

## IN THE ZONE: SEX OFFENDERS AND THE TEN PERCENT SOLUTIONS

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*Abstract*

*This Article challenges prevailing judicial orthodoxy that many sex offender residency restrictions are constitutional under the federal Ex Post Facto Clause. The paper applies the analytical framework in Smith v. Doe, the Court's most recent case involving sex offender legislation. It also forges a new way of thinking about these regimes as land-use policies that "negatively" zone individuals out of the urban cores. The paper proposes an innovative "positive" zoning scheme, the Sex Offender Containment Zone, that zones high-risk convicted sex offenders back into the city and that is effective, humane, and constitutional.*

*At first glance, sex offender residency restrictions appear plausible because they ostensibly place a convicted sex offender's residence out of reach of children. However, these regimes address less than 10% of the very real problem of child sex abuse, as over 90% of this abuse is committed by a family member or acquaintance of the child. On the other hand, many schemes effectively banish almost 100% of convicted sex offenders to society's literal and psychic margins, condemning many low-risk offenders who pose minimal recidivist risk to a lifetime of isolation and breeding optimal conditions for high-risk offenders to reoffend. The practical implications of this policy choice, therefore, are dangerous and real, lulling the public into a veritable false sense of security.*

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## INTRODUCTION

With the horrific and highly publicized child sexual assaults, murders, and disappearances of Jessica Lunsford,<sup>1</sup> Jacob Wetterling,<sup>2</sup> and Megan Kanka,<sup>3</sup> it is no wonder that convicted sex offenders are currently viewed as some sort of human toxic waste destined to live on the literal and psychic margins of society.<sup>4</sup> States and localities have attempted to manage this human “waste” problem through a number of ways, such as mandatory registration requirements<sup>5</sup> and community notification provisions.<sup>6</sup> Currently, waste management of sex offenders has devolved into SORRs (sex offender residency restrictions), or legislative regimes that mandate wholesale restrictions on where convicted sex offenders may live, generally without any accompanying rehabilitative measures.<sup>7</sup>

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<sup>1</sup> See Abbie VanSickle, *Tears Mark Jessica's Farewell*, ST. PETERSBURG TIMES, Mar. 27, 2005, at 1B (stating that nine-year-old Jessica Lunsford was kidnapped from her bedroom and murdered by a convicted sex offender). In response, numerous states have passed versions of Jessica's Law that require that sexual predators register with law enforcement at least twice a year.

<sup>2</sup> See Jacob Wetterling Foundation, *The Jacob Wetterling Story*, <http://www.jwf.org/ReadArticle.asp?articleId=34> (last visited Aug. 7, 2007) (noting that Jacob Wetterling, an eleven-year-old boy from St. Joseph, Minnesota, was kidnapped at gunpoint by an unknown assailant, and stating that neither Jacob's nor his abductor's whereabouts have been identified). As a consequence, Congress passed Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program [hereinafter Jacob's Law,] which established guidelines and financial incentives for states to require the registration with local law enforcement of any person (1) convicted of a criminal offense against a child, (2) convicted of a sexually violent offense, and (3) who is a sexually violent predator. § 42 U.S.C. 14071 (West 2005).

<sup>3</sup> See Megan Nicole Kanka Foundation, <http://www.megannicolekankafoundation.org/mission.htm>. (last visited Jan. 31, 2008) (describing seven-year-old Megan Kanka's rape and murder in New Jersey by a convicted sex offender who had previously been convicted of assaulting another child and who lived across the street). Congress subsequently passed Megan's Law in 1996 which amended Jacob's Law by requiring that states notify the public, in a variety of ways, when a sex offender resides in a community. See Megan Nicole Kanka Foundation, *Megan's Law Coast to Coast*, <http://www.megannicolekankafoundation.org/ctc.htm> (last visited Aug. 7, 2007).

<sup>4</sup> Editorial, *Wrong Turn on Sex Offenders*, N.Y. TIMES, Mar. 13, 2007, at A18 (stating in reference to New York's civil commitment regime of sex offenders that “[a]nd when you consider the recent explosion of local laws designed to keep sex offenders at bay—restricting where they can live and work, forcing them to the literal fringes of society, like some human form of toxic waste.”).

<sup>5</sup> See *supra* note 2.

<sup>6</sup> See *supra* note 3. States have also enacted indefinite and involuntary civil commitment regimes for certain sex offenders. *Kansas v. Hendricks*, 521 U.S. 346, 346 (1997) (holding that a Kansas law requiring a sexually violent predator to be civilly committed upon a finding of either dangerousness to one's self or to others did not violate due process because commitment proceedings were only initiated when a person had been convicted of or charged with a sexually violent offense and suffered from a mental abnormality).

<sup>7</sup> See *infra* Part II.B. regarding the effects of these regimes.

SORRs zone out convicted sex offenders from generally 500 to 2,500 feet from areas where children may congregate, such as schools or child care facilities.<sup>8</sup> In spite of evidence that almost 93% of sexual assaults committed against children 17 years of age and under are committed by *family members or acquaintances of the child*,<sup>9</sup> these schemes focus on stranger-sex offenders<sup>10</sup> who account for less than ten percent of total child sexual assaults,<sup>11</sup> strengthened by the erroneous perception that all offenders are destined to re-offend.<sup>12</sup>

At first glance, SORRs seem plausible because, in theory, convicted sex offenders, especially those who abuse children, would have less access and be less tempted by the objects of their desire.<sup>13</sup> In practice, however, there is no evidence proving their effectiveness.<sup>14</sup> Instead, they arguably worsen the

<sup>8</sup> Corey Rayburn Yung, *Banishment By a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 104 (2007) (iterating that “[t]he typical residency regulation establishes an ‘exclusion zone’ around schools, child-care facilities, parks, and/or other locations where children are commonly found [and that] . . . [t]he exclusion zone usually requires that a sex offender live 500 to 2,500 feet from any listed location.”).

<sup>9</sup> HOWARD N. SNYDER, U.S. BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf> (culling the Uniform Crime Reporting Program’s National Incident-Based Reporting System’s master files for the years 1991 through 1996).

<sup>10</sup> Laura Mansnerus, *Zoning Laws that Bar Pedophiles Raise Concerns*, N.Y. TIMES, Nov. 27, 2006, at A1 (quoting Charles Onley, a researcher at the Center for Sex Offender Management, a project of the U.S. Department of Justice that “most of the laws are passed on the basis of the repulsive-stranger image, when in most cases the offender knows the victim.”); *see also Will Residency Rules Work with Sex Offenders?*, SIOUX CITY JOURNAL.COM, Oct. 10, 2005, <http://www.siouxcityjournal.com/articles/2005/10/29/news/nebraska/811b2852bf029312862570a900198506.txt> (stating that the governments of at least two cities in Nebraska were considering SORRs because of a fear that the 234 registered sex offenders in a neighboring city in Iowa will seek haven there).

<sup>11</sup> SNYDER, *supra* note 9, at 10. This Article terms these stranger sex offenders as the “ten percent.”

<sup>12</sup> JILL S. LEVENSON, PH.D., SEX OFFENDER RESIDENCY RESTRICTIONS; A REPORT TO THE FLORIDA LEGISLATURE 7 (2005), [http://www.nacdl.org/sl\\_docs.sf/issues/sexoffender\\_attachments/\\$FILE/Levinson\\_FL.pdf](http://www.nacdl.org/sl_docs.sf/issues/sexoffender_attachments/$FILE/Levinson_FL.pdf) (“Because residence restrictions are designed to prevent recidivistic predatory offenses, . . .”).

<sup>13</sup> *Id.* at 2. (“It seems to make sense that decreasing access to potential victims would be a feasible strategy for preventing sex crimes.”).

<sup>14</sup> *Id.* (“There is no evidence, however, that such laws are effective in reducing recidivistic sexual violence.”); *see also* Iowa County Attorneys Association, STATEMENT ON SEX OFFENDERS RESIDENCY RESTRICTIONS IN IOWA 1 (2006), [http://www.iowaicaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20State ment%20Dec%2011%202006.pdf](http://www.iowaicaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%2011%202006.pdf) (“Research shows that there is no correlation between residency restrictions and reducing sex offenses against children or improving the safety of children” and “Research does not support the belief that children are more likely to be victimized by strangers at covered locations [such as parks, schools, licensed childcare facilities, etc.] than at other places.”); KANSAS SEX OFFENDER POLICY BOARD, JAN. 8, 2007 REPORT TO THE KANSAS LEGISLATURE, P. 27, JAN. 8, 2007 (noting that while the public feels safer with SORRs, “[o]f the

problem by isolating convicted sex offenders from the urban cores, where countervailing forces such as employment opportunities, public transportation, social services, therapeutic personnel, family, and law enforcement, are most likely to exist and to counteract any recidivist impulses.<sup>15</sup> Thrust out of mainstream urban society into a downward trajectory of “homelessness and transience,”<sup>16</sup> the convicted sex offender suffers from increased acute

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research studies available to the Sex Offender Policy Board on the issue of residence restrictions for sex offenders, none found a positive correlation between residence restrictions and preventing re-offending behavior.”); MINNESOTA DEPARTMENT OF CORRECTIONS LEVEL THREE SEX OFFENDERS: 2003 REPORT TO THE LEGISLATURE 11 (2003), [www.doc.state.mn.us/.../pdf/2004/Lv1%203%SEX%20OFFENDERS%20report%202003%20\(revised%202-04\).pdf](http://www.doc.state.mn.us/.../pdf/2004/Lv1%203%SEX%20OFFENDERS%20report%202003%20(revised%202-04).pdf) (“There is no evidence in Minnesota that *residential* proximity to schools or parks affects re-offense. Thirteen level three offenders [at highest risk to re-offend] released between 1997 and 1999 have been rearrested for a new sex offense since their release from prison, and in none of the cases has residential proximity to schools or parks been a factor in re-offense” and ultimately forgoing a recommendation in support of SORRs by concluding that “[s]ince blanket proximity restrictions on *residential* locations of level three offenders do not enhance community safety, the current offender-to-offender restrictions should be retained) (emphasis included); COLORADO SEX OFFENDER MANAGEMENT BOARD, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 3-4 (2004), <http://dcj.state.co.us/odvsom> (calling into question the efficacy of SORRs in Colorado because convicted sex offenders on probation, in comparison to other offenders, living in the Denver, Colorado, metropolitan areas did not appear to favor living near schools or childcare centers and stating that “[p]lacing restrictions on the location of correctionally supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.”); *But see* Jeffrey T. Walker, *The Geographic Link Between Sex Offenders and Potential Victims: A Routine Activities Approach*, 3 JUST. RES. POL’Y 15, 16 (2001) (in a study of sex offenders who had victimized children living in Pulaski County, Arkansas, concluding that “child sex offenders are largely incorrigible and they may attempt to live in areas with a high concentration of children.”). However, in studying the residences of these convicted sex offenders, the study did not examine why certain sex offenders were living in a particular area that may be near children. *Id.* at 22. Indeed, many offenders may have lived in these locations for any number of reasons. For example, rent may have been inexpensive or family leaved nearby. Moreover, while the study found a correlation between convicted sex offenders whose victims were children and target-rich sites such as schools and parks, it did not “establish a connection with recidivism.” Jodi Schwarzberg & Annie Lo, *The Law and Policy of Sex Offender Residency Restrictions: An Analysis of Proposition 83* 6 (Public Law Research Institute at Hastings College of Law Papers Series Aug. 2006), available at [www.uchastings.edu/plri](http://www.uchastings.edu/plri).

<sup>15</sup> See JILL S. LEVENSON, Ph.D., RESIDENCE RESTRICTIONS AND THEIR IMPACT ON SEX OFFENDER REINTEGRATION, REHABILITATION, AND RECIDIVISM, ATSA Forum (2007), XVIII(2) 7, <http://www.atsa.com/pdfs/ppResidenceRestrictions.pdf> (stating that SORRs “tend to isolate offenders by pushing them into either rural areas or socially disorganized, economically deprived neighborhoods with fewer resources by which to facilitate crime-prevention strategies.”). Professor Levenson is an Assistant Professor of Human Services at Lynn University, a Board Member of the Association for Treatment of Sexual Abusers, located at [www.atsa.org](http://www.atsa.org), and a leading expert in the field of sex offender management.

<sup>16</sup> LEVENSON, *supra* note 12, at 5 (noting that SORRs “can lead to homelessness and transience, which interfere with effective tracking, monitoring, and close probationary supervision.”). As of press time, there is no comprehensive study regarding the numbers of

“psychosocial stressors,” which is alarmingly correlated with an increased tendency to re-offend.<sup>17</sup> Further compromising public safety, those at most risk to recidivate are cut off from easy access to treatment.<sup>18</sup>

The proliferation of SORRs<sup>19</sup> suggests that convicted sex offenders, unlike the convicted murderer, are morally irredeemable, no matter the offense<sup>20</sup> or the individual propensity to re-offend. However, in the midst of this highly charged atmosphere, this Article asserts a need for rational discourse that truly focuses on protecting children and the larger public from dangerous sex offenders without trampling on the Constitution and common sense in the process.

Lacking in the SORR scholarship<sup>21</sup> is an in-depth application, incorporating empirical data, of the complete analytical framework under the

convicted sex offenders subject to these regimes or made homeless by them. However, since Iowa’s SORR scheme became effective in June 2005, the number of unaccounted sex offenders in Iowa has doubled. The National Alliance to End Sexual Violence, Community Management of Sex Offenders, at <http://www.naesv.org/Policypapers/Community%20Management%20of%20Convicted%20Sex%20Offenders.htm> (last visited Feb. 3, 2008).

<sup>17</sup> LEVENSON, *supra* note 15, at 7 (iterating that isolation from family, jobs, and public transport creates “financial hardship and psychosocial stress . . . [which] are likely to exacerbate dynamic risk factors associated with reoffense, such as lifestyle instability, negative moods, and lack of social support.”) (citing R. KARL HANSON & ANDREW HARRIS, DYNAMIC PREDICTORS OF SEXUAL RECIDIVISM, OTTAWA, CANADA: DEPARTMENT OF THE SOLICITOR GENERAL OF CANADA, p. 22 & 28-29 (1998), a study which examined the effect of dynamic risk factors on the recidivism rates of almost 400 sex offenders in Canada, who were evenly divided between rapists, child molesters of boys, and child molesters of girls)).

<sup>18</sup> See R. KARL HANSON & KELLY MORTON-BOURGON, PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS, 2004-02 6 (2004), [http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200402\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200402_e.pdf) (analyzing 95 different studies of more than 31,000 sex offenders from the United States, Canada, the United Kingdom, Austria, Sweden, Australia, France, Netherlands, and Denmark and noting that “[i]nterventions directed towards the highest risk offenders are most likely to contribute to public safety.”).

<sup>19</sup> At least 16 states and numerous local entities have passed SORR regimes. Mark Loudon-Brown, “*They Set Him on a Path Where He’s Bound to Get Ill*”: *Why Sex Offender Residency Restrictions Should be Abandoned*, 62 N.Y.U. ANN. SURV. AM. L. 795, 796 (2007); see also *infra* notes 33-43.

<sup>20</sup> Individuals labeled as sex offenders and therefore impacted by SORRs include a mother who allowed her teenage daughter’s boyfriend to move into the house, resulting in the daughter’s pregnancy, [Third Amended Complaint at 8, *Whitaker v. Perdue*, No. 4:06-CV-140-CC (N.D. Ga. Jun. 1, 2007)], as well as a teen engaged in sex with an underage individual [Third Amended Complaint at 8, *Whitaker v. Perdue*, No. 4:06-CV-140-CC (N.D. Ga. Jun. 1, 2007).], a “peeping tom,” [See *Brown v. Michigan City, Ind.*, No. 3:02-CV-572-RM, 2005 WL 2281502 at \*2 (N.D. Ind. Sept. 19, 2005) (granting city’s summary judgment because plaintiff-convicted sex offender’s substantive due process rights were not violated under the Fourteenth Amendment when the city parks department banned him from the city’s public parks), and a flasher who exposed himself to an adolescent [*Doe v. Miller*, 298 F. Supp. 2d 844, 853-58 (S.D. Iowa 2004).]

<sup>21</sup> Scholarship in the field has centered on (1) the deleterious practical consequences of SORRs, Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Zones*, 92 IOWA L. REV. 1, 17-23 (2007), (2) the proposition that they should be inapplicable to



Ex Post Facto Clause<sup>22</sup> reiterated by the Supreme Court in *Smith v. Doe*,<sup>23</sup> the most recent case involving sex offender legislation granted certiorari. Similarly absent are innovative alternative solutions to the very real problem of child sex abuse. Accordingly, Part I introduces a sampling of likely unconstitutional state statutes and local ordinances pertaining to sex offenders. It also explores the practical consequences of the current SORR approach. Part II mines precedent in state and federal district courts and courts of appeal to explore the arguments weighing against the constitutionality of many SORR legislative regimes under the Ex Post Facto Clause. Part III recasts SORRs as negative “human zoning,”<sup>24</sup> or land-use policies that zone sex offenders out of the city ostensibly to order perceivably disordered individuals,<sup>25</sup> but with dangerous and inhumane consequences. It then proposes a novel “positive” zoning and land-use scheme, the Sex Offender Containment Zone (SOCZ), that zones high-risk sex offenders back into the city.

## I. OVERVIEW

### A. *Re-Offense*

Unquestionably, government has a legitimate interest in protecting and ensuring the safety and welfare of children from dangerous sexual offenders, stranger or acquaintance, who would repeatedly prey on them.<sup>26</sup> Statistics

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individuals convicted of statutory rape, Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 296 (2006), (3) the argument that they are modern-day equivalent of the colonial punishment of banishment, Yung, *supra* note 8, and (4) a descriptive appraisal of SORRs limited largely to the effects test of Ex Post Facto analysis, Loudon-Brown, *supra* note 19.

<sup>22</sup> Arguably, SORR regimes also impact convicted sex offenders’ rights to interstate and intrastate travel, liberty interests under substantive due process under the Constitution. However, these arguments have proven more vulnerable than those involving Ex Post Facto, even among judges who have ruled that these regimes are retroactively punitive. *See, e.g., Doe v. Miller*, 405 F.3d 700, 709-16 & 723 (8th Cir. 2005) (rejecting all of these arguments, including the dissenting judge) (Melloy, J., concurring and dissenting). Similarly, these schemes may violate the Constitution’s Equal Protection Clause because they are overinclusive. These arguments, however, are beyond the scope of this paper.

<sup>23</sup> 538 U.S. 84 (2003) (holding that Alaska’s Sex Offender Registration Act did not violate the federal Constitution’s Ex Post Facto Clause).

<sup>24</sup> Michael J. Duster, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 713 (2006) (noting that “hopefully, these attempts [SORRs] will not mark an entrance into an era of human zoning regulations.”).

