

In the Zone: Sex Offenders and the Ten-Percent Solutions

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ABSTRACT: 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 ten percent of the very real problem of child sex abuse, as family members and acquaintances of children commit more than ninety percent of this abuse. On the other hand, many schemes effectively banish almost 100% of convicted sex offenders to society's literal and social margins, condemning many low-risk offenders to a lifetime of isolation while 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 false sense of security.

This Article challenges prevailing judicial orthodoxy that many sex-offender residency restrictions are constitutional under the Ex Post Facto Clause. The Article applies the analytical framework of Smith v. Doe, the U.S. Supreme 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 Article proposes an innovative "positive" zoning scheme, the Sex-Offender Containment Zone, which zones high-risk convicted sex offenders back into the city in a manner that is effective, humane, and constitutional.

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INTRODUCTION

With the horrific and highly publicized disappearances, sexual assaults, and murders of Jessica Lunsford,¹ Jacob Wetterling,² and Megan Kanka,³ it is no wonder that society currently views convicted sex offenders as some sort of “human . . . toxic waste” destined to live on the literal and social margins of society.⁴ Legislators have attempted to manage this “human-waste” problem in a number of ways, such as through registration requirements⁵ and community-notification provisions.⁶ Currently, sex-offender waste management has devolved into sex-offender residency restrictions (“SORRs”), or legislative regimes that mandate wholesale restrictions on where convicted sex offenders may live, generally without any accompanying rehabilitative measures.⁷

SORRs typically prevent convicted sex offenders from residing within certain distances—generally between 500 and 2500 feet—of areas where

1. See Abbie VanSickle, *Tears Mark Jessica's Farewell*, ST. PETERSBURG TIMES (Fla.), 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 “Jessie’s Law,” which, among other things, requires sexual predators to register with law enforcement at least twice a year. Susannah A. Nesmith, *Jessie's Law Having Effect Against Sex Offenders*, MIAMI HERALD, Feb. 22, 2007, at B1.

2. See Jacob Wetterling Resource Ctr., *How We Began and the Need for Transition*, <http://www.jwrc.org/who-we-are/history.aspx> (last visited Oct. 28, 2008) (noting that Jacob Wetterling, an eleven-year-old boy from Minnesota, was kidnapped at gunpoint by an unknown assailant and that neither Jacob’s nor his abductor’s whereabouts have been identified). As a consequence, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (“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. See 42 U.S.C. § 14071 (2000 & Supp. V 2005).

3. See Megan Nicole Kanka Found., *Mission*, <http://www.megannicolekankafoundation.org/mission.htm> (last visited Oct. 28, 2008) (describing seven-year-old Megan Kanka’s rape and murder in New Jersey by a convicted child sex offender 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 when a sex offender resides in a community. Megan Nicole Kanka Found., *Megan’s Law Coast to Coast*, <http://www.megannicolekankafoundation.org/ctc.htm> (last visited Oct. 28, 2008).

4. Editorial, *Wrong Turn on Sex Offenders*, N.Y. TIMES, Mar. 13, 2007, at A18 (describing New York’s civil commitment of sex offenders as part of a “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”).

5. See *supra* note 2 (describing Jacob’s Law).

6. See *supra* note 3 (describing Megan’s Law). States have also enacted indefinite and involuntary civil-commitment regimes for certain sex offenders. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 350–71 (1997) (upholding, against due-process, double-jeopardy, and ex post facto challenges, a Kansas law providing for the civil commitment of certain dangerous sex offenders).

7. See *infra* Part II.B (discussing the effects of these regimes).

children may congregate, such as schools or child-care facilities.⁸ In spite of evidence that family members or acquaintances of the child commit almost ninety-three percent of sexual assaults committed against children seventeen years of age or younger,⁹ these schemes focus on strangers¹⁰—who account for less than ten percent of total child sexual assaults¹¹—and are strengthened by the erroneous perception that all offenders are destined to reoffend.¹²

At first glance, SORRs seem plausible because, in theory, convicted sex offenders—especially those who abuse children—would have less access to

8. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 104 (2007) (“The typical residency regulation establishes an ‘exclusion zone’ around schools, child care facilities, parks, and/or other locations where children are commonly found. The exclusion zone usually requires that a sex offender live at least 500 to 2,500 feet from any location listed as protected.” (footnotes omitted)).

9. HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 tbl.6 (2000), available at <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).

10. Michelle L. Meloy, *The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors, and Deterrence of Sex Offenders on Probation*, 16 CRIM. JUST. POL’Y REV. 211, 233 n.8 (2005). Meloy notes that:

Sex offender legislation does not target the most common and most high-risk sex crime scenarios (i.e., date rape, adult female victims, and child molestation cases involving perpetrators who often know the victim intimately). Rather, sex offender registration/community notification, for example, is designed almost exclusively to protect children from stranger assailants, a statistically rare occurrence.

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

11. SNYDER, *supra* note 9, at 10 tbl.6. This Article refers to these stranger sex offenders as “the ten percent.”

12. See JILL S. LEVENSON, SEX OFFENDER RESIDENCE RESTRICTIONS: A REPORT TO THE FLORIDA LEGISLATURE 3 (2005), available at [http://www.nacdl.org/sl_docs.nsf/issues/sex_offender_attachments/\\$FILE/Levinson_FL.pdf](http://www.nacdl.org/sl_docs.nsf/issues/sex_offender_attachments/$FILE/Levinson_FL.pdf) (stating that “[h]ousing restrictions appear to be based largely on . . . myths that are repeatedly propagated by the media” and that one such myth is that “all sex offenders reoffend”); Terance D. Miethe et al., *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types*, 43 J. RES. CRIME & DELINQ. 204, 205 (2006) (“On the basis of previous commentaries and anecdotal evidence, the dominant contemporary image of sex offenders involves attributions of uncontrolled sexual compulsion, specialization, and persistence in behavioral patterns over their criminal careers.”).

and be less tempted by the objects of their desire.¹³ In practice, however, there is no evidence proving the effectiveness of SORRs.¹⁴ Instead, they arguably worsen the problem by isolating convicted sex offenders from the

13. See LEVENSON, *supra* note 12, at 2. (“It seems to make sense that decreasing access to potential victims would be a feasible strategy for preventing sex crimes.”).

14. *Id.* (“There is no evidence, however, that such laws are effective in reducing recidivistic sexual violence.”); see also IOWA COUNTY ATTORNEYS ASS’N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA 1 (2006), available at <http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%202011%202006.pdf> (noting both that “[r]esearch shows that there is no correlation between residency restrictions and reducing sex offenses against children or improving the safety of children,” and “[r]esearch does not support the belief that children are more likely to be victimized by strangers at the covered locations [such as parks, schools, licensed child-care facilities, etc.] than at other places”); KAN. SEX OFFENDER POLICY BD., KAN. CRIMINAL JUSTICE COORDINATING COUNCIL, JANUARY 8, 2007 REPORT 27 (2007), available at <http://www.governor.ks.gov/grants/policies/docs/SOPBReport.pdf> (noting that while the public feels safer with SORRs, “[o]f the 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”); MINN. DEP’T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 11 (rev. 2004), available at [http://www.corr.state.mn.us/publications/legislative-reports/pdf/2004/Lvl%203%20SEX%20OFFENDERS%20report%202003%20\(revised%202-04\).pdf](http://www.corr.state.mn.us/publications/legislative-reports/pdf/2004/Lvl%203%20SEX%20OFFENDERS%20report%202003%20(revised%202-04).pdf); SEX OFFENDER MGMT. BD., COLO. DEP’T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 37 (2004), available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal.pdf (calling into question the efficacy of Colorado SORRs because convicted sex offenders who committed crimes while on probation, in comparison to other offenders, did not appear to favor living near schools or child-care centers, and stating that “[p]lacing restrictions on the location of correctionally [sic] 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”). The Minnesota report states:

There is no evidence in Minnesota that *residential* proximity to schools or parks affects re-offense. Thirteen [of the highest-risk] offenders 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.

MINN. DEP’T OF CORR., *supra*, at 11. The department ultimately opted to forgo a recommendation in support of SORRs, concluding that “[s]ince blanket proximity restrictions on *residential* locations of [the highest-risk] offenders do not enhance community safety, the current offender-by-offender restrictions should be retained.” *Id.* But see Jeffery T. Walker et al., *The Geographic Link Between Sex Offenders and Potential Victims: A Routine Activities Approach*, JUST. RES. & POL’Y, Fall 2001, at 15, 16 (concluding, in a study of Arkansas sex offenders who had victimized children, that “child sex offenders are largely incorrigible and they may attempt to live in areas with a high concentration of children”). However, in examining the residences of these convicted sex offenders, the Arkansas study did not examine why certain sex offenders were living in a particular area that may be near children. Walker et al., *supra*, at 22. Indeed, many offenders may have lived in these locations for any number of reasons. For example, rent may have been inexpensive there, or family may have lived 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 Schwartzberg & Annie Lo, *The Law and Policy of Sex Offender Residency Restrictions: An Analysis of Proposition 83*, at 6 (Aug. 2006) (unpublished working paper), available at http://www.uchastings.edu/site_files/plri/SexOffender.pdf.

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 counteract any recidivist impulses.¹⁵ Thrust out of mainstream urban society into a downward trajectory of “homelessness and transience,”¹⁶ the convicted sex offender suffers from increased acute “psychosocial stressors,” which is alarmingly correlated with an increased tendency to reoffend.¹⁷ Further compromising public safety, SORRs cut off easy access to treatment for those most at risk to recidivate.¹⁸

The proliferation of SORRs¹⁹ suggests that the convicted sex offender, unlike the convicted murderer, is morally irredeemable, no matter the offense²⁰ or the individual propensity to reoffend. However, in the midst of

15. See Jill S. Levenson, *Residence Restrictions and Their Impact on Sex Offender Reintegration, Rehabilitation, and Recidivism*, ATSA FORUM (Ass'n for the Treatment of Sexual Abusers, Beaverton, Or.), Spring 2007, at 7, available at <https://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”). SORRs isolate convicted sex offenders by prohibiting them from living in many parts of the city and relegating them to the margins, where inadequate access to transportation limits access to employment, support, and care. See *infra* note 17.

16. LEVENSON, *supra* note 12, at 5 (“[SORRs] can lead to homelessness and transience, which interfere with effective tracking, monitoring, and close probationary supervision.”). At the time of this Article’s publication, there exists no comprehensive study regarding the number of 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-for sex offenders in Iowa has doubled. Nat’l Alliance to End Sexual Violence, Community Management of Convicted Sex Offenders: Registration, Electronic Monitoring, Civil Commitment, Mandatory Minimums, and Residency Restrictions, <http://www.naevs.org/Policypapers/communitymanagementofconvictedoffenders.html> (last visited Oct. 29, 2008).

17. Levenson, *supra* note 15, at 7 (iterating that isolation from family, jobs, and public transportation 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” (citations omitted)).

18. See R. KARL HANSON & KELLY MORTON-BOURGNON, PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS 1, 5 (Pub. Safety Can., Report No. 2004-02, 2004), available at http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200402_e.pdf (analyzing ninety-five 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”).

19. At least sixteen states and numerous local entities have passed SORR regimes. Mark Loudon-Brown, Note, “*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* Part I.B (discussing state and local SORR regimes).

20. 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 12, *Whitaker v. Perdue*, No. 4:06-cv-140-CC (N.D. Ga. June 1, 2007), a teen engaged in sex with an underage individual, *id.* at 8, and a flasher who exposed himself to an adolescent, *Doe v. Miller*, 298 F. Supp. 2d 844, 856–57 (S.D. Iowa 2004), *rev’d*, 405 F.3d 700 (8th Cir. 2005).

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 SORR scholarship²¹ is an in-depth application, incorporating empirical data, of the complete analytical framework under the Ex Post Facto Clause²² reiterated by the Supreme Court in *Smith v. Doe*,²³ the most recent Supreme Court case involving sex-offender legislation. Similarly absent are innovative alternative solutions to the very real problem of child sex abuse. Accordingly, Part I introduces a sampling of state statutes and local ordinances pertaining to sex offenders that are likely unconstitutional as retroactive punishments under the Ex Post Facto Clause. 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,”²⁴ or land-use policies that zone sex offenders out of the city ostensibly to order perceivably disordered individuals,²⁵ but with dangerous and inhumane consequences. It then

21. Scholarship in the field has centered on (1) the deleterious practical consequences of SORRs, Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 17–22 (2006), (2) the proposition that they should be inapplicable to 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 a modern-day equivalent of the colonial punishment of banishment, Yung, *supra* note 8, at 130–39, and (4) a descriptive appraisal of SORRs limited largely to the effects test of ex post facto analysis, Loudon-Brown, *supra* note 19, at 806–27.

22. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”). Arguably, SORR regimes also impact convicted sex offenders’ rights to interstate and intrastate travel, liberty interests under substantive due process. However, these arguments have proven more vulnerable than those involving the Ex Post Facto Clause, even among judges who consider these regimes to be retroactively punitive. *See, e.g., Doe v. Miller*, 405 F.3d 700, 709–16, 718–23 (8th Cir. 2005) (rejecting both substantive-due-process and ex post facto arguments); *id.* at 723–26 (Melloy, J., concurring and dissenting) (rejecting the substantive-due-process argument, but agreeing with the ex post facto argument). Similarly, these schemes may violate the Constitution’s Equal Protection Clause because they are overinclusive. These arguments are, however, beyond the scope of this Article.

