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Human Zoning: The Constitutionality of Sex-Offender Residency Restrictions as Applied to Post-Conviction Offenders

RYAN HAWKINS*

I. INTRODUCTION

My definition of a free society is a society where it is safe to be unpopular.

— Adlai Stevenson¹

National media coverage of recent, heinous sex crimes has brought sex-offenders' punishments and restrictions to the forefront of most states' legislative priorities. Public outcry regarding these crimes is understandable. In *McKune v. Lile*,² Justice Kennedy stated, "[s]ex offenders are a serious threat in this Nation. . . . [T]he victims of sexual assault are most often juveniles [and] . . . [w]hen 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."³ Studies show that pedophiles have a fifty-two percent recidivism⁴ rate and that rapists have a thirty-nine percent recidivism rate.⁵ These statistics demonstrate why politicians are seeking measures to protect the public from sex offenders. The dangers posed by recidivist sex offenders must be addressed, but the haste with which legislatures are attempting to curb sex-offender recidivism has led to unconstitutional policies.

These high recidivism rates show that the threat of jail time alone is not sufficient to curb sex crimes. With this in mind, legislators sought to find other ways that would protect potential victims. Community notification laws were the first policy to be implemented. Community notification methods included press releases, flyers, phone calls, door-to-door contact, neighborhood meetings, and Internet sites, which informed citizens of the

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1. Adlai Stevenson, Campaign Speech in Detroit, Michigan (Oct. 7, 1952), in MAJOR CAMPAIGN SPEECHES OF ADLAI E. STEVENSON 218 (1953).

2. 536 U.S. 24 (2002).

3. *Id.* at 32-33.

4. Recidivist: "a repeat offender." BLACK'S LAW DICTIONARY 1297 (8th ed. 2004).

5. Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 50 (2005).

name, location, and/or other information of persons who had been convicted of sex crimes.⁶

Legal challenges to these notification laws soon appeared in the courts. In *Connecticut Department of Public Safety v. Doe*,⁷ the U.S. Supreme Court upheld the constitutionality of sex-offender internet registries against a due process challenge, even though the registries applied to sex offenders regardless of their current threat to society.⁸ In *Smith v. Doe*,⁹ the U.S. Supreme Court upheld a sex-offender registration and notification statute against an *ex post facto* challenge even where the offender had been charged prior to the codification of the new requirements.¹⁰ *Smith* cemented the legality of sex-offender registries, and soon thereafter all fifty states had some form of sex-offender registry in place.

The public soon realized that these sex-offender registries did little to actually keep the sex offenders away from potential victims. Sex offenders were still able to move in next door, roam public parks freely, and work wherever they were able to get hired. Soon critics claimed that sex-offender registries were nothing more than “feel good law(s).”¹¹ In addition, sex-offender registries have been plagued with administrative problems that allow many sex offenders to slip through the system and others to be classified improperly.

Since the U.S. Supreme Court seemingly settled the debate on the constitutionality of sex-offender registration and notification requirements in 2003,¹² several states and local municipalities have begun to create laws that limit where sex offenders may reside.¹³ Courts generally ground justi-

6. *Id.*

7. 538 U.S. 1 (2003).

8. *Id.* at 8.

9. 538 U.S. 84 (2003).

10. *Id.* at 85.

11. Heather McElvain, *Web Map Shows Where Sex Offenders Can Live*, IOWA CITY PRESS-CITIZEN, Oct. 5, 2005, at 14A (quoting Johnson County Attorney Patrick White).

12. *Smith*, 538 U.S. at 85.

13. *Doe v. Miller*, 405 F.3d 700, 714 n.4 (8th Cir. 2005) (“ALA. CODE § 15-20-26(a) (‘Unless otherwise exempted by law, no adult criminal sex offender shall establish a residence or accept employment within 2,000 feet of the property on which any school or child care facility is located.’); ARK. CODE ANN. § 5-14-128(a) (‘It shall be unlawful for a sex offender who is required to register . . . and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2000’) of the property on which any public or private elementary or secondary school or daycare facility is located.’); CAL. PENAL CODE § 3003(g) (‘[A]n inmate who is released on parole for any violation of [sections prohibiting lewd or lascivious acts, or continued sexual abuse of a child] shall not be placed or reside . . . within one one-quarter mile of any public or private school.’); FLA. STAT. ANN. § 947.1405(7)(a)(2) (‘Any inmate convicted of [certain sexual crimes against minors] and . . . subject to conditional release supervision . . . [is prohibited from] living within 1,000 feet of a school, day care center, park, playground, designated public school bus stop or other place where children regularly congregate.’); GA. CODE ANN. § 42-1-13(b) (‘No individual required to register . . . shall reside within 1,000 feet of any child care facility, school, or area where minors congregate.’); 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (‘It is unlawful for a child sex offender to knowingly reside within 500 feet of a school