<sup>25</sup> Logan, *supra* note 21, at 11 (stating that “[r]esidence exclusion zones are also in keeping with more modern efforts to conceive of crime control in terms of space and spatial design . . . . Consistent with this orientation, state and local governments in recent years have endeavored to curtail social ills by imposing location restrictions on prostitution, drug use and dealing, gang activity, and trespassory behavior of the suspected criminal element more generally.”).

<sup>26</sup> *Owens v. State*, 724 A.2d 43, 56 (Md. 1999) (unequivocally stating that “[t]he state

suggest, however, that the perception that most or all convicted sex offenders are destined to re-offend varies significantly from reality.<sup>27</sup> Indeed, sex offenders, as a whole, are no more likely to re-offend, and are even less likely to re-offend based on re-conviction rates, than other criminal offenders.<sup>28</sup> In contrast, data supports the contention that one specific group of high-risk offenders who are the most resistant to treatment, namely pedophiles who offend against boys, are most likely to re-offend with re-offense rates of 50%.<sup>29</sup> Still, according to Dr. Karl Hanson, a leading authority in the field, these re-

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has an unparalleled interest in protecting children from the potentially devastating effects of sexual abuse and exploitation. . . .”).

<sup>27</sup> See *infra* notes 28-30.

<sup>28</sup> Myths and Facts About Sex Offenders from the Center of Sex Offender Management, a project of the Office of Justice program at the U.S. Department of Justice, the National Institute of Corrections, and the State Justice Institute, <http://www.csom.org/pubs/mythsfacts.html> (last visited Feb. 27, 2008) (stating that “it is noteworthy that recidivism rates for sex offenders are lower than the general criminal population. For example, one study of 108,580 non-sex criminals released from prisons in 11 states in 1983 found that nearly 63% were rearrested for a non-sexual felony or serious misdemeanor within three years of their release from incarceration; 47% were reconvicted; and 41% were ultimately returned to prison or jail (Bureau of Justice Statistics).”). See also PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROS, DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 36 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf> (reporting that within three years of release from prison, 5.3% of sex offenders were rearrested for a sex offense and 43% of sex offenders were rearrested for a crime of any kind); Press Release, Bureau of Justice Statistics, 5 Percent of Sex Offenders Rearrested For Another Sex Crime Within 3 Years of Prison Release (Nov. 16, 2003), <http://www.ojp.usdoj.gov/bjs/pub/press/rsorp94pr.htm> (last visited Feb. 27, 2008) (“Sex offenders were less likely than non-sex offenders to be rearrested for any offense - 43 percent of sex offenders versus 68 percent of non-sex offenders”); HANSON & MORTON-BOURGON, *supra* note 18, at 15 (noting that “the observed sexual recidivism rate was 13.7% after approximately 5 years (compared to 13.8% in Hanson & Bussière, 1998) and in both studies, sexual offenders were more likely to recidivate with a non-sexual offense than a sexual offense. The observed rates underestimate the actual rates because many offenses remain undetected. Nevertheless, the results are consistent with other studies indicating that the overall recidivism rate of sexual offenders is lower than that observed in other samples of offenders”); Carl Bialik, *Underreporting Clouds Attempt to Count Repeat Sex Offenders*, WALL ST. J., Jan. 25, 2008, at B1 (reiterating that “[a]mong convicted criminals released from prison, sex offenders released from prison are less likely to be arrested for any new crime than most other offenders. . . [c]hild molesters’ rate of recidivism is at least as low as the group of sex offenders taken as a whole”).

<sup>29</sup> See LANGAN, SCHMITT & DUROS, *supra* note 28, at 2-4, 15 (reporting that within three years of release from prison, 3.3% of child molesters were rearrested for another sex offense and 39.4% of child molesters were rearrested for a crime of any kind. This report indicates that the re-offense rates of child molesters are still less than the re-offense rates of non sex offenders); See also Robert F. Worth, *Exiling Sex Offenders from Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1 (noting that “[i]n fact, a number of studies have found that pedophiles—the group of sex offenders that has provoked the most public fear—have recidivism rates of more than 50 percent, and do not tend to respond to treatment. But many other criminal groups have higher recidivism rates than these “high-risk” sex offenders, said Dr. Karl Hanson, a Canadian researcher and leading authority in the field.”).

offense rates are lower than those of the general criminal offender population.<sup>30</sup>

This public obsession with the ten percent, to the virtual exclusion of the vast majority of individuals who sexually violate children by taking advantage of proximate relationships, has led to sometimes absurd results. For example, while a convicted sex offender is prohibited from living within an arbitrarily set distance of a child-friendly place, he is nonetheless permitted to live with the child and family member whom he was convicted of sexually assaulting in the first place.<sup>31</sup>

### B. Regimes

Like their legislative antecedents mandating registration and community notification, SORRs run the gamut, from relatively lenient to more moderate to comparatively severe, and likely retroactive punishments in violation of the federal Ex Post Facto Clause.<sup>32</sup> Many restrictions, however, are in force for an offender's lifetime or for a significant portion of time.<sup>33</sup> Determining whether a SORR scheme is so severe that it is unconstitutional is largely dependent on four factors: 1) whether the regime encompasses a broad range of convicted or registered sex offenders instead of providing an individual determination of the sex offender's dangerousness to the community; 2) whether the distance-markers prescribed in the statute are prohibitive to such an extent, that, for example, they literally zone out a registered sex offender from a city or town, providing the offender with little or no choice but to reside in rural areas where law enforcement, familial and therapeutic support, employment opportunities and transportation are less likely to be available; 3) whether the list of proscribed sites is so expansive in scope that an offender is similarly zoned out of the city at a significant distance from support and employment networks that might keep him from re-offending; and 4) the length of time that a convicted sex offender is affected by a restriction.<sup>34</sup>

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<sup>30</sup> Worth, *supra* note 29.

<sup>31</sup> See e.g., *Doe v. Seering*, 701 N.W.2d 655, 659 (Iowa 2005) (noting that the sex offender who was convicted of sexually abusive acts against his teenage daughter was nonetheless permitted to live with her while barred by Iowa's SORR scheme from residing in a zone where other children may be found).

<sup>32</sup> U.S. CONST. art. I, § 9 ("No bill of attainder or ex post facto law shall be passed."); see also *infra* Part II.

<sup>33</sup> See e.g., *supra* note 154; see also MIAMI BEACH, FLA., CODE art. IV, § 70-402(A) (2005), available at <http://www.nationallawcenter.org/files/Miami%20Beach,%20FL%20ordinance.pdf> (providing for no relief from the residency restraints).

<sup>34</sup> See *infra* Part II.B. See also Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 INT'L J. OFFENDER & COMP. CRIMINOLOGY 173 (2005) (noting the need for social support from family and friends to curb recidivism risks).

## 1. State

Average and more moderate sex offender residency exclusion schemes tend to avoid blanket restrictions against all sex offenders but apply to a broad sub-category of sex offenders who have previously been convicted of sex offenses against a child,<sup>35</sup> though without an individual determination of dangerousness. In addition, the average state residency restriction erects distance markers of typically 1,000 feet,<sup>36</sup> and “use[s] schools and parks as geographic anchor points.”<sup>37</sup> In contrast, state-crafted residency restrictions on the harsher end of the legislative statutory spectrum are likely to penalize all sex offenders, lumping non-violent lawbreakers with the violent, statutory rapists with child molesters,<sup>38</sup> establish distance-markers of close to 2,000

<sup>35</sup> See e.g., ARK. CODE ANN. § 5-14-128(a) (West 2006) (“It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997 . . . and who has been assessed as a Level 3 “high-risk” offender or Level 4 “sexually violent predator” Offender . . .”). See also IOWA CODE ANN. § 692A.2A1 (West 2006) (applying to persons who have “committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.”); FLORIDA STAT. ANN. § 947.1405 (7)(a) (West 2007) “If the victim was under the age of 18, a prohibition on living within 1,000 feet of a school, day care center, park, playground, . . . .”); LA. REV. STAT. ANN. § 14.91.1(A)(2) (2006) (restricting the residency of a “sexually violent predator”); LA. REV. STAT. ANN. § 15:560.1 (2007) (3) (defining sexually violent predator as “a person who has been convicted of a sexual offense . . . and who has a mental abnormality or anti-social personality disorder that makes the person likely to engage in predatory sexually violent offenses as determined by the sex offender assessment panel . . . .”).

<sup>36</sup> See, e.g., Logan, *supra* note 21, at 7 (citing FLA. STAT. § 794.065(1) (2004); GA. CODE ANN. § 42-1-15(a) (West 2006); IND. CODE § 35-42-4-11(c) (2006); LA. REV. STAT. ANN. § 14:91.1(A)(2) (2006); MICH. COMP. LAWS § 28.733(f) (2006); MO. REV. STAT. § 566.147(1) (2005); N.C. GEN. STAT. § 14-208.16 (2006); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis 2005); TENN. CODE ANN. § 0-39-211(a) (West 2005); MISS. CODE ANN. § 45-33-25(4) (West 2006); N.C. GEN. STAT. § 14-208.16 (Supp. 2006); N.C. GEN. STAT. § 15-20-26(a) (2005); ARK. CODE ANN. § 5-14-128(a) (West 2006)).

<sup>37</sup> Logan, *supra* note 21, at 7.

<sup>38</sup> See, e.g., GA. CODE ANN. § 42-1-15 (West 2006) (“Residence of or loitering by *registered sex offender* prohibited 1,000 feet from child care facility, church, school, or place where minors congregate.” (emphasis added); ALA. CODE § 15-20-26(a) (2007) (noting that “[u]nless otherwise exempted by law, no *adult criminal sex offender* shall establish a residence or any other living accommodation or accept employment within 2,000 feet of the property on which any school or child care facility is located.”) (emphasis added); KY. REV. STAT. ANN. § 17.545 (1) (West 2007) (“No registrant . . . shall reside within one thousand (1,000 feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility.”); 2007 Okla. Sess. Law Serv. Ch. 261 (“It is unlawful for any person registered pursuant to the Sex Offenders Registration Act to reside, either temporarily or permanently within a two-thousand-foot radius of any public or private school site, educational institution, playground, or park, . . . or licensed child care center.”). The federal Jacob’s Law, *supra* note 2, defines, for example, who is required to register as a convicted sex offender, including “a person who is convicted of a criminal offense against a victim who is a minor.” 42 U.S.C. § 14071(a)(1)(A). The Act subsequently defines this latter term as “a range of offenses specified by State law which is comparable to or exceeds the following range of offense,”

feet,<sup>39</sup> and/or ban offenders from residing within a certain distance of a more opaque and less clearly defined site such as an “area where minors may congregate.”<sup>40</sup>

## 2. Local

In contrast to their statehouse counterparts, local residency restrictions have gone even further in condemning sex offenders to a city or town’s literal fringes, given the comparatively small size of the locales. Some locales have enacted local residency restrictions in response either to inaction by their respective state legislatures or to action by neighboring jurisdictions.<sup>41</sup> Others have promulgated residency exclusions on sex offenders in addition to action at the state legislative level on the issue.<sup>42</sup> For instance, a sampling of local residency exclusions indicates that not only do the distance markers tend to be greater, averaging 2,000 feet and beyond, but also they are likelier to zone out a

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including “any conduct that by its nature is a sexual offense against a minor,” “production or distribution of child pornography,” “solicitation of a minor to engage in sexual conduct,” and “criminal sexual conduct toward a minor.” 42 U.S.C. § 14071 (a)(3)(A).

<sup>39</sup> See *supra* note 38 with respect to Alabama’s SORR regime; see also IOWA. CODE ANN. § 692A.2A (West 2007) (§3 repealed 2007) (stating that a “person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor . . . shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.”).

<sup>40</sup> See, e.g., FL. STAT. ANN. § 947.1405 (7)(a)(2) (West 2007) (prohibiting offenders with victims under 18 years of age 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.*”) (emphasis added); see also GA. CODE ANN. § 42-1-15(a) (West 2006) (using a “place where minors congregate” as a parameter and including video arcades, swimming pools, and libraries). In contrast, a more lenient residency restriction is one exemplified in Illinois where “[i]t is unlawful for a child sex offender to knowingly reside within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend.”). ILL. COMP. STAT. ANN. 5/11-9.3(b-5) (West 2002). Similarly, Arkansas is the only state that provides for not only a “tiered risk scheme,” but also requires an individual assessment of dangerousness of a sex offender in order for the state restrictions to apply. Yung, *supra* note 8, at 125; see also ARK. CODE ANN. § 5-14-128(a) (West 2006).

<sup>41</sup> See, e.g., cities of La Vista, Omaha, and Ralston, Nebraska, enacting ordinances that proscribe high-risk sex offenders from residing within a 500-foot zone of schools. Karen Sloan, *La Vista Approves Sex Offender Limits*, OMAHA WORLD-HERALD, May 18, 2006, at 5B; see also Yung, *supra* note 8, at 125 nn. 201-02. Moreover, like Nebraska, New Jersey has failed to adopt statewide residency restrictions on sex offenders, and consequently, localities have attempted to fill in the void. See *infra* note 42. Similarly, in keeping with the Not In My Backyard (NIMBY) phenomenon and concerned that they will become the “dumping ground” for others’ sex offenders, neighboring jurisdictions have adopted their own restrictions in response. See Yung, *supra* note 8, at 104 (noting that “[f]urther, as one jurisdiction has attempted to restrict the residency of its sex offenders by creating exclusion zones, neighboring communities have followed suit to avoid becoming a haven to local sex offenders.”).

<sup>42</sup> See, e.g., *infra* note 45 concerning the City of Miami Beach, Florida, and Polk County, Iowa.

greater number of sex offenders.<sup>43</sup>

More often than not, these offenders have not been assessed individually to determine their likelihood to re-offend and their true danger to the public. In addition, given the smaller spatial areas of many localities, the consequences to sex offenders of enhanced distance-markers are more severe.

In spite of these problems, many of the local restrictions appear, at first glance, to comply with the federal Ex Post Facto Clause<sup>44</sup> by providing “grandfather” exceptions to an offender, who having committed and having been convicted of a sex crime before the effective date of an ordinance, established, reported, or registered a particular residence prior to the effective date of the local law.<sup>45</sup> However, these exceptions are premised on the notion that sex offenders’ residences are permanently fixed. At any given time, a sex

<sup>43</sup> For instance, on June 8, 2005, the City of Miami Beach, Florida, passed and adopted an ordinance that prohibits certain sex offenders, persons convicted of FLA. STAT. § 794.011 (2002) (sexual battery), FLA. STAT. § 800.04 (2000) (lewd or lascivious offenses committed upon or in the presence of a person less than 16 years of age), FLA. STAT. § 827.071 (2001) (sexual performance by a child), and FLA. STAT. § 847.0145 (1988) (selling or buying of minors) “in which the victim was less than 16 years of age” from establishing a residence “within 2500 feet of any school, designated public school bus stop, day care center, park, playground, or other place where children regularly congregate.” MIAMI BEACH, FLA., CODE art. IV, § 70-402(A) (2005), available at <http://www.nationallawcenter.org/files/Miami%20Beach,%20FL%20ordinance.pdf>. In addition, other localities around the United States have followed suit. *See, e.g.*, TOWNSHIP OF FLORENCE, N.J., CODE ch. 70, art. IV, § 70-15a (2006) (restricting registered sex offenders from living “within 2,500 feet of any school; library; municipal building; public park, tot lot, active or passive recreation area or open space; playground; child care center or church, or property designated for such use in the Township Master Plan”); POLK COUNTY, IOWA, CODE ch. 34.4 (2005) (prohibiting any “person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor, from residing within two thousand feet of “child-oriented facilities”), available at <http://www.co.polk.ia.us:8080/downloads/board/OffenderResidencyOrdinance.pdf>; NASSAU COUNTY, N.Y., ADMIN. CODE ch. VIII, tit. K, § 8-130.6 (2005) (stating that “[i]t shall be unlawful for any registered sex offender to establish a residence or domicile where the property line of such residence or domicile lies within 1) one thousand feet of the property line of a school; and 2) five hundred feet.”); FRANKLIN TOWNSHIP, N.J., CODE ch. 322 § 322-1(A) (2005) (extending the residency restriction to 3,000 feet for high-risk offenders, 2,000 feet for moderate-risk offenders, and 1,000 feet for low-risk offenders); TOWN OF BRICK, N.J., CODE ch. 357 § 357-1 (2005) (banning sex offenders “from living or working within 2,500 feet of a school, park, playground, day care center, or school bus stop.”).

<sup>44</sup> *See infra* Part II.B. regarding the Ex Post Facto effects test.

<sup>45</sup> *See, e.g.*, MIAMI BEACH, FLA., CODE art. IV, § 70-402(d)(i) (2005), (stating that an exception to the local residency restriction applies when the sex offender has “established,” “reported,” and “registered” his residence before July 1, 2005); POLK COUNTY, IOWA, CODE ch. 34.5 (2005) (stating that the exception is applicable if the sex offender “has established a residence” before the effective date of the law); NASSAU COUNTY, N.Y., ADMIN. CODE ch. VIII, tit. K, § 8130.8 (2005) (applying exceptions to registered sex offenders who have “established residences or domiciles” before the law’s effective date); FRANKLIN TOWNSHIP, N.J., CODE ch. 322, § 71.3(c) (2006) (noting that the local residency restriction “shall not apply to a person who has established a residence prior to enactment of this ordinance”).

offender may have to move and to re-establish residence due to any number of reasons, such as change in economic circumstances, sale of a residence by a landlord, death of an owner of the residence, who may be a relative or friend, or pressure from a neighboring community to move. In this way, the consequences to the sex offender of many local residency restrictions fall on the harsh end of the spectrum.

### *C. Practical Limitations of the Current SORR Approach*

Along with isolating convicted sex offenders and providing a hospitable climate in which they may be motivated to re-offend, there are a number of other unintended practical consequences of the current SORR approach that, combined, may lead to children being less safe. For instance, the Iowa County Attorneys Association, an organization composed of Iowa's prosecutors, decried Iowa's scheme, arguing that they effectively gut sex offender registries and the community notification laws that feed off of them.<sup>46</sup> When convicted sex offenders have no physical address because they are barred from living in most urban locations, they are neither capable of registering on a registry nor do they have the incentive to register.

As a practical matter, SORRs have zoned out convicted sex offenders from most of Iowa's cities and towns,<sup>47</sup> Miami Beach, Florida,<sup>48</sup> and whole counties in the Atlanta, Georgia, metropolitan area.<sup>49</sup> In theory, they would

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<sup>46</sup> Iowa County Attorneys Association, *supra* note 14, at 2 ("Law enforcement has observed that the residency restriction is causing offenders to become homeless, to change residences without notifying authorities of their new locations, to register false addresses or simply disappear. If they do not register, law enforcement and the public do not know where they are living. The resulting damage to the reliability of the sex offender registry does not serve the interests of public safety."). A cynic might be tempted to think that the first sentence of the previous quotation illustrates the point of SORRs. Sex offender registries and community notification provisions were simply part of a larger design to ban convicted sex offenders almost wholesale from communities. However, this author attributes the best intentions to supporters of these regimes.