23. *Smith v. Doe*, 538 U.S. 84, 92–106 (2003) (holding that Alaska’s Sex Offender Registration Act did not violate the Federal Constitution’s Ex Post Facto Clause).

24. Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 714 (2005) (“Hopefully, [SORRs] will not mark an entrance into an era of human zoning regulations.”).

25. *See* Logan, *supra* note 21, at 11. Logan notes:

Residence 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

proposes the Sex-Offender Containment Zone (“SOCZ”), a novel “positive” zoning and land-use scheme that zones high-risk sex offenders back into the city.

I. OVERVIEW

A. REOFFENSE

Unquestionably, government has a legitimate interest in protecting children from dangerous sexual offenders, whether strangers or acquaintances, who would repeatedly prey on them.²⁶ Statistics suggest, however, that the perception that most or all convicted sex offenders are destined to reoffend varies significantly from reality.²⁷ As a whole, sex offenders are no more likely to reoffend, and are even less likely to reoffend based on reconviction rates, than are other criminal offenders.²⁸ In contrast,

dealing, gang activity, and trespassory behavior of the suspected criminal element more generally.

Id. (footnotes omitted).

26. *Owens v. State*, 724 A.2d 43, 56 (Md. 1999) (“The state has an unparalleled interest in protecting children from the potentially devastating effects of sexual abuse and exploitation . . .”).

27. *See infra* notes 28–30 and accompanying text.

28. CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, MYTHS AND FACTS ABOUT SEX OFFENDERS (2000), <http://www.csom.org/pubs/mythsfacts.html>. The Center for Sex Offender Management states:

It is noteworthy that recidivism rates for sex offenders are lower than for 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.

Id. (citation omitted). In addition, a recent study that examined “917 convicted male sex offenders on probation in 17 states” concluded that “[i]f probation success is measured . . . by the percentage of sex offenders who were not rearrested for a new sex crime, then 95.5% of this sex offender population [was] successful[.]” Meloy, *supra* note 10, at 211, 227. Further, a study that used arrest data in Illinois for the years 1990 through 1997 found that “[n]o category of sex offenders had greater than a 10% rearrest rate for a sex crime” within one, three, and five years of arrest. Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL’Y REV. 83, 95 & fig.3 (2006). Yet another study noted that:

[T]he observed sexual recidivism rate was 13.7% after approximately 5 years (compared to 13.8% in [another study]) and in both studies, sexual offenders were more likely to recidivate with a non-sexual offence than a sexual offence. The observed rates underestimate the actual rates because many offences 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.

HANSON & MORTON-BOURGON, *supra* note 18, at 15 (citations omitted); *see also* PATRICK A. LANGAN ET AL., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 34 & tbl.41 (2003), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>

data support the contention that one specific group of high-risk offenders, namely pedophiles, is resistant to treatment and very likely to reoffend, with reoffense rates of over fifty percent.²⁹ Still, according to at least one leading authority in the field, these reoffense rates are lower than those of the general criminal-offender population.³⁰

This public obsession with the ten percent—to the virtual exclusion of the vast majority of sex offenders, who sexually violate children by taking advantage of proximate relationships—has led to sometimes absurd results. The most obvious example is that, 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 sexually assaulted in the first place.³¹

B. REGIMES

Like their antecedents mandating registration and community notification, SORRs run the gamut, from relatively lenient to more moderate to comparatively severe and likely retroactive in violation of the Ex Post Facto Clause.³² Many restrictions, however, are in force for an

(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); Carl Bialik, *Underreporting Clouds Attempt to Count Repeat Sex Offenders*, WALL ST. J., Jan. 25, 2008, at B1 (“Among convicted criminals released from prison, sex offenders released from prison are less likely to be arrested for any new crime than most other offenders . . . Child molesters’ rate of recidivism is at least as low as the group of sex offenders taken as a whole.”); Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, 5 Percent of Sex Offenders Rearrested for Another Sex Crime Within 3 Years of Prison Release (Nov. 16, 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/press/rsorp94pr.htm> (“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.”).

29. Robert F. Worth, *Exiling Sex Offenders from Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1. Worth reports:

[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, [according to] Dr. Karl Hanson, a Canadian researcher and leading authority in the field.

Id. Pedophilia is “typically defined as a sexual preference for prepubescent youth.” Sample & Bray, *supra* note 28, at 91. It is also considered “a serious mental illness.” Meloy, *supra* note 10, at 233 n.7.

30. Worth, *supra* note 29.

31. See, e.g., *State 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).

32. See *infra* Part II (analyzing SORRs under the Ex Post Facto Clause).

offender's lifetime or for a significant portion of time.³³ Determining whether the effects of an SORR scheme are so severe that the SORR is unconstitutional under the Ex Post Facto Clause is largely dependent on four factors, all stemming from the *Mendoza-Martinez* "effects test"³⁴: (1) whether the regime encompasses a broad range of convicted or registered sex offenders in lieu of providing an individualized determination of each 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 a registered sex offender out of 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 reoffending; and (4) the length of time that a convicted sex offender is affected by a restriction.³⁵

1. State Regimes

Average and more moderate SORR schemes tend to avoid blanket restrictions on all sex offenders but apply to a broad subcategory of child-victimizing or sexually violent offenders,³⁶ though without individualized determinations of dangerousness. In addition, state residency restrictions typically erect distance markers of 1000 feet³⁷ and designate schools and

33. See, e.g., MIAMI BEACH, FLA., CODE § 70-402 (Mun. Code Corp., Municode through July 16, 2008) (providing for no relief from the residency restraints); see also *infra* note 156 and accompanying text.

34. See *infra* note 76 and accompanying text (describing the factors in *Mendoza-Martinez*).

35. See *infra* Part II.B (engaging in an effects analysis of SORRs).

36. See, e.g., ARK. CODE ANN. § 5-14-128(a) (2006) (applying to "sex offender[s] who [are] required to register under the Sex Offender Registration Act of 1997 . . . and who ha[ve] been assessed as . . . Level 3 ['high-risk' offenders] or Level 4 ['sexually violent predators']"); FLA. STAT. § 947.1405(7)(a)(2) (2007) ("If the victim was under the age of 18, [the sex offender is] prohibit[ed from] living within 1,000 feet of a school, day care center, park, playground, . . . or other place where children regularly congregate."); IOWA CODE § 692A.2A(1) (2007) (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"); LA. REV. STAT. ANN. § 14:91.1(A)(2) (Supp. 2008) (restricting the residency of a "sexually violent predator"); LA. REV. STAT. ANN. § 15:560.1(3) (Supp. 2008) (defining "sexually violent predator" as "a person who has been convicted of a sex 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").

37. Logan, *supra* note 21, at 6-7; see, e.g., FLA. STAT. § 794.065(1) (2007); GA. CODE ANN. § 42-1-15(b) (Supp. 2008); IND. CODE ANN. § 35-42-4-11(c) (West Supp. 2008); LA. REV. STAT. ANN. § 14:91.1(A)(2) (Supp. 2008); MICH. COMP. LAWS SERV. § 28.733(f) (LexisNexis Supp. 2008); MO. REV. STAT. § 566.147(1) (Supp. 2006); N.C. GEN. STAT. § 14-208.16(a) (2007); OHIO REV. CODE ANN. § 2950.034(A) (West Supp. 2008); TENN. CODE ANN. § 40-39-211(a) (Supp. 2008).

parks as the epicenters of distance restrictions.³⁸ In contrast, state-crafted residency restrictions on the harsher end of the spectrum tend to penalize all sex offenders, lumping nonviolent lawbreakers with violent offenders, statutory rapists, and child molesters.³⁹ These restrictions generally establish distance markers of 2000 feet⁴⁰ and/or ban offenders from residing within a certain distance of a more opaque and vaguely defined site, such as an “area where minors may congregate.”⁴¹

2. Local Regimes

In contrast to their statehouse counterparts, local residency restrictions have gone even further in condemning sex offenders to a city’s or town’s literal fringes, given the comparatively small size of the locales. Some local governments have enacted local residency restrictions in response either to

38. Logan, *supra* note 21, at 7.

39. See, e.g., ALA. CODE § 15-20-26(a) (LexisNexis Supp. 2007) (“Unless 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)); GA. CODE ANN. § 42-1-15(a)–(b) (Supp. 2008) (applying to any “individual,” which is defined for this purpose as “a person who is required to register” as a sex offender); KY. REV. STAT. ANN. § 17.545(1) (West Supp. 2008) (“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.”); OKLA. STAT. ANN. tit. 57, § 590(A) (West Supp. 2008) (“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[,] . . . park . . . or licensed child care center . . .”). The federal Jacob’s Law, for example, defines 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) (2000); see also *supra* note 2 (discussing Jacob’s Law). The law subsequently defines “criminal offense against a victim who is a minor” as “a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses,” 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) (2000 & Supp. V 2005).

40. See ALA. CODE § 15-20-26(a) (LexisNexis Supp. 2007) (establishing a 2000-foot distance marker); IOWA CODE § 692A.2A(1)–(2) (2007) (“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 . . . a public or nonpublic elementary or secondary school or a child care facility.”).

41. See, e.g., FLA. STAT. § 947.1405(7)(a)(2) (2007) (prohibiting offenders with victims under eighteen 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)); GA. CODE ANN. § 42-1-15(b) (Supp. 2008) (using an “area where minors congregate” as a parameter). In contrast, Illinois has a more lenient residency restriction, under which “[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.” 720 ILL. COMP. STAT. 5/11-9.3(b-5) (2004). Similarly, Arkansas is the only state that not only provides for a “tiered risk scheme,” but also requires an individualized assessment of the dangerousness of a sex offender in order for the state restrictions to apply. Yung, *supra* note 8, at 125; see ARK. CODE ANN. § 5-14-128(a) (Supp. 2007).

inaction by their respective state legislatures or to action by neighboring jurisdictions.⁴² Others have promulgated residency exclusions on sex offenders in addition to such action at the state level.⁴³ For instance, a sampling of local residency exclusions indicates not only that their distance markers tend to be greater, averaging 2000 feet and beyond, but also that they are more likely to zone out a greater number of sex offenders.⁴⁴

More often than not, the ordinances do not require or ensure the individualized assessment of offenders to determine their likelihood to

42. For instance, the Nebraska cities of La Vista and Omaha have enacted ordinances that proscribe high-risk sex offenders from residing within 500 feet 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 (noting these ordinances and stating that these “towns were motivated by a desire to avoid becoming havens to sex offenders fleeing Iowa after Iowa adopted . . . onerous restrictions”). Moreover, like Nebraska, New Jersey has failed to adopt statewide residency restrictions on sex offenders, and consequently, localities have attempted to fill the void. See *infra* note 44. 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 (“[W]hen one jurisdiction restricts the residency of its sex offenders by creating exclusion zones, neighboring communities are pressured to follow suit to avoid becoming a haven for local sex offenders.”).

43. See, e.g., *infra* note 44 (citing Miami Beach, Florida, and Polk County, Iowa, ordinances); *supra* notes 40–41 (citing statewide legislation from Iowa and Florida).

44. For instance, on June 8, 2005, the City of Miami Beach, Florida, adopted an ordinance that prohibits certain sex offenders—persons convicted of sexual battery, lewd or lascivious offenses committed upon or in the presence of a person less than sixteen years of age, sexual performance by a child, and selling or buying of minors, if “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., Ordinance 2005-3485, § 1 (June 8, 2005) (codified as amended at MIAMI BEACH, FLA., CODE § 70-402(a)), 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., NASSAU COUNTY, N.Y., ADMIN. CODE § 8-130.6 (General Code, E-Codes through Dec. 31, 2007) (“It 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 of the property line of a park.”); Polk County, Iowa, Ordinance No. 238 (2005), available at <http://www.co.polk.ia.us:8080/downloads/board/OffenderResidencyOrdinance.pdf> (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”); TOWNSHIP OF BRICK, N.J., CODE § 357-1 (General Code, E-Codes through Aug. 15, 2008) (banning sex offenders from living “within 2,500 feet of any school, park, playground, day-care center, or Board of Education approved school bus stop”); TOWNSHIP OF FLORENCE, N.J., CODE § 70-15 (General Code, E-Codes through 2007) (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”); TOWNSHIP OF FRANKLIN, N.J., CODE § 322-1 (General Code, E-Codes through Sept. 15, 2008) (extending the residency restriction to 3000 feet for high-risk offenders, 2500 feet for moderate-risk offenders, and 1000 feet for low-risk offenders).

reoffend and their true danger to the public.⁴⁵ 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 Ex Post Facto Clause⁴⁶ by providing “grandfather” exceptions to offenders.⁴⁷ These exceptions apply to an offender who has both committed and been convicted of a sex crime before the effective date of the ordinance and who has established, reported, or registered a particular residence prior to the effective date of the local law.⁴⁸ However, these exceptions are premised on the notion that sex offenders’ residences are fixed. At any given time, a sex offender may reestablish residence for any number of reasons, such as a change in economic circumstances.⁴⁹ In this way, the consequences to the sex offender of many local residency restrictions fall on the harsh end of the spectrum of potential restrictions.

