishment and exile have several obvious advantages compared to other methods of physical restraint. For example, they are both cheap and efficient methods of social control, involving in most cases little more cost than the proverbial 'one-way ticket out of town.' Acts of banishment and exile also have strong symbolic value as punishments and may uniquely enhance community solidarity. The public degradation ceremonies in which these sanctions are pronounced may serve to dramatize the evil of the offender and the offense, ultimately leading to greater community solidarity and reinforcing the prevailing power relations in the community.

Id. England's practice of banishment began toward the end of the sixteenth century and lasted for over 200 years. *Id.* at 31. "England used transportation to its colonies as a means to rid the homeland of criminal felons and various 'rogues, vagabonds, and beggars.'" *Id.* Before the revolutionary war, about "50,000 English prisoners were sent to the American colonies. . . . The annual number of convicts shipped to Australia and other British colonies peaked at 5,000 per year in the early 1830's, representing about one-third of convicted offenders in English courts." *Id.*

[112] In *Doe v. Miller*, the United States Court of Appeals for the Eighth Circuit found that offenders are neither expelled from the community nor restricted from accessing areas where restricted from living. 405 F.3d at 719. The Eighth Circuit further cited that the statute allowed offenders who resided near a school before the statute was enacted did not require them to move. *Id.*

not accept the argument in *Smith* because "Megan's Law" did not equate to shaming, it did in fact scrutinize the effects of the law, rather than disposing the argument without just review.[113]

Banishment should be evaluated not as it was explicitly applied in colonial times, but rather, through the effects upon the individual when a municipality restricts one from living in the community.[114] As described earlier, both Brick[115] and Lower Townships[116] have ordinances that restrict sex offenders from living within the entire municipality by restricting sex offenders from being within 2,500 feet of bus stops. In contrast, the Legislature's proposed bill merely restricts sex offenders from living within five hundred feet of a school, and does not apply to offenders who already reside near a school.[117] A five hundred foot restriction is far more reasonable than the outright banishment of citizens from a community as seen in the Brick and Lower Township ordinances. The Court should scrutinize the ordinance and find that modern day banishment is occurring. As the Court was particularly concerned with the "excessiveness" of the statute in *Doe*, the first factor already indicated that excessiveness is found lurking behind the ordinance, banishing offenders who have already served their respective sentences.[118]

B. *Affirmative Disability or Restraint*

The affirmative disability or restraint factor is determined by looking at the effect of the restraint upon those subjected to the ordinance.[119] As stated in *Smith*, if the restraints are minor, then the statute is unlikely to be punitive.[120] However, being banished from a community for a single conviction is an excessive restraint; distinguishable and unlike the minor implications of registration and notification seen in *Smith* and *Doe*. If A639 is signed into law, the court should give deference to the Legislature's bill, as a 500 foot

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[113] *Smith*, 538 U.S. at 97-98.

[114] In *Doe v. Miller*, 298 F. Supp. 2d at 869, (*vacated* by 405 F.3d 700 (8th Cir. 2005)), the District Court noted that the Iowa statute "does not specifically banish sex offenders from Iowa's many communities," but in the act's practical application, "sex offenders are completely banned from living in a number of Iowa's smaller towns and cities."

[115] Brubaker, *supra* note 23, at L02.

[116] Associated Press, *supra* note 9, at A03.

[117] A639, 2006 Leg., 212th Reg. Sess. (N.J. 2006).

[118] *Doe*, 662 A.2d at 405.

[119] *Smith*, 538 U.S. at 99.

[120] *Id.*

restriction would survive as a minor restraint. However, the 2,500 foot ordinances entirely banish individuals from the municipality, evict them from their homes, or restrict them from visiting public places. Such ordinances are excessive and pose an affirmative disability or restraint upon movement and ownership of property.[121] As a society, we cannot be blind to the outright taking of a person's liberties or property based upon criminal actions for which they have already been accountable.[122]

The Court should not attempt to compare the ordinances at hand with the civil commitment of sex offenders in *Kansas v. Hendricks*, holding that civil commitment was not punitive in violation of the Ex Post Facto Clause.[123] Civil Commitment is easily distinguishable from the sex offender restrictions at hand.