<sup>47</sup> Miller, 405 F.3d at 724 (Melloy, J., concurring and dissenting) (stating that, with reference to Iowa's 200-foot SORR, that "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.").

<sup>48</sup> JOHN ZARRELLA & PATRICK OPPMAN, FLORIDA HOUSING SEX OFFENDERS UNDER BRIDGE, <http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/index.html> (last visited Nov. 19, 2007) (stating that convicted sex offenders have formed a "colony" under a bridge as a result of a 2,500 foot SORR enacted by many of Florida's cities, including Miami Beach, Florida).

<sup>49</sup> Jill Young Miller, *Registered Sex Offenders Ordered to Find New Homes*, ATLANTA JOUR. & CONST., May 19, 2006, at A1 ("In Rockdale County, southeast of Atlanta, 48 of 51 sex offenders must move because they live too close to a school bus stop [from which registered sex offenders are prohibited from living within 1,000 feet], Rockdale County Sheriff's Office Capt.

similarly zone out certain convicted Minneapolis/St. Paul, Minnesota,<sup>50</sup> Denver and other of Colorado's metropolitan areas,<sup>51</sup> Los Angeles, and San Francisco.<sup>52</sup>

From an economic perspective, instead of a contributor to the community's coffers, a homeless convicted sex offender likely becomes a fiscal burden. Similarly, enforcement costs of SORRs and sex offender registries increase when it is harder to find a convicted sex offender who was once on the registry and when the net is cast wide to include any number and type of convicted sex offender.<sup>53</sup>

In the judicial context, the Iowa County Attorneys Association anecdotally noted that Iowa's scheme resulted in a decrease in confessions of defendants in cases where "defendants usually confess after disclosure of the offense by the child."<sup>54</sup> These prosecutors have further noted a decrease in plea bargains by defendants charged with sex crimes, especially those involving child victims.<sup>55</sup> As the organization notes, "[p]lea agreements are necessary in many cases involving child victims in order to protect the children from the trauma of the trial process. This unforeseen result seriously jeopardizes the

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Tommy Eaton said . . .").

<sup>50</sup> MINNESOTA DEPARTMENT OF CORRECTIONS, *supra* note 14, at 9-10 (stating that "a 1,500-foot restriction would exclude every residential area of Minneapolis and St. Paul with minor exceptions. Again, the well-dispersed location of schools and parks in both cities would lead to overlapping restriction zones that essentially forbid any residential options in either city.").

<sup>51</sup> COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 4 (determining that if Colorado were to enact a SORR that, because of the "large number of schools and childcare centers" located in various neighborhoods, there would be "extremely limited areas for sex offenders to reside if restrictions were implemented.").

<sup>52</sup> Schwartzberg & Lo, *supra* note 14, at 3 (positing that California's Proposition 83, which applies to all sex offenders convicted of a sex offense since July 1, 1944, and which includes a 2000 foot ban from any school or park where children regularly gather, "will be the functional equivalent of banishment" "due to the density of schools and parks in some metropolitan areas such as San Francisco and Los Angeles.") (citing Proposition 83, amending § 3003.5 of the California Penal Code). Proposition 83 is among the "nation's toughest" SORR regimes and was passed by 70% of the California electorate in November 2006. Jenifer Warren, *Judge Blocks Part of Sex Offender Law*, LA TIMES, Nov. 8, 2006, at A32. While federal courts have enjoined the application of the law to sex offenders who were placed on parole before November 7, 2006, it is being challenged by sex offenders placed on parole subsequent to this date on the grounds that it is "irrational." Bob Egelko, *Court Will Review Challenge to Sex Offenders*, S. F. CHRON., at B2.

<sup>53</sup> Schwartzberg & Lo, *supra* note 14, at 6 (analyzing the effects of the broad California SORR and concluding that "[t]he inclusion of sexual offenders who do not pose a threat to children only increases the numbers forced upon communities, further burdening already strained resources. A more narrow law would minimize some of the costs involve. . ."); *see also* Iowa County Attorneys Association, *supra* note 14, at 2 ("There is no demonstrated protective effect of the residency requirement that justifies the huge draining of scarce law enforcement resources in the effort to enforce the restriction.").

<sup>54</sup> Schwartzberg & Lo, *supra* note 14, at 3.

<sup>55</sup> *Id.*



welfare of child victims and decreases the number of convictions of sex offenders. . . .”<sup>56</sup> In an effort to shield children from the trauma of trial, decreasing numbers of sex offenders who victimize children will be held to account for their crimes or be required to seek treatment.<sup>57</sup> They are then emboldened to re-offend.

Unintentionally, by providing optimal conditions for a convicted sex offender to re-offend, the public has been lulled into a veritable “false sense of security.”<sup>58</sup> Moreover, a race to the bottom ensues as neighboring communities rush to implement SORRs in order to prevent the convicted sex offender from living there.<sup>59</sup>

## II. THE FEDERAL CONSTITUTIONAL CASE: EX POST FACTO

Like their legislative antecedents,<sup>60</sup> many SORR schemes have been unsuccessfully challenged under the federal Ex Post Facto Clause.<sup>61</sup> For instance, the Eighth Circuit has upheld Iowa’s<sup>62</sup> and Arkansas’<sup>63</sup> SORR

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> LEVENSON, *supra* note 15, at 7 (“Because residence restrictions are designed to prevent recidivistic predatory offenses, they target only a fraction of sex crimes. The assumption that children are at great risk posed by sex offenders lurking in schoolyards or playgrounds is misleading and can create a false sense of security for parents.”).

<sup>59</sup> LEVENSON, *supra* note 15, at 2 (“Local laws tend to create a ‘domino effect’ whereby neighboring towns quickly pass similar or even more restrictive legislation in an effort to prevent exiled sex offenders from migrating to their communities.”); Yung, *supra* note 8, at 104. In certain states, however, state pre-emption statutes may bar local entities from promulgating additional or more restrictive legislation.

<sup>60</sup> *Smith v. Doe*, 538 U.S. 84 (2003) (upholding the constitutionality of Alaska’s sex offender registry and community notification regimes under the Ex Post Facto Clause); *see also* *Kansas v. Hendricks*, 521 U.S. 346 (1997), *supra* note 7, (holding that Kansas’ legislative scheme of involuntary committing certain convicted sex offenders with mental abnormalities was constitutional under the Ex Post Facto Clause).

<sup>61</sup> *See, e.g., Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1181 (E.D. Cal. 2007) (denying plaintiffs’ motion to enjoin enforcement of California’s voter-approved residency restrictions, the Sexual Predator Punishment and Control Act, that prohibited registered sex offenders from residing within 2,000 feet of any school, park, or place where children regularly gather because it was not retroactive and it was “well established in California that laws operate prospectively,” though no clear statement of retroactive or prospective application was found in the statute); *Doe v. Baker*, No. CIV.A. 1:05-CV-2265 2006 WL 905368 (N.D. Ga. April 5, 2006) (granting Georgia’s motion to dismiss the plaintiff-sex offender’s complaint, in part, because Georgia’s sex offender exclusion regime did not constitute an additional punishment prohibited by the Ex Post Facto Clause); *Seering*, 701 N.W.2d at 655 (upholding the constitutionality of Iowa’s SORR regime under the Ex Post Facto Clause); *People v. Leroy*, 828 N.E. 2d 779, 792 (Ill. App. 2005) (finding that Illinois’ SORR scheme prohibiting complainant, who had an 18-year old conviction stemming from consensual sex with a 17-year-old, from living at his mother’s house, where he had maintained lifelong residence, was a civil remedy).

<sup>62</sup> *Miller*, 405 F.3d at 700 (8th Cir. 2005).

<sup>63</sup> *Weems v. Little Rock Police Dept.*, 453 F.3d 1010, 1017 (8th Cir. 2005)

schemes, both of which involved relatively severe 2,000 foot bans, under the Ex Post Facto Clause.

Despite this precedent, this Article concludes that, in the face of a 5-4 majority in *Smith v. Doe*, the last case involving sex offender legislation considered by the Court and in which it upheld the constitutionality of Alaska's sex offender registration act under the Ex Post Facto Clause, there is room for optimism.<sup>64</sup> For example, while concurring only in the judgment that Alaska's act was not an ex post facto law because of the constitutional presumption accorded state laws, Justice Souter,<sup>65</sup> joined by dissenters Justices Ginsburg and Breyer,<sup>66</sup> expressly noted that "considerable" evidence suggested that, substantively, the law was as much an unconstitutional retroactive punishment as a permissible civil regulation. Increasingly also, cracks have appeared in the judicial wall sanctioning SORR regimes under the Ex Post Facto Clause.<sup>67</sup>

In *Smith*, the Court reiterated that the analytical framework for Ex Post Facto inquiry was based on two central questions: 1) is a legislature's explicit or implicit intent either civil and regulatory or criminal and punitive?<sup>68</sup>; and 2) has a challenger proffered the "clearest proof"<sup>69</sup> to demonstrate that the regime's effects are nonetheless punitive<sup>70</sup> under the *Mendoza-Martinez* test?<sup>71</sup>

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(distinguishing Arkansas' regime from Iowa's by noting that the former mandated an individual assessment of dangerousness).

<sup>64</sup> See also Bret R. Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, Symposium, 50 GA. L. REV. 961, 980-81 (2006) (paralleling sex offender registration and community notification statutes and SORRs and stating that "courts assessing ex post facto implications of the latter [residency restrictions] have applied this same framework and looked to the Supreme Court's analysis in *Smith*. In general, residency restriction challenges based on the Ex Post Facto Clause have fared just as poorly as those based on substantive due process, but dissents to the ex post facto rulings have been much more common."). However, while retaining its value as binding precedent on the Court were it to consider the constitutionality of a SORR regime, it remains to be seen whether a reasonable case for optimism exists, given that two Justices have been replaced since *Smith v. Doe*.

<sup>65</sup> *Smith*, 538 U.S. at 107 (Souter, J., concurring).

<sup>66</sup> *Id.* at 115 (Ginsburg, Breyer, JJ., dissenting).

<sup>67</sup> See *Miller*, 405 F.3d at 723 (Melloy, J., dissenting) (stating that the Iowa residency regime constituted a punishment and was, therefore, an unconstitutional ex post facto law); See also *Leroy*, 828 N.E.2d at 793 (Kuehn, J., dissenting) (holding that Illinois' SORR regime was an unconstitutional ex post facto law); *Commonwealth v. Baker*, No. 07-M-00604, at 33 (Kenyon Dist. Ct. 4th Div. Apr. 2007), available at [http://theparson.net/so/residencyrestrictions.source.prod\\_affiliate.79.pdf](http://theparson.net/so/residencyrestrictions.source.prod_affiliate.79.pdf) (striking down Kentucky's sex offender residency restriction scheme as an "ex post facto punishment which is barred by both the United States Constitution and the Kentucky Constitution.").

<sup>68</sup> *Smith*, 538 U.S. at 92.

<sup>69</sup> *Id.* at 92 (quoting *Hudson v. United States*, 522 U.S. 93,100 (1997)).

<sup>70</sup> *Id.* at 97 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

<sup>71</sup> *Smith*, 538 U.S. at 97.

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A. *Threshold Inquiry: Legislative Intent*

In assessing whether a legislature's explicit or implicit intent in promulgating a statute was regulatory or punitive, Justice Souter in *Smith* looked to several "indicators."<sup>72</sup> These indicators include whether (1) a statute is expressly denoted as "civil,"<sup>73</sup> (2) some or all of the sex offender registration and community notification requirement legislation was placed in the criminal section of a state's code, such as the Criminal Procedure section,<sup>74</sup> (3) notification of the registration requirements accompanies a plea of guilt or subsequent conviction<sup>75</sup> and (4) with respect to enforcement of the statute, criminal agencies, such as police departments, are provided with the information, in lieu of more regulatory agencies.<sup>76</sup>

Many judges, even those who ultimately held that an SORR scheme had a punitive effect, have accepted almost wholesale the proposition that the legislature's intent was strictly civil, given its stated desire to protect the health, safety and welfare of children without affixing a clear civil label.<sup>77</sup> On the other hand, at least one other court has deemed this examination of intent wanting, and it has identified additional markers to probe a legislature's intent in promulgating a SORR regime. These measures are whether (1) the title of the statute invokes criminal and punitive language, such as "offenses" and "punishment,"<sup>78</sup> (2) the legislature commissioned preliminary studies assessing what financial impact residency restrictions would have on a state's

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<sup>72</sup> *Id.* at 108 (Souter, J., dissenting).

<sup>73</sup> *Id.* at 107-08 ("The Act does not expressly designate the requirements imposed as "civil," a fact that makes this different from our past cases, which have relied heavily on the legislature's state label in finding a civil intent.").

<sup>74</sup> *See id.* (noting that "[t]he placement of the Act in the State's code, another important indicator . . . also leaves the matter in the air, for although the section establishing the registry is among the code's health and safety provisions, which are civil, *see* ALASKA STAT. § 18.65.087 (2000), the section requiring registration occurs in the title governing criminal procedures, *see* § 12.63.010.").

<sup>75</sup> *See id.* ("What is more, the legislature made written notification of the requirement a necessary condition of any guilty plea, *see* ALASKA RULE CRIM. PROC. 11(c)(4) (2002), and perhaps most significant, it mandated a statement of the requirement as an element of the actual judgment of conviction for covered sex offenses.").

<sup>76</sup> *See id.* at 108 (stating that "[f]inally, looking to enforcement, . . . offenders are obliged, at least initially, to register with state and local police, . . . although the actual information so obtained is kept by the State's Department of Public Safety, a regulatory agency.").

<sup>77</sup> *See, e.g.,* Miller, 405 F.3d at 723 (Melloy, J., dissenting) (stating that "I agree with the majority that the purpose of section 692A.2A is to protect the public. This purpose is non-punitive. . . ."; *see also* Leroy, 828 N.E.2d at 787 (Kuehn, J., dissenting) (noting that "[t]he legislative intent behind Public Act 91-911 is beyond question. Legislators wanted to find a way to better protect children from people capable of taking sexual advantage of them.").

<sup>78</sup> Baker, at 16 ([http://theparson.net/so/residencyrestrictions.source.prod\\_affiliate.79.pdf](http://theparson.net/so/residencyrestrictions.source.prod_affiliate.79.pdf)).

correctional system,<sup>79</sup> and (3) the statute called for criminal sanctions, such as jail time or classified violations as misdemeanors or felonies in lieu of simply assessing fines.<sup>80</sup>

In contrast, while courts have dismissed Justice Souter's use of placement of a statute involving SORRs in the criminal code as a criterion for assessing a legislature's criminal intent, contending that mere "location and labels"<sup>81</sup> are rarely indicative of legislative intent because the criminal code may similarly contain a myriad of "civil" provisions, they have ignored the other indicators of criminal intent outlined by Justice Souter and the dissent in *Smith*. In the absence of a clear civil designation of many SORR schemes, a rigorous examination of legislative intent using these numerous measures would likely reveal more *Smith*-like "close cases" than not.

### B. Effects

#### 1. Plaintiff's Burden of Proof

In the effects test, the complainant has the burden of showing by the "clearest proof"<sup>82</sup> that a legislative regime, despite a civil intent, has punitive effects. In *Smith*, Justice Souter contended that this burden of proof is "heightened" and is appropriate only when the evidence of legislative intent in the threshold inquiry "clearly points"<sup>83</sup> in the civil direction, an occurrence which belied the "close case" for him.<sup>84</sup>

In spite of this precedent, many courts examining SORR regimes have used the clearest proof standard to short-circuit probing analysis of the effects of a nominally civil regime under the *Mendoza-Martinez* factors.<sup>85</sup> In the face of this judicial reluctance and in cases where legislative intent does not clearly point in the "civil direction," this Article asserts that a more appropriate plaintiff's burden of proof is "substantial or reasonable."<sup>86</sup> By removing a

<sup>79</sup> *Id.* at 16-17.

<sup>80</sup> *Id.* at 17 (holding that Kentucky's SORR scheme violated the federal Ex Post Facto Clause based simply on the threshold question of intent).

<sup>81</sup> See Lee, 895 So. 2d at 1042 (upholding Alabama's SORR scheme under the Ex Post Facto Clause).

<sup>82</sup> *Smith*, 538 U.S. at 107 (Souter, J., concurring).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Lee, 895 So. 2d at 1042 (divining the Alabama legislature's intent as civil in the absence of a clear legislative statement and dismissing its placement of that state's SORR regime in the criminal code); Miller, 405 F.3d at 719 (underscoring that "the ultimate question always remains whether the punitive effects [under *Mendoza-Martinez*] of the law are so severe as to constitute the 'clearest proof' . . .").

<sup>86</sup> Justice Ginsburg also argued for a lessened burden of proof (preferring instead a neutral evaluation of a statute's "purpose and effects."). *Smith*, 538 U.S. at 115 (Ginsburg, J., dissenting).

heightened procedural bar in “close cases,” this lower standard of proof would require courts to analyze the substantive effects of a potentially punitive regime more forcefully.

## 2. *Mendoza-Martinez* Factors

### a. Traditionally Regarded as a Historical Punishment

The first factor in the *Mendoza-Martinez* effects test is whether the legislative scheme, though regulatory in intent, has been traditionally and historically regarded as punishment.<sup>87</sup> Given the *Smith* framework, it appears that many SORR regimes, though relatively new developments in the law, are simply old punishments dressed up in new guises.

In *Smith*, the Court distinguished Alaska’s sex offender registration-notification scheme from colonial punishments of public shaming, or permanent social banishment from a community,<sup>88</sup> and actual expulsion, or physical banishment.<sup>89</sup> It noted that any public shame accruing from the statute was a consequence of the efficient “dissemination”<sup>90</sup> on the Internet of the convicted sex offender’s already public criminal record and no different than stigma incurred during any other offender’s public indictment, trial, and sentencing, hallmarks of the transparency demanded by the American criminal law tradition.<sup>91</sup> The Court stated that if the statute’s true intent were to socially or physically ostracize offenders instead of to arm the public with protective information, then it would have permitted the public to post comments underneath a sex offender’s personal information on the website.<sup>92</sup>

In contrast to registration-notification statutes, SORRs *effectively* physically and socially banish convicted sex offenders from many cities and towns, especially their urban cores. While many convicted sex offenders may

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<sup>87</sup> See *Smith*, 538 U.S. at 97.

<sup>88</sup> *Id.* at 97-98 (citing Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991)).