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 reoffend, there are a number of other unintended practical consequences of the current SORR approach that, combined, may render such an approach less effective at protecting children than other possible approaches. For instance, the Iowa County Attorneys Association, an organization composed of Iowa’s *prosecutors*, decried Iowa’s scheme—which mandates a 2000-foot residency barrier⁵⁰—arguing that it effectively guts sex-offender registries and the community-notification laws that feed off of them.⁵¹ When convicted sex offenders have

45. For example, none of the ordinances cited *supra* at note 44 include mandates to assess the dangerousness of convicted sex offenders.

46. See *infra* Part II.B (discussing the ex post facto effects test).

47. See *infra* note 48 and accompanying text.

48. See, e.g., MIAMI BEACH, FLA., CODE § 70-402(d)(1) (Mun. Code Corp., Municode through July 16, 2008) (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); NASSAU COUNTY, N.Y., ADMIN. CODE § 8-130.8 (General Code, E-Codes through Dec. 31, 2007) (applying exceptions to registered sex offenders who have “established residences or domiciles” before the law’s effective date); Polk County, Iowa, Ordinance No. 238 (2005), available at <http://www.co.polk.ia.us:8080/downloads/board/OffenderResidencyOrdinance.pdf> (stating that the exception is applicable if the sex offender “has established a residence” before the effective date of the law); TOWNSHIP OF FLORENCE, N.J., CODE § 70-15 (General Code, E-Codes through 2007) (noting that the local residency restriction “shall not apply to a person who has established a residence prior to enactment of this article”).

49. Other reasons may include the sale of a residence by a landlord, the death of an owner of the residence, who may be a relative or friend of the offender, or pressure from the community to move.

50. See *supra* note 40.

51. IOWA COUNTY ATTORNEYS ASS’N, *supra* note 14, at 1–2. The statement notes:

no physical address because they are barred from living in most urban locations, they neither are capable of registering on a registry nor do they have the incentive to register.

As a practical matter, SORRs have zoned convicted sex offenders out of most of Iowa's cities and towns,⁵² as well as Miami, Florida,⁵³ and whole counties in the Atlanta, Georgia, metropolitan area.⁵⁴ They similarly would zone certain convicted residents out of Minneapolis–St. Paul, Minnesota,⁵⁵ Denver and other Colorado metropolitan areas,⁵⁶ Los Angeles, and San Francisco.⁵⁷

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 to 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.

Id. A cynic might be tempted to think that the first sentence of this quotation illustrates the point of SORRs—i.e., that sex-offender registries and community-notification provisions are simply part of a larger design to ban convicted sex offenders almost wholesale from communities. However, the author attributes the best intentions to supporters of these regimes.

52. Justice Melloy's opinion in *Miller* reiterated the district court's findings of fact regarding Iowa's 2000-foot SORR:

"[S]ex 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."

Doe v. Miller, 405 F.3d 700, 724 (8th Cir. 2005) (Melloy, J., concurring and dissenting) (alteration in original) (quoting *Doe v. Miller*, 298 F. Supp. 2d 844, 869 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005)).

53. John Zarrella & Patrick Oppmann, *Florida Housing Sex Offenders Under Bridge*, CNN.COM, Apr. 6, 2007, <http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/> (reporting that convicted sex offenders have formed a colony of sorts under a bridge as a result of a 2500-foot SORR enacted by many of Florida's cities, including Miami).

54. Jill Young Miller, *Registered Sex Offenders Ordered to Find New Homes*, ATLANTA J.-CONST., May 19, 2006, at A1 ("In Rockdale County, southeast of Atlanta, 48 of 51 sex offenders must move because they live [within 1000 feet of] a school bus stop . . .").

55. MINN. DEP'T OF CORR., *supra* note 14, at 10 ("[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." (citation omitted)).

56. SEX OFFENDER MGMT. BD., *supra* note 14, at 4 (determining that if Colorado were to enact an SORR, there would be "extremely limited areas" in which sex offenders could reside because of the "large number of schools and childcare centers . . . located within various neighborhoods").

57. Schwartzberg & Lo, *supra* note 14, at 1, 3 (positing that California's Proposition 83, which "applies to all sex offenders convicted of a sex[] offense since July 1, 1944," and 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

From an economic perspective, instead of being a contributor to the community's coffers, a homeless convicted sex offender likely becomes a fiscal burden. Similarly, when a convicted sex offender is not on a registry and is therefore more difficult to locate, and when SORRs apply to all types of sex offenders, enforcement costs of SORRs and sex-offender registries increase.⁵⁸

In the judicial context, the Iowa County Attorneys Association anecdotally noted that Iowa's scheme resulted in a decrease in offenders' confessions "in cases where defendants usually confess after disclosure of the offense by the child."⁵⁹ These prosecutors further noted a decrease in plea bargains by defendants charged with sex crimes.⁶⁰ As the organization stated: "Plea 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 welfare of child victims and decreases the number of convictions of sex offenders . . ."⁶¹ This decrease in plea agreements would result in fewer offenders facing consequences for their crimes or being required to seek treatment.⁶² Offenders are then emboldened to reoffend.

Unintentionally, legislators are providing optimal conditions for convicted sex offenders to reoffend and have lulled the public into a "false sense of security."⁶³ Moreover, a race to the bottom ensues as neighboring communities rush to implement SORRs in order to prevent convicted sex offenders from living there.⁶⁴

such as San Francisco and Los Angeles"). Proposition 83 is among the "nation's toughest" SORR regimes and was passed by seventy percent of the California electorate in November 2006. Jenifer Warren, *Judge Blocks Part of Sex Offender Law*, L.A. TIMES, Nov. 9, 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, the law 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 Offender Restrictions*, S.F. CHRON., Dec. 13, 2007, at B2.

58. Schwartzberg & Lo, *supra* note 14, at 6 ("The 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 involved . . ."); *see also* IOWA COUNTY ATTORNEYS ASS'N, *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.").

59. IOWA COUNTY ATTORNEYS ASS'N, *supra* note 14, at 3.

60. *Id.*

61. *Id.*

62. *Id.*

63. 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.").

64. *Id.* 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,

II. THE FEDERAL CONSTITUTIONAL CASE: EX POST FACTO

Like their antecedents,⁶⁵ SORRs have withstood many challenges under the Ex Post Facto Clause.⁶⁶ For instance, the Eighth Circuit has upheld Arkansas's and Iowa's SORR schemes—both of which involve relatively severe 2000-foot bans—under the Ex Post Facto Clause.⁶⁷

Despite this precedent, this Article concludes that, in the face of a 5–4 majority in *Smith v. Doe*—the last Supreme Court case involving sex-offender legislation, in which the Court upheld Alaska's sex-offender registration-notification act under the Ex Post Facto Clause—there is room for optimism.⁶⁸ 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,⁶⁹ Justice Souter, with whom dissenters Justices Ginsburg and Breyer substantially agreed,⁷⁰ expressly noted that “considerable” evidence suggested the law was substantively as much an

however, state preemption statutes may bar local entities from enacting additional or more restrictive legislation.

65. *Smith v. Doe*, 538 U.S. 84, 89–106 (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, 370–71 (1997) (holding that Kansas's legislative scheme of involuntarily committing certain convicted sex offenders with mental abnormalities was constitutional under the Ex Post Facto Clause).

66. *See, e.g., Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1179–83 (E.D. Cal. 2007) (denying the plaintiffs' motion to enjoin enforcement of California's voter-approved residency-restriction statute, the Sexual Predator Punishment and Control Act—which prohibits registered sex offenders from residing within 2000 feet of any school or park where children regularly gather—because of an interpretation that the statute does not apply retroactively); *Doe v. Baker*, No. CIV.A. 1:05-CV-2265, 2006 WL 905368, at *3–6 (N.D. Ga. Apr. 5, 2006) (holding that Georgia's sex-offender exclusion regime does not constitute an additional punishment prohibited by the Ex Post Facto Clause); *People v. Leroy*, 828 N.E.2d 769, 778–82 (Ill. App. Ct. 2005) (holding that Illinois's SORR scheme does not violate the Ex Post Facto Clause); *State v. Seering*, 701 N.W.2d 655, 666–69 (Iowa 2005) (upholding the constitutionality of Iowa's SORR regime under the Ex Post Facto Clause).

67. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006) (emphasizing the individualized assessment of dangerousness provided for in the Arkansas regime); *Doe v. Miller*, 405 F.3d 700, 718–23 (8th Cir. 2005).

68. *See* Bret R. Hobson, Note, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 GA. L. REV. 961, 980–81 (2006). Hobson parallels sex-offender registration and community-notification statutes with SORRs:

[C]ourts assessing ex post facto implications of [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.

Id. (footnotes omitted). However, while *Smith* retains its value as precedent for the Court were it to consider the constitutionality of an SORR regime, it remains to be seen whether a reasonable cause for optimism exists, given that two Justices have been replaced since *Smith*.

69. *Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J., concurring in the judgment).

70. *See id.* at 114–18 (Ginsburg, J., dissenting).

unconstitutional retroactive punishment as a permissible civil regulation.⁷¹ Increasingly, cracks also have appeared in the judicial wall sanctioning SORR regimes under the Ex Post Facto Clause.⁷²

In *Smith*, the Court reiterated that the analytical framework for ex post facto inquiry is based on two central questions: (1) Is a legislature's explicit or implicit intent civil and regulatory, or criminal and punitive?⁷³ (2) Has a challenger proffered the "clearest proof"⁷⁴ to demonstrate that the regime's effects are nonetheless punitive⁷⁵ under the *Mendoza-Martinez* test, the most common judicial schema used to analyze ex post facto challenges?⁷⁶

A. THRESHOLD INQUIRY: LEGISLATIVE INTENT

As part of the threshold ex post facto inquiry of assessing whether the legislature's explicit or implicit intent in enacting a statute was regulatory or punitive—and separate and apart from the *Mendoza-Martinez* effects test—Justice Souter looked to several indicators in *Smith*.⁷⁷ These indicators included whether the legislature (1) expressly denoted the statute as civil,⁷⁸ (2) placed some or all of the sex-offender registration and community-notification legislation in the criminal section of the state's code, such as in the criminal-procedure section,⁷⁹ (3) required that notification of the

71. *Id.* at 107 (Souter, J., concurring in the judgment).

72. *See Miller*, 405 F.3d at 726 (Melloy, J., concurring and dissenting) (stating that the Iowa SORR regime constituted a punishment and was, therefore, an unconstitutional ex post facto law); *People v. Leroy*, 828 N.E.2d 769, 785 (Ill. App. Ct. 2005) (Kuehn, J., dissenting) (stating that Illinois's SORR regime was an unconstitutional ex post facto law); *Commonwealth v. Baker*, No. 07-M-00604, slip op. at 33 (Ky. Dist. Ct. 2007), http://theparson.net/so/residency_restrictions.source.prod_affiliate.79.pdf (striking down Kentucky's SORR scheme as an "ex post facto punishment which is barred by both the United States Constitution and the Kentucky Constitution").

73. *Smith*, 538 U.S. at 92.

74. *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)) (internal quotation marks omitted).

75. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

76. *Id.* at 97. The Court noted:

In analyzing the effects of the Act we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez* as a useful framework. These factors, which migrated into our *ex post facto* case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and *Ex Post Facto* Clauses.

Id. (citation omitted) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

77. *See id.* at 107–08 (Souter, J., concurring in the judgment).

78. *Smith*, 538 U.S. at 107–08 (Souter, J., concurring in the judgment) ("The Act does not expressly designate the requirements imposed as 'civil,' a fact that itself makes this different from our past cases, which have relied heavily on the legislature's stated label in finding a civil intent.").

79. *See id.* at 108 ("The 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

registration requirements accompany a guilty plea or subsequent conviction,⁸⁰ and (4) with respect to enforcement of the statute, required that criminal agencies, such as police departments, receive the information, in lieu of more regulatory agencies.⁸¹

Many judges, even those who ultimately believe that an SORR scheme has a punitive effect, have accepted almost wholesale the proposition that, even without affixing a clear “civil” label to the statute, the legislature’s intent was strictly civil, given its stated desire to protect the health, safety, and welfare of children.⁸² On the other hand, at least one court has deemed this examination of intent wanting, and it has identified additional markers to consider when examining the legislative intent behind an SORR regime.⁸³ These measures are whether (1) the title of the statute invokes criminal and punitive language, such as “offenses” and “punishment,” (2) the legislature commissioned preliminary studies assessing what financial impact residency restrictions would have on a state’s correctional system, and (3) the statute calls for criminal sanctions, such as jail time, or classifies violations as misdemeanors or felonies in lieu of simply assessing fines.⁸⁴

Courts have dismissed Justice Souter’s use of statutory placement of an SORR in the criminal code as a criterion for assessing a legislature’s intent, contending that mere “location and labels”⁸⁵ rarely are indicative of such intent because criminal codes often contain a myriad of civil provisions.⁸⁶ Similarly, courts 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 an SORR scheme, a rigorous examination of legislative

among the code’s health and safety provisions, which are civil, the section requiring registration occurs in the title governing criminal procedure.” (citations omitted)).