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[121] John Locke, the Seventeenth Century political philosopher who inspired many of the Founders of the United States of America, states in "The Second Treatise of Government," that "[t]he state of Nature has a law of Nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions." JEAN PORTER, CLASSICS IN POLITICAL PHILOSOPHY 332 (Jean Porter ed., Prentice-Hall 2000) (1689).

John Locke championed the role of governments to protect property, particularly stating,

> The supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires, that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it, too gross an absurdity for any man to own. Men therefore in society having property, they have such a right to the goods, which by the law of the community are theirs, that nobody has a right to take their substance, or any part of it from them, without their own consent, without this, they have no property at all. . . . Hence it is a mistake to think that the supreme or legislative power of any commonwealth, can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure.

Id. at 362.

[122] The issue of eminent domain may also be at play, although beyond the scope of this note. In *Kelo v. City of New London*, the Court upheld the constitutionality of the Takings Clause of the United States Constitution as applied to taking private property for private use, provided there was a "public purpose" at stake. 125 S. Ct. 2655, 2688 (2005). Will municipalities seek to use the Takings Clause to banish offenders from their communities because a "public interest" is at stake? If an offender is forced from his home, and is forced to sell the property at a loss, is he entitled to just compensation under the Takings Clause? *See* U.S. CONST. amend. V, (stating, "Nor shall private property be taken for public use, without just compensation."); *see also* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) (incorporating the Takings Clause to the States through the Fourteenth Amendment of the Unites States Constitution).

[123] Kansas v. Hendricks, 521 U.S. 346 (1997).

Commitment is necessary to rehabilitate and prevent *high risk* individuals from recommitting sex offenses.[124] Not all offenders are civilly committed, nor should they be committed if the offender poses no threat of recidivism and is not "dangerously mentally ill."[125] In fact, civil commitment may be a more practical and effective approach to further rehabilitate, rather than banishing an offender and making that person another municipality's problem.[126] Commitment affords due process rights to high risk offenders, as the statutes provide for hearings, unlike municipal living restrictions that outright banish offenders without any such process.[127] It is in society's best interest for the government to seek ways of effectively rehabilitating offenders, rather than avoiding the issue by banishing offenders to neighboring communities. The affirmative disability or restraint posed by the restrictive ordinances is excessive, and goes beyond the policies of civil commitment by punishing offenders without due process, rather than seeking to rehabilitate and correct the problems that sex offenders pose to society.

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[124] *Hendricks* is the leading authority on the constitutionality of states using civil commitment to hold sex offenders beyond their criminal sentences. *Id.* There, a Kansas statute was held constitutional as it did not impose punishment. *Id.* Specifically applying the Ex Post Facto Clause, the Court stated that confinement is based upon the offender's current status as suffering "from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public." *Id.* at 371. Civil commitment in *Hendricks* was not based upon punishing prior acts, as such acts were only used for evidentiary purposes. *Id.*

[125] Civil commitment, although involuntary, has historically been considered a necessary nonpunitive means to "restrict the freedom of the dangerously mentally ill." *Id.* at 363. Although the length of commitment may be indefinite, it does not equate to punishment because the duration is dependent upon recovery from causing a threat to others. *Id.*

[126] *See* John Kip Cornwell, *The Right to Community Treatment of Mentally Disordered Sex Offenders*, 34 SETON HALL L. REV. 1213, 1217 (2004) (revealing that sexually violent predators who are civilly committed in New Jersey are not guaranteed a right to adequate treatment, or any treatment, once released into the community).

[127] "We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Hendricks*, 521 U.S. 346 at 357. The *Hendricks* Court notes that a likelihood of dangerousness alone is not sufficient to commit an individual, but evidence of dangerousness coupled with mental illness is sufficient. *Id.* The Kansas civil commitment statute was thus upheld, as it provided sufficient due process to determine mental illness, not basing commitment on past offenses. *Id.; see also In re* D.C., 679 A.2d 634 (N.J. 1996) (upholding the New Jersey civil commitment statute for released sex offenders).