<sup>89</sup> See *id.* at 98 (citing T. Blumberg & K. Lucken, AMERICAN PENOLOGY: A HISTORY OF CONTROL 30-31 (2000); see also Miller, 405 F.3d at 725 (Melloy, J., dissenting) (concluding that Iowa’s regime was “substantially” similar “to banishment.”); Seering, 701 N.W.2d at 671-72 (opining that Iowa’s SORR “effectively banishes an offender from a community.”) (echoing Justice Ginsburg’s dissent in *Smith* wherein she stated that “Alaska’s Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.”) *Smith*, 538 U.S. at 115; Leroy, 828 N.E.2d at 786-88 (stating that the banishment of the registered sex offender “resembles banishment,” is a “reinvented form of permanent exclusion from home and family,” and is “very much akin” and “decidedly similar” to “banishment imposed in earlier times.”); Yung, *supra* note 8, at 104 (equating SORRs to the former Soviet system of “internal exile” or “propiska”).

<sup>90</sup> See *Smith*, 538 U.S. at 98.

<sup>91</sup> See *id.* at 99.

<sup>92</sup> See *id.*

visit prohibited zones with SORR regimes, and therefore are not *literally* physically banished,<sup>93</sup> they have been “in effect cast out of the community,”<sup>94</sup> in many of Iowa’s cities and towns, Georgia’s counties, and Miami Beach,<sup>95</sup> where they are reduced to living on the margins in motels, in rural areas, under freeways, or forced to move elsewhere or even out of state because of limited access to employment, housing, and transport. Visitation rights are of little consequence when access from the margins is impinged.

In addition, local residency exclusions, which are often more severe,<sup>96</sup> only compound the effective physical banishment of state-wide restrictions, further exacerbated by local entities’ race to the bottom in keeping with the NIMBY phenomenon.<sup>97</sup> This effect is aggravated by long distance markers, expanded lists of proscribed sites, and indefinite time frames.<sup>98</sup> Therefore, SORRs effectively banish sex offenders from not only their original communities,<sup>99</sup> but also “cannot be admitted easily into a new one.”<sup>100</sup> This effective physical banishment heightens the social banishment already experienced by convicted sex offenders as a result of prior registration and notification statutes.<sup>101</sup>

b. Imposes an Affirmative Disability or Restraint

The second factor of the *Mendoza-Martinez* test is whether the legislative scheme imposes an affirmative disability or restraint. The “paradigmatic affirmative disability or restraint” is imprisonment or other physical restraint akin to imprisonment,<sup>102</sup> such as the Kansas sex offender

<sup>93</sup> Leroy, 828 N.E.2d at 780 (noting that a sex offender, though prohibited by the Illinois regime from living at his mother’s house, where he had lived for most of his life, could visit “his mother at that home on a daily basis” and enjoy “her support.”); *see also* Miller, 405 F.3d at 719 (stating that the Iowa regime does not “expel” the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence.”).

<sup>94</sup> *See supra* note 88.

<sup>95</sup> *See supra* text accompanying notes 47-49.

<sup>96</sup> *See supra* Part I.B.2.

<sup>97</sup> *See supra* note 41.

<sup>98</sup> *See supra* Part I.C.

<sup>99</sup> Mansnerus, *supra* note 10 (reporting on a 77-year-old man convicted of molesting three children, including two grandchildren, who after serving seven years in prison for these crimes, may be expelled from his home that he owns because it is located within a “child safety zone” under Franklin Township, New Jersey’s local residency restrictions.).

<sup>100</sup> Smith, 538 U.S. at 98.

<sup>101</sup> Smith, 538 U.S. at 109 (Souter, J., dissenting) (quoting *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997), that catalogued ““numerous instances in which sex offenders have suffered harm in the aftermath of notification-ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson””).

<sup>102</sup> Smith, 538 U.S. at 100.

regime of permitting the indefinite and involuntary commitment of certain sex offenders with certain mental diseases upheld in *Kansas v. Hendricks*.<sup>103</sup> Subsequently, in *Smith*, the majority noted that Alaska's registration-notification statute was not an affirmative restraint, given that sex offenders were "free to change jobs or residencies."<sup>104</sup>

Residency restrictions, however, restrain almost all registered sex offenders, whether they have been individually determined to pose a risk to public safety, from residing in many cities, towns, and effectively, even some states, given the lack of housing, employment opportunities, and access to transportation in unrestricted areas.<sup>105</sup> To be sure, registered sex offenders may be able to live in certain areas of the city, such as industrial zones, but a lack of suitable housing and transportation access almost certainly limits these opportunities. Alternatively, registered sex offenders have the option to relocate to communities where there are no such zones, such as the plaintiff sex offender in *Leroy*.<sup>106</sup> However, given the rising popularity of sex offender residency exclusions, it is arguable whether this option actually exists.<sup>107</sup> In addition, even courts upholding the constitutionality of residency restrictions under Ex Post Facto recognize that these restrictions, even relatively mild ones of 500 feet, are not "minor or indirect."<sup>108</sup> This is so because they disable a sex offender's freedom to live where he chooses,<sup>109</sup> especially if where he chooses to live, would place him close to support systems such as family who may deter him from re-offending.

c. Promotes the Traditional Aims of Punishment

The third factor in the *Mendoza-Martinez* test is whether the legislative scheme promotes the traditional aims of punishment, those of retribution and deterrence.<sup>110</sup> In *Smith*, the majority opined that though Alaska conceded that

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<sup>103</sup> 521 U.S. at 346 (1997).

<sup>104</sup> *Smith*, 538 U.S. at 100.

<sup>105</sup> See *supra* Introduction.

<sup>106</sup> *Leroy*, 828 N.E.2d at 780 (noting that the sex offender was living in "nearby Belleville" and that there is "absolutely no evidence that the defendant has been unable to assimilate himself into this new community. . .").

<sup>107</sup> See *supra* Introduction.

<sup>108</sup> *Smith*, 538 U.S. at 100 ("If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.").

<sup>109</sup> See *Leroy*, 828 N.E.2d at 781 (refusing to characterize the effect of Illinois' regime as minor or indirect on registered sex offenders). The majority in *Smith* similarly distinguished Alaska's registration-notification statute by noting that registrants are "free to move where they wish and to live and work as other citizens, with no supervision." *Smith*, 538 U.S. at 101. See also *Miller*, 405 F.3d at 721 (conceding that the Iowa regime imposed an affirmative disability or restraint, though not as disabling as the indefinite civil commitment of sex offenders in *Kansas v. Hendricks*).

<sup>110</sup> *Miller*, 405 F.3d at 720 ("The second factor that we consider is whether the law promotes the traditional aims of punishment-deterrence and retribution.").

the registration-notification statute “might deter future crimes,” this aim was not determinative, as “any number of governmental programs might deter crime without imposing punishment.”<sup>111</sup> In addition, the Court noted that retribution was not at work in Alaska’s scheme, given that the “broad categories” of applicable sex offenders and the consequent time that an offender must register and remain on the sex offender website was “reasonably related” to the recidivist danger of sex offenders.<sup>112</sup> According to the Court, this reasonable relation to recidivism was “consistent” with Alaska’s “regulatory objective” in promulgating the statute.<sup>113</sup>

This Article agrees with the majority in *Smith* that deterrence is frequently an aim of legislation. Indeed, the rightful purpose of regulation is, in part, to deter individuals or institutions from engaging in behavior and choices that would illegally impact the health, safety, and welfare of society.

However, as Justice Souter argued in *Smith*, it is “naïve”<sup>114</sup> to believe that in the face of an extremely hostile environment to sex offenders, as evidenced by the popularity of increasingly harsh yet ineffective sex offender legislation, that legislators do not, at some level, seek retribution.<sup>115</sup> Given that sex offenders have always lived among us, indeed perhaps just in the other room, and the proven lack of effectiveness of SORRs, it is almost undeniable that one of the legislative purposes is to seek revenge or retribution and to “revisit past crimes, not prevent future ones.”<sup>116</sup> Moreover, the lack of data linking a high incidence of recidivist behavior by convicted sex offenders subject to SORR regimes is similarly strong circumstantial evidence that legislatures may be more interested in revisiting the past rather than focusing on the future.

Just as Justice Souter indicated in *Smith* that the retributive perception of Alaska’s sex offender registration-notification statute was heightened by “widespread dissemination” of offenders’ photographs and personal information in an effort not only “to inform the public but also to humiliate and ostracize the convicts,” so too can the analogous argument be made for many residency restrictions. While it would be logical to presume that these restrictions enhance public safety, an avowedly regulatory aim, by providing sex offenders with less access to children, the opposite is likely more plausible. As the dissent in *Leroy* noted, the sex offender would have access to all the children that he wanted during the daytime while the children were at the school near his mother’s house, access which he had had in the 36 years that he had resided at the address.<sup>117</sup>

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<sup>111</sup> *Smith*, 538 U.S. at 102.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 108-109 (Souter, J., concurring).

<sup>115</sup> *See id.*

<sup>116</sup> *Id.* at 109.

<sup>117</sup> *Leroy*, 828 N.E.2d at 793 (Kuehn, J., dissenting).



Furthermore, according to empirical studies, SORR schemes have been shown to be ineffective and perhaps even to aggravate the problem,<sup>118</sup> feeding the perception that there is a retributive purpose attached to them. One of the main reasons that these regimes are ineffective is that if an individual, whether a convicted and registered sex offender, wants to sexually offend a child, a mere zoning restriction will not deter him. Under the current regimes, and depending on the distance marker, he can longingly gaze at children with “a cheap pair of binoculars” from the comfort of his front porch, which may be located 501 feet from a school or child care facility.<sup>119</sup> Even in those regimes where distance-markers are more than Illinois’ 500 feet and are even 2,000 feet, the determined individual can “still call out to children, lure them to the house, engage in sexual exposure, or do all manner of things that child sex offenders do, with all the ease that befalls a child molester who moves into closer range with the aid of a car.”<sup>120</sup> As long as they do not sleep in the zone, they can linger around children in the zone during the day.<sup>121</sup>

Outside of the zone, determined individuals still have access to children, perhaps in their houses or neighborhoods. Indeed, living outside the zone still does not address would-be or previously convicted sex offenders who are family and acquaintances of children from sexually abusing them in the “familiar zone”<sup>122</sup> of a private residence. For those offenders who fit into the rare category of the stranger-offender, an arbitrary distance set by a legislature may not deter temptation if he or she resides 501 or 2001 feet from a school or child care facility.<sup>123</sup>

Moreover, the absence of an individual determination of dangerousness in many SORR schemes adds to the perception that legislators and city council members are more concerned with seeking retribution for previously committed wrongful acts than ensuring public safety. For instance, an individual convicted of statutory rape for having sex with an underage individual would not likely pose a risk to toddlers in a day care center near his or her residence.<sup>124</sup> Conversely, a grandparent convicted of molesting his or her young grandchildren may safely be able to reside near a high school.<sup>125</sup>

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<sup>118</sup> See *supra* Introduction notes 13-18.

<sup>119</sup> Leroy, 828 N.E.2d at 792 (Kuehn, J., dissenting).

<sup>120</sup> *Id.*

<sup>121</sup> This prospect may be alarming to many. As a result, anti-loitering provisions for convicted sex offenders have gained in popularity.

<sup>122</sup> See *supra* Introduction.

<sup>123</sup> Leroy, 828 N.E.2d at 792-93 (Kuehn, J., dissenting) (noting that the 500-foot barrier in Illinois’ SORR scheme still permits child sex offenders to live just outside the zone and “covet” children they see playing on a playground).

<sup>124</sup> *Id.* at 791 (Kuehn, J., dissenting).

<sup>125</sup> *Id.*

d. A Rational Connection to a Nonpunitive Purpose

The fourth factor of the *Mendoza-Martinez* test is whether the purported regulatory regime has a rational connection to a nonpunitive purpose.<sup>126</sup> The Court in *Smith* viewed this factor as “most significant” in assessing the punitive effects of a statutory regime.<sup>127</sup>

i. Nonpunitive Purpose

In *Smith*, the Court reiterated that “public safety” was the nonpunitive purpose of the statute requiring registration of sex offenders and notification to the community.<sup>128</sup> Similarly, courts have held that the purpose of SORRs is to “protect children from known child sex offenders.”<sup>129</sup>

Given the focus on public safety, this factor appears to be a proxy for the threshold inquiry of regulatory intent, an inquiry that has historically evaded much scrutiny in the SORR context.<sup>130</sup> Especially in cases where intent is arguably a “close call,” such as in *Smith*, a SORR regime may not satisfy this element. For instance, given that they are effectively banned from residing near family, work, treatment, and public transportation, the severity of the burden imposed on many offenders suggests that there is neither a civil intent nor a nonpunitive purpose. Moreover, the fact that many offenders’ past crimes are the “touchstone”<sup>131</sup> for application, though they may not pose a high risk to public safety, further supports finding against a nonpunitive purpose. Arguably, these characteristics of many SORR schemes lend a veneer of retribution.<sup>132</sup>

ii. “Rational Connection”

The second prong of this factor is whether there is a “rational connection” to the nonpunitive purpose. In *Smith*, the Court held that “rational connection” does not equate to “a close or perfect fit with the nonpunitive aims

<sup>126</sup> *Smith*, 538 U.S. at 102-03.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (“As the Court of Appeals acknowledged, the Act has a legitimate non-punitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community.”).

<sup>129</sup> *Leroy*, 828 N.E.2d at 782; *see also Miller*, 405 F.3d at 721 (“In light of the high recidivism risk posed by sex offenders . . . the legislature reasonably could conclude that § 692A.2A would protect society by minimizing the risk of repeated sex offenses against minors.”).

<sup>130</sup> *See supra* Part II.A.

<sup>131</sup> *Smith*, 538 U.S. at 109 (Souter, J., concurring) (noting that the Alaska act “uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community. . .”).

<sup>132</sup> *See supra* text accompanying notes 114-125.

it seeks to advance.”<sup>133</sup> In light of this loose standard, courts have almost unfailingly held that many SORR regimes satisfy this prong, given a legislative purpose to protect children and perceived high rates of re-offense for convicted sex offenders.<sup>134</sup>

However, this standard masks the lack of almost any fit of SORR regimes to public safety. In the face of empirical data that conclude SORRs are ineffective<sup>135</sup> and grossly overinclusive because they fail to address the 90% of sex offenders who victimize children,<sup>136</sup> while ensnaring a host of others because of a failure to assess offenders individually, then the fit between a rational connection and an alleged nonpunitive purpose of public safety is beyond irrational. It is true that the *Smith* majority determined that the failure to mandate an individual assessment of dangerousness in Alaska’s registration-notification regime was of little consequence, given that it found that the Alaska legislature’s conclusion that “a conviction for a sex offense provides evidence of substantial risk of recidivism” was reasonable.<sup>137</sup> This conclusion, however, is called into question, given recent data indicating that the recidivism rate of sex offenders is no more, and likely less, than other offenders.<sup>138</sup>

On the other hand, perhaps what concerned the Court in *Smith* and what lingers currently in the SORR cases is fear of the seemingly inevitable- a registered sex offender who re-offends against a child. However, while the lowered re-offense statistics for sex offenders are no guarantee that *no* sex offender will *ever* re-offend, they are persuasive in arguing against the rationality of sweeping restrictions to all sex offenders. Arguably, many more registered sex offenders are being targeted for exclusion than empirically warranted. If the fear is drawn on extremist lines that *any* sex offender will re-offend against children, or that a handful of known high-risk “stranger” child sex offenders will re-offend, then it would be more rational to apply

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<sup>133</sup> *Smith*, 538 U.S. at 103.

<sup>134</sup> *See, e.g., Seering*, 701 N.W.2d at 668 (stating, with respect to the constitutionality of Iowa’s residency restrictions, that “[w]e look for a rational connection, which clearly exists, to protect society.”); *see also Miller*, 405 F.3d at 721 (“In light of the high risk of recidivism posed by sex offenders, . . . the legislature reasonably could have concluded that § 692A.2A would protect society by minimizing the risk of repeated sex offenses against minors.”); *Leroy*, 828 N.E.2d at 782 (“Given this purpose [of protecting children from known child sex offenders], it is reasonable to conclude that restricting child sex offenders from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age might also protect society.”).

<sup>135</sup> *See supra* notes 14-15.

<sup>136</sup> *See supra* note 9.

<sup>137</sup> *Smith*, 538 U.S. at 103 (citing *McKune v. Lile*, 536 U.S. 24, 34 (2002) for the proposition that the recidivism rate for sex offenders was “frightening and high” and citing to 1997 statistics from the U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS 27 (1997) and U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 6 (1997)).

<sup>138</sup> *See supra* Part I.A.

individually tailored residency restrictions to just these individuals, instead of to an entire population that is not likely to victimize children.

Furthermore, many of the most dangerous offenders of children are not being addressed with these regimes, and many otherwise harmless offenders are irrationally being swept out of a large portion of a city and state. Arguably, an arbitrary distance set by a legislature will not prevent a convicted sex offender who lives even one foot out of the zone from sexually offending a child, given that he may nonetheless be tempted by children at play and re-offend.<sup>139</sup> By the same token, because these regimes permit the 90% to live in the zone, they do not prevent these individuals from sexually abusing children.

e. Excessive in Relation to Its Nonpunitive Purpose

The fifth and final relevant factor of the *Mendoza-Martinez* test is whether the regime is excessive in relation to its regulatory purpose. The Court in *Smith* otherwise stated this factor as “whether the regulatory means chosen are reasonable in light of the nonpunitive objective.”<sup>140</sup> Assigned the heaviest weight of all of the factors of the *Mendoza-Martinez* test,<sup>141</sup> it underscored that this prong does not require that the legislature make “the *best possible choice* to address the problem it seeks to remedy.”<sup>142</sup>

While the “nonpunitive objective” portion of this factor mimics the same inquiry in the fourth factor, the crux of this test centers on the excessiveness prong. In *Smith*, the debate coalesced, in part, around (1) the duration of Alaska’s registration-notification scheme and (2) the lack of an individual assessment of dangerousness for each registered sex offender.<sup>143</sup> Similar to its analysis of the fourth factor, the majority’s holding that Alaska’s regime was not excessive was predicated on outdated [and scientifically dubious] recidivism statistics of sex offenders.<sup>144</sup> For instance, the majority noted that “[t]he duration of the reporting requirements is not excessive”<sup>145</sup> because child molesters may reoffend “as late as 20 years following release.”<sup>146</sup> In addition, the majority stated that the absence of an individual risk assessment in Alaska’s regime was unpersuasive to hold the regime unconstitutional under the federal Ex Post Facto Clause because the overall

<sup>139</sup> See *supra* text accompanying notes 119-123.

<sup>140</sup> *Smith*, 538 U.S. at 105.

<sup>141</sup> See *id.* at 102 (stating that “[t]he Act’s rational connection to a non-punitive purpose is a ‘[m]ost significant’ factor in our determination that the statute’s effects are not punitive.”) (citing *United States v. Ursery*, 518 U.S. 267, 290 (1996)).