80. *See id.* (“What is more, the legislature made written notification of the requirement a necessary condition of any guilty plea, and, perhaps most significant, it mandated a statement of the requirement as an element of the actual judgment of conviction for covered sex offenses.” (citation omitted)).

81. *See id.* (“Finally, 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.” (citations omitted)).

82. *See, e.g., Doe v. Miller*, 405 F.3d 700, 723 (8th Cir. 2005) (Melloy, J., concurring and dissenting) (“I agree with the majority that the purpose of [the SORR] is to protect the public. This purpose is nonpunitive”); *People v. Leroy*, 828 N.E.2d 769, 785 (Ill. App. Ct. 2005) (Kuehn, J., dissenting) (“The legislative intent behind [the SORR] is beyond question. Legislators wanted to find a way to better protect children from people capable of taking sexual advantage of them.”).

83. *Commonwealth v. Baker*, No. 07-M-00604, slip op. at 16–18 (Ky. Dist. Ct. 2007), http://theparson.net/so/residencyrestrictions.source.prod_affiliate.79.pdf (holding that Kentucky’s SORR scheme violated the Ex Post Facto Clause based simply on the threshold question of intent).

84. *Id.*

85. *Lee v. State*, 895 So. 2d 1038, 1042 (Ala. Crim. App. 2004) (quoting *Smith*, 538 U.S. at 94).

86. *Id.* (upholding Alabama’s SORR scheme under the Ex Post Facto Clause).

intent using these numerous measures likely would reveal more *Smith*-like “close case[s]”⁸⁷ than not.

B. EFFECTS

1. Challenger’s Burden of Proof

Under the effects test, the complainant has the burden of showing by the “clearest proof” that a legislative regime, despite a civil intent, has punitive effects.⁸⁸ In *Smith*, Justice Souter contended that this “heightened” burden of proof is appropriate “only when the evidence of legislative intent [in the threshold inquiry] clearly points in the civil direction”—an occurrence that, in this “close case,” did not present itself.⁸⁹

In spite of Justice Souter’s concurrence, 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 *Mendoza-Martinez*.⁹⁰ 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 burden of proof is one that requires only “substantial or reasonable” evidence.⁹¹ By removing a heightened procedural bar in “close cases,” this lower standard of proof would require courts to analyze more carefully the substantive effects of a potentially punitive regime.

2. *Mendoza-Martinez* Factors

a. *Traditionally Regarded as a Historical Punishment*

In *Smith*, the Court looked to the *Mendoza-Martinez* framework to evaluate whether the effects of Alaska’s registration–notification scheme on sex offenders were retroactively punitive.⁹² The first factor in the effects analysis is whether society and courts traditionally and historically have regarded the legislative scheme, though regulatory in intent, as punishment.⁹³ 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.

87. *Smith*, 538 U.S. at 107 (Souter, J., concurring in the judgment).

88. *Id.* (quoting *Unites States v. Ward*, 448 U.S. 242, 249 (1980)) (internal quotation marks omitted).

89. *Id.*

90. *See, e.g.*, *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) (“[T]he ultimate question always remains whether the punitive effects of the law [under *Mendoza-Martinez*] are so severe as to constitute the ‘clearest proof’ that a statute . . . should . . . be deemed to impose *ex post facto* punishment.”); *Lee*, 895 So. 2d at 1043.

91. *See also Smith*, 538 U.S. at 115 (Ginsburg, J., dissenting) (also arguing for a lessened burden of proof, preferring instead a neutral evaluation of a statute’s “purpose and effects”).

92. *Id.* at 97 (majority opinion).

93. *See id.*

In *Smith*, the Court distinguished Alaska's sex-offender registration-notification scheme from the colonial punishments of public shaming, or permanent social banishment from a community,⁹⁴ and actual expulsion, or physical banishment.⁹⁵ It noted that any public shame accruing from the statute was a consequence of the efficient Internet dissemination 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.⁹⁶ The Court noted, as evidence that the statute's true intent was not to socially or physically ostracize offenders but instead to arm the public with protective information, that the state did not permit the public to post comments underneath a sex offender's personal information on the website.⁹⁷

In contrast to statutes that require registration of sex offenders and notification to communities, SORRs *effectively* banish convicted sex offenders from many cities and towns, especially their urban cores. While many convicted sex offenders may visit prohibited zones under SORR regimes and therefore are not *literally* physically banished,⁹⁸ they have been “in effect cast . . . out of the community”⁹⁹ and are reduced to living on the margins in motels, in rural areas, and under freeways, or forced to move elsewhere (even out of state) because of limited access to employment, housing, and transportation.¹⁰⁰ Visitation rights are of little consequence when access from the margins is impinged.

94. *See id.* at 97–99.

95. *See id.* at 98. *But see Miller*, 405 F.3d at 725 (Melloy, J., concurring and dissenting) (concluding that Iowa's SORR regime was “substantial[ly] similar[] to banishment”); *People v. Leroy*, 828 N.E.2d 769, 786–87 (Ill. App. Ct. 2005) (Kuehn, J., dissenting) (stating that Illinois's SORR regime “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”); *State v. Seering*, 701 N.W.2d 655, 671–72 (Iowa 2005) (Wiggins, J., concurring in part and dissenting in part) (opining that Iowa's SORR “effectively banishes an offender from a community”); Yung, *supra* note 8, at 137–39 (equating SORRs to the former Soviet system of “internal exile,” or “propiska”).

96. *See Smith*, 538 U.S. at 98–99.

97. *See id.* at 99.

98. *See 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”); *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 thereby enjoy[] her support”).

99. *Miller*, 405 F.3d at 724 (Melloy, J., concurring and dissenting) (quoting *Smith*, 538 U.S. at 98).

100. *See supra* notes 52–54 and accompanying text (discussing sex offenders' situations in Iowa, Florida, and Georgia).

In addition, local residency exclusions, which are often more severe than their state counterparts,¹⁰¹ only compound the effective physical banishment of statewide restrictions, an effect that is exacerbated by local entities' race to the bottom in keeping with the Not In My Backyard ("NIMBY") phenomenon.¹⁰² The effect is aggravated by long distance markers, expanded lists of proscribed sites, and indefinite time frames.¹⁰³ Therefore, SORRs not only effectively banish sex offenders from their original communities,¹⁰⁴ but also prevent them from being "admitted easily into a new one."¹⁰⁵ This effective physical banishment heightens the social banishment already experienced by convicted sex offenders as a result of prior registration and notification statutes.¹⁰⁶

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,¹⁰⁷ such as the Kansas sex-offender regime permitting the indefinite and involuntary commitment of certain sex offenders with certain mental diseases, which was upheld in *Kansas v. Hendricks* under the threshold *ex post facto* inquiry for lack of punitive intent.¹⁰⁸ 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 residences."¹⁰⁹

Residency restrictions, however, restrain almost all registered sex offenders from residing in many cities and towns, regardless of whether they

101. See *supra* Part I.B.2 (discussing local regimes).

102. See *supra* note 42 (discussing the NIMBY phenomenon).

103. See *supra* notes 33, 40–41 and accompanying text (describing state statutes imposing restrictions on sex offenders).

104. See Mansnerus, *supra* note 10 (reporting on a seventy-seven-year-old man who, after serving seven years in prison for molesting three children, two of whom were his grandchildren, may be expelled from his home because it is located within a "child safety zone" under local residency restrictions).

105. *Smith v. Doe*, 538 U.S. 84, 98 (2003).

106. See *id.* at 109 (unnumbered footnote) (Souter, J., concurring in the judgment) (noting that the Second Circuit has found "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" (quoting *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997))).

107. *Id.* at 100 (majority opinion) (citing *Hudson v. United States*, 522 U.S. 93, 104 (1997)).

108. *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997) ("[W]e cannot say that [the Kansas legislature] acted with punitive intent. We therefore hold that the Act . . . is not punitive. [This] conclusion . . . thus removes an essential prerequisite for . . . [the challenger's] . . . *ex post facto* claim[.].").

109. *Smith*, 538 U.S. at 100.

have been individually determined to pose a risk to public safety. SORRs also effectively prevent many registered sex offenders, regardless of risk, from residing in some states because of the lack of housing, employment opportunities, and access to transportation in unrestricted zones.¹¹⁰ 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 access to transportation almost certainly limits these opportunities. Alternatively, registered sex offenders have the option to relocate to communities where there are no restricted zones, such as the community in which the sex offender in *People v. Leroy* lived.¹¹¹ However, given the rising popularity of SORRs,¹¹² it is arguable whether this option actually exists. In addition, even courts upholding the constitutionality of residency restrictions under the Ex Post Facto Clause recognize that these restrictions, including relatively mild restrictions of 500 feet, are not “minor or indirect.”¹¹³ This is so because SORRs disable a sex offender’s freedom to live where he chooses,¹¹⁴ which is especially problematic if where he chooses to live would place him close to support systems, such as family, that may deter him from reoffending.

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, specifically those of retribution and deterrence.¹¹⁵ In *Smith*, the majority opined that although Alaska conceded that its registration–notification statute “might deter future crimes,” this effect was not determinative, as “[a]ny number of governmental programs might deter crime without imposing punishment.”¹¹⁶ 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 time that an offender must register and remain on the sex-offender website were

110. See *supra* notes 15–17 and accompanying text.

111. *People v. Leroy*, 828 N.E.2d 769, 780 (Ill. App. Ct. 2005) (noting that the sex offender was living in “nearby Belleville” and that there was “absolutely no evidence that [he] ha[d] been unable to assimilate himself into this new community”).

112. See *supra* note 19 (explaining that at least sixteen states have SORRs).

113. *Smith*, 538 U.S. at 100 (“If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.”); *Leroy*, 828 N.E.2d at 781 (refusing to characterize the effect of Illinois’s 500-foot regime as “minor or indirect”).

114. See *Leroy*, 828 N.E.2d at 781. The majority in *Smith* similarly emphasized that, under Alaska’s registration–notification statute, 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 *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (conceding that the Iowa regime imposed an affirmative disability or restraint, though not as disabling as the indefinite civil commitment of sex offenders at issue in *Kansas v. Hendricks*).

115. *Miller*, 405 F.3d at 720 (“The [next] factor that we consider is whether the law promotes the traditional aims of punishment—deterrence and retribution.”).

116. *Smith*, 538 U.S. at 102.

“reasonably related to the [recidivist] danger” of sex offenders.¹¹⁷ According to the Court, this reasonable relation to recidivism was “consistent with [Alaska’s] regulatory objective” in enacting the statute.¹¹⁸

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 making choices that would illegally impact the health, safety, and welfare of society.

However, as Justice Souter argued in *Smith*, it is “naive” to believe—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.¹¹⁹ Given that sex offenders have always lived among us—indeed, perhaps just in the other room—and the proven lack of effectiveness of SORRs,¹²⁰ 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.”¹²¹ Moreover, the lack of data showing 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 than focusing on the future.

Just as Justice Souter indicated in *Smith* that the retributive perception of Alaska’s registration–notification statute was heightened by “[w]idespread dissemination” of offenders’ photographs and personal information in an effort “not only to inform the public but also to humiliate and ostracize the convicts,”¹²² 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 limiting sex offenders’ access to children, the opposite is likely more plausible. As the dissent in *Leroy* noted, the sex offender there had access to all the children he could want during the daytime while the children were at the school near his mother’s house—access that he had had in the thirty-six years that he had resided at the address.¹²³

Furthermore, empirical studies have shown SORR schemes to be ineffective and perhaps even to aggravate the problem, feeding the perception that there is a retributive purpose attached to them.¹²⁴ One of the main reasons that these regimes are ineffective is that a mere zoning

117. *Id.*

118. *Id.*

119. *Id.* at 108–09 (Souter, J., concurring in the judgment).

120. *See supra* notes 14–18 and accompanying text.

121. *Smith*, 538 U.S. at 109 (Souter, J., concurring in the judgment).

122. *Id.*

123. *People v. Leroy*, 828 N.E.2d 769, 793 (Ill. App. Ct. 2005) (Kuehn, J., dissenting).

124. *See supra* notes 14–18 and accompanying text.

restriction does not deter an individual who wants to sexually offend against a child. 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.¹²⁵ Even in those regimes where distance markers are more than Illinois’s 500 feet, including those with 2000-foot markers, 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.”¹²⁶ As long as they do not sleep in the restricted zone, they can linger around children in the zone during the day.

Outside of the restricted zone, determined individuals still have access to children, perhaps in the sex offenders’ own houses or neighborhoods. Indeed, living outside the zone still does not prevent would-be or previously convicted sex offenders who are family or acquaintances of children from sexually abusing them in the “familiar zone” of a private residence.¹²⁷ Under blanket residency bans and in the absence of individualized residency restrictions, these would-be or current offenders are not subject to similar residency restraints.¹²⁸ 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 the offender resides 501 or 2001 feet from a school or child-care facility.¹²⁹

Moreover, the absence of an individualized 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, a person convicted of statutory rape for having consensual sex with an underage individual likely would not pose a risk to toddlers in a daycare center near his residence.¹³⁰ Conversely, a grandparent convicted of molesting his young grandchildren may safely be able to reside near a high school.¹³¹

125. *Leroy*, 828 N.E.2d at 792 (Kuehn, J., dissenting).