C. *Promotion of Traditional Aims of Punishment*

The next factor is whether the statute promotes traditional aims of punishment such as retribution and deterrence.[128] Precedent dictates that the mere presence of deterrence alone does not make a statute criminal, but the issue must be carefully scrutinized.[129] Conceding the court's statement in *Doe* that "the threat of long-term incarceration"[130] already achieves the goal of deterrence, it cannot be said that the ordinances' sole purpose is to impose punishment.[131] Although there are attributes of retribution and deterrence inherent in the ordinance, the main purpose is to protect children, which

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[128] The theories of punishment within the criminal justice system are retribution, general deterrence, specific deterrence, rehabilitation and incapacitation. DRESSLER, *supra* note 18, at 33-43. "Retributivism is based on the principle that people who commit crimes deserve punishment. In that sense, the theory is backward looking: the justification for punishment is found in the prior wrongdoing." *Id.* at 33. General deterrence is the theory that "[k]nowledge that punishment will follow crime deters people from committing crimes, thus reducing future violations of right and the unhappiness and insecurity they would cause. The person who has already committed a crime cannot, of course, be deterred from committing that crime, but his punishment may help to deter others." *Id.* at 35. Specific deterrence, also known as individual deterrence, is the theory that the "actual imposition of punishment creates fear in the offender that if he repeats his act, he will be punished again. Adults are more able than small children to draw conclusions from the punishment of others, but having a harm befall oneself is almost always a sharper lesson than seeing the same harm occur to others." *Id.* at 36. Regarding rehabilitation,

> incarceration rarely is imposed today for rehabilitative (reform) purposes. The conventional wisdom is that past efforts to rehabilitate convicted offenders were mostly unsuccessful. Advocates of rehabilitation initially responded that adequate funds for reform measures were never appropriated and, therefore, the 'failures' really represented a failure of will by legislators hesitant to appropriate large sums of money for what some taxpayers considered 'coddling' of criminals.

Id. at 38.

As rehabilitation is not the main purpose of the criminal system, society must make efforts to help rehabilitate sex offenders, rather than exiling them. The problem of recidivism is not alleviated by banishment, but rather, rehabilitation should be the goal during a prison sentence or thereafter.

[129] This factor is very deferential to the legislative body, as the *Smith* Court stated, "to hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." 538 U.S. at 103 (quoting *Hudson*, 522 U.S. at 105).

[130] *Doe*, 662 A.2d at 404.

[131] These factors are to be weighed accordingly. *Doe*, 298 F. Supp. 2d at 875-80 (finding the restrictions as retributive as the risk of re-offense was not considered for each offender and there was no time limit placed on the living restrictions, as the restrictions were indefinite).

most likely will not be viewed as promoting traditional aims of punishment in the eyes of the court.[132] However, the court must also question whether the restrictions are "reasonably related to the danger of recidivism . . . consistent with the regulatory objective."[133] This question must also be conceded. As the *Smith* Court found, the reporting requirement met the reasonable relation to a regulatory objective test, with municipalities entitled to determine that the ordinances reduce recidivism.[134] With this concession, the Court continues the analysis, determining whether there is a rational connection to the purpose of reducing recidivism and whether the ordinances are excessive in its purpose.

D. *Rational Connection to an Alternative Purpose*

Considered the "most significant" factor under *Smith*, if the ordinances indeed punish sex offenders, admittedly, there is an alternative purpose of preventing sex offenders from preying on children.[135] However, there is much controversy over whether the ordinances are actually effective in extinguishing recidivism and

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[132] MIETHE & LU, *supra* note 110, at 19-20, states:

> The recent model of selective incapacitation in the United States is designed to target criminal offenders thought to have the greatest probability of repeat offending and place greater restraints on the nature and conditions of confinement for these "high risk" offenders. Although research suggests that a small pool of people commits the predominant share of violent and property crime, efforts to successfully predict these high-risk offenders suffer from numerous ethical and practical problems, including high rates of both "false positives" and "false negatives." Contrary to early historical patterns of incapacitation that emphasized the reduction of the physical opportunity for crime and deviance, modern versions of this philosophy are more "forward looking" in terms of focusing on the utility of punishments for changing offenders' criminal motivations once they are no longer physically restrained from committing deviance. In this way, incapacitation is united with other utilitarian philosophies for punishment. Different types of incapacitative sanctions may serve as the initial framework for establishing successful programs of deterrence and rehabilitation.