fications for these residency restrictions in the state's interest in protecting the public's and, specifically, children's health and safety from the high recidivism rates of sex offenders.¹⁴ Most of these laws prohibit sex offenders from living within a specified distance of schools, parks, day-care facilities, and other areas where children generally congregate.¹⁵ Some are specific to certain individuals,¹⁶ while others apply to all sex offenders, even if they were incarcerated prior to the law's enactment.¹⁷

Considering the staggering recidivism rates and the stomach turning nature of some of the crimes that constitute sex offenses, these restrictions seem justified to most and are difficult for legislators to oppose. Unfortunately, these laws have unreasonable practical effects and do little to help those in need of protection.

These laws force sex offenders to live in rural areas, far from the support networks required for their reintegration into society. Some restric-

building . . .'); KY. REV. STAT. ANN. § 17.495 ('No registrant . . . who is placed on probation, parole, or any form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility.');

LA. REV. STAT. § 14:91.1(A)(2) ('Unlawful presence of a sexually violent predator is . . . the physical residing of a sexually violent predator within one thousand feet of any public or private, elementary or secondary school, a day care facility, playground, public or private youth center, public swimming pool, or free standing video arcade facility.');

OHIO REV. CODE ANN. § 2950.031(A) ('No person who has been convicted of . . . either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises.');

OKLA. STAT. tit. 57, § 590 ('It is unlawful for any person registered pursuant to the Oklahoma Sex Offenders Registration Act to reside within a two thousand-foot radius of any public or private school site or educational institution.');

OR. REV. STAT. § 144.642(1)(a) (Rules for post-prison supervision or parole 'shall include . . . a general prohibition against allowing a sex offender to reside near locations where children are the primary occupants or users.');

TENN. CODE ANN. § 40-39-211(a) ('No sexual offender, . . . or violent sexual offender, . . . shall knowingly reside or work within one thousand feet (1,000') of the property on which any public school, private or parochial school, licensed day care center, or any other child care facility is located.');

see also IND. CODE ANN. § 11-13-3-4(g)(2) (West 2006) ('As a condition of parole, the parole board shall . . . prohibit the offender from residing within on thousand (1,000) feet of school property');

MICH. COMP. LAWS ANN. § 28.735 (West 2006) ('an individual required to be registered . . . shall not reside within a [1,000 feet or less from school property]');

MO. ANN. STAT. § 566.147 (West 2006) ('Any person who has . . . been convicted of . . . [certain sexual crimes against minors] shall not establish residency within one thousand feet of any public school, . . . any private school, . . . or child care facility');

TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2006) ('If a judge grants community supervision to a defendant . . . and the judge determines that a child . . . was the victim of the offense, the judge shall . . . [require] . . . that the defendant . . . not . . . go in, on or within 1,000 feet of a premises where children commonly gather.');

14. See generally *Miller*, 405 F.3d at 704-05 (2005) ('[W]e conclude that the Constitution of the United States does not prevent the State of Iowa from regulating the residency of sex offenders in this manner in order to protect the health and safety of the citizens.');

15. See ARK. CODE ANN. § 5-14-128(a) (West 2006) (specifying 2000 feet); 720 ILL. COMP. ANN. § 5/11-9.3(b-5) (West 2006) (specifying 500 feet).

16. *Doe v. City of Lafayette*, 377 F.3d 757, 774 (7th Cir. 2004) (upholding city imposed ban against Doe from entering public parks).