126. *Id.*

127. *See supra* note 9 and accompanying text (explaining that over ninety percent of sex offenders are family or acquaintances of the victim).

128. For an example of such an occurrence, see *supra* note 31.

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

130. *Id.* at 791.

131. *Id.*

d. A Rational Connection to a Nonpunitive Purpose

The fourth factor of the *Mendoza-Martinez* test is whether the regulatory regime “has a rational connection to a nonpunitive purpose.”¹³² The Court in *Smith* viewed this as “a ‘[m]ost significant’ factor” in assessing the punitive effects of a statutory regime.¹³³

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.¹³⁴ Similarly, lower courts have held that the purpose of SORRs is to “protect children from known child sex offenders.”¹³⁵

Given the focus on public safety, this factor appears to be a proxy for the threshold inquiry of regulatory intent, an inquiry that historically has evaded much scrutiny in the SORR context.¹³⁶ Especially in cases where intent is arguably a “close call,” as it was in *Smith*, a SORR regime may not satisfy this element. For instance, given that offenders 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” for SORR application¹³⁷—even though the offenders may not pose a high risk to public safety—further weighs against the existence of a nonpunitive purpose. Arguably, these characteristics of many SORR schemes lend a veneer of retribution.¹³⁸

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

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

133. *Id.* at 102 (alteration in original) (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)).

134. *Id.* at 102–03 (“As the Court of Appeals acknowledged, the Act has a legitimate nonpunitive purpose of ‘public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].’” (alteration in original) (quoting *Doe v. Otte*, 259 F.3d 979, 991 (2001), *rev’d*, 538 U.S. 84 (2003))).

135. *Leroy*, 828 N.E.2d at 782; *see also Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (“In light of the high risk of recidivism posed by sex offenders, the legislature reasonably could conclude that [the SORR] would protect society by minimizing the risk of repeated sex offenses against minors.” (citation omitted)).

136. *See supra* Part II.A.

137. *Smith*, 538 U.S. at 109 (Souter, J., concurring in the judgment) (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”).

138. *See supra* notes 121–31 and accompanying text.

nonpunitive aims [the legislation] seeks to advance.”¹³⁹ In light of this loose standard, courts almost unfailingly have held that SORR regimes satisfy this prong, given a legislative purpose to protect children and perceived high rates of reoffense for convicted sex offenders.¹⁴⁰

This standard, however, masks the lack of almost any fit between SORR regimes and public safety. In the face of empirical data evidencing that SORRs are ineffective¹⁴¹ and grossly overinclusive,¹⁴² the fit between an SORR 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 individualized assessment of dangerousness in Alaska’s registration–notification regime was of little consequence, given that the Court found that it was reasonable for the legislature to “conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism.”¹⁴³ This conclusion is questionable, however, given recent data indicating that the recidivism rate of sex offenders is no higher, and likely lower, than that of other offenders.¹⁴⁴

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 reoffends against a child. However, while the lowered reoffense statistics for sex offenders do not guarantee that *no* sex offender will *ever* reoffend, they are persuasive in arguing against the rationality of sweeping restrictions on all sex offenders. Arguably, these restrictions target many more registered sex offenders for exclusion than is empirically warranted. If the fear were drawn from extremist lines that *any* sex offender would reoffend against children, or that a handful of known high-risk “stranger” child sex offenders would reoffend, then it would be more rational to return to the status quo ante and apply individually tailored residency restrictions to just these individuals instead of to an entire population that is not likely to victimize children.

139. *Smith*, 538 U.S. at 103.

140. *See, e.g., Miller*, 405 F.3d at 721 (8th Cir. 2005) (“In light of the high risk of recidivism posed by sex offenders, the legislature reasonably could conclude that [the SORR] would protect society by minimizing the risk of repeated sex offenses against minors.” (citation omitted)); *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.”); *State v. Seering*, 701 N.W.2d 655, 668 (Iowa 2005) (“We look for a rational connection, which clearly exists—to protect society.”).

141. *See supra* notes 14–18 and accompanying text (discussing the ineffectiveness of SORRs).

142. They are overinclusive because they ensnare a host of sex offenders who have not been individually assessed as dangerous.

143. *Smith*, 538 U.S. at 103; *see also id.* (“The risk of recidivism posed by sex offenders is ‘frightening and high.’” (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002))).

144. *See supra* Part I.A.

Furthermore, these regimes are not addressing many of the most dangerous offenders of children, and they irrationally are sweeping many otherwise harmless offenders out of large portions of cities and states. Arguably, an arbitrary distance set by a legislature will not prevent a convicted sex offender who lives only a short distance out of the zone from sexually offending against a child, given that he can still view the source of his temptation—children at play—and reoffend.¹⁴⁵ By the same token, because these blanket regimes permit the ninety percent to live near victims who are family members or acquaintances, 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 formulated this factor as “whether the regulatory means chosen are reasonable in light of the nonpunitive objective.”¹⁴⁶ The Court underscored that this prong does not require that the legislature make “the *best choice possible* to address the problem it seeks to remedy.”¹⁴⁷

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 individualized assessment of dangerousness for each registered sex offender.¹⁴⁸ Similar to its analysis of the fourth factor, the majority predicated its holding that Alaska’s regime was not excessive on outdated (and scientifically dubious) recidivism statistics of sex offenders.¹⁴⁹ For instance, the majority noted that “[t]he duration of the reporting requirements is not excessive” because child molesters may reoffend “as late as 20 years following release.”¹⁵⁰ In addition, the majority stated that the absence of individualized risk assessment in Alaska’s regime was unpersuasive because the overall recidivism rates for sex offenders are “frightening and high.”¹⁵¹

Courts reviewing the constitutionality of SORR regimes under this factor generally have parroted the majority’s arguments in *Smith*. For example, in *Doe v. Miller*, in which a convicted sex offender challenged

145. See *supra* text accompanying note 123 (discussing observations by the dissent in *Leroy*).

146. *Smith*, 538 U.S. at 105.

147. *Id.* (emphasis added).

148. See *id.* at 103–04.

149. See *supra* Part I.A (discussing current statistics of recidivism rates of convicted sex offenders).

150. *Smith*, 538 U.S. at 104 (quoting ROBERT A. PRENTKY ET AL., U.S. DEP’T OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

151. *Id.* at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

Iowa's SORR, the Eighth Circuit recycled the same evidence concerning sex-offender recidivism discussed in *Smith* to address the lack of individualized 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" and that "there are never any guarantees that [sex offenders] won't reoffend."¹⁵² More strikingly, the majority in the Iowa Supreme Court case of *State v. Seering*, while acknowledging that "it is not easy to fully assess this [fifth] factor," responded to the argument essentially by stating that a court would find few legislative regimes constitutionally excessive when the safety of children is purportedly at stake.¹⁵³

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) the statute "applie[d] to all convicted sex offenders, without regard to their future dangerousness" and (2) the general duration of the statute's restrictions was long-term to indefinite because it provided no allowances for good behavior in society or even physical incapacitation.¹⁵⁴ For instance, the *Miller* dissent stated that Iowa's scheme was excessive in that it imposed on all sex offenders, "regardless of their type of crime, type of victim, or risk of re-offending," the "dramatic" consequence of being forbidden to live with their families and in their hometowns—where support mechanisms guarding against reoffense likely would exist—"because the whole community is a restricted area."¹⁵⁵ In addition, the dissent noted that the lifetime duration of the ban made the scheme excessive.¹⁵⁶

The distance markers of SORR schemes, ranging from 500 to 2500 feet,¹⁵⁷ add a fascinating twist to the excessiveness inquiry. For example, a

152. *Doe v. Miller*, 405 F.3d 700, 722 (8th Cir. 2005) (alteration in original) (quoting the testimony of Dr. William McEchron, an expert witness).

153. *See State v. Seering*, 701 N.W.2d 655, 668 (Iowa 2005) (noting that "the relative gauge we use to test excessiveness includes the protection of children").

154. *Smith*, 538 U.S. at 116–17 (Ginsburg, J., dissenting). Justice Ginsburg noted that "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." *Id.* at 117. She also commented on the "perpetual quarterly reporting" mandated by the statute. *Id.*

155. *Miller*, 405 F.3d at 725 (Melloy, J., concurring and dissenting).

156. *See id.* at 726; *see also Seering*, 701 N.W.2d at 672 (Wiggins, J., concurring in part and dissenting in part). Wiggins notes:

[P]unishing 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.

Id.

157. *See supra* Part I.B (discussing state and local regimes).

500-foot marker, such as that of Illinois's regime, might not seem excessive because it is spatially less restrictive.¹⁵⁸ In contrast, the *Leroy* dissent took a more nuanced view of Illinois's restrictions, arguing that the relatively weak 500-foot ban was less justifiable, and therefore excessive, because it still placed sex offenders within temptation's reach, thereby encouraging reoffense.¹⁵⁹ Similarly, Iowa's and other jurisdictions' 2000-foot bans are more reasonable because they place children clearly out of a child sex offender's "sight and mind."¹⁶⁰

Under this line of reasoning, less is more—"softer" approaches to distance markers ironically are 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 the Ex Post Facto Clause?¹⁶¹

Under any reasonable definition of "excessive," greater distance markers of 1500 to 2000 feet are excessive because of the greater likelihood that they effectively banish offenders from urban life, regardless of dangerousness. Similarly, lesser distances demonstrate the arbitrary nature of many SORR regimes and highlight that they do not positively impact public safety.¹⁶² In addition, the relatively low recidivism rates of many sex offenders,¹⁶³ the absurd results that SORRs can sometimes engender, and the lifetime duration of many residency bans¹⁶⁴ weigh in favor of the proposition that all sweeping SORR regimes, regardless of their particular distance markers, are excessive. Moreover, addressing less than ten percent 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 more than ninety percent 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?¹⁶⁵ Under this line of reasoning, any punitive law that has a purported purpose of protecting

158. *People v. Leroy*, 828 N.E.2d 769, 782 (Ill. App. Ct. 2005) (noting that, in comparison to other SORR regimes, Illinois's 500-foot distance marker "is the least restrictive in geographical terms").

159. *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 reoffend.").

160. *Id.*

161. *See Loudon-Brown*, *supra* note 19, at 826 ("[I]f a 500-foot restriction is sufficient to promote this nonpunitive end, why is a 2000-foot restriction to promote the same end not excessive?").

162. *See supra* notes 14–18 and accompanying text (questioning the effectiveness of SORRs).

163. *See supra* Part I.A.

164. *See supra* notes 31, 33 and accompanying text.

165. *See supra* note 153 and accompanying text (discussing *Seering*).

children would be safe from constitutional scrutiny under the Ex Post Facto Clause. If this is the case, what then is the purpose of the Ex Post Facto Clause?

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

As part of the “affirmative disability or restraint” prong, the *Smith* Court compared the restrictions imposed on convicted sex offenders in Alaska’s registration–notification regime to other post-conviction occupational restraints challenged under the Ex Post Facto Clause.¹⁶⁶ For instance, in *De Veau v. Braisted*, the Court upheld, as nonviolative of the Ex Post Facto Clause, a New York statute forbidding persons who had been convicted of a felony from working as waterfront union officials.¹⁶⁷ Similarly, in *Hawker v. New York*, the Court rejected a challenge under the Ex Post Facto Clause to a New York law prohibiting the practice of medicine after a felony conviction.¹⁶⁸

In *Smith*, the majority judged the effects of Alaska’s registration–notification scheme on convicted sex offenders to be “less harsh” than the occupational sanctions upheld in *Hawker* and *De Veau* because sex offenders were still “free to change jobs or residences.”¹⁶⁹ On the other hand, while agreeing with the majority that Alaska’s registration–notification regime incorporated no “formal” restraints on sex offenders, Justice Souter pronounced the effects of broadcasting an offender’s personal information over the Internet to be more severe than these occupational restrictions.¹⁷⁰ According to Justice Souter, 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 the ensuing social isolation.¹⁷¹

166. See *Smith v. Doe*, 538 U.S. 84, 100 (2003) (comparing other restraints to those imposed on sex offenders).

167. *De Veau v. Braisted*, 363 U.S. 144, 160 (1960).

168. *Hawker v. New York*, 170 U.S. 189, 197 (1898); see also *Richardson v. Ramirez*, 418 U.S. 24, 54–56 (1974) (rejecting an equal-protection challenge to the disenfranchisement of convicted felons); *State v. Swartz*, 601 N.W.2d 348, 350–51 (Iowa 1999) (holding that an Iowa law that banned the possession of a firearm by a convicted felon was not a retroactive punishment under the Ex Post Facto Clause); G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1644–45 (1995) (discussing civil disabilities).

169. *Smith*, 538 U.S. at 100.

170. See *id.* at 109 (unnumbered footnote) (Souter, J., concurring in the judgment) (“I seriously doubt that the Act’s requirements are ‘less harsh than the sanctions of occupational debarment’ that we [have] upheld . . .”).

171. *Id.* (quoting *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997)).