[133] *Smith*, 538 U.S. at 102.

[134] *Smith*, 538 U.S. at 100-01. This concedes that the court may find that deterrence and retribution are not explicitly what municipalities are seeking to achieve, and a municipality may determine upon its own right that living restrictions are proper to reduce recidivism. *Id.* However, the later discussed argument of excessiveness to achieve the outcome is the primary inquiry regarding the reduction of recidivism. *Id.*

[135] Garber, *supra* note 12.

protecting children.[136] One source reports that:

Statistics indicate that most sex offenders commit crimes against relatives of juveniles they know. The value of restrictive residency laws may, therefore, not be very effective.[137]

The article continues, citing to Charles Only, an associate research assistant at the Center for Sex Offender Management at the United States Department of Justice, stating that restriction laws may not actually be effective at preventing recidivism.[138] Rather, he supports laws that seek to "successfully integrate [sex offenders] in the community."[139] Dr. Karl Hanson, a leading research authority on sex offenders, further contends that offenders are not likely to repeat their crimes, and they "over all are less likely to be rearrested than drunk drivers, drug offenders, and domestic violence offenders."[140]

Minnesota and Colorado both recently rejected living restriction laws after a Minnesota study found "no relationship between offenders' proximity to schools and their risk of committing new crimes."[141] The same study also stated that the restrictions create obstacles in tracking offenders and would "not enhance community safety."[142] A forensic pathologist, Dr. Richard Hamill, believes that governments prefer restriction laws because they are cheaper than other options of rehabilitation.[143] Dr. Hamill believes that the laws are ineffective because dangerous offenders are not deterred and lower risk offenders are unlikely to commit subsequent sex crimes under any circumstances.[144]

The *Smith* Court stated that a "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance," and therefore a legislative body may conclude that living restrictions are consistent with preventing recidivism.[145] The *Smith* Court supported this statement by citing empirical research that "the risk of recidivism posed by sex offenders is

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[136] The District Court in *Doe v. Miller* rightfully concedes that the statute's purpose is of minimizing the risk of recidivism by sex offenders, which is upheld in the 8th Circuit's opinion. 405 F.3d at 718-19.

[137] Garber, *supra* note 135. The article quotes from Charles Only, who is a research associate for "Center for Sex Offender Management" of the U.S. Department of Justice. *Id.*

[138] *Id.*

[139] *Id.*

[140] Worth, *supra* note 56, at B1.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Smith*, 538 U.S. at 103.

'frightening and high.'"[146]

Here, however, the above quoted opinions conflict with curtailing recidivism and protecting children. Rather than passing "feel good" legislation without examining the ordinance's true effects, elected officials have a responsibility to study the effects of laws before enacting them.[147] Empirical evidence should be evaluated at length, without deferring to passion or prejudice, and local legislative bodies should not reach a decision by succumbing to political posturing. Municipalities such as Hamilton Township, have not explicitly cited that they have considered the constitutionality of the ordinances, but rather, it appears that the municipalities have adopted the ordinances arbitrarily without proper debate or expert opinions.[148]

Considering the weight of expert opinion on this subject, the court should question the impact of these ordinances.[149] Protecting

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[146] *Id.*

[147] "Farmingdale. . . has become one of the few area municipalities to have extensive deliberation on excluding registered sex offenders." Bob Jordan, *Borough Adopts Sex-Convict Law, Farmingdale Revises Original Limits*, ASBURY PARK PRESS, Nov. 8, 2005, at B1. The ordinance is a restriction of 1,000 feet, rather than a 2,500 foot living restriction around schools, parks, playgrounds, child care centers and bus stops, because a 2,500 foot restriction "would have encompassed virtually all of the half-square mile borough." *Id.* Councilman David K. Mackenzie of Farmingdale, New Jersey, stated that it was "unrealistic" to include the entire town in the ordinance, making it more likely to uphold if challenged. *Id.*