17. IOWA CODE § 692A.2A (2005) ('"person" means a person who has committed a criminal offense against a minor').

tions apply to sex offenders who have been released from prison for decades and offenders whose crimes did not involve children. Others allow officials to evict families who have lived in their homes for years. Several jurists have likened the restrictions to banishment.¹⁸ Others have stated that the new laws inch toward “human zoning regulations.”¹⁹ A Seventh Circuit decision in 2004 which upheld a sex-offender restriction has been questioned by legal scholars as punishment for thoughts.²⁰ The sex-offender residency restriction laws create a one-upmanship attitude among legislators who are forced to keep their districts from becoming sex-offender havens for those who have effectively been forced out of other areas.²¹

In spite of these problems, few residency restrictions have been addressed in court. Currently, only the Seventh and Eighth Circuits have heard cases involving sex-offender residency restrictions. The Seventh Circuit originally found the City of Lafayette’s restriction unconstitutional on a number of grounds, but that decision was overturned when re-heard en banc.²² The Eighth Circuit’s two-to-one split decision overturned the district court’s finding of five separate constitutional violations.²³

While the Seventh and Eighth Circuits left sex-offender restriction legislation unchecked, the U.S. Supreme Court is unlikely to be able to do so. Sex-offender registration and notification laws were justified by the fact that the information was generally public already. With sex-offender residency restrictions, the state will have to overcome a difficult burden of proving the law is not an *ex post facto*²⁴ punishment that equates to modern banishment when applied to post-conviction sex offenders. Furthermore, questions exist as to whether the restrictions impinge upon substantive due process rights. Part II of this note will describe current sex-offender re-

18. *Miller*, 405 F.3d at 724 (Melloy, J., dissenting) (“it sufficiently resembles banishment”); *State v. Seering*, 701 N.W.2d 655, 672 (Iowa 2005) (Wiggins, J., dissenting) (“I would hold [Iowa’s sex offender residency restriction] effectively banishes an offender from a community”); see also *Doe*, 377 F.3d at 774 (Williams, J., dissenting) (“The City’s action is reminiscent of a partial banishment.”).

19. Michael J. Duster, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 714 (2005).

20. *Doe*, 377 F.3d at 774; see generally Clay Calvert, *Freedom of Thought, Offensive Fantasies and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got It Wrong in Doe v. City of Lafayette, Indiana*, 3 PIERCE L. REV. 125 (2005); Jennifer B. Siverts, Comment, *Punishing Thoughts Too Close to Reality: A New Solution to Protect Children from Pedophiles*, 27 T. JEFFERSON L. REV. 393 (2005).

21. Jim Saunders, *Lawmakers Want State to Create Uniformity in Sex Predator Rules*, DAYTONA NEWS, Oct. 20, 2005, § C (quoting Palm Coast Councilman Jon Netts); Robert F. Worth, *Exiling Sex Offenders from Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1 (quoting Joseph Scarpelli, Mayor of Brick, New Jersey).

22. *Doe v. City of Lafayette*, 334 F.3d 606, 613 (7th Cir. 2003), *rev’d en banc*, 377 F.3d 757 (7th Cir. 2004).

23. *Doe v. Miller*, 298 F.Supp.2d 844, 880 (S.D. Iowa 2004), *rev’d*, 405 F.3d 700 (8th Cir. 2005).

24. *Ex post facto*: “After the fact; retroactively.” BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

restrictions in place across the country. Part III will provide a constitutional analysis of these sex-offender restrictions. Based on this analysis, Part IV will conclude by advocating against sex-offender restrictions and offering alternatives.

II. SEX-OFFENDER RESTRICTIONS

Many states and municipalities have begun creating sex-offender restrictions. Often, a state or municipality copies, combines, or adds on to a neighboring state's or municipality's restrictions. Residency restrictions may seem reasonable when they are looked at on a case-by-case basis. However, as more and more restrictions are combined, they will effectively banish sex offenders out of the country.

Drastic residency restrictions are already in force or being considered by legislatures across the country. Georgia, a state with only 159 counties, implemented a 158-county banishment system for persistent troublemakers and those whom other punishments do not deter.²⁵ For a judge to banish someone, the State requires: (1) a logical relation to the rehabilitative process; and (2) that the length of banishment bear a reasonable relation to the rehabilitation.²⁶ Criminal psychologists believe that minimizing a sex-offender's exposure to possible triggers is part of a healthy rehabilitative process.²⁷ A judge can therefore banish a sex-offender to the one unpopulated county in Georgia as part of the rehabilitative process to keep a sex-offender away from potential triggers.