<sup>142</sup> *Smith*, 538 U.S. at 105 (emphasis added).

<sup>143</sup> *Id.* at 103.

<sup>144</sup> See *supra* Part I.A. regarding current statistics of recidivism rates of convicted sex offenders.

<sup>145</sup> *Smith*, 538 U.S. at 104.

<sup>146</sup> *Id.* (citing National Institute of Justice, R. Prentky, R. Knight & A. Lee, U.S. DEPT. OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

recidivism rates for sex offenders are “frightening and high.”<sup>147</sup>

Courts reviewing the constitutionality of SORR regimes under this factor have generally parroted the majority’s arguments in *Smith*. For example, in *Miller*, the Eighth Circuit recycled the same evidence concerning sex offender recidivism discussed in *Smith* to address the lack of an individual risk assessment in Iowa’s SORR scheme. The court noted that “sex offenders as a class were more likely to commit sex offenses against minors than the general population”<sup>148</sup> and that “there are never any guarantees that [sex offenders] won’t re-offend.”<sup>149</sup> More strikingly, the majority in *Seering*, while acknowledging that “it is not easy to fully assess this [fifth] factor,”<sup>150</sup> responded to the argument by essentially stating that few legislative regimes could be constitutionally excessive when the safety and concern of children is purportedly at stake.<sup>151</sup>

However, Justice Ginsburg’s dissent in *Smith* that Alaska’s scheme was excessive frames the contrarian view of sex offender legislation under this factor, noting that (1) it applied to all convicted sex offenders without regard to their future dangerousness and (2) the general duration of the statute to offenders was long-term to indefinite because it provided no allowances for good behavior in society or even physical incapacitation.<sup>152</sup> For instance, the *Miller* dissent held that Iowa’s scheme was excessive by noting that it relegated all sex offenders, “regardless of their type of crime, type of victim, or risk of re-offending” to the “dramatic” consequence, of being forbidden to live with their families and in their hometowns where support mechanisms guarding against re-offense would likely exist, “because the whole community is a restricted area.”<sup>153</sup> In addition, it noted that the lifetime duration of the ban also made it excessive.<sup>154</sup>

The distance markers of SORR schemes, ranging from 500 to 2,500 feet,<sup>155</sup> add a fascinating twist to the excessiveness inquiry. For example, a

<sup>147</sup> *Id.* at 104 (citing *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

<sup>148</sup> *Miller*, 405 F.3d at 722.

<sup>149</sup> *Id.* (citing Dr. McEchron’s [an expert witness’] testimony at trial).

<sup>150</sup> *Seering*, 701 N.W.2d at 668.

<sup>151</sup> *See id.* (noting that “the relative gauge we use to test excessiveness includes the protection of children.”).

<sup>152</sup> *See Smith* at 116-17 (Ginsburg, J., dissenting) (“And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.”) and (commenting on the broad “scope” and the “perpetual quarterly reporting” mandated by the statute).

<sup>153</sup> *Miller*, 405 F.3d at 725 (Melloy, J., dissenting).

<sup>154</sup> *See id.* at 726; *see also Seering*, 701 N.W.2d at 672 (Wiggins, J., concurring in part and dissenting in part) (“By punishing all these offenders with a residency requirement without considering whether a particular offender is a danger to the general public, exceeds the non-punitive purpose of the statute. This is especially true because a sex offender is subject to the residency restrictions for the rest of the sex offender’s life.”).

<sup>155</sup> *See supra* Part I.B.

500-foot marker, such as in Illinois' regime, suggests, at first glance, that it is not excessive because it is spatially less restrictive.<sup>156</sup> In contrast, the *Leroy* dissent took a more nuanced view of Illinois' restrictions, arguing that the relatively weak 500-foot ban was less justifiable, and therefore excessive, because it arguably still places sex offenders within temptation's reach of the object of their desires, innocent children, thereby encouraging re-offense.<sup>157</sup> Similarly, Iowa's and other jurisdictions' 2,000 foot bans are more reasonable because they place children clearly out of child sex offenders' "sight and mind."<sup>158</sup>

Under this line of reasoning, less is more - "softer" approaches to distance markers are ironically more excessive. Do more prohibitive distance-markers, therefore, better satisfy the excessiveness inquiry? Or, does a 500-foot barrier simply support the argument that more distance is excessive under Ex Post Facto?<sup>159</sup>

Under any reasonable definition of excessive, greater distance- markers of 1500 to 2000 feet are excessive because of the greater likelihood that they are effectively banished from urban life, regardless of dangerousness.<sup>160</sup> Similarly, lesser distances suggest the arbitrary nature of many SORR regimes and highlight that they do not positively impact public safety.<sup>161</sup> In addition, the decreased recidivism rates of many sex offenders,<sup>162</sup> the absurd results that they can sometimes engender,<sup>163</sup> and the often lifetime residency bans, argue in favor of the proposition that all sweeping SORR regimes, regardless of distance, are excessive. Moreover, punishing less than 10% of the problem with broad and indefinite residency bans that displace individuals from their families, treatment, jobs, and housing, while not giving the same attention to over 90% of the individuals who sexually abuse children is, by any reasonable measure, excessive.

However, as the majority in *Seering* suggested, when it comes to children, can any legislative regime be excessive?<sup>164</sup> Under this line of reasoning, any subsequently punitive law that had a purported purpose of protecting children would be safe from constitutional scrutiny under the Ex

<sup>156</sup> *Leroy*, 828 N.E.2d at 782 (pronouncing the 500-foot distance marker as "the least restrictive in geographical terms.").

<sup>157</sup> *Id.* at 792 (Kuehn, J., dissenting) ("Illinois child sex offenders can reside close enough to playgrounds, schools, and daycare centers to tempt their inner desires and promote their ability to re-offend.").

<sup>158</sup> *Id.*

<sup>159</sup> *See* Loudon-Brown, *supra* note 19, at 795. ("But if a 500-foot restriction is sufficient to promote this nonpunitive end, why is a 2000-foot restriction to promote the same end not excessive?").

<sup>160</sup> *See supra* Part I.B.

<sup>161</sup> *See supra* text accompanying notes 14-18.

<sup>162</sup> *See supra* Part I.A.

<sup>163</sup> *See supra* note 31.

<sup>164</sup> *See supra* note 187.

Post Facto Clause. Why then have the Ex Post Facto Clause?

### 3. SORRs Compared to Other Post-Conviction or Civil Disabilities

Apart from the *Mendoza-Martinez* effects test, the *Smith* Court also compared the disabilities imposed on convicted sex offenders in Alaska's registration-notification regime to other post-conviction or subsequent occupational restraints that had been previously challenged under the Ex Post Facto Clause. For instance, in *Deveau v. Braisted*, 363 U.S. 144 (1960), the Court upheld a New York statute forbidding work as a waterfront union official if the individual had been convicted of a felony. Similarly, in *Hawker v. New York*, 170 U.S. 189 (1898), the Court rejected a challenge to a New York law prohibiting the practice of medicine after a felony conviction. Moreover, courts have upheld firearms<sup>165</sup> and voting restrictions<sup>166</sup> on convicted felons.

In *Smith*, the majority judged the effects of Alaska's registration-notification scheme on convicted sex offenders to be "less harsh"<sup>167</sup> than the occupational sanctions upheld in *Hawker* and *Deveau* because sex offenders were still "free to change jobs or residences."<sup>168</sup> On the other hand, while agreeing with the majority that Alaska's registration-notification regime incorporated no "formal" restraints on sex offenders, Justices Souter, Ginsburg, and Breyer pronounced the effects of broadcasting an offender's personal information over the Internet more severe than these occupational restrictions.<sup>169</sup> According to these Justices, this virtual dissemination of information exposed offenders to "profound" public humiliation, loss of employment opportunities, decreased housing options, actual and threatened physical violence and property damage because of private retribution, and the fraying of family and personal relationships as a result of public humiliation and ensuing social isolation.<sup>170</sup>

In comparison to occupational restrictions, the effects to convicted sex offenders in many SORR regimes are even more severe by the *Smith* majority's yardstick. Unlike the registration-notification statute at issue in that case, SORRs do not effectively permit sex offenders to change residences or jobs

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<sup>165</sup> See, e.g., *State v. Swartz*, 601 N.W.2d 348 (Iowa 1999) (holding that a subsequent Iowa law that banned the possession of a firearm by a convicted felon was not a retroactive punishment under the Ex Post Facto Clause).

<sup>166</sup> See, e.g., *Richardson v. Ramirez*, 418 U.S. 24 (1974) (declining to strike down a challenge on Equal Protection grounds that convicted felons were disenfranchised); see also G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1644-45 (1995).

<sup>167</sup> *Smith*, 538 U.S. at 100.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 109 (Souter, J., concurring) ("I seriously doubt that the Act's requirements are 'less harsh than the sanctions of occupational debarment' that we upheld in *Hudson v. United States* . . .").

<sup>170</sup> *Id.*

because they are relegated to living on the margins where little housing stock exists and where access to public transportation to jobs is more limited.

Similarly, under the *Smith* dissent's comparative analysis, SORRs may disrupt family life, if offenders, as in *Leroy*, are barred from living with family whose residences are inside the proscribed zone.<sup>171</sup> Moreover, convicted sex offenders with school-age or adult dependents who live with them may be unable to live near schools, child-care centers, parks, or medical personnel, though they require use of these facilities. Finally, this physical marginalization may lead to the "profound" public humiliation described in *Smith* that can lead to an increased tendency to re-offend,<sup>172</sup> the problem that initially spurred SORR regimes.<sup>173</sup>

### III. TRULY WORKING TO END SEXUAL ABUSE OF CHILDREN

Convicted sex offenders are the legislative gift that keeps on giving.<sup>174</sup> As one of the least defensible populations, legislators understand that there is little political price to be paid for mandating increasingly severe constraints on these individuals and much perceived gain by voters who desire tough restraints. Ultimately, however, it is the public that may pay a high price in public safety and public resources as a result of ineffective and indiscriminate SORR regimes.<sup>175</sup>

In lieu of these regimes, this Article proposes Sex Offender Containment Zones, an alternative method not only to managing convicted sex offenders at high-risk to reoffend, but also to mitigating child sex abuse. Unlike the current SORR regimes, however, the SOCZ does not violate the Constitution, but rather enhances public safety and satisfies the public's demands to address the perceived sex offender problem.

#### A. Sex Offender Containment Zones (SOCZs)

##### 1. History of Land-Use Policies to Manage Disordered Individuals and Behavior

###### a. Zoning In

Precedent suggests that land-use regimes, whether formal and city-

<sup>171</sup> See *supra* notes 61 and 93.

<sup>172</sup> See *supra* note 17.

<sup>173</sup> See *supra* text accompanying note 12 and Part I.A. regarding recidivism statistics for sex offenders.

<sup>174</sup> See KANSAS SEX OFFENDER POLICY BOARD, *supra* note 14, at 26 ("Testimony provided indicated that residency restrictions are extremely popular with the general public, thus making policy makers' decision on this issue a difficult one.").

<sup>175</sup> See *supra* text accompanying notes 14-18 and Part I.B.



sanctioned or informal and organic, are methods used historically to control perceivably disordered individuals and behaviors by containing them to certain areas of the city. Professor Nicole Stelle Garnett,<sup>176</sup> the author of seminal work in this area, terms these land-management devices “disorder-relocation” policies.<sup>177</sup> An advantage of these regimes is that they manage disorder or behaviors that lie outside society’s norms, by relocating it to certain formally or informally designated zones,<sup>178</sup> while facing much less judicial and political scrutiny than traditional law-and-order policing methods.<sup>179</sup>

One example of a formal municipally-designated zone for managing disordered individuals and therefore urban disorder is New Orleans’ Storyville district. At the turn of the 20th century, a New Orleans ordinance made it illegal for any “public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live or sleep in any house, room or closet situated” beyond Storyville.<sup>180</sup> The effect of this designated zone was to create a vice zone for prostitution and brothels.<sup>181</sup>

More contemporarily, Los Angeles<sup>182</sup> and Phoenix,<sup>183</sup> among a number of other cities in the United States,<sup>184</sup> have created formal zones or campuses

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<sup>176</sup> Professor Garnett is the John Cardinal O’Hara, C.S.C. Associate Professor at Notre Dame Law School, and she is author of *Relocating Disorder*, 91 VA. L. REV. 1075 (2005) and *Ordering (and Order) in the City*, 57 STAN. L. REV. 1 (2004).

<sup>177</sup> Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1077 (2005).

<sup>178</sup> See *id.* at 1090-91, 1127 (citing *Armendariz v. Penman*, 75 F.3d 1311, 1313 (9th Cir. 1996) (en banc) (holding that housing code sweeps and closing 95 buildings as a result in a low-income area were arbitrary actions) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning)); and Nicole Stelle Garnett, *Ordering (and Order) in the City*, 57 STAN. L. REV. 1, 13 (2004) (“Importantly, the standard debate tends to disregard the ways in which government choices about the uses of property also dramatically affect an urban environment without raising the same constitutional concerns about police discretion.”).

<sup>179</sup> Garnett, *supra* note 177, at 1077 (“The vast majority of order-maintenance scholarship treats urban disorder primarily as policing problem. But it is also a land-management problem.”).

<sup>180</sup> NEW ORLEANS, LA. CODE § 13,032 (1897) (cited in *L’Hote v. New Orleans*, 177 U.S. 587, 588 (1900)).

<sup>181</sup> Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1210 (1996) (“... the New Orleans authorities treated prostitution in Storyville as legal. It was openly documented and advertised. Guidebooks informed customers about the racial gradations, sexual practices, and interior furnishings distinguishing the various brothels. The district offered other forms of entertainments auxiliary to its sexual business: drinking, gambling, dancing and music were available in saloons, dance halls, and cabarets.”). Interestingly, New Orleans used zoning within zoning to confine Caucasian prostitutes to Storyville, while Black prostitutes were relegated to the Uptown district. See *id.* at 1210-11.

<sup>182</sup> For years, Los Angeles has formally allocated a portion of its downtown land mass area to containing homelessness. This area is formally designated as Skid Row. See Garnett, *supra* note 177, at 1119 (“Instead, the city council approved an official skid row containment policy. The local Community Redevelopment Agency spent millions of dollars to support service agencies and rehabilitate skid row housing. It also relocated missions and other homeless services away from downtown and into the skid row and has (until recently) resisted any efforts to provide homeless services outside of skid row.”). See also Robert C. Ellickson,

for homeless individuals that are located within the city and that are located near organizations that serve the homeless. In addition, the poor have also been formally zoned into specific areas of the city. For instance, Garnett points to the Robert Taylor Homes, 28 buildings that composed the U.S.'s largest public-housing complex and that spanned two miles in Chicago, where public-housing tenants, the large majority of whom were black and poor, lived.<sup>185</sup>

#### b. Zoning Out

In contrast to New Orleans' Storyville, Los Angeles' Skid Row, Phoenix's homeless campus, and Chicago's Robert Taylor Homes, where prostitutes, homeless, and the poor, respectively, were formally *zoned into* a certain section of the city, other cities have formally chosen to *zone out* certain perceivably disordered individuals. For instance, local officials in Portland, Oregon, and Cincinnati have promulgated "drug exclusion zones" where offenders arrested for or convicted of certain drug crimes may not trespass.<sup>186</sup> These zones are municipally-designated areas of the cities that have disproportionately significantly higher rates of drug-related crime compared to other neighborhoods in the cities.<sup>187</sup>

#### c. Informal Zoning

##### i. SORRs Distinguished

Informal analogues of these formal zones have similarly existed in American cities, from numerous informally-designated skid rows that have tended to attract the homeless population, especially men,<sup>188</sup> to red light

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*Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1167 n.3 (1995).

<sup>183</sup> Garnett, *supra* note 177, at 1076 (noting that Phoenix "has acquired several square blocks of property south of downtown Phoenix for a human services campus and plans to spend at least \$24 million to relocate governmental, nonprofit, and religious organizations that serve the homeless to new facilities there.").

<sup>184</sup> *See id.* at 1086 (noting that other cities such as Anchorage, Atlanta, Washington, D.C., Sacramento, San Antonio, Jacksonville, Ft. Lauderdale, Miami, Las Vegas, and New Orleans, have followed the Phoenix and Los Angeles examples by creating smaller homeless campuses).

<sup>185</sup> *See id.* at 1108-09.

<sup>186</sup> Peter M. Flanagan, Note, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 N. DAME. L. REV. 328, 329 (2003).

<sup>187</sup> *See id.*

<sup>188</sup> Garnett, *supra* note 177, at 1099-1102 (stating that "[s]kid rows developed in the years after the Civil War, when widespread economic dislocation left many people homeless and poor and that they served "as lodging and employment center for this large, transient, and male population."). Professor Robert C. Ellickson, Walter E. Meyer Professor of Property and Urban Law at Yale Law School and another scholar of central importance to the field, has also theoretically proposed that a city's public space be divided into three color-coded zones, with

districts that attracted those in the sex trade,<sup>189</sup> to ghettos and barrios, that have long been the epi-center for many lower-income African-American and Latino communities. In many of these informal districts, certain individuals, whether because of economic status, professional occupation, or race and ethnicity that did not comport with society's norms, have been effectively zoned into a particular district. Conversely, these individuals may have also been zoned out of other areas of the city.

Therefore, in this respect, the current phenomenon of SORRs is distinguishable from formal and informal zones designed to contain ostensibly disordered individuals. While many of these districts, or as Gerald Neuman terms them, "anomalous zones"<sup>190</sup> or "geographical exceptions,"<sup>191</sup> focus on *zoning in* a certain segment of society, SORRs are similar to drug exclusion zones in that they *zone out* a particular population.<sup>192</sup> However, the difference between drug exclusion zones and SORRs is that the latter effectively zone out a much larger population using much broader exclusionary criteria, from a much larger surface area, and for generally an indefinite period of time.<sup>193</sup> In contrast, drug exclusion zones tailor the exclusionary zoning to certain areas of the city impacted by certain individuals who have been determined to be involved in specific drug activity that negatively impacts these pre-determined areas for a duration of no longer than a year.<sup>194</sup>

On the other hand, while registered sex offenders are not *de jure* being zoned into certain areas of the city, in the sense that government has formally designated a certain part of the city to contain these individuals, *de facto* this situation is occurring, albeit in the worst of places, such as under expressways<sup>195</sup> or on the outskirts of town where there are few employment and transportation prospects.<sup>196</sup> Since legislators and policymakers implicitly recognize that sex offenders can live amongst us, as the vast majority is neither

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red zones being places that would order disorder by concentrating in certain areas of the city that would act "as safe harbors for people prone to engage in disorderly conduct," such as public drunkenness and prostitution. Ellickson, *supra* note 182, at 1221.