[148] For example, Councilman Daniel R. Benson, in the minutes of the Tuesday, May 17, 2005, Hamilton Township Council Meeting, stated that he is unhappy with the legislature's proposals of less than 2,500 foot restrictions, stating further that "we need to make sure there's mandatory life sentencing and life imprisonment for those that do sexual assault upon minors and upon our children in our community." Councilman Benson also stated that the legislature must make stringent laws that keep "these predators and these beings in jail for the rest of their lives so they can do no further harm and so that again, our children can sleep safe at night and our parents can know that we're doing everything we can to protect the children in the State of New Jersey." Hamilton Township Council Meeting, May 17, 2005 (statements of Councilman Daniel R. Benson), *available at* http://www.hamilton nj.com/announcements/ pdf/council-2005-may-17-meeting-minutes.pdf. (last visited Feb. 14, 2006). Mr. Benson's rationale does not consider due process, the goals of the criminal justice system or the overbreadth of statutes or Ex Post Facto jurisprudence. The admirable goal of protecting our children tends to spark human emotions beyond the point of retribution, neglecting the social goal of rehabilitation. *Id.*

[149] As with most expert opinions and statistics, there are arguments in juxtaposition to those aforestated. In *Smith*, 538 U.S. at 103, the Court quotes *McKune v. Lile*, 536 U.S. 24, 34 (2002), stating, "The risk of recidivism posed by sex offenders is 'frightening and high.'" *McKune* further quotes from the U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997), that "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.*

children from predators should concern every elected official, but when a policy has little hope of success in its stated goal, and where Ex Post Facto punishment is a possible result, society cannot permit these regulations to trample constitutional principles. Society must not abandon constitutional principles in a foolhardy attempt to ensure safety. As James Madison warned in *Federalist 10*,[150] we cannot afford to disregard essential liberties in exchange for comfort of safety; or as Benjamin Franklin is oft-quoted, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[151]

E. *Excessive in Relation to an Alternative Purpose*

When evaluating the excessiveness of the ordinances, it is critical to acknowledge that some expert research has shown that the connection between protecting children and restricting offenders from certain public places is attenuated at best.[152] In *Doe*, the Court favored registration and notification legislation because it only applied to the more serious offenders, the offender's loss of anonymity was not an excessive intrusion upon his life, and any punitive impact of registration and notification did not equate to

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The District Court for the Southern District of Iowa in *Doe v. Miller*, 298 F. Supp. 2d at 859-62, cited differing opinions of expert testimony, including: Dr. William McEchron, a doctor in educational psychology, who agreed that restricting sex offenders from coming into contact with children is "common sense," but did not know the statistics for whether restrictions actually prevent recidivism, and who further stated that the restrictions could "be a problem for treatment because the restriction seems unfair to the individual offender" who may be progressing in treatment; Dr. Luis Rosell, a clinical and forensic psychologist and member of the Association for the Treatment of Sexual Abusers, who testified about a study of sixty-one studies of 28,000 subjects, performed by Dr. R. Karl Hanson finding that in four to five years after an offense only "13.4 percent of child molesters re-offend," and in Dr. Rosell's response to whether living restrictions from a school will deter offenders, he stated "not in general. . . . [I]f an individual wants to get children in, he can find ways." *Id.* at 859-63. These findings, differing from findings of researchers opining that living restrictions have no bearing on preventing sex offenses, emphasize the point that restrictions are a questionable practice that not only have material statistical questions, while inflicting punishment on citizens.

[150] "Liberty is to faction, what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, for which is essential to animal life, because it imparts to fire its destructive agency." JAMES MADISON, THE FEDERALIST NO. 10, 43 (Gary Wills ed., Bantam Books 1982) (1787).

[151] GERALD F. LIEBERMAN, 3,500 Good Quotes for Speakers (1983).