Cape Coral, Florida considers its beaches and coastline to be public parks. Offenders in Cape Coral are, therefore, being restricted from living near or visiting the beaches, and a local councilman has stated that he would like to extend the restricted zone to one mile.²⁸ In Hillsborough County, Florida, local officials voted to ban sex offenders from public hurricane shelters.²⁹ In Saratoga, New York, legislation is being considered that would preclude sex offenders from patronizing hotels that fall within

25. Jason S. Alloy, *158-County Banishment in Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1084-85 (2002).

26. *Id.* at 1093.

27. See Kim English, *The Containment Approach to Managing Sex Offenders*, 34 SETON HALL L. REV. 1255, 1260-61 (2004).

28. See Don Ruane, *Cape Plan May Widen Predator-Free Zones*, NEWS-PRESS, Oct. 1, 2005, at 1A (discussing Cape Coral Councilman Tim Day's proposal to create a one mile protection zone).

29. Worth, *supra* note 21, at B1.

the restricted zone.³⁰ In Ocean City, Maryland, a legislator has attempted to ban all sex offenders from the City.³¹

In Florida, Georgia, and Texas, the restrictions are, at best, vague. All three states restrict sex offenders from living within so many feet of an area where children generally congregate.³² These restrictions could be interpreted to ban sex offenders from restaurants, museums, convention centers, and all other public venues.

Other types of sex offender restrictions are being considered across the country. Legislation giving convicted sex offenders 180 days to obtain a new driver's license bearing the words "Sex Offender" was recently introduced in the Oklahoma Senate.³³ Failure to comply with this requirement would result in the revocation of the person's driver's license for a year and a maximum fine of \$200.³⁴

As these individual laws are deemed constitutional, legislatures have begun combining and broadening the laws creating a super restriction. Imagine a restriction preventing offenders from living in all but one county in the state and within a mile of schools, childcare facilities, parks (including beaches), and other areas where children congregate. This broad range of restrictions might include hotels, restaurants, sports arenas, concerts, malls, homeless shelters, and disaster shelters. Such super restrictions would cripple the ability of the broad class of persons labeled sex offenders to find housing, make a living, and attend rehabilitation classes and therapy.³⁵

30. Jim Kinney, *Supervisors: Saratoga Offender Rules Could Burden Clerks*, SARATOGIAN, Oct. 2, 2005 (reporting on sex offenders living in a motel and planned city laws that would ban such residency).

31. Michael Miller, *Ocean City Bans Sex Offenders From Living Near Beach*, PRESS ATLANTIC CITY, Oct. 5, 2005, § Region (reporting on city council's initial plan that would have banned all those required to register under Megan's Law from the city).

32. FLA. STAT. ANN. § 947.1405(7)(a)(2) (West 2006) ("or other place where children regularly congregate"); GA. CODE ANN. § 42-1-13(b) (West 2006) ("or area where minors congregate"); TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2006) ("within 1,000 feet of a premises where children commonly gather").

33. S.B. 35, 51st Leg., 1st Sess. (Okla. 2007).

34. *Id.*

35. *See generally* GA. CODE ANN. § 16-6 (2005) (Georgia's list of included sex offenses: rape; sodomy; statutory rape; child molestation; enticing a child for indecent purposes; sexual assault against persons in custody; bestiality; necrophilia; public indecency; prostitution; keeping a place of prostitution; pimping; pandering; pandering by compulsion; solicitation of sodomy; masturbation for hire; giving massages in place used for lewdness; fornication; adultery; bigamy; marrying a bigamist; incest; sexual battery; aggravated sexual battery; publication of the name or identity of female raped; and distributing obscene materials).

III. CONSTITUTIONAL ANALYSIS OF SEX-OFFENDER RESTRICTIONS

A. *Ex Post Facto* Clause

1. *Summary of the Legal Standard*

The *Ex Post Facto* Clause forbids the government from imposing a new, punitive measure on a crime that has already been completed.³⁶ The four categories of *ex post facto* laws are:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.³⁷

Challenges to residency restrictions would fall under the third category.