<sup>189</sup> Garnett, *supra* note 177, at 1103 ("Traditionally, the sex industry was concentrated in special disorder zones known colloquially as red light districts. As with skid rows, these containment policies were—with a few notable exceptions—informal in nature.").

<sup>190</sup> Neuman, *supra* note 181, at 1200-01 (similarly describing Washington, D.C. and Guantanamo as "anomalous zones" wherein subversion of the polity's fundamental values, such as the right to national representation and civil rights reigns).

<sup>191</sup> Neuman, *supra* note 181, at 1233.

<sup>192</sup> See *supra* text accompanying notes 186-187.

<sup>193</sup> See *supra* Part II.B. regarding the effects of many SORR regimes.

<sup>194</sup> See Flanagan, *supra* note 186, at 331-34.

<sup>195</sup> See *supra* note 48.

<sup>196</sup> See Monica Davey, *Time Served: Barring the Unwanted Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1 (discussing a motel as ground central for sex offenders on the outskirts of Cedar Rapids, Iowa. Ironically, the motel containing the banned sex offenders is located just a stone's throw from homes in which children live).

imprisoned for life nor condemned to death,<sup>197</sup> then it is important that they be managed in a way that balances the demands of the Constitution, while remaining humane, effective, and accountable to the public's demand to control the perceived sex offender problem. This Article argues that Sex Offender Containment Zones (SOCZs), while not determinative, may provide yet another alternative method by which to manage convicted sex offenders at high-risk to re-offend in lieu of the SORR regimes.

## 2. SOCZs as a Concept

SOCZs are based on Shared Living Arrangements (SLAs), a highly successful sex offender treatment program used exclusively in Colorado.<sup>198</sup> SLAs are typically two or three sex offenders who are generally considered of high-risk to re-offend and who live together in a house that they rent or own.<sup>199</sup> In a 2004 study of living arrangements of 131 sex offenders on probation who were living in the Denver metropolitan area, high-risk offenders who lived in SLAs, of which 75% of sex offenders who were living in SLAs were composed,<sup>200</sup> “had significantly fewer” re-offense violations than sex offenders in other living arrangements.<sup>201</sup> Moreover, on average, the total number of violations was low in SLAs.<sup>202</sup> As a result, the Sex Offender Management Board of the Division of Criminal Justice of the Colorado Department of Public Safety, the agency which conducted the study, recommended to the Colorado Senate and House Judiciary Committees that SLAs “should be considered a viable living situation for higher risk sex offenders living in the

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<sup>197</sup> Michael J. Jenuwine et al., *Community Supervision of Sex Offenders-Integrating Probation and Clinical Treatment*, 67 FED. PROBATION 20 (2003) (noting that almost 60% of convicted sex offenders “live in our communities under conditional supervision [probation or parole].”). Moreover, a study on the effectiveness of SORRs in Colorado noted that most of the jailed sex offenders in Colorado “will eventually be returned to their communities of origin, with or without the benefit of parole supervision. In short, most convicted sex offenders either will never leave the community upon conviction or will return to the community at a later date.” COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 7.

<sup>198</sup> COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 12 n. 10 (“An inquiry was sent to the ATSA [Association for the Treatment of Sexual Abusers] listserv requesting information on other treatment agencies who utilize shared living arrangements. The inquiry resulted in feedback that Colorado was the only state that had agencies who utilize Share[d] [sic] Living Arrangements.”).

<sup>199</sup> *See id.* at 12.

<sup>200</sup> *See id.* at 20.

<sup>201</sup> *Id.* at 3. In addition, the study noted that of the 130 offenders, 15 “new sexual offenses” were reported. *Id.* at 22. All of these sexual offenses were “hands off” violations, such as “peeping, voyeurism, or exposure.” *Id.* at 22. While almost 80% of offenders living in other living arrangements such as living with a family member, with friends, living alone, or in jail or work release, committed these “hands off” violations, only 20% of them were convicted by offenders living in SLAs, though 75% of the offenders living in SLAs were high-risk. *See id.* at 23 (Table 8).

<sup>202</sup> *See id.*

community.”<sup>203</sup> Importantly, Colorado, in contrast to other states, has not adopted SORRs.

a. The Containment Model

More broadly, SLAs comprise one approach of a number of “containment” methods used to manage convicted sex offenders who are living in the community or who are under community supervision through parole or probation.<sup>204</sup> The containment model has met with relative success in a number of cities that have implemented their versions of it.<sup>205</sup> At its core, the model consists of five elements:

- 1) a consistent multi-agency philosophy focused on community and victim safety;
- 2) a coordinated, multidisciplinary implementation strategy;
- 3) a case management and control plan that is individualized for each sex offender;
- 4) consistent and informed public policies and agency protocols; and
- 5) quality-control mechanisms designed to ensure that policies are implemented and services are delivered as planned.<sup>206</sup>

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<sup>203</sup> *Id.* at 4.

<sup>204</sup> Kim English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, 4 PSYCHOL., PUB. POL’Y, & LAW 220 n.1/2 (1998), available at [http://dcj.state.co.us/ors/published\\_research\\_articles.html](http://dcj.state.co.us/ors/published_research_articles.html) (“Although many citizens believe convicted sex offenders are sent directly to the penitentiary, in fact, most sex offenders receive community supervision, either as a direct sentence to probation or, following time in prison, on terms of parole.”). At the time of her article’s publication, English was Director of the Office of Research and Statistics for the Colorado Division of Criminal Justice, Department of Public Safety.

<sup>205</sup> See Lisa Henderson, Note, *Sex Offenders: You Are Now Free to Move About the Country, An Analysis of Doe v. Miller’s Effects on Sex Offender Residential Restrictions*, 73 UMKC L. REV. 797, 828 (2005) (“Colorado and Maricopa County, Arizona, were some of the first to experiment with the model, although its use has now become widespread. Indiana has a containment program entitled The Indiana Sex Offender Management and Monitoring Program (SOMM) . . . . In Illinois, The Cook County Adult Sex Offender Program (ASOP), which utilizes a form of the containment model, has proven notably effective.”). A study of Maricopa County, Arizona’s program “determined that only 1.6 percent of 1,700 offenders participating in the program from April 1993 through April 1998 were committed for new sex crimes. Maricopa County found that such offenders ordinarily are recommitted for sex crimes at a rate of about 14 percent.” LEGISLATIVE ANALYST’S OFFICE, A CONTAINMENT STRATEGY FOR ADULT SEX OFFENDERS ON PAROLE, LAO RECOMMENDATION: CONTAINMENT OF HIGH-RISK SEX OFFENDERS, LAO ANALYSIS OF THE 1999-00 BUDGET BILL, [http://www.lao.ca.gov/analysis\\_1999/crim\\_justice/crim\\_justice\\_crosscutting\\_anl99.html](http://www.lao.ca.gov/analysis_1999/crim_justice/crim_justice_crosscutting_anl99.html) (last visited Nov. 12, 2007); see also Jenuwine et al., *supra* note 197, at 26 (evaluating Cook County’s Adult Sex Offender Program and concluding that “treatment within the context of the ‘containment model’ indeed works. Although it is not a panacea, we have seen numerous offenders change their offending behavior with abatement in re-occurrence rates and lifestyle changes that manifest effective problem-solving skills and pro-social and productive lives. The research data supports this contention and is encouraging in this regard.”).

<sup>206</sup> English, *supra* note 204, at 221.

What distinguishes the SLA program in Colorado (and therefore, by implication, SOCZs), is its focus on high-risk offenders.

b. SOCZs Distinguished

Finally, it is important to note that SLAs, and therefore SOCZs, are fundamentally grounded in treatment and rehabilitation rather than in retribution.<sup>207</sup> As envisioned, the zoning of sex offenders is positively guided, in contrast to the governmentally-sanctioned “negative” human zoning that is occurring *de facto* in SORR regimes, as well as instances that occurred to individuals of certain ethnic and other groups during World War II. These instances are the U.S. government’s internment camps of Americans of Japanese descent<sup>208</sup> or the Nazi government’s concentration camps of Jews, the Roma people, and homosexuals.<sup>209</sup> By the same token, SOCZs are also neither “child-rape zones,” “pedophile zones,” nor “child-molester zones,” wherein law enforcement and reason are suspended to give convicted sex offenders free reign to sexually abuse children.<sup>210</sup>

c. Specifics

Many of the specifications of SOCZs would mirror those of SLAs. The

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<sup>207</sup> COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 12 (stating that “Shared Living Arrangements (SLAs) are a modality of treatment utilized by three sex offender treatment programs in the state of Colorado.”).

<sup>208</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944) (sanctioning the internment of Japanese-Americans).

<sup>209</sup> Language and terminology are important, conveying intention and perception, and ultimately influencing popular support. Indeed, to buttress against the concern that SOCZs are simply dressed-up concentration or quarantine camps, they could very well be termed Sex Offender *Compassion* Zones, Sex Offender *Treatment* Zones, or Sex Offender *Rehabilitation* Zones. However, “containment” is included in the suggested name of Sex Offender Containment Zone because it better communicates to legislators and to the public who elects them the public safety rationale behind them. Given the highly emotionally charged environment surrounding convicted and registered sex offenders, it may make sense, at least initially, to call attention to the public safety advantages of SOCZs by using “containment” in the title in order to muster and to increase public and legislative support. In addition, while the term “Sex Offender Containment Zone” is suggested, the author leaves ultimate determinations of terminology of these areas to others more familiar and better versed in the politics and characteristics of their specific communities.

<sup>210</sup> Similarly, because of concerns that SOCZs may be unduly *permissive*, instead of oppressive, because the words “sex offender” and “zone” are included in the name, certain features of them would need to be promoted in order to secure public support, namely an emphasis on the tight network of law enforcement and treatment personnel that manages each offender and the consequences to each offender should he or she attempt to bypass this network. Furthermore, in order to call attention to the security features of this zoning scheme, the term “sex offender containment zone” could be replaced with “public safety zone,” “public security zone,” or “public safety district.”

distinction between them is concentration and scale, depending on the size of the urban area as well as the population pool of high-risk sex offenders who agree to live in the zones.<sup>211</sup> However, much as SORRs, SOCZs would certainly apply prospectively, as well as retroactively.<sup>212</sup> Further, in order to maximize the most efficient use of resources and like the Colorado program, this Article recommends that they apply to convicted sex offenders at high-risk to re-offend, such as pedophiles with male victims,<sup>213</sup> and as determined by common actuarial risk tests which have proven more accurate than clinician assessments.<sup>214</sup>

i. Roles of the Treatment Provider and Supervising Officer

In keeping with the therapeutic foundations of SOCZs, each registered sex offender would be assigned both a treatment provider as well as a supervising officer who would likely work in the jurisdiction's probation or parole office.<sup>215</sup> Each plays a complementary role. For instance, the treatment provider would be responsible for creating and supervising an appropriate, customized treatment plan for the registered sex offender.<sup>216</sup> The aim of this plan is to "decrease denial and minimization, increase victim empathy, increase

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<sup>211</sup> In theory, the program used in SOCZs could be mimicked in halfway houses dispersed throughout the city. This Article advocates SOCZs over halfway houses that utilize containment methods for reasons of efficiency. The concentration of high-risk convicted sex offenders in zones of the city may be a more cost-efficient way of providing services and supervision to these individuals than providing them in disparate areas of city or town. Moreover, concentration of these individuals will also likely promote keen attention to any problems to the public's safety that they may pose.

<sup>212</sup> See *infra* Part III.C. for the federal Constitutional case under Ex Post Facto of the retroactive application of SOCZs.

<sup>213</sup> See *supra* note 29.

<sup>214</sup> See HANSON & MORTON-BOURGON, *supra* note 18, at 8 (identifying a number of actuarial assessments used to assess whether or not a sex offender will re-offend such as the Minnesota Sex Offender Screening Tool-Revised, the Violence Risk Appraisal Guide, the Sex Offender Risk Appraisal Guide, and the Rapid Risk Assessment for Sex Offence Recidivism and stating that these tests are more accurate "[g]iven that the predictive accuracy of unguided clinical assessments are typically slightly above chance levels [in predicting sex offender recidivism] . . .").

<sup>215</sup> See COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 14 (underscoring that treatment providers and probation officers supervise each offender and noting that "[p]ossibly one of the most important benefits to SLAs is that treatment providers are able to contact the offender's probation officer very quickly if there is a violation or if the offender is missing.").

<sup>216</sup> See *id.* at 13 (noting that "[t]he general SLA philosophy is an extension of the Therapeutic Community treatment modality in which offenders' living environments can be seen as an extension of both treatment and monitoring" and that SLAs "allow for a controlled opportunity for a therapist to work with an offender's cognitive and behavioral levels because the offender is influenced throughout the day by not only his or her peers, but by his or her therapist as well.").

appropriate social skills, develop an individualized relapse prevention plan, as well as addressing secondary issues such as offender substance abuse of anger management problems.”<sup>217</sup> Treatment providers may also be responsible for checking in daily or in other increments of time with each registered sex offender in the SOCZ.<sup>218</sup>

On the other hand, the probation or parole officer is charged with ensuring that the offenders are in compliance with the guidelines set forth by the officer, as dictated by the sex offender’s individual situation and risk of re-offense. For instance, they may perform “regular home visits and curfew checks” with the offenders.<sup>219</sup> In addition, as in the Colorado program, the treatment provider and the supervising officer would be intimately involved in pre-approving a registered sex offender’s housemates or roommates.<sup>220</sup>

Officers are each offender’s “external conscience,”<sup>221</sup> consistently reminding offenders of the consequences for failing to adhere to the treatment plan.<sup>222</sup> Integrating the roles of the treatment provider with that of law enforcement personnel is crucial, given that consequences in the form of arrest and probation provide a “compelling mechanism” for “individuals [who] would likely never seek help nor focus on necessary change.”<sup>223</sup> The importance of this compelling mechanism as deterrent cannot be underestimated, given that a recent large study of the factors that predict sexual recidivism concluded that rule violation such as “non-compliance with supervision” and parole or probation violations were the “strongest indicators of sexual recidivism.”<sup>224</sup> In addition, the study also found that “[o]ffenders with general self-regulation problems were more likely than offenders with stable lifestyle to sexually recidivate. Included among general self-regulation problems were measures of lifestyle instability . . . [and] impulsivity. . . . Other anti-social traits that were significantly correlated with sexual recidivism included employment instability, any substance abuse, intoxication during offense, and hostility.”<sup>225</sup> All of these factors promoting sexual re-offense could also be mitigated if there

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<sup>217</sup> Jenuwine et al., *supra* note 197, at 22.

<sup>218</sup> *See id.* (noting that “[o]ffenders residing in a shared living environment might be subject to regular and multiple daily call-ins to the treatment provider.”).

<sup>219</sup> *Id.* at 10.

<sup>220</sup> *See* COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 13 (stating that “housemates are approved in advance by the treatment provider and supervising officer.”).

<sup>221</sup> *Id.*

<sup>222</sup> *See id.* (discussing the containment model of the Cook County Adult Sex Offender Program).

<sup>223</sup> Jenuwine et al., *supra* note 197, at 23.

<sup>224</sup> HANSON & MORTON-BOURGON, *supra* note 18, at 10. In the study, the authors caution that these conclusions may prove less dramatic in a larger sampling. *See id.* (“Readers should be cautioned, however, that these effects were based on a limited number of studies and that extreme values tend to regress towards the mean (i.e. the biggest values tend to become smaller when additional data is collected).”).

<sup>225</sup> *Id.*



is adequate therapeutic and housing support that are buttressed by consequences.<sup>226</sup>

Therefore, this prong of SOCZs is likely not different from existing programs servicing sex offenders, as many offenders are already supervised by probation and parole officers and are also in treatment programs.<sup>227</sup>

## ii. Accountability Mechanisms

A crucial component of SLAs, much as with living arrangements in SOCZs, is accountability to treatment and supervisory plan, backed by enforcement of supervising officers, when registered sex offenders living in SOCZs go “off plan.” A hallmark of containment methods, including SLAs is the accountability triangle, encompassing “criminal justice supervision, sex offender specific treatment, and polygraph examinations.”<sup>228</sup> For instance, polygraph tests are used to verify offenders’ whereabouts. According to the Colorado study, these polygraph tests are “the number one way violations [of an offender’s treatment plan] were detected.”<sup>229</sup> A second accountability method in the Colorado SLA program is more self-directed and involves sex offenders accounting for all of their time using a log.<sup>230</sup>

The third approach to accountability and, according to the Colorado study, what makes the SLA program so successful is that in order to live there, roommates or housemates are duty-bound to inform treatment providers when another roommate goes astray by staying out late or making contact with minors.<sup>231</sup> Upon notification to therapeutic personnel, supervising officers are

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<sup>226</sup> *Id.*

<sup>227</sup> Jenuwine et al., *supra* note 197, at 20 (“In reality, however, nearly 60 percent of convicted sex offenders live in our communities under conditional supervision. The inherent problem with releasing convicted sex offenders into the community is the likelihood that they will repeat their crimes. To address this problem, intensive treatment programs for sex offenders have been developed to be used in combination with traditional measures such as incarceration, probation, and parole.”).

<sup>228</sup> English, *supra* note 204, at 224 (noting that sex offender containment methods that are successful require “three interrelated, mutually enhancing activities: criminal justice supervision, sex offender specific treatment, and polygraph examinations” that form a triangle, “with the three corners anchored with the three interventions just mentioned and with the offender contained inside the triangle.”).

<sup>229</sup> COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 28.

<sup>230</sup> *See id.* at 13-14 & n. 13 (iterating that “an offender living in an SLA has to account for all of his or her time” and that “[t]ime logs kept by sex offenders in SLAs have the added benefit of verification by housemates who are also being held accountable for the same behaviors and responsibilities.”).

<sup>231</sup> *See id.* at 13 (noting that “[o]ffenders hold each other accountable for their actions and responsibilities and notify the appropriate authorities when a roommate commits certain behaviors, such as returning home late or having contact with children. This type of accountability and support is different in an SLA than in other types of living arrangements in that the treatment provider makes holding each other accountable for their actions a *requirement* of living in the SLA.”) (emphasis included).

almost immediately notified of the transgression or if an offender has disappeared.<sup>232</sup>

This Article envisions that SOCZs would, like SLAs, hold sex offenders, including the individual and his or her peer group, similarly accountable. Nonetheless, the emphasis in both programs on a structured and controlled environment that is closely monitored by treatment personnel, supervising officers, the sex offender himself, and his peers, appears to provide a highly positive support system to prevent an offender from re-offending.<sup>233</sup> This support system tends to mitigate the factors that prompt sex offenders to re-offend such as “lack of social skills (personality disorders), chaotic lifestyle, and being disengaged from treatment.”<sup>234</sup>

### iii. Duration and Incentives

Participation in an SOCZ would be voluntary for the time needed for an offender to no longer reasonably present a high-risk to public safety. Encouragement to reside and to participate in an SOCZ could take several forms. For example, rent subsidies or lower-cost rent could be offered to offenders. Faced with limited housing opportunities because of community backlash in connection with registration and community notification requirements, as well as limited financial means, it is probably fair to say that reduced rent to registered high-risk sex offenders may prove a highly effective incentive to live there.<sup>235</sup> Alternatively, sex offenders agreeing to live within an SOCZ may earn credits towards an earlier release date from monitoring and supervision as part of probation or parole, if appropriate, and as judged by the supervising officer, treatment provider, and judge. In addition, one of the biggest incentives may be the opportunity to be treated effectively and to better manage their desires, resulting in a more “normal” life.