[152] Worth, *supra* note 56, at B1.

punishment.[153] Because the legislation was "likely to achieve" a regulatory purpose, the legislation did not violate Ex Post Facto principles.[154]

Here, however, many ordinances apply to all listed offenders and not only to serious offenders.[155] These laws do not merely concern the dissemination of public information to neighbors, but rather, completely exile offenders from communities.[156] And on top of all of this, experts differ on whether the ordinances actually prevent or deter offenders from re-offending.[157]

To evaluate whether an ordinance is excessive, the court must use the excessive "in light of the nonpunitive objective" standard articulated in *Smith*.[158] However, as the court has applied a deferential "likely to achieve" a regulatory purpose standard in *Doe*, it is necessary to first determine whether this outdated standard would be met.[159] Under this standard there is serious doubt that a regulatory purpose is being achieved, as expressed by numerous experts mentioned above.[160]

For example, an offender may travel to any restricted living area, abduct, or assault a child, and quickly leave the area without a trace. The only obstacle afforded by these laws is the five minutes that it would take to drive or walk from a home 2,500 feet away to commit an offense. Also, rather than the community being able to monitor the offenders, they are now outside of the regulatory reach of the

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[153] *Doe*, 662 A.2d at 405.

[154] *Id.*

[155] For example, Hamilton Township's ordinance applies to all offenders regardless of Tiered class. Garber, *supra* note 12.

[156] Associated Press, supra note 9, at A03.

[157] The Iowa Civil Liberties Union takes particular issue to the Iowa law applying to all sex offenders and not to the most serious offenders. Ben Stone, Executive Director of the Iowa Civil Liberties Union, states,

> The 2,000 foot rule applies equally to all kinds of people who don't fit the public perception of the typical sex offender. . . . The law covers cases where a 19-year-old had sex with a 15-year-old, as well as persons who pled guilty to exposing themselves at a party. And, perhaps most significantly, the law has no time limit-middle-aged fathers with wives and children who have had no criminal convictions for decades are being forced to leave their families.

Press Release, American Civil Liberties Union, ACLU Asks U.S. Supreme Court to Review Iowa's Sex Offender Residency Restriction, (Sept. 29, 2005), *available at* http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=19211&c=15 (last visited Feb. 11, 2006).

[158] *Smith*, 538 U.S. at 105.

[159] *Doe*, 662 A.2d at 405.

[160] *See* discussion, *supra* note 149.

community and harder to track.[161] Considering these expert opinions and the obstacles created regarding tracking of offenders, these ordinances are arbitrary, capricious, and unreasonable, having no rational relation to a purpose other than banishing an offender from the community for having a prior criminal record.[162]

Notwithstanding that the "likely to achieve" standard is unlikely to persist, the court should easily find that the ordinance is excessive "in light of the nonpunitive objective."[163] Again, the factors articulated in *Smith* are "useful guideposts" and should be balanced accordingly.[164] With other factors of the test tending towards excessiveness and an attenuated relationship to a rational purpose, the balance of all factors gives the Court further reason to strike down the ordinances as unconstitutional.[165] The Court should not allow municipalities to have carte blanche power to write laws that trump constitutional protections merely because they believe that the ends justify the means.

VI. Fundamental Fairness

If the Court is not persuaded that restrictive ordinances are unconstitutional under the doctrine of Field Preemption or Ex Post Facto punishment, the Court must invoke its power of upholding fundamental fairness. The doctrine, under New Jersey law, is used to "protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to

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[161] Worth, *supra* note 56, at B1 (stating, "New restrictions would make it harder to track offenders and would 'not enhance community safety'").

[162] "Municipalities may enact ordinances pursuant to the police power, but police-power legislation is subject to the constitutional limitation that it be not unreasonable, arbitrary, or capricious, and that the means selected by the legislative body shall have real and substantial relation to the object sought to be attained." 515 Assocs. v. City of Newark, 623 A.2d 1366, 1369 (N.J. 1993) (citing Hutton Park Gardens v. West Orange Town Council, 350 A.2d 1 (1975); N.J. STAT. ANN. § 40:48-2 (1993); Bonito v. Bloomfield Township, 484 A.2d 1319 (N.J. Super. Ct. Law Div. 1984)).