Smith outlined the framework that must be applied to determine whether a sex-offender residency restriction violates the *Ex Post Facto* Clause by imposing a retroactive punishment.³⁸ The first question is what was the intent of the legislature in implementing this law? If the legislature intended criminal punishment, then the inquiry ends, the intent of the legislature is punitive, and the law will be deemed unconstitutional.³⁹ If, on the other hand, the legislature claims that the law is civil and nonpunitive, then the law must be analyzed to determine whether the law is nonetheless “so punitive either in purpose or effect as to negate’ the state’s nonpunitive intent.”⁴⁰

The five relevant factors in determining if the law is punitive are whether the law: (1) “imposes an affirmative disability or restraint”; (2) “has been regarded in our history and traditions as a punishment”; (3) “has a rational connection to a nonpunitive purpose”; (4) “is excessive with respect to this purpose”; and (5) “promotes the traditional aims of punishment.”⁴¹ “The punitive effects of the law must be so severe as to constitute

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

37. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1796); *see, e.g., Stogner v. California*, 539 U.S. 607 (2003); *Carmell v. Texas*, 529 U.S. 513, 539 (2000); *Siverts*, *supra* note 20, at 404.

38. *Doe v. Miller*, 405 F.3d 700, 718 (8th Cir. 2005).

39. *Id.*

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

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

the ‘clearest proof’ that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose *ex post facto* punishment.”⁴²

The most debated of these factors is whether sex-offender residency restrictions amount to banishment or its modern equivalent. Further, while most courts accept the stated intent of the legislators, recent statements made by legislators around the country may warrant a closer scrutiny.

2. *What Is the Legislator’s Intent in Passing Such Requirements?*

The burden of proving the intent of the legislature in enacting a statute is very low. When a legislative statement is included, it will define the intent of the legislature. At other times, the placement of the new statute, in the criminal or public safety chapters of the state’s code for example, can be a sign of the legislative intent. The legislative history and any transcript of discussion on the matter can also be used to define the intent of the statute. Finally, public statements can be persuasive in determining legislative intent.

While some legislators have claimed that their intent was to protect the health and safety of their constituents, others have made it quite clear that they had a punitive goal in mind. New York Assemblyman Harvey Weisenberg stated during a discussion on the New York sex offender law that “the result of this [legislation] . . . is the fact that a sex offender who is going to come out after serving his time might rethink as to where he is going to relocate, and I think that one of the results of this legislation might be that this guy is going to go out of town, out of state, and that’s very good for us.”⁴³ Tennessee State Senator Rusty Crowe stated that “we’ll see sex offenders leaving Tennessee and you won’t see them coming in.”⁴⁴ Representative Susan Goldstein, a Florida lawmaker, stated that the goal of sex-offender residency restriction laws is “to get these people out of our neighborhoods and hopefully out of our state.”⁴⁵

The courts have upheld sex-offender residency restrictions by stating that the restrictions were civil in nature because the legislatures had created them to protect the health and safety of its citizens.⁴⁶ These types of comments from legislators will make it easier to prove that the intentions stated

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

43. Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, And Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1855 (2005) (citing *Doe v. Pataki*, 940 F.Supp. 603, 621-22 (S.D.N.Y. 1996)).

44. *Id.* (citing Petition for Writ of Certiorari at 3, *Cutshall v. Sundquist*, 529 U.S. 1054 (2000) (No. 99-1123)).

45. Jason Garcia, *State May Crack Down on Predators*, ORLANDO SENTINEL, Sept. 14, 2005, at A1.

46. *E.g.*, *Smith v. Doe*, 538 U.S. 84, 85 (2003).

in the preambles of new statutes and their placement in the code are a sham, and that the true intentions are punitive.

3. *Do Residency Restrictions Punish the Offender in a Manner That Equates to Banishment?*

Ha, banishment! Be merciful, say death for exile hath more terror in his look, much more than death: do not say banishment.