In comparison to occupational restrictions, the effects of many SORR regimes on convicted sex offenders are even more severe by the *Smith* majority's yardstick. Unlike the registration–notification statute at issue in that case, many SORRs effectively prevent sex offenders from changing residences or jobs, because offenders are relegated to living on the margins, where little housing stock exists and where access to public transportation to jobs is limited.

Similarly, under Justice Souter's comparative analysis, SORRs may disrupt family life if offenders are barred from living with family whose residences are inside the proscribed zone. Moreover, convicted sex offenders who live with school-aged or adult dependents may be unable to live near schools, child-care centers, parks, or medical facilities, even though these dependents require use of these places. Finally, this physical marginalization may lead to the "profound" public humiliation referred to by Justice Souter in *Smith*, which, in turn, can lead to an increased tendency to reoffend¹⁷²—the problem that initially spurred SORR regimes.¹⁷³

III. TRULY WORKING TO END SEXUAL ABUSE OF CHILDREN

As a group, convicted sex offenders are the legislative gift that keeps on giving.¹⁷⁴ Because this group is one of the least defensible populations, legislators understand that there is little political price to be paid for mandating increasingly severe constraints on these individuals and much to be gained from voters who desire tough restraints. Ultimately, however, it is the public that pays a high price in public safety and public resources as a result of ineffective and indiscriminate SORR regimes.¹⁷⁵

In lieu of these regimes, this Article proposes the Sex Offender Containment Zone ("SOCZ") as an alternative method not only of managing convicted sex offenders at high risk to reoffend, but also of 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 for legislatures to address the perceived sex-offender problem.

172. See *supra* notes 15–18 and accompanying text (reviewing the potentially exacerbating effects associated with SORRs).

173. See *supra* note 12 and accompanying text (stating that SORRs are based on an offender's likelihood to reoffend).

174. See KAN. SEX OFFENDER POLICY BD., *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.").

175. See *supra* notes 14–18 and accompanying text (discussing the ineffectiveness of SORRs).

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-sanctioned or informal and organic, are methods historically used to control perceivably disordered individuals and behaviors by containing them in certain areas of the city. Professor Nicole Stelle Garnett, the author of seminal work in this area, terms these land-management devices “disorder-relocation” policies.¹⁷⁶ An advantage of these regimes is that they manage disorder, or behavior that lies outside society’s norms, by relocating it to certain formally or informally designated zones¹⁷⁷ while facing much less judicial and political scrutiny than traditional law-and-order policing methods.¹⁷⁸

One example of a formal municipally designated zone for managing disordered individuals and therefore urban disorder is New Orleans’s Storyville district. At the turn of the twentieth 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.¹⁷⁹ The effect of this designated zone was to create a vice zone for prostitution and brothels.¹⁸⁰

176. Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1077 (2005).

177. *See id.* at 1077 (“These policies, which incorporate both zoning and trespass-law principles, empower local officials to exclude particularly disorderly individuals from struggling communities. These tactics . . . relocate urban disorder from one place (where it is perceived to be harmful) to another (where policymakers hope it will be more benign).”).

178. *See id.* at 1078 (“[S]ome city officials apparently have come to view land-management strategies as (legally) ‘safer’ alternatives to order-maintenance policing.”); *see also* Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 12 (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.”).

179. *L’Hote v. New Orleans*, 177 U.S. 587, 588 (1900) (quoting New Orleans, La., Ordinance 13,032, § 1 (Jan. 29, 1897)).

180. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1210 (1996). Neuman notes:

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 entertainment auxiliary to its sexual business: drinking, gambling, dancing, and music were available in saloons, dance halls, and cabarets.

Id. (footnotes omitted). Interestingly, New Orleans used zoning within zoning to confine Caucasian prostitutes to Storyville, while it relegated black prostitutes to the Uptown district. *See id.* at 1210–11.

More contemporarily, Los Angeles,¹⁸¹ Phoenix,¹⁸² and numerous other cities in the United States¹⁸³ have created formal zones, or “campuses,” for homeless individuals located within the city near organizations that serve the homeless. In addition, some cities have formally zoned the poor into specific areas of the city. For instance, Garnett points to the Robert Taylor Homes—twenty-eight buildings that composed the United States’s largest public-housing complex, spanning two miles in Chicago—where public-housing tenants lived from 1962 until 2005.¹⁸⁴

b. Zoning Out

In contrast to New Orleans’s Storyville, Los Angeles’s Skid Row, Phoenix’s homeless campus, and Chicago’s Robert Taylor Homes—where cities formally zoned prostitutes, the homeless, and the poor *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, Ohio, have created “drug exclusion zones,” from which offenders arrested for or convicted of certain drug crimes are excluded.¹⁸⁵ These zones are municipally designated areas that have disproportionately higher rates of drug-related crime than do other neighborhoods in the city.¹⁸⁶

c. Informal Zoning and SORRs Distinguished

Informal analogues of these formal zones similarly have existed in American cities, from numerous informally designated skid rows that have

181. For years, Los Angeles has formally allocated a portion of its downtown area—known as “Skid Row”—to containing homelessness. *See* Garnett, *supra* note 176, at 1119. Garnett notes:

[T]he 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.

Id.; *see also* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1167 n.3 (1996) (discussing Los Angeles’s Skid Row).

182. Garnett, *supra* note 176, at 1076 (“[Maricopa County] already 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.”).

183. *See id.* at 1086 (noting that Anchorage, Atlanta, Washington, D.C., Sacramento, San Antonio, Jacksonville, Ft. Lauderdale, Miami, Las Vegas, and New Orleans created smaller homeless campuses following the Phoenix and Los Angeles examples).

184. *See id.* at 1108–09.

185. Peter M. Flanagan, Note, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 NOTRE DAME L. REV. 327, 330–31 (2003).

186. *Id.* at 329.

tended to attract the homeless population, especially men,¹⁸⁷ to red-light districts that have attracted those in the sex trade,¹⁸⁸ to ghettos and barrios that have long been the epicenter for many lower-income African American and Latino communities. In many of these informal districts, cities effectively have zoned certain individuals into a particular area for having characteristics that do not comport with society's norms, ranging from economic status to professional occupation to race and ethnicity. Conversely, these cities also may have been zoning these individuals out of other areas of the city.

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”¹⁸⁹ or “geographical exceptions”¹⁹⁰—focus on zoning in a certain segment of society, SORRs are similar to drug-exclusion zones in that they zone out a particular population.¹⁹¹ However, the difference between drug-exclusion zones and SORRs is that the latter uses much broader exclusionary criteria to effectively zone out a much larger population from a much larger surface area for, generally, an indefinite period of time.¹⁹² In contrast, drug-exclusion zoning is tailored to certain areas of the city—those disproportionately impacted by certain individuals who are involved in specific drug activity—and applies for a limited period of time.¹⁹³

On the other hand, while cities are not zoning registered sex offenders into certain areas de jure—i.e., in the sense that government has formally designated a certain part of the city to contain these individuals—they are doing so de facto, albeit in the worst of places, such as under expressways¹⁹⁴

187. See Garnett, *supra* note 176, at 1099–1100 (“Skid rows developed in the years after the Civil War, when widespread economic dislocation left many people homeless and poor. . . . [They] emerged to serve as lodging and employment centers for [a] large, transient, male population.”). Professor Robert C. Ellickson, a scholar of central importance to the field, has theoretically proposed that a city’s public space be divided into three color-coded zones—red, yellow, and green—with red zones being places in which disorder would be concentrated, creating “safe harbors for people prone to engage in disorderly conduct” such as public drunkenness and prostitution. Ellickson, *supra* note 181, at 1220–21.

188. See Garnett, *supra* note 176, 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.”).

189. Neuman, *supra* note 180, at 1200–01 (describing red-light districts, Washington, D.C., and Guantanamo Bay as “anomalous zones,” wherein subversion of the polity’s fundamental values, such as the right to national representation and civil rights, reigns).

190. *Id.* at 1233.

191. See *supra* notes 185–86 and accompanying text (discussing drug-exclusion zones).

192. See generally *supra* Parts I.B, II.B (discussing SORR regimes and their effects).

193. See Flanagan, *supra* note 185, at 331–34.

194. See *supra* note 53 (discussing sex offenders in Miami who have been relegated to living under a bridge).

or on the outskirts of town where there are few employment and transportation prospects.¹⁹⁵ Since legislators and policymakers implicitly recognize that sex offenders can live among us, as the vast majority are neither imprisoned for life nor condemned to death,¹⁹⁶ it is important that society manages them in a way that respects the demands of the Constitution while remaining humane, effective, and accountable to the public's demand for government to control the perceived sex-offender problem. This Article argues that SOCZs, while not perfect, may provide an alternative method by which to manage convicted sex offenders who are at high risk to reoffend, in lieu of SORR regimes.

2. SOCZs as a Concept

SOCZs are based on Shared Living Arrangements ("SLAs"), highly successful sex-offender treatment programs used exclusively in Colorado.¹⁹⁷ SLAs typically include two or three sex offenders who are considered to be at high risk to reoffend and who live together in a house that they rent or own.¹⁹⁸ In a 2004 study of the living arrangements of 130 sex offenders on probation and living in the Denver metropolitan area, those living in SLAs had "significantly fewer [reoffense] violations than those living in other living arrangements."¹⁹⁹ In addition, over seventy-five percent of the sex offenders living in SLAs were high risk.²⁰⁰ Moreover, "the average overall

195. See Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1 (reporting that a motel on the outskirts of Cedar Rapids, Iowa, was home to twenty-six sex offenders and that, ironically, the motel was located just a stone's throw from homes in which children lived).

196. Michael J. Jenuwine et al., *Community Supervision of Sex Offenders—Integrating Probation and Clinical Treatment*, FED. PROBATION, Dec. 2003, at 20, 20 ("[N]early 60 percent of convicted sex offenders live in our communities under conditional supervision."). Moreover, a study on the effectiveness of SORRs in Colorado noted that "[m]ost . . . incarcerated [sex] offenders 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." SEX OFFENDER MGMT. BD., *supra* note 14, at 7.

197. SEX OFFENDER MGMT. BD., *supra* note 14, at 12 n.10 ("An inquiry was sent to the [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 [sic] Living Arrangements.").

198. See *id.* at 12, 14.

199. *Id.* at 3. In addition, the study noted that, of the 130 offenders, "[f]ifteen new sexual offenses were reported." *Id.* at 22. All of these sexual offenses were "hands off" violations, such as "peeping, voyeurism, or exposure." *Id.* While eighty percent of these offenses were committed by offenders living in other living arrangements—such as with a family member, with friends, alone, or in jail—only twenty percent were committed by offenders living in SLAs, *id.* at 22–23, even though over seventy-five percent of the offenders living in SLAs were high risk, *id.* at 21 tbl.6.

200. *Id.* at 21 tbl.6.

number of violations was low in [SLAs].”²⁰¹ As a result, the Sex Offender Management Board of the Colorado Department of Public Safety recommended to the Colorado Senate and House Judiciary Committees that SLAs “be considered a viable living situation for higher risk sex offenders living in the community.”²⁰² Importantly, Colorado, in contrast to other states, has not adopted SORRs because policymakers recognize their ineffectiveness.²⁰³

a. The Containment Model

More broadly, SLAs constitute one approach of a number of containment methods that one may use to manage convicted sex offenders who are living in a community or who are under community supervision through parole or probation.²⁰⁴ The containment model has been relatively successful in a number of cities that have implemented their versions of it.²⁰⁵ At its core, the model consists of five elements:

201. *Id.* at 3; *see also supra* note 199 (citing the study’s statistical data regarding reoffense).

202. SEX OFFENDER MGMT. BD., *supra* note 14, at 4.

203. *Id.* (recommending that SORRs not be used as “a method to control sexual offending recidivism”).

204. *See* Kim English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, 4 PSYCHOL. PUB. POL’Y & L. 218, 220 (1998) (“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.”).

205. *See* Lisa Henderson, Comment, *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). Henderson states:

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.

Id. (footnotes omitted). A study of Maricopa County’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,” even though “such offenders ordinarily are recommitted for sex crimes at a rate of about 14 percent.” CAL. LEGISLATIVE ANALYST’S OFFICE, ANALYSIS OF THE 1999–00 BUDGET BILL, at D-28 (1999), *available at* http://www.lao.ca.gov/analysis_1999/crim_justice/crim_just_anl99.pdf (recommending a containment approach for California). Furthermore, an evaluation of Cook County’s Adult Sex Offender Program revealed that:

[T]reatment 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.

Jenuwine et al., *supra* note 196, at 26.

(a) a consistent multi-agency philosophy focused on community and victim safety; (b) a coordinated, multidisciplinary implementation strategy; (c) a case management and control plan that is individualized for each sex offender; (d) consistent and informed public policies and agency protocols; and (e) quality-control mechanisms designed to ensure that policies are implemented and services are delivered as planned.²⁰⁶

What distinguishes the SLAs in Colorado (and, by implication, SOCZs) are their focus on high-risk offenders.

b. SOCZs Distinguished

Finally, it is important to note that SLAs, and therefore SOCZs, fundamentally are grounded in treatment and rehabilitation rather than in retribution.²⁰⁷ As envisioned, these strategies guide zoning of sex offenders in a positive manner, in contrast to the governmentally sanctioned “negative” human zoning that is occurring de facto in SORR regimes. Similar examples of negative human zoning are the U.S. government’s internment of Japanese Americans²⁰⁸ and the Nazi government’s concentration camps for Jews, the Roma people, and homosexuals during World War II.²⁰⁹ By the same token, SOCZs are not “Child-Rape Zones,” “Pedophile Zones,” or “Child-Molester Zones,” wherein society suspends law enforcement and gives convicted sex offenders free reign to sexually abuse children.²¹⁰

206. English, *supra* note 204, at 221.

207. SEX OFFENDER MGMT. BD., *supra* note 14, at 12 (“Shared Living Arrangements (SLAs) are a modality of treatment utilized by three sex offender treatment programs in the state of Colorado.”).