[163] If this question were posed to the proposed Assembly Bill, A639, 2006 Leg., 212th Reg. Sess. (N.J. 2006), the court should defer to the legislature, as the bill doesn't apply to offenders already residing near a school, the restriction is only a 500 foot restriction, it does not have the effect of banishing citizens completely from towns and only applies to serious sex offenders likely to re-offend. The reasonableness of the legislature's attempt to restrict sex offenders from moving into a residence within 500 feet of a school is a minimal restriction, and would survive the balancing approach of excessiveness in light of the questionable results argued by experts.

[164] *Smith*, 538 U.S. at 97.

[165] *Id.*

operate arbitrarily."[166] The doctrine serves as a procedural defense when potential unfair treatment occurs, and there are no protections available to those negatively impacted.[167] Although the doctrine has been applied mostly to Double Jeopardy cases, application of the doctrine is appropriate here because the ordinances subject individuals to "oppression, harassment, or egregious deprivation" by municipalities.[168]

The fundamental fairness doctrine was articulated in *State v. Yoskowitz*, where a defendant agreed to plead guilty on the condition that no further charges would be brought.[169] When prosecutors disregarded their promise and filed additional charges, the doctrine was applied as the court found it to be a fundamentally unfair practice.[170] The *Doe* Court discussed this doctrine but did not apply it to the classification of sex offenders, as defendants were afforded due process during classification, and the classification was not arbitrarily assigned.[171] Here, however, offenders are being oppressed, harassed, and ostracized from the community without any due process protections. The ordinances apply to all sex offenders without regard for classification, and offenders are restricted from their homes without any showing that banishment is an effective means of curbing recidivism.[172] Some ordinances may even have the effect of separating offenders from their families, who may be unable or unwilling to leave their homes because of various personal reasons.[173] The Court should use the fundamental fairness doctrine to disallow

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[166] *Doe*, 662 A.2d at 421.

[167] "This Court has relied on the concept of fundamental fairness to require procedures to protect the rights of defendants at various stages of the criminal justice process, even when such procedures were not constitutionally compelled." *Id.*

[168] *Id.* The *Doe* court discusses the doctrine in a broad light, applicable to notions of due process, rather than limiting the doctrine to Double Jeopardy concerns. *Id.* at 417-22.

[169] 563 A.2d 1, 15 (N.J. 1989). There, the defendant argued that he was pleading guilty to filing a false police report, as the detectives led him to believe that a guilty plea would cause "the whole thing to be over." *Id.* Meanwhile, the defendant was further charged with arson and insurance fraud. *Id.* The court stated that if the Prosecutor's Office engaged in the defendant's belief that he would not be subject to further prosecution if he pled guilty to the first change, a question of fundamental fairness to the defendant would exist. *Id.* at 16. The question was remanded to determine if fundamental fairness was warranted. *Id.*

[170] *Id.*

[171] *Doe*, 662 A.2d at 422.

[172] Garber, *supra* note 12.

[173] Beyond the scope of this note, this refers to a substantive due process argument by sex offenders in *Doe v. Miller*, arguing that sex offenders could not live with their wives, children or parents if those family members lived in a restricted zone, violating a "right to privacy and choice in family matters." 405 F.3d at 709.

the arbitrary actions of New Jersey municipalities from harassing individuals merely because of their criminal record.

VII. Conclusion

The New Jersey Supreme Court should find unequivocally that sex offender living restrictions are unconstitutional. Several municipalities have passed ordinances that essentially banish sex offenders from entire communities without any determination that the offender poses any ongoing threat. This leaves individuals with prior offenses to be summarily subjected to punishment after their sentences have already been served.

The field of sex offender legislation has been preempted by the New Jersey Legislature, as it has already sought to deter, rehabilitate, and punish sex offenders through incarceration, civil commitment, and registry and notification laws.[174] The Legislature's intent to preempt the field is further evident by its recent sponsoring of A639, a bill imposing minor living restrictions on offenders.[175] The Legislature's proposed bill does not completely banish offenders from municipalities with overbearing restrictions, but rather, is more reasonable and tailored to a living restriction of five-hundred feet from schools, playgrounds, and child care centers.[176] The Legislature is a professional body and fully capable of lawmaking. It is knowledgeable of the Constitution and has the resources to produce experts with empirical evidence regarding the objectives and effects of living restrictions. The Legislature's bill would also provide a general application to all municipalities, rather than having municipal governments shovel sex offenders from one town to the next. A uniform and measured law by the legislature is a step in the right direction toward eliminating the overbroad restrictions imposed by several municipalities.