Conversely, this Article envisions that the private market would be harnessed to provide residential housing and amenities for sex offenders

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<sup>232</sup> See *id.* at 14 (concluding that “one of the most important benefits to SLAs is that treatment providers are able to contact the offender’s probation officer very quickly if there is a violation or if the offender is missing.”).

<sup>233</sup> See *id.* at 4 (concluding that a “positive support system, which 100% of the Shared Living Arrangements provided, is an important component of being successful in treatment.”).

<sup>234</sup> *Id.* at 13.

<sup>235</sup> See, e.g., COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 14 (stating that “many offenders who are sentenced to the community have limited resources with which to obtain housing that meets the ideal placement criteria, leaving many living in potentially dangerous situations, such as a motel, living with friends who are not sufficiently supportive, or homeless.”); see also Smith, 538 U.S. at 115 (Ginsburg, Breyer, JJ., dissenting) (discussing threats to sex offenders’ lives as a result of community notifications provisions and stating that these mandates “impose onerous and intrusive obligations on convicted sex offenders; and it exposes restraints, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.”).

residing in an SOCZ. For example, local and or state government could provide property tax abatements for a certain number of years to private developers who rehabilitate or construct new residential housing, either single-family or low-rise multi-family units in order to prevent the concentrated effects of social ills found in much of the government-funded high-rise multi-family housing of the Urban Redevelopment era.<sup>236</sup>

This Article conceives that the private for-profit or non-profit sector would own the residential housing, while working in partnership with the public sector, such as law enforcement, or other public mental health care agencies or quasi-public non-profit private entities. On the other hand, individual jurisdictions may wish to decide not only incentives for private developers and offenders, but also the ways in which for-profit and non-profit private entities will partner with government that are most appropriate for them.

#### iv. Location

Ideally, an SOCZ would be located in or near a city's downtown, so that offenders would have easy access to transportation to travel to and from jobs and family. Similarly, this single location would also likely ensure that their treatment providers and supervising officers would have easy access to monitor and to supervise the offenders. The spatial dimensions of an SOCZ would obviously vary in size, depending on the number of sex offenders and the land mass/space available in an area.<sup>237</sup> To ward against the ill effects of concentrated housing,<sup>238</sup> it is recommended that a zone include several low-rise residential or mixed-use buildings, instead of a single high-rise big-block facility. However, this recommendation is tempered by the particular spatial,

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<sup>236</sup> Alexander Von Hoffman, *High Ambitions: The Past and Future of America's Housing Policy Debate*, 7 HOUSING POL'Y DEBATE 423, 436, available at [http://www.fannie.mae.foundation.org/programs/hpd/pdf/hpd\\_0703\\_hoffman.pdf](http://www.fannie.mae.foundation.org/programs/hpd/pdf/hpd_0703_hoffman.pdf) ("In the late 1960s and early 1970s, public housing became the subject of fierce attacks. In his book, sociologist Lee Rainwater (1970) condemned Pruitt-Igoe and other giant projects as human disaster areas. Portraying a bleak world where the strong persecute the weak, the architect Oscar Newman (1972) disparaged the design of the high-rises for their lack of security.") (citing LEE RAINWATER, *BEHIND GHETTO WALLS* (Aldine-Atherton, 1970) and OSCAR NEWMAN, *DEFENSIBLE SPACE* (Macmillan, 1972)). Hoffman is a senior research fellow at the Joint Center for Housing Studies at Harvard University's Graduate Center of Design and the Kennedy School of Government; *See also supra* note 202 involving the Robert Taylor homes in Chicago, the setting for the famous 1970s television sitcom, *Good Times*.

<sup>237</sup> Therefore, unlike with the Colorado program, it is unnecessary for the treatment provider and the supervising officer to pre-approve the location of the sex offender's residence, as the locations of the SOCZs ostensibly would have already been negotiated prior to sex offenders' residing in them. *See COLORADO SEX OFFENDER MANAGEMENT BOARD, supra* note 14, at 13 (noting that "[t]he residence location . . . [is] approved in advance by the treatment provider and the supervising officer.").

<sup>238</sup> *See supra* note 236 and *infra* note 252.

financial, and political constraints of a community. As in the Colorado SLA program and, solely to mitigate concerns of neighboring communities, one constraint on the location of SOCZs may be that they be located out of plain sight of “a school, playground, or next-door to a residence that has ‘child-type’ items (for example, a swing set).”<sup>239</sup>

v. Education and Awareness

Ideally, the SOCZ would be accompanied by a comprehensive public health educational component that would educate children about inappropriate touching and prurient language by *anyone* and the need to report it immediately to a parent, guardian, teacher, trusted adult friend or family member, or adult caretaker.<sup>240</sup> Therefore, while the SOCZ would focus on offenders, the educational component centers attention on potential victims who are children.

As part of this educational effort, it may be wise to educate children about the tactics that abusers who prey on children use to attract them and engender trust - trust that abusers ultimately violate. These tactics are often consistently offering candy or toys or making unsolicited efforts to be around them.<sup>241</sup>

However, solely raising awareness of child sexual abuse among potential victims is ill-fated to succeed unless the community at large, especially individuals who are most likely to be around children such as parents, guardians, caretakers, teachers, school administrators, and medical professionals, are educated to recognize the warning signs of a child who is being sexually abused. It would also be wise to educate these individuals about the enticements used by child sex abusers to win favor and trust with children

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<sup>239</sup> COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 13; *see also supra* note 14 noting that this constraint on SOCZs is unsupported by evidence to prevent convicted sex offenders from re-offending.

<sup>240</sup> KANSAS SEX OFFENDER POLICY BOARD, *supra* note 14, at 30 (“The question then becomes how best to protect all children from victimization. On this, experts from every field are abundantly clear. The most viable alternative for protecting children is a wholesale comprehensive education program for children, their families, and the community.”); *see also* Duster, *supra* note 23, at 776 (“[h]owever, despite all the efforts of state legislatures, both good and bad, ‘[t]he first line of prevention still must rest with educating youths to be wary of strangers and unfamiliar situations.’”) (citing Wayne A. Logan, *Jacob’s Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1293 (2003)).

<sup>241</sup> ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, FACTS ABOUT SEXUAL ABUSERS, <http://www.atsa.com/ppOffenderFacts.html> (last visited on Nov. 28, 2007) (noting that pedophiles, individuals who are almost exclusively sexually attracted to children “seek out children to victimize by placing themselves in positions of trust, authority, and easy access to youngsters,” “may be extremely charming and skilled at manipulating adults, and they will use adult relationships to gain access to children,” and “may spend years working his way up to a position of authority and trust within a church, school, or youth organization in order to have access to children.”).

as well as with adults. This information would in turn raise awareness regarding children who are being placed in vulnerable positions.

Indeed, as the Iowa County Attorneys Association pointed out in its condemnation of Iowa's SORR - "[o]nly parents can effectively impede [the] kind of access that allows most sex crimes against children to be committed by a relative or acquaintance who has some prior relationship with the child and access to the child."<sup>242</sup> Although statistics demonstrate that any one of these individuals is likeliest to be the sexual abuser of a child, educating all of them may be the best prophylactic measure, given that some may not sexually abuse a child.<sup>243</sup>

In tandem with this large-scale public education approach to raising awareness of child sex abuse, research also supports the contention that the flow of people in the pipeline of future sexual abusers of children may be slowed by positively intervening early in the lives of children who are neglected or abandoned by parents, and in particular, who have a "negative relationship" with their mother.<sup>244</sup> For example, this data may assist legislators in reforming many of the country's beleaguered foster care systems and child protective agencies which serve children at greatest risk to be affected by these factors.<sup>245</sup>

### 3. Dynamic Factors

#### a. Children and Other Dependents

In the Colorado study, 98.5% of the sex offenders were male, 86.4% were never married, divorced, or separated from a spouse, and 51% had at least

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<sup>242</sup> Iowa County Attorneys Association, *supra* note 14, at 1.

<sup>243</sup> See *supra* text accompanying note 9.

<sup>244</sup> R. Karl Hanson & Monique T. Bussière, *Predictors of Sexual Offender Recidivism: A Meta-Analysis*, 66 J. CONSULTING & CLINICAL PSYCHOL., 348-362 n.2 (1998). ("This meta-analysis also identified a number of promising measures not covered in previous reviews. . . . The most interesting of these correlates was a negative relationship with mother. . . . A negative relationship with mother could also be considered equivalent to having no parental support, since fathers are often uninvolved in childrearing.")

<sup>245</sup> See Editorial, *Fixing Foster Care*, WASH. POST, June 23, 2004, at A20 ("The foster-care system is in abysmal shape. On average, children entering foster care languish in the system for three years, shuttled through three different placements. The federal government recently completed its final reviews of state child-protection systems; every state failed, and one of the biggest problems was states' slowness in getting foster-care children back to their homes or into adoptive families."). Yet another approach in managing sex offenders might be to monitor convicted sex offenders at high-risk to re-offend with Global Positioning Satellite (GPS) technology. However, this method may prove too ineffective to merit the expense, given that offenders may not be personally monitored by a number of individuals, as with SOCRs. Therefore, unless combined with rehabilitation, this option may prove just as ineffective as SORRs.

one child.<sup>246</sup> Presumably, for those sex offenders living in SLAs, the offenders' children or other dependents, if any, were not also living with them. However, this point was not expressly addressed in the study.

In the SOCZ context, this Article anticipates that there will certainly be sex offenders who choose to live there who will have children or other dependents, such as aged parents. However, because SOCZs, as SLAs, are primarily geared to offenders who have been individually determined to be of high-risk to re-offend, then any dependent, especially children, would be unable to live with them. In the rare case where they may be high-risk offenders whose children or other dependents are not able to reside outside of the SOCZ, then separate residential facilities for those certain offenders could be made available. Moreover, it is likely that the overwhelming number of sex offenders in an SOCZ will be male.<sup>247</sup> If there are also high-risk female sex offenders who choose to live in the zone, it may similarly be wise to have these offenders live with each other, rather than with other men in the zone.

### B. Practical Implications of SOCZs

#### 1. Advantages

SOCZs have a number of advantages. The first is that the public will know where many high-risk sex offenders live, in contrast to SORRs where many convicted sex offenders are untracked because they are living on the margins or homeless.<sup>248</sup> Another advantage, as demonstrated by the Colorado SLA study, is that because these offenders will reside in a positive and supportive environment that does not promote re-offense, public safety will be enhanced. However, if an offender in an SOCZ chooses to re-offend, he or she will be dealt with swiftly, as also demonstrated by SLAs.<sup>249</sup>

Other advantages accrue to the offenders themselves. For instance, those who are currently zoned out of the city as a result of SORR regimes will once again be able to live in it, in conditions fit for human beings and at a relatively affordable price. Furthermore, because participants will reside in SOCZs as a group, it is likelier that they will be better protected against community backlash directed against individual registered sex offenders who may reside in a particular neighborhood and whose status has been discovered by the public as a result of community notification laws.<sup>250</sup> A fifth advantage

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<sup>246</sup> COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 18 (Table 4).

<sup>247</sup> *See id.*

<sup>248</sup> *See supra* notes 15-16.

<sup>249</sup> *See supra* text accompanying notes 231 and 232.

<sup>250</sup> *Smith*, 538 U.S. at 109 (Souter, J., concurring) (iterating the “onerous practical effects of being listed on a sex offender registry,” including “public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, [to] threats of violence, physical attacks, and arson.”).

is that because these offenders will be in a highly supportive environment that holds them accountable through intense supervision and management, they will be able to, on the whole, resist re-offense and further criminal repercussions.

## 2. Limitations

No program or idea is perfect, and certainly there are some shortcomings attached to SOCZs. The following is a discussion of potential limitations, as well as ways in which they may be mitigated.

### a. Social Effects

One potential shortcoming is that, as with Chicago's Robert Taylor Homes and Los Angeles' Skid Row, the concentrated "disorder" in the SOCZ may spill over to neighboring communities that are likely already struggling with enough disorder.<sup>251</sup> As a result, policymakers in Chicago and in Los Angeles took steps to diffuse the disorder. For instance, the high-rise continuous blocks of federal public housing that stretched for miles in Chicago were subsequently razed because of the perceived spillover effects of ultra-concentrated poverty to neighboring communities.<sup>252</sup> Similarly, in Los Angeles, although not formally disbanded, efforts have been made to make Skid Row less concentrated and to decentralize the services and amenities available to the homeless to other areas of the city.<sup>253</sup> Therefore, two logical questions arise: (1) will there be negative effects associated with the concentration of high-risk sex offenders in one area; and (2) will these effects, if any, spill over into neighboring communities that are likely already suffering under the weight of their own disorder,<sup>254</sup> making them even more vulnerable?

A primary concern is that clustering high-risk convicted sex offenders will result in the worst kind of "group think," without the protections afforded by prison. This concentration will then expose already struggling communities

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<sup>251</sup> See *supra* text accompanying notes 182 and 185 regarding the Robert Taylor Homes and Los Angeles' Skid Row.

<sup>252</sup> Garnett, *supra* note 177, at 1108-09, 1110 (stating that "The Taylor Homes are almost gone now, thanks to the federal government's massive Hope VI program, which funds the demolition of urban-renewal-era public-housing projects and their partial replacement with low-rise, mixed-income projects" and "By the late 1980s--after over two decades of efforts to de-concentrate public-housing tenants--crime and disorder had come to define high-rise projects.").

<sup>253</sup> *Id.* at 1120 (noting that "Bring L.A. Home, a partnership of civic and city leaders formed in 2003, released a draft of its ten-year strategic plan to end homelessness. The plan calls for greater dispersal of homeless services to serve the needs of the entire metropolitan areas.").

<sup>254</sup> See *id.* at 1117 (discussing the reasons that, policymakers' choices to locate, for example, a homeless campus in a poor, urban neighborhood with people of color, may "amplify disorder in the very communities that are least likely to have the social wherewithal to withstand an onslaught of new disorder. This result would not only be unjust, it may also fuel the downward spiral of disorder and decay that plagues so many poor urban neighborhoods.").

to increased crime, particularly to sexual crimes. While it would be impossible to assert that no sex offender living in an SOCZ would ever re-offend against individuals, especially children, in a neighboring community, the chances of this situation occurring in an SOCZ are likely far less than what the current crop of SORRs allows, given the lack of evidentiary support for these regimes and offenders' physical and psychic sense of marginalization.<sup>255</sup> Indeed, SOCZs may be distinguished from the *de facto* zoning of sex offenders in certain areas, even those near children,<sup>256</sup> because offenders will also receive treatment and supervision that have been proven to be effective in managing sex offenders and any recidivist tendencies.<sup>257</sup> Therefore, the spillover effects of any increased crime into neighboring vulnerable communities are likely to be limited, and arguably less than in the current regimes of SORRs.

As a general matter, any disorder that results from the clustering of convicted sex offenders in SOCZs may be distinguished from the disorder resulting from the clustering of individuals living in entrenched poverty, many of whom are disproportionately jobless as in Chicago's Robert Taylor Homes,<sup>258</sup> or who are homeless as in L.A.'s Skid Row.<sup>259</sup> Many homeless individuals are also disproportionately unemployed and suffer from mental illness as well as debilitating drug and alcohol addictions.<sup>260</sup> As the Colorado study demonstrates, while 54% of the individuals studied were assessed as "high-risk,"<sup>261</sup> 73.1% of all the sex offenders worked full-time and 6.7%

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<sup>255</sup> See *supra* text accompanying notes 15-18.

<sup>256</sup> See Davey, *supra* note 196 (noting that in Cedar Rapids, Iowa, sex offenders have been forced to reside in a motel on the outskirts of the city because they are barred from living elsewhere in the metropolitan area under Iowa's SORR regime).

<sup>257</sup> See *supra* Part III.A.2.

<sup>258</sup> Garnett, *supra* note 178, at 48 ("For example, most inner-city residents endorse the importance of individual initiative and hard work. But, people's faith in the efficacy of such initiative may be undermined unless it is based on an observable reality. As a result of chronic joblessness, in other words, inner-city residents develop what psychologists would term "negative self-efficacy"; they wish to achieve success through work, but become so discouraged by the reality of their community that they cease to believe that it is possible to do so. The economic effects of this phenomenon parallel the social-influence effects of urban disorder. Just as visible disorder discourages law-abiders by signaling that a community tolerates lawlessness, widespread unemployment signals that economic prospects are dim and disheartens job seekers.").

<sup>259</sup> See *supra* note 182.

<sup>260</sup> See MENTAL ILLNESS AND HOMELESSNESS, NCH FACTSHEET #5, NATIONAL COALITION FOR THE HOMELESS, WASHINGTON, D.C. 1 (2006), [http://www.nationalhomeless.org/publications/facts/Mental\\_Illness.pdf](http://www.nationalhomeless.org/publications/facts/Mental_Illness.pdf) ("Approximately 20-25% of the single adult homeless population suffers from some form of severe and persistent mental illness..."); see also ADDICTION DISORDERS AND HOMELESSNESS, NCH FACTSHEET #6 NATIONAL COALITION FOR THE HOMELESS, WASHINGTON, D.C. 1 (2007), <http://www.nationalhomeless.org/publications/facts/addiction.pdf> ("... approximately 26% of the homeless population is dealing with issues of substance abuse.").

<sup>261</sup> COLORADO SEX OFFENDER MANAGEMENT BOARD, *supra* note 14, at 20.



worked on a part-time basis.<sup>262</sup> Therefore, almost 80% of sex offenders studied was working. As Garnett notes, work, in itself, forces order, by giving structure to one's time.<sup>263</sup>

In addition, the social costs associated with SOCZs may in many respects mirror those of other LULUs (locally undesirable land uses)<sup>264</sup> that may be perceived as incompatible with neighboring communities, such as the siting of a cement grinding facility,<sup>265</sup> a state highway,<sup>266</sup> or a parking garage.<sup>267</sup> However, as Garnett notes, physical and architectural barriers and details, such as landscaping and building designs, may serve to shield neighboring "struggling communities from a new infusion of disorder."<sup>268</sup>

<sup>262</sup> *Id.* at 18 (Table 4).