208. See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (sanctioning the internment of Japanese Americans).

209. 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, “Sex Offender Containment Zone,” because it better communicates to legislators and the public that elects them the public-safety rationale behind SOCZs. Given the emotionally charged environment surrounding convicted 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 increase public and legislative support. In addition, while I suggest the term “Sex Offender Containment Zone,” I leave ultimate determinations of terminology to others more familiar with and better versed in the politics and characteristics of their specific communities.

210. Similarly, because inclusion of the words “sex offender” and “zone” in the name may create concerns that SOCZs would be unduly *permissive*, instead of *oppressive*, supporters would need to promote certain features of SOCZs in order to secure public support. Specifically, supporters should emphasize the tight network of law enforcement and treatment personnel who manage 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

c. Specifics

Many of the specifications of SOCZs would mirror those of SLAs. The distinction between them is in 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.²¹¹ However, much like SORRs, SOCZs would apply prospectively as well as retroactively.²¹² Further, in order to use resources most efficiently, this Article recommends that, like the Colorado SLA program, SOCZs apply to convicted sex offenders at high risk to reoffend, such as pedophiles²¹³ and those determined to be likely reoffenders by common actuarial risk tests, which have proven more accurate than clinician assessments.²¹⁴

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 and a supervising officer, who likely would work in the jurisdiction's probation or parole office.²¹⁵ Each would play 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.²¹⁶ The aim of this plan would be to "decrease denial and minimization, increase victim empathy, increase appropriate social skills, develop an individualized relapse

zoning scheme, the term "Sex Offender Containment Zone" could be replaced with "Public Safety Zone," "Public Security Zone," or "Public Safety District."

211. In theory, halfway houses dispersed throughout the city could mimic the program used in SOCZs. For reasons of efficiency, however, this Article advocates SOCZs over halfway houses that utilize containment methods. Concentrating high-risk convicted sex offenders in zones of the city, rather than in disparate areas of a city, may be a more cost-efficient way for the city to provide services and supervision to these individuals. Moreover, concentration of these individuals likely would promote keen attention to any public-safety problems they may pose.

212. See *infra* Part III.C (discussing the constitutionality under the Ex Post Facto Clause of the retroactive application of SOCZs).

213. See Worth, *supra* note 29 (discussing recidivism rates for convicted pedophiles).

214. See HANSON & MORTON-BOURGON, *supra* note 18, at 2–3 (identifying a number of actuarial assessments used to assess whether a sex offender will reoffend—such as the Minnesota Sex Offender Screening Tool, 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 than "unguided clinical assessments" because "the predictive accuracy of [the latter] are [sic] typically only slightly above chance levels").

215. See SEX OFFENDER MGMT. BD., *supra* note 14, at 14 ("Possibly 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.").

216. 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 [also] his or her therapist").

prevention plan, [and] address[] secondary issues such as offender substance abuse or anger management problems.”²¹⁷ Treatment providers also may be responsible for regularly checking in with each registered sex offender in the SOCZ.²¹⁸

On the other hand, the probation or parole officer would be charged with ensuring that the offenders were in compliance with the guidelines set forth by the officer, as dictated by the sex offender’s individual situation and risk of reoffense. For instance, the officer may perform regular home visits and curfew checks with the offenders.²¹⁹ In addition, as in the Colorado program, the treatment provider and the supervising officer would be intimately involved in preapproving a registered sex offender’s housemates or roommates.²²⁰

Officers are each offender’s “external conscience,” consistently reminding offenders of the consequences of failing to adhere to the treatment plan.²²¹ Integrating the roles of the treatment provider with those 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.”²²² The importance of this “compelling mechanism” cannot be understated, considering that a recent large study of the factors that predict sexual recidivism concluded that rule violations such as “non-compliance with supervision” and parole or probation violations were the “strongest . . . indicators of sexual recidivism.”²²³ In addition, the study found that:

Offenders with general self-regulation problems were more likely than offenders with stable lifestyles to sexually recidivate Included among general self-regulation problems were measures of lifestyle instability [and] impulsivity Other antisocial traits that were significantly correlated with sexual recidivism included

217. Jenuwine et al., *supra* note 196, at 22.

218. See SEX OFFENDER MGMT. BD., *supra* note 14, at 10 (“Offenders residing in a shared living environment might be subject to regular and multiple daily call-ins to the treatment provider . . .”).

219. *Id.*

220. See *id.* at 13 (“[H]ousemates are approved in advance by the treatment provider and supervising officer.”).

221. Jenuwine et al., *supra* note 196, at 22.

222. *Id.* at 23.

223. HANSON & MORTON-BOURGON, *supra* note 18, at 10. However, 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).”).

employment instability . . . , any substance abuse . . . ,
intoxicat[ion] during offence . . . , and hostility²²⁴

Adequate therapeutic and housing support buttressed by consequences also could mitigate factors promoting sexual reoffense.

Therefore, this aspect of SOCZs likely is not different from existing programs servicing sex offenders, as many offenders already are supervised by probation and parole officers and are also in treatment programs.²²⁵

ii. Accountability Mechanisms

A crucial component of SLAs, much as with living arrangements in SOCZs, is accountability to a treatment and supervisory plan, backed by the 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.”²²⁶ For instance, supervisors use polygraph tests to verify offenders’ whereabouts. According to the Colorado study, these polygraph tests were “the number one way violations [of an offender’s treatment plan] were detected.”²²⁷ 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.²²⁸

The third approach to accountability—and, according to the Colorado study, what makes the SLA program so successful²²⁹—is that in order to live in an SLA, roommates or housemates are duty-bound to inform treatment providers when another roommate goes astray by staying out late or making

224. *Id.*

225. *See* Jenuwine et al., *supra* note 196, at 20. The authors note:

In reality, . . . 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.

Id. (endnote omitted).

226. English, *supra* note 204, at 224 (noting that successful sex-offender containment methods require that these “three interrelated, mutually enhancing activities” form a triangle, “with the three corners anchored with the three interventions just mentioned and with the offender contained inside the triangle”).

227. SEX OFFENDER MGMT. BD., *supra* note 14, at 28.

228. *See id.* at 13–14 & 13 n.12 (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”).

229. *See id.* at 28 (“[I]n SLAs, roommates calling in to a probation officer or treatment provider was the most effective tool in detecting violations . . .”).

contact with minors.²³⁰ Upon notification to therapeutic personnel, supervising officers are notified quickly of the transgression or if an offender has disappeared.²³¹

This Article envisions that, like SLAs, SOCZs similarly would hold both the individual sex offender and his peer group accountable. 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 reoffending.²³² This support system tends to mitigate the factors that prompt sex offenders to reoffend, such as “lack of social skills (personality disorders), chaotic lifestyle, and being disengaged from treatment.”²³³

iii. Duration and Incentives

A sex offender’s participation in an SOCZ would be voluntary and endure until the offender no longer presented a high risk to public safety. Encouragement to reside and participate in an SOCZ could take several forms. For example, cities could offer rent subsidies or lower-rent housing to offenders. Because of offenders’ limited financial means and housing opportunities resulting from community backlash in connection with registration and community-notification requirements, reduced rent for registered high-risk sex offenders may prove to be a highly effective incentive.²³⁴ Alternatively, sex offenders agreeing to live within an SOCZ

230. *Id.* at 13. The study notes:

Offenders 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.

Id.

231. *See id.* at 14 (“[O]ne 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.”).

232. SEX OFFENDER MGMT. BD., *supra* note 14, at 4 (“[A] positive support system, which 100% of the Shared Living Arrangements provided, is an important component of being successful in treatment.”).

233. *Id.* at 13.

234. *See, e.g., id.* at 14 (“[M]any 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 v. Doe, 538 U.S. 84, 115 (Ginsburg, J., dissenting) (discussing threats to sex offenders’ lives as a result of community-notification provisions and stating that these mandates “impose[] onerous and intrusive obligations on convicted sex offenders” and “expose[] registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism”).

could earn credits toward an earlier release date from probation- or parole-related monitoring and supervision, if deemed appropriate by the supervising officer, treatment provider, and judge. In addition, one of the biggest incentives may be the opportunity for sex offenders to receive effective treatment and to better manage their desires, resulting in a more normal life.

Conversely, this Article envisions that the government would harness the private market to provide residential housing and amenities for sex offenders residing in an SOCZ. For example, local and/or state governments could provide property-tax abatements for a certain number of years to private developers who rehabilitate or construct single-family or low-rise multi-family residential housing 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.²³⁵

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

iv. Location

Ideally, an SOCZ would be located in or near a city's downtown so that offenders would have easy access to transportation for travel to and from jobs and family. Similarly, this single location would likely ensure that offenders' treatment providers and supervising officers would have easy access to monitor and to supervise offenders. The spatial dimensions of an SOCZ obviously would vary in size, depending on the number of sex offenders and the land mass or space available in an area.²³⁶ To ward off the

235. Alexander von Hoffman, *High Ambitions: The Past and Future of American Low-Income Housing Policy*, 7 HOUSING POL'Y DEBATE 423, 436 (1996), available at http://www.fanniemae.foundation.org/programs/hpd/pdf/hpd_0703_hoffman.pdf. Von Hoffman states:

In the late 1960s and early 1970s, public housing became the subject of fierce attacks. In his book, sociologist Lee Rainwater 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 disparaged the design of the high-rises for their lack of security.

Id. (citations omitted) (citing OSCAR NEWMAN, DEFENSIBLE SPACE (1972); LEE RAINWATER, BEHIND GHETTO WALLS: BLACK FAMILIES IN A FEDERAL SLUM (1970)); see also *supra* note 184 and accompanying text (discussing the Robert Taylor Homes in Chicago).

236. Therefore, in contrast to the Colorado program, it is unnecessary for the treatment provider and the supervising officer to preapprove the location of the sex offender's residence, as communities ostensibly would have already negotiated the locations of the SOCZs prior to

ill effects of concentrated housing,²³⁷ a zone should contain several low-rise residential or mixed-use buildings instead of a single high-rise facility. However, this recommendation is tempered by the particular spatial, 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 . . . residence that has ‘child-type’ items (for example, a swing set).”²³⁸

v. Education and Awareness

Ideally, the SOCZ would be accompanied by a comprehensive 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.²³⁹ Therefore, while the SOCZ would focus on offenders, the educational component would center attention on potential child victims.

As part of this educational effort, it may be wise to educate children about the tactics that abusers use to attract children and engender trust—trust that abusers ultimately violate. However, raising awareness of child sexual abuse among potential victims is unlikely to succeed unless members of the community at large—especially individuals most likely to be around children, such as parents, guardians, caretakers, teachers, school administrators, and medical professionals—receive education that teaches them 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. This information would in turn raise awareness regarding children who are being placed in vulnerable positions.

sex offenders residing in them. *See* SEX OFFENDER MGMT. BD., *supra* note 14, at 13 (“The residence location . . . [is] approved in advance by the treatment provider and supervising officer.”).

237. *See supra* note 235 (discussing criticisms of high-rise public housing).

238. SEX OFFENDER MGMT. BD., *supra* note 14, at 13. *But see supra* note 14 and accompanying text (noting that evidence does not support the notion that this constraint on SOCZs would prevent convicted sex offenders from reoffending).

239. *See* KAN. SEX OFFENDER POLICY BD., *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.”); Duster, *supra* note 24, at 776 (“[D]espite 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.’” (second alteration in original) (quoting 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))).

As the Iowa County Attorneys Association pointed out in its condemnation of Iowa's SORR, "[o]nly parents and caretakers can effectively impede [the] kind of access" that allows "80 to 90 percent of sex crimes against children [to be] committed by a relative or acquaintance who has some prior relationship with the child."²⁴⁰ Although statistics demonstrate that any one of these individuals is likeliest to be the sexual abuser of a child,²⁴¹ educating all of them may be the best prophylactic measure.

In tandem with this large-scale public-education approach to raising awareness of child sex abuse, research supports the contention that positively intervening early in the lives of children who are neglected or abandoned by parents—and in particular, those who have negative relationships with their mothers—may prevent people from becoming future sexual abusers of children.²⁴² This data could assist legislators in reforming many of the country's beleaguered foster-care systems and child-protection agencies, which serve the children most likely to be affected by these factors.²⁴³

3. Dynamic Factors: Children and Other Dependents

In the Colorado study, 98.5% of the sex offenders were male, 86.4% were divorced, separated from a spouse, or never married, and 51% had at least one child.²⁴⁴ Presumably, for those sex offenders living in SLAs, the

240. IOWA COUNTY ATTORNEYS ASS'N, *supra* note 14, at 1.

241. See *supra* note 9 and accompanying text (stating that family members or acquaintances commit ninety-three percent of sexual assaults against children).

242. R. KARL HANSON & MONIQUE T. BUSSIÈRE, PREDICTORS OF SEXUAL OFFENDER RECIDIVISM: A META-ANALYSIS 16 (Pub. Safety Can., Report No. 1996-04, 1996), available at http://ww2.ps-sp.gc.ca/publications/corrections/199604_e.pdf ("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 with childrearing.").

243. See Editorial, *Fixing Foster Care*, WASH. POST, June 23, 2004, at A20. The author notes:

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.

Id. Yet another approach to managing sex offenders might be for law enforcement to monitor high-risk sex offenders with Global Positioning System ("GPS") technology. However, this method may prove too ineffective to merit the expense, given that offenders may not personally be monitored by a number of individuals, as with SOCZs. Therefore, unless combined with rehabilitation, this option may prove just as ineffective as SORRs.

244. SEX OFFENDER MGMT. BD., *supra* note 14, at 18 & tbl.4.

offenders' children or other dependents, if any, were not living with them. However, the study did not expressly address this point.²⁴⁵

In the SOCZ context, this Article anticipates that there certainly would be sex offenders who have children or other dependents, such as aged parents. However, because SOCZs, like SLAs, are primarily geared toward offenders who are at high risk to reoffend, dependents, especially children, would be unable to live with offenders. In the rare case where a high-risk offender has dependents who are unable to reside outside of the SOCZ, the community could make separate residential facilities available for such offenders. Moreover, it is likely that an overwhelming number of sex offenders in an SOCZ will be male.²⁴⁶ If there are also high-risk female sex offenders who choose to live in the zone, it similarly may be wise to have these offenders live with each other rather than with male offenders. While costs may increase because of the need to provide separate facilities in this type of scenario, they likely would be offset by the greater political and practical problems that may arise by allowing high-risk sex offenders of both genders to live together.

B. PRACTICAL IMPLICATIONS OF SOCZS

1. Advantages

SOCZs have a number of advantages. The first is that the public would know where many high-risk sex offenders live, in contrast to SORRs, where many sex offenders are untracked because they are living on the margins or are homeless.²⁴⁷ Another advantage, as demonstrated by the Colorado SLA study, is that because these offenders would reside in a positive and supportive environment that does not promote reoffense, public safety would be enhanced. And if an offender in an SOCZ chooses to reoffend, monitors would swiftly deal with that offender, as demonstrated by SLAs.²⁴⁸

Other advantages accrue to the offenders themselves. For instance, for those offenders whom SORR regimes currently zone out of the city, SOCZs would allow them once again to be able to live in the city, in conditions fit for human beings and at a relatively affordable price. Furthermore, because participants would reside in SOCZs as a group, it is more likely that they would be better protected against community backlash than if they lived in particular neighborhoods and had their identities known because of

245. Data regarding the living arrangements of the children of the offenders who participated in this study were not collected. Telephone Interview by Joely Stewart with Amy Dethlefsen, Researcher, Sex Offender Mgmt. Bd., Colo. Dep't of Pub. Safety (Sept. 10, 2008).

246. See SEX OFFENDER MGMT. BD., *supra* note 14, at 18 (noting that 98.5% of the studied offenders were male).

247. See *supra* notes 15–16 and accompanying text.

248. See *supra* Part III.A.2.c.i–ii (discussing the roles of treatment providers and supervising officers, as well as other accountability mechanisms).

community-notification laws.²⁴⁹ A sixth advantage is that because these offenders will be in a highly supportive environment that holds them accountable through intense supervision and management, they would be able to, on the whole, resist reoffense and thereby avoid further criminal repercussions.

2. Limitations

No program or idea is perfect, and there certainly 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's Skid Row, the concentrated "disorder" in the SOCZ may spill over into neighboring communities that likely are already struggling with their own disorders.²⁵⁰ Policymakers in Chicago and in Los Angeles took steps to diffuse the disorder that their concentrated housing units caused. For instance, Chicago razed the continuous blocks of high-rise federal public housing that stretched for miles in Chicago because of the perceived spillover effects of ultra-concentrated poverty into neighboring communities.²⁵¹ Similarly, Los Angeles, although not formally disbanding it, has attempted to make Skid Row less concentrated and to decentralize the services and amenities available to the homeless by providing these services in other areas of the city.²⁵² Therefore, two questions logically arise: (1) Will there be negative effects associated with the concentration of high-risk sex offenders in one area? (2) And if so, will these effects spill over into neighboring communities that are already suffering under the weight of their own disorders, making them even more vulnerable?²⁵³

249. See *Smith v. Doe*, 538 U.S. 84, 109 (unnumbered footnote) (2003) (Souter, J., concurring in the judgment) (noting the "onerous practical effects of being listed on a sex offender registry," including "public shunning, picketing, press vigils, ostracism, loss of employment, . . . eviction, . . . threats of violence, physical attacks, and arson" (quoting *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997))).

250. See *supra* note 181 and text accompanying note 184 (discussing Los Angeles's Skid Row and the Robert Taylor Homes).

251. Garnett, *supra* note 176, at 1108–10 (noting that "[b]y 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" and that "[t]he 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" (footnote omitted)).

252. See *id.* at 1120–21 ("'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 area." (footnote omitted)).

253. See *id.* at 1117. Garnett notes:

A primary concern is that clustering high-risk convicted sex offenders would result in the “worst kind of ‘group think,’”²⁵⁴ without the protections afforded by prisons. This concentration would expose already struggling communities to increased crime, particularly sexual crime. While it would be impossible to assert that no sex offender living in an SOCZ would ever reoffend, the chances of this situation occurring in an SOCZ are far less than the chances allowed by the current crop of SORRs, given the lack of evidentiary support for these regimes and offenders’ physical and social sense of marginalization.²⁵⁵ Indeed, SOCZs may be distinguished from the de facto zoning of sex offenders out of certain areas, even those near children,²⁵⁶ because, in SOCZs, offenders would receive treatment and supervision proven effective in managing sex offenders and any recidivist tendencies.²⁵⁷ Therefore, the spillover effects of any increased crime into neighboring communities would be limited and arguably less than those of the current SORR regimes.

As a general matter, disorder that results from the clustering of convicted sex offenders in SOCZs may be distinguished from disorder that results from the clustering of individuals living in entrenched poverty, many of whom are disproportionately jobless, as in Chicago’s Robert Taylor Homes,²⁵⁸ or homeless, as in Los Angeles’s Skid Row.²⁵⁹ Many homeless

[T]he creation of a homeless campus [in poor minority neighborhoods] 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.

Id.

254. E-mail from Caprice Roberts, Assoc. Dean for Faculty Research & Dev., Professor of Law, W. Va. Univ. Coll. of Law, to author (Feb. 13, 2008, 16:45 CST) (on file with author).

255. See *supra* notes 14–18 and accompanying text.

256. See Davey, *supra* note 195 (noting that sex offenders have been forced to reside in a motel on the outskirts of Cedar Rapids, Iowa, because they are barred from living elsewhere in the city under Iowa’s SORR regime).

257. See generally *supra* Part III.A.2.

258. Garnett describes the disorder resulting from the clustering of individuals living in poverty:

[M]ost 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.

Garnett, *supra* note 178, at 48 (footnotes omitted).

individuals also suffer from mental illness and debilitating drug and alcohol addictions.²⁶⁰ The Colorado study demonstrated that while 54% of the studied sex offenders were assessed as high risk,²⁶¹ 73.1% worked full time, and 6.7% worked on a part-time basis.²⁶² Therefore, almost 80% of the studied sex offenders worked. As Garnett notes, work, in itself, forces order by giving structure to one's time.²⁶³

In addition, the social costs associated with SOCZs may in many respects mirror those of other locally undesirable land uses ("LULUs")²⁶⁴ that cities may perceive as incompatible with neighboring communities, such as a cement-grinding facility,²⁶⁵ a state highway,²⁶⁶ or a parking garage.²⁶⁷

259. See *supra* note 181.

260. See NAT'L COAL. FOR THE HOMELESS, NCH FACT SHEET NO. 5, MENTAL ILLNESS AND HOMELESSNESS 1 (2008), available at http://www.nationalhomeless.org/publications/facts/Mental_Illness.pdf ("An average of 16% of the single adult homeless population suffers from some form of severe and persistent mental illness." (citation omitted)); NAT'L COAL. FOR THE HOMELESS, NCH FACT SHEET NO. 6, ADDICTION DISORDERS AND HOMELESSNESS 1 (2008), available at <http://www.nationalhomeless.org/publications/facts/addiction.pdf> ("[A]pproximately 9.6% of the homeless population in a family with children is dealing with issues of substance abuse while 37.1% of homeless individuals are dealing with these issues.").

261. SEX OFFENDER MGMT. BD., *supra* note 14, at 20.

262. *Id.* at 18 tbl.4.

263. See Garnett, *supra* note 178, at 48–49 ("The lack of a 'culture of work' resulting from chronic joblessness contributes to social disorder. . . . Work 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."). 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. See W.B. Brookover, *Education in the Rehabilitation of Maladjusted Personalities*, 20 J. EDUC. SOC. 332, 335 (1947).

264. Garnett, *supra* note 176, at 1116 ("A homeless campus is a classic 'LULU'" (citing Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001 (1993))).

265. See *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 254 F. Supp. 2d 486 (D.N.J. 2003) (addressing a neighboring community's Title VI, equal protection, Fair Housing Act, and nuisance law challenges to the siting of a cement-grinding facility). Professor Sheila R. Foster notes:

The disproportionate concentration of hazardous land uses in certain communities threatens not only physical health and neighborhood aesthetics, but also can alter the 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 implies, the social costs of these LULUs may be damage to neighborhood integrity and visual, aural, and air pollution. See *id.*

266. See *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999) (addressing various challenges by a neighboring community to the siting of a state highway).

267. See Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455, 486–87 & 487 n.144

However, as Garnett notes, physical and architectural barriers and details, “such as landscaping and building designs,” may serve to shield neighboring communities from disorder.²⁶⁸

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 give legitimacy to the argument that an SOCZ constitutes a taking under state or federal constitutional law. In practice, takings lawsuits that involve “[g]overnment actions resulting in less than a total deprivation of all economic value are subject to ad hoc judicial review that strongly favors the government.”²⁶⁹

Moreover, as a recent study demonstrated, the economic costs of a sex offender’s proximity to residences may be overstated. The study showed that only if a sex offender lived within one-tenth of a mile did owners of neighboring houses suffer declines in real-property values.²⁷⁰ While the study appears to have focused solely on the effect of individual sex offenders

(2007) (discussing the construction of a 500-car, multi-story parking garage in a residential neighborhood).

268. Garnett, *supra* note 176, at 1119 (noting that Los Angeles used “physical barriers, such as landscaping and building designs, that emphasized the separation of skid row from the rest of downtown”); *see also* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1041 (2002) (“Architectural improvements that control crime . . . can be adopted and implemented locally with real effect.”).

269. Garnett, *supra* note 176, at 1087 (citing DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 121–22 (2002)) (concluding that neighboring communities’ takings lawsuits challenging the construction of homeless campuses will be unsuccessful). A claim may be brought on inverse-condemnation grounds, but even those are successful only in “certain narrow circumstances.” *Id.* at 1088. Another option would be to pursue damages based on a nuisance claim, but this claim could proceed only once “the campus was constructed and the property owners injured.” *Id.* As a further nail in the coffin, some states do not even allow citizens to prosecute local governments for nuisance claims. *Id.*

270. 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.columbia.edu/~l12240/NBER%20Megan's%20Law%20Linden%20and%20Rockoff.pdf> (“[While] the sale price[s] 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.”). On the other hand, a prior study that examined 3200 home transactions in Montgomery County, Ohio, found:

On average, houses located within one-tenth of a mile of a sexual offender sold for 17.4 percent less than similar houses located farther away, houses between one-and [sic] two-tenths of a mile from an offender sold for 10.2 percent less, and houses between two and three tenths of a mile from an offender sold for 9.3 percent less.

Suzanna Hartzell-Baird, *When Sex Doesn’t Sell: Mitigating the Damaging Effect of Megan’s Law on Property Values*, 35 REAL EST. L.J. 353, 369 (2006) (citing Press Release, Wright State Univ., Sex Offenders Hurt Property Values, Wright State University Study Shows (Apr. 12, 2002), available at http://www.wright.edu/cgibin/news_item.cgi?310).

on real-property values of neighboring residences, as opposed to the effect of a concentrated number of sex offenders, the outcome of the study nonetheless suggests that diminution in value may be more theoretical than actual for most property owners. This conclusion may be especially true if SOCZs are visually separated, through the use of design and landscaping, and there is distance between neighboring communities and each SOCZ to minimize effects on property values.²⁷¹

c. Community Opposition

Because of the perceived deleterious social and economic costs of SOCZs to neighboring communities, these constituencies may 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 in determining spatial dimensions of a site.²⁷² In addition, community opposition to neighboring SOCZs may be mitigated if local governments follow open-meetings requirements and if jurisdictions “adopt ‘fair siting’ requirements” to prevent local governments from “