In addition to being pre-empted, these municipal restrictions violate the Ex Post Facto Clauses of both the United States and New Jersey Constitutions. Applying the *Mendoza-Martinez* standard from *Smith*, the New Jersey Supreme Court should find that modern-day retroactive punishment tramples on the rights of citizens who have already served their sentences. Banishment is well grounded in

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[174] *See* discussion, *supra* note 23.

[175] A639, 2006 Leg., 212th Reg. Sess. (N.J. 2006) (sponsored by Assemblyman Brian E. Rumpf and Assemblyman Christopher J. Connors and co-sponsored by Assemblyman Joseph Vas).

[176] *Id.*

history and tradition as a punishment, and the ordinances impose an affirmative disability or restraint through restricting movement and preventing offenders from owning property. Concededly, keeping sex offenders away from children is regulatory, but experts contend that there is no rational connection between living restrictions and curtailing recidivism. The ordinances punish individuals excessively in relation to an alleged and unknown outcome, while offenders are being deprived of property without reference to their designated Tier; exiled from the community merely because of their criminal history.

Further, the ordinances are fundamentally unfair, causing offenders to suffer from "oppression, harassment, or egregious deprivation" by New Jersey municipalities. Therefore, the court should invoke the doctrine of fundamental fairness to strike down such ordinances as being unconstitutional. Offenders are not given process to determine whether recidivism is actually achieved, or as contended, whether the relationship between the ordinances and recidivism are so attenuated that individuals are merely being oppressed because they have past criminal records. Sex offenders have committed offenses that are deplorable, unacceptable, and appalling, however they should not be jostled into another community, but rather, effectively rehabilitated within the bounds of the Constitution, for the betterment of all society.

VIII. Recommendation

Before the blatant disregard of the Constitution continues through all 566 municipalities, the Legislature should pass its proposed legislation in order to explicitly preempt municipalities from continuing the unreasonable banishment of citizen offenders. Further, those who bear the brunt of these ordinances should bring action once subjected to fines or imprisonment for residing within an arbitrarily created zone.

Municipalities should refrain from engaging in residency restrictions as the Legislature has already preempted the field. Notwithstanding the issue of Legislative Field Preemption, full debates should be placed on the record and experts should testify to the effectiveness of the ordinances in eliminating recidivism. Attorneys should also counsel the governing body, citing any adverse implications of the ordinance and the probability of the ordinance passing constitutional muster.

If municipalities want to engage in residency restrictions, the

ordinances should be limited to a reasonable number of feet from schools, such as the 500 foot restriction as seen in the proposed Assembly Bill. Restrictions from living near bus stops and other public places are ludicrous, excessive, and should not be included in any ordinance. "Brown zones" are also arbitrary and should not be ordained, restricting people from partaking in legal and legitimate activities.[177] Further, limiting the ordinances to offenders most likely to re-offend, as already classified into Tiers, is a more tailored and less arbitrary means in relation to the ordinances' purpose to reduce recidivism.

Sex offenders are in need of the community's aid and should be rehabilitated and reintegrated instead of being ostracized. Municipalities are encouraged to seek professional advice from those people studying sex offender behavior. The debate should involve treating and preventing sex offenders from recidivism rather than wasting precious time and resources arguing over and enforcing useless ordinances.

As recognized by distinguished scholars in this area, continuous and effective treatment after prison release or while on parole should be available to sex offenders attempting to reintegrate into society.[178] Registration and notification laws have been an effective and innovative means of protecting children, while balancing the rights of individuals who have already served their sentences. If municipalities seek to prevent recidivism, resources should be used for mandatory counseling and close monitoring in the community. Rather than throwing sex offenders into another community for someone else to deal with and creating laws repugnant to constitutional principals and fundamental fairness, rehabilitation through innovation within constitutional principles is the best means to balance the safety of our children and the rights of all.

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[177] Quirk, *supra* note 5, at B8.

[178] *See* Cornwell, *supra* note 126, at 1217.