— William Shakespeare⁴⁷

Banishment, exile, or transporting, i.e., the sending of criminals to distant colonies, has historically been punitive in nature.⁴⁸ Banishment is listed as a punishment in the oldest recorded system of law, *The Code of Hammurabi*, which was written around 1700 B.C.⁴⁹

Developed societies have tended to eliminate banishment as a form of punishment.⁵⁰ Learned Hand stated “[banishment] is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.”⁵¹ Federal law is settled that banishment as a condition of probation is unconstitutional.⁵²

Some scholars have speculated that in primitive societies, banishment was tantamount to death because banishment was widely publicized.⁵³ Banishment led to a defamation of the person’s character that made it next to impossible for the person to ever return to his home and very difficult to move anywhere else. While current restrictions do not directly ostracize a person, sex-offender registries in conjunction with sex-offender restrictions have the same effect.

The effects of sex-offender registries in conjunction with sex-offender residency restrictions are that sex offenders are being denied housing even outside the residency restriction zones. For example, one of the plaintiff sex offenders in *Doe v. Miller* challenging the Iowa statute, stated that once he found an apartment outside the sex-offender restriction zones, he was forced to move out when his landlord discovered that he was a sex offender.⁵⁴ Two other plaintiffs stated that their applications for housing in a compliant area were denied because of their criminal record.⁵⁵

47. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 3, sc. 2.

48. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 889 (2d Cir. 1996).

49. *United States v. Abushaar*, 761 F.2d 954, 959 (3d Cir. 1985).

50. *Id.*

51. *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630 (2d Cir. 1926).

52. *Klapprott v. United States*, 335 U.S. 601, 616-17 (1949) (Rutledge, J., concurring).

53. H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 294 (3d ed. 1959).

54. *Doe v. Miller*, 405 F.3d 700, 706 (8th Cir. 2005).

55. *Id.* at 706-07.

Judge Melloy's dissent in *Miller* stated that residency restrictions created a permanent stigma as well as cast the person out of the community.⁵⁶ Melloy referenced *Smith* and described banishment as a punishment in which individuals "could neither return to their original community nor, reputation tarnished, be admitted easily into a new one."⁵⁷

The requirements placed on sex offenders now amount to the equivalent of banishment. The *Smith* Court held that the registration requirement was not a punishment.⁵⁸ In the Court's analysis of whether the law was punitive, Justice Kennedy stated:

The [sex-offender registration] Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or *residences*. The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint. . . . By contrast, offenders subject to the Alaska statute *are free to move where they wish and to live and work as other citizens*, with no supervision.⁵⁹

The *Smith* decision was split six-to-three, yet while the majority found the registration requirement not to be punitive, it emphasized more than once that restrictions on a person's ability to choose where she lives would be more like traditional banishment.

Residency restrictions constitute *de facto* banishment. A proposed sex-offender residency restriction in Phillipsburg, Pennsylvania would make ninety-eight percent of the town off limits to those on the sex-offender registry.⁶⁰ A Florida councilman said he is not worried about the areas not covered by the restriction zones because they are in areas of town where the "land is too expensive to buy."⁶¹ In Des Moines and Iowa City, Iowa, the 2,000 foot restriction zones cover "virtually the entire city area. The few areas not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods."⁶²

56. *Id.* at 724 (Melloy, J., concurring and dissenting).

57. *Id.*

58. *Smith v. Doe*, 538 U.S. 84, 100-01 (2003).

59. *Id.* (emphasis added).

60. Harley Payette, *P'burg May Restrict Sex Offenders' Housing*, MORNING CALL (Allentown, Pa.), Oct. 12, 2005, at B6.

61. Ruane, *supra* note 28, at 1A (discussing Cape Coral Councilman Tim Day's proposal to create a one mile protection zone).

62. *Doe v. Miller*, 405 F.3d 700, 724 (8th Cir. 2005) ("The district court made the following factual findings on the availability of housing: Sex offenders are completely banned from living in a number of Iowa's small towns and cities. In the state's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited. Although some areas are completely unrestricted, these are either very small towns without any services, or farmland. . . . In larger cities such as Des Moines and Iowa City, the maps show that the two thousand foot circles cover virtually the entire city area. The few

At best, these types of restrictions effectively prevent sex offenders from living in heavily populated areas. If unrestricted zones exist within the city, they are most likely in industrial zones or areas where the properties are too costly for recently released criminals. Even if the offender is able to find a place that he or she can afford, public notification statutes stigmatize the offenders and make it difficult for the offender to pass the housing application process. In conjunction with required registration, sex-offender residency restrictions create a *de facto* banishment.