<sup>263</sup> See Garnett, *supra* note 178, at 48-49 (noting that "[t]he lack of a 'culture of work' resulting from chronic joblessness [for a variety of reasons] contributes to social disorder" and that "[w]ork determines where we are going to be and when we are going to be there; the lives of those without regular employment become less coherent, not just economically but socially as well") (citing to William Julius Wilson, *When Work Disappears* 73, wherein he posits that "where jobs are scarce. . . many people eventually lose their feeling of connectedness to work. In the formal economy; they no longer expect work to be a regular, and regulating, force in their lives."). Garnett's statement is otherwise exemplified in the maxim, "An idle mind is the devil's workshop" which speaks to the power of work or, more precisely, the power of not working.

<sup>264</sup> Garnett, *supra* note 177, at 1116 (stating that a homeless campus, for example is a "classic LULU").

<sup>265</sup> *South Camden Citizens In Action v. New Jersey Dept. of Environmental Protection*, 254 F. Supp. 2d 486 (D.N.J. 2003) (denying a motion to dismiss plaintiffs' environmental justice claims based, in part, on intentional discrimination under Title VI and Equal Protection and private nuisance law, but granting the motion to dismiss for failure to state a claim under public nuisance law and the Fair Housing Act in connection with the approval of air permits by the New Jersey Department of Environmental Protection to operate a cement grinding facility near an impoverished neighborhood that was largely composed of African-American and Hispanic residents). Professor Sheila R. Foster, Albert A. Walsh Professor of Law, Fordham University School of Law, notes that "[t]he disproportionate concentration of hazardous land uses in certain communities threatens not only physical health and neighborhood aesthetics, but also can alter ways in which people live, work, and play—for example, by entrenching historical patterns of discriminatory land use and thereby fragmenting urban space by race and class." Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 532 (2006). As Professor Foster alludes, the social costs of these LULUs may be damage to neighborhood integrity, visual, aural, and air pollution. *See id.*

<sup>266</sup> *Jersey Heights Neighborhood Assoc. v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (upholding the district court's dismissal of a lawsuit for failure to state a claim under the Fair Housing Act after plaintiffs challenged the siting of a state highway because of its discriminatory effect on their neighborhood, comprising mainly people of color).

<sup>267</sup> See Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit Corporations*, 56 AM. U. L. REV. 455, 486-87 nn. 144-45 (2007) (discussing the construction of a 500-car multi-story parking garage in a residential neighborhood).

<sup>268</sup> Garnett, *supra* note 177, at 1117 (noting that Los Angeles' local government used "physical barriers, such as landscaping and building designs, that emphasized the separation of [L.A.'s] skid row from the rest of downtown."); *see also* Neal Kumar Katyal, *Architecture as*

b. Takings

Another potential limitation of SOCZs is that neighboring communities may suffer economic consequences in the form of decreased property values. These decreased property values may otherwise give legitimacy to the argument that an SOCZ constitutes a taking under a state's or the federal Constitution. In practice, takings lawsuits involving "government actions resulting in less than a total deprivation of all economic value are subject to ad hoc judicial review that strongly favors the government."<sup>269</sup>

Moreover, as one study demonstrated, the economic costs of a sex offender's proximity to residences may be overstated. Indeed, the study showed that only if a sex offender lived within 1/10 of a mile, did owners of neighboring houses suffer declines in real property values.<sup>270</sup> While the study appeared solely to focus on the effect of individual sex offenders on real property values of neighboring residences, as opposed to a concentrated number of sex offenders, the outcome of the study suggests nonetheless that diminution in value may be more theoretical than actual. This conclusion is especially true, if SOCZs are visually separated, through the use of design and landscaping, and there is distance between neighboring communities and the SOCZ.

c. Community Opposition

Because of the perceived potentially deleterious social and economic costs of SOCZs to neighboring communities, these constituencies may therefore mobilize to derail them. However, at the risk of being termed obstructionist, these communities may be more supportive of SOCZs if they are provided some formalized role in site-selection and the spatial dimensions

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*Crime Control*, 111 YALE L.J. 1039, 1041 (2002) (stating that "[a]rchitectural improvements that control crime, in contrast, can be adopted and implemented locally with real effect.").

<sup>269</sup> Garnett, *supra* note 177, at 1087-88 (concluding that takings lawsuits challenging the construction of a homeless campus near neighboring communities will be unsuccessful) (citing DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 121-22 (2002) for the proposition that there is a de minimus standard of review in these types of "regulatory takings."). A claim may be brought on inverse condemnation grounds, but even those are successful under "certain narrow circumstances." *Id.* Another option would be to pursue damages based on a nuisance claim, but this claim could only proceed once "the campus was constructed and the property owners injured." *Id.* As a further nail in the coffin, some states do not even allow local governments to be prosecuted for nuisance claims. *See id.*

<sup>270</sup> Leigh L. Linden & Jonah E. Rockoff, *There Goes the Neighborhood? Estimates of the Impact of Crime Risk on Property Values From Megan's Laws* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 12253, 2006), available at <http://www.nber.org/papers/w12253> (concluding that while "the sale price of homes closest to the offender decline by about 10% in value or about \$10,000 for the median value home in our data . . . [w]e find no evidence of any impact on homes located more than a tenth of a mile away from offenders' locations.")

of a site.<sup>271</sup> In addition, community opposition to neighboring SOCZs may be mitigated if Open Meetings requirements are followed and if a jurisdiction adopts Fair Sitting Requirements to prevent local governments from “singling out the most vulnerable neighborhoods.”<sup>272</sup> In conjunction with these approaches, local or state enabling legislation for SOCZs may require a NEPA-like<sup>273</sup> process to “carefully consider” the impact of the siting of a SOCZ on neighboring communities.<sup>274</sup> Indeed, state enabling legislation for SOCZs may help inoculate local politicians from community resistance towards them.

Legislators and policymakers tacitly acknowledge that sex offenders, even the worst of the worst, must live somewhere, given that many sentencing laws mandate neither life imprisonment nor capital punishment. It is important, therefore, that the burden of finding appropriate places for these individuals, especially those at high-risk to re-offend not fall solely on communities that are most at-risk or that have the most disorder. For fairness’ sake, the sacrifice should be shared.

However, in the current context of sex offender legislation, where registered sex offenders are physically isolated from many communities because of humiliation and community opposition brought on by notification requirements which is aggravated by SORRs, it is vulnerable and already disordered communities that largely bear the consequences of bad policy choices. Rent is minimal or non-existent in these areas, and many times, enforcement is lax.

#### d. Stigma

A perception that offenders residing in the zones are living in leper-like colonies may also fuel the type of social stigma or social banishment that troubled Justice Souter about Alaska’s registration-notification regime in *Smith v. Doe*.<sup>275</sup> However, any stigma that a resident of a SOCZ may face is probably much less than that incurred under SORRs, given that broad classes of convicted sex offenders are zoned *de facto* to living on the margins.<sup>276</sup> In addition, to the extent that residents of many types of formal and informal zones in the city who potentially live “on the wrong side of the tracks,”

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<sup>271</sup> Garnett, *supra* note 177, at 1132.

<sup>272</sup> *Id.*

<sup>273</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 43329(c) (2006) (requiring an environmental impact statement for all “[f]ederal actions” including those by federal agencies, “significantly affecting the quality” of the environment.).

<sup>274</sup> Foster, *supra* note 265, at 557 (noting that while the environmental impact statements of NEPA have been “[w]idely criticized as lacking substantive ‘teeth’ . . . [and] cannot impose a substantive duty to mitigate,” . . . the information gleaned by them “can be useful both as an effective organizing tool for the interested public, and as a prod for better public agency decisionmaking, and may ultimately influence the outcome of a proposed project.”).

<sup>275</sup> See *supra* note 101.

<sup>276</sup> See *supra* Part I.C.

including the impoverished, racial minorities, homeless, and homosexuals, face social stigma because of where they live, then residents of the SOCZ will undoubtedly incur some minor social shame. On the other hand, any deleterious social consequences that offenders may incur from living in the zones will likely be mitigated by the overwhelming social advantages of access to society, housing, and treatment.

e. Opting Out

While participation in an SOCZ is highly incentivized,<sup>277</sup> it is also voluntary in order to mitigate the significant constitutional risk posed by the Ex Post Facto Clause,<sup>278</sup> especially in light of increasing consensus that SOCZs' informal analogues, SORRs, run afoul of this Clause.<sup>279</sup> On the other hand, this facet may run afoul of politics and of policy, given that a handful of high-risk offenders may opt out. In light of a broad dismantling of SORR regimes, these offenders would then be subject to individualized restrictions set by probationary or parole officers, the norm before the advent of the SORR era.<sup>280</sup> While this reversionary approach is not an ideal solution, given the relative empirical success of containment models and in particular SLAs, individualized restrictions occupy a middle ground between divergent constitutional concerns under Ex Post Facto and those in policy and politics that regard enhancing public safety.

C. *The Federal Constitutional Case for SOCZs under Ex Post Facto*

I have previously analyzed SORRs under current Ex Post Facto doctrine to assess whether they are unconstitutional retroactive punishments in violation of the federal Constitution's Ex Post Facto Clause.<sup>281</sup> I now turn to a similar scrutiny of SOCZs.<sup>282</sup>

1. Legislative Intent

The first question in the Ex Post Facto analysis centers on the

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<sup>277</sup> See *supra* Part III.A.2.c.iii.

<sup>278</sup> See *infra* Part III.C.

<sup>279</sup> See *supra* note 67.

<sup>280</sup> Loudon-Brown, *supra* note 19, at 797-98.

<sup>281</sup> See *supra* Part II.

<sup>282</sup> Similarly, SORRs and SOCZs are arguably subject to challenge on Equal Protection grounds under *Cleburne v. Cleburne Living Center.*, 473 U.S. 432 (1985), in which the Court struck down zoning regulations that treated group homes for mentally retarded individuals more harshly than other communal living arrangements, because these regimes make zoning classifications that are not rationally related to a legitimate state interest. This topic, however, is beyond the scope of this paper.

legislature's intent. Unlike SORRs,<sup>283</sup> the impetus for SOCZs is to ensure public safety, a clear civil intent. This conclusion is suggested by their core emphases on treatment and providing a 100% positive supportive environment for sex offenders, especially high-risk individuals.<sup>284</sup> In addition, in contrast with many SORR regimes, zoning high-risk sex offenders in SOCZs near urban cores allows them access not only to transportation, family, treatment, and employment opportunities, but also to law enforcement. On the off-chance that there is a violation of treatment, supervising officers will swiftly step in to curb it. Therefore, there is no punishment unless the offender chooses behaviors or actions that will result in these consequences. On the other hand, integrating high-risk sex offenders into society, a rehabilitative objective, is simply not an option in many SORR regimes which place sex offenders on the margins.

## 2. Effects

### a. "Clearest Proof" Burden

Because SOCZs are geared towards treatment and rehabilitation, it would likely be unnecessary in a legal challenge to them to use a lower plaintiff's burden of proof, as called for by Justice Souter in *Smith v. Doe* when the legislative intent is equivocal,<sup>285</sup> rather than the "clearest proof" standard already currently required.<sup>286</sup>

### b. Traditional Punishment

While a legislature may evince regulatory intent in promulgating a particular statutory regime, the scheme may still be deemed an unconstitutional retroactive punishment if the effects are punitive, as measured by the *Mendoza-Martinez* test.<sup>287</sup> The first question in the effects test is whether the regime is regarded a traditional punishment.<sup>288</sup> While this Article, as well as numerous commentators and judges, have equated SORRs with banishment, a punishment used in colonial times, SOCZs are a novel concept.

Undoubtedly, the question arises as to whether SOCZs are simply another form of internal exile, or banishment, to a particular zone in the city. In other words, are SOCZs themselves banishment, or even prisons without walls? However, participation and residence in an SOCZ is voluntary, and therefore, enticements notwithstanding, offenders consent to living in the zone.

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<sup>283</sup> See *supra* Part II.

<sup>284</sup> See *supra* Parts III.A.2.a.-c.ii.

<sup>285</sup> See *supra* notes 82-84.

<sup>286</sup> See *id.*

<sup>287</sup> See *supra* notes 69-70.

<sup>288</sup> See *supra* note 87.

Offenders, if any, who choose not to live in an SOCZ are free to live elsewhere, subject to individual requirements imposed by probation or parole officers.

Also, relative to many SORR regimes, SOCZs are far from banishment. Indeed, while many residency exclusions essentially prohibit almost all sex offenders from living in the city and provide little access to public transportation routes, employment opportunities, treatment personnel, and family, resident sex offenders in SOCZs, because of their location within the city and accessibility to services, would largely face none of these barriers. Far from being banished from the city, sex offenders could legally live in it.<sup>289</sup>

c. Affirmative Disability or Restraint

The second factor in the *Mendoza-Martinez* test is whether the legislative regime is an affirmative disability or restraint.<sup>290</sup> Even courts and judges upholding SORRs have deemed them more than simply a minor restraint on registered sex offenders.<sup>291</sup> On the other hand, residency in an SOCZ is voluntary, although highly encouraged and incentivized. Therefore, residency in a SOCZ is only a restraint if an offender chooses to live there.<sup>292</sup>

d. Promotes the Traditional Aims of Punishment

The next question to consider in the effects analysis of a statutory regime under the *Mendoza-Martinez* test is whether the regime promotes the two traditional aims of punishment: 1) deterrence or 2) retribution.<sup>293</sup> By emphasizing treatment in SOCZs, deterrence of further re-offenses by convicted high-risk sex offenders is a positive by-product of the zones. Yet, as argued previously, retribution is the primary concern of this prong of the *Mendoza-Martinez* test.

In this respect, the differences between SOCZs and SORRs are striking. For instance, unlike residency exclusions, SLAs are effective precisely because they emphasize treatment and rehabilitation and therefore diffuse arguments that they are promulgated for the sheer purpose of seeking revenge from offenders for past sexual crimes.<sup>294</sup> Moreover, SOCZs' core focus on rehabilitation of offenders inoculates them from arguments that they promote

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<sup>289</sup> See also *supra* Part III.B.2.d. regarding social banishment of offenders residing in the SOCZ.

<sup>290</sup> See *supra* Part II.B.2.b.

<sup>291</sup> See *supra* notes 108-109.

<sup>292</sup> Consent to reside in a SOCZ would, ideally, be documented with an agreement, in which the offender also consents to abiding by the rules of residency as well as to accepting the consequences for failing to adhere to the zone's rules.

<sup>293</sup> See *supra* Part II.B.2.c.

<sup>294</sup> See *id.*

retribution. For example, as compared to SORRs, which simply ban offenders from living within the city and force them into homelessness and transient lifestyles, SOCZs emphasize treatment of the offender and provide a positive support system that ensures the offender's future success. Furthermore, unlike most SORR regimes, SOCZs call for individual assessments of dangerousness, thereby tailoring policy and treatment to individual offenders.

e. Rational Connection to a Non-punitive Purpose

The fourth factor of the *Mendoza-Martinez* test is whether there is a rational connection to a non-punitive purpose.<sup>295</sup> Unlike SORR regimes, which are arguably not based on anything approaching rationality, SOCZs are grounded in evidence-based SLAs and containment methodology.<sup>296</sup> SLAs have been proven to result in low recidivist outcomes for sex offenders, especially those determined to be of high-risk.<sup>297</sup> In addition, unlike with many SORR schemes,<sup>298</sup> SOCZs target a narrow population, those convicted sex offenders who are determined to be at high-risk to re-offend pursuant to common actuarial assessments.<sup>299</sup> As a result, all of these indicators lead to the conclusion that SOCZs are rationally connected to public safety.

f. Excessive in Relation to Its Non-punitive Purpose

The fifth element of the *Mendoza-Martinez* test is whether the regime is excessive in relation to its non-punitive purpose, or, as stated by the *Smith v. Doe* Court, whether “the regulatory means chosen are reasonable in light of the non-punitive objective.”<sup>300</sup> The Court has assigned “heaviest weight” to this factor.<sup>301</sup>

Unlike SORR mechanisms, SOCZs are not perpetual, and an offender's time in the zone is limited by what his treatment plan dictates and his choice to remain in the zone.<sup>302</sup> Moreover, in comparison to most SORRs,<sup>303</sup> SOCZs would apply only to certain offenders, who have been assessed as high-risk by actuarial tools.<sup>304</sup>

Furthermore, as a way to address Justice Ginsburg's concern in *Smith v. Doe* regarding the Alaska registration-notification regime, that there was no way to be free or have reduced time in the scheme, the design of an SOCZ

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<sup>295</sup> See *supra* Part II.B.2.d.

<sup>296</sup> See *supra* Parts III.A.2.a.-b.

<sup>297</sup> See *supra* Part III.A.2.

<sup>298</sup> See, e.g., *supra* notes 63 and 153.

<sup>299</sup> See *supra* notes 213-214.

<sup>300</sup> See *supra* note 140 and Part II.B.2.e.

<sup>301</sup> See *supra* note 141.

<sup>302</sup> See *supra* Part III.A.2.c.iii.

<sup>303</sup> See *supra* note 298.

<sup>304</sup> See *supra* note 299.

provides, pursuant to certain guidelines, that an offender can have “time off or time reduced”<sup>305</sup> from living within the zone. Because the program is voluntary, he can choose to live there. While this choice would not be one endorsed by treatment providers or supervising officers, it is one that the offender can make.

In addition, in contrast to the grave burdens imposed on convicted and registered sex offenders by the distance-markers of SORR regimes, whether on the lighter end of the spectrum at 500 feet or at the other extreme at 2000 or 2500 feet,<sup>306</sup> there are no similar burdens with SOCZs. Because offenders are in the city, they have access to public transportation routes, jobs, family, and treatment personnel. Also, they do not feel the psychological isolation and the lack of support that may induce them to re-offend. Therefore, the means that SOCZs employ to ensure the safety of the public is not excessive, especially as compared those used by many current SORR legislative regimes.

#### IV. CONCLUSION

Sex offender residency restrictions are land-use policies that represent the latest wave of increasingly harsh legislative measures aimed at the dangers posed by less than ten percent of individuals who have been convicted of child sex abuse. This particular form of human waste management is not only unconstitutional under federal Ex Post Facto analysis, but also is dangerously ineffective and leaves the public with a false sense of security. While implicitly acknowledging that registered sex offenders are capable of being reintegrated into society by neither imprisoning them for life nor condemning them to death, policymakers and jurists have effectively banished them, no matter the crime, to society’s literal and psychic margins. In contrast, the Sex Offender Containment Zone (SOCZ), in conjunction with heightened awareness of child sex abuse through comprehensive education of communities, is an alternative land-use policy and positive zoning approach to managing the most dangerous of convicted sex offenders. By emphasizing treatment over retribution and fact over fear, the SOCZ, in stark contrast to many SORR regimes, is constitutional, humane, and effective.

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<sup>305</sup> See *supra* Part III.A.2.c.iii.

<sup>306</sup> See *supra* Part I.B.