B. *Substantive Due Process*

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

— Justice Harlan⁶³

1. *Summary of the Legal Standard*

The Fourteenth Amendment to the U.S. Constitution mandates that no state shall “deprive any person of life, liberty, or property, without due process of law.”⁶⁴ In addition to the “guarantee of fair procedure,” the Due Process Clause also includes a substantive component, “which forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”⁶⁵

The U.S. Supreme Court has found substantive due process rights to include the right to marry,⁶⁶ to have children,⁶⁷ to direct the education and

areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods. In smaller towns that have a school or childcare facility, the entire town is often engulfed by the excluded area. In Johnson County alone, the towns of Lone Tree, North Liberty, Oxford, Shueyville, Solon, Swisher, and Tiffin are wholly restricted to sex offenders under § 692A.2A. Unincorporated areas and towns too small to have a school or childcare facility remain available, as does the country, but available housing in those areas is not necessarily readily available.”)

63. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

64. U.S. CONST. amend. XIV, § 1.

65. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); *Doe v. Miller*, 298 F. Supp.2d 844, 871 (S.D. Iowa 2004).

66. *Loving v. Virginia*, 388 U.S. 1 (1967).

67. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

upbringing of one's children,⁶⁸ to marital privacy,⁶⁹ to use contraception,⁷⁰ to bodily integrity,⁷¹ to abortion,⁷² and to privacy and choice in one's personal and sexual relationships.⁷³ The U.S. Supreme Court has cautioned against expanding the concept of substantive due process.⁷⁴

The substantive due process analysis has two primary requirements.⁷⁵ First, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."⁷⁶ Second, substantive due process also requires a "careful description of the asserted fundamental liberty interest."⁷⁷ As the U.S. Supreme Court has stated, "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decision making' that direct and restrain our exposition of the Due Process Clause."⁷⁸

A careful description of the asserted right must first be considered to determine if that right invokes the protections of the substantive Due Process Clause.⁷⁹ To be afforded protection, the right must be "fundamental" in that it is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed."⁸⁰ If the right is "fundamental," then the law burdening that right must pass strict scrutiny analysis.⁸¹ Specifically, the state must prove that the law is "narrowly tailored to serve a compelling state interest."⁸²

The few constitutional challenges to sex-offender restrictions have involved the right to personal choice in family relationships and the right to travel.⁸³

68. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

70. *Id.*

71. *Rochin v. California*, 342 U.S. 165 (1952).

72. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

73. *Lawrence v. Texas*, 539 U.S. 558 (2003).

74. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

75. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

76. *Id.* at 720-21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) (quotations omitted)).

77. *Id.* at 721.

78. *Id.* (quoting *Collins*, 503 U.S. at 125 (citation omitted)).

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

80. *Glucksberg*, 521 U.S. at 720-21.

81. *See id.* at 721.

82. *Id.* (quoting *Reno*, 507 U.S. at 302).

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

2. *What is the Right Being Asserted and Does It Substantially Burden the Familial Relationship?*

The due process issue is whether sex-offender restrictions involve the fundamental right regarding familial relationship. The U.S. Supreme Court has recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.⁸⁴

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home* and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁸⁵

If the right being asserted is only that of “freedom of choice in where an offender lives and under what conditions,” then the statute must only have a rational relation to a non-punitive state purpose.⁸⁶ If, on the other hand, the statute does impinge upon the familial relationship, then the statute must pass strict scrutiny.

The U.S. Supreme Court has stated that an alleged infringement on a familial right is unconstitutional, as a due process violation, only when an infringement has a direct and substantial impact on the familial relationship.⁸⁷ The case that is most on point is *Moore v. City of East Cleveland*.⁸⁸ In *Moore*, the City of East Cleveland had created a zoning restriction that made it criminal for a grandmother and her grandchildren to live together.⁸⁹ The Court found that the zoning ordinance had both a direct and substantial impact on the familial relationship.⁹⁰ The zoning ordinance *directly* affected the family because it defined “family” in a manner that did not include the Moores’ family situation.⁹¹ It had a *substantial impact* because it made it criminal for the family to live together in their current home.⁹²

84. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974).

85. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

86. *State v. Seering*, 701 N.W.2d 655, 664 (Iowa 2005).

87. *See, e.g., Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972).

88. 431 U.S. at 494.

89. *Id.*

90. *Id.* at 500.

91. *Id.*

92. *Id.*

In spite of the U.S. Supreme Court's holding in *Moore*, the Eighth Circuit concluded that a sex-offender residency restriction only has an incidental effect on the family relationship.⁹³ The Court distinguished *Moore*, pointing out that the residency restriction statute "does not operate directly on the family relationship. Although the law restricts where a residence may be located, nothing in the statute limits who may live with the [sex offenders] in their residences."⁹⁴ Furthermore, it commented that the law "affects or encourages decisions on family matters but does not force such decisions."⁹⁵ By this rationale, the statute would have to explicitly state that sex offenders' families could not live within the restricted zone in order to directly affect the family relationship. The standard established by the U.S. Supreme Court is whether a statute "unreasonably interferes" with the right to personal choice regarding the family, not whether it completely restricts it.⁹⁶

If the statute precludes one member of the family from living in a certain location, then the statute has the exact effect as that in *Moore*: it forces the entire family either to choose to live separately or to move to a locale that does not have such a restriction on housing. It is an unavoidable consequence of the statute for families to have to move out of their current homes, cities, and possibly even the entire state. Therefore, the effect of the regulation is not incidental.⁹⁷

As discussed earlier, residency restrictions make it very difficult for offenders to find acceptable housing in a municipality. Any acceptable housing within a municipality that the offender finds is, by definition, a large distance from schools and parks that an offender's children might attend. Moreover, as many of the cases have shown, the sex-offender restriction zones force sex offenders to leave populated areas altogether.

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

94. *Id.*

95. *Id.* (quoting *Gorrie v. Bowen*, 809 F.2d 508, 523 (8th Cir. 1987)).

96. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) ("undue intrusion"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) ("unreasonably interferes"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("unreasonably infringes").

97. See generally *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (facially neutral law that was found to have a discriminatory effect).

IV. CONCLUSION

You have that sex offender [who thinks] “What do I have to lose? I’ve lost my wife, I’ve lost my job and now I’ve lost my place to live. I might as well be that bad person that they think I am.”

— Sergeant Keith Hubbard⁹⁸

Courts have long recognized that people cannot be punished based on their status in society.⁹⁹ “No matter how repulsed society is concerning sex offenders, we cannot place offenders in a unique, separate class bereft of constitutional rights.”¹⁰⁰ Proponents of special regulation for sex offenders often cite the high recidivism rates for those accused of sex offenses to justify the harsh punishment. What they fail to mention is that the recidivism rate for sex offenders is lower than that of drunk drivers, drug offenders, and domestic violence offenders.¹⁰¹ The nature of the crimes that sex offenders commit has created an animus from society that is apparent in the laws created to punish them. Sex offenders, on average, serve sentences that are three times longer than the average for all felons.¹⁰²

Even against a background of public outcry, the courts must analyze sex-offender residency restrictions to determine their constitutionality. Sex-offender residency restrictions that apply to post-conviction offenders are unconstitutional as violations of the *Ex Post Facto* and substantive Due Process Clauses of the U.S. Constitution. Legislators have injected their animus against sex offenders into these restrictions and have created laws that are tantamount to *de facto* banishment. The restrictions directly and substantially affect the ability of sex offenders to make decisions regarding their families. For these reasons, the courts should strike down sex-offender residency restrictions that impinge on the constitutionally protected rights of all citizens, including sex offenders.

98. Garcia, *supra* note 45, at B3 (quoting Sergeant Keith Hubbard, a ten-year veteran of the Orange County Sheriff’s Office’s sex offender surveillance unit).

99. See Robinson v. California, 370 U.S. 660, 666-67 (1962).

100. Amy L. Van Duyn, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 659 (1999).

101. Worth, *supra* note 21, at B1.

102. WASH. SENTENCING GUIDELINES COMM’N, SEX OFFENDER SENTENCING 3 (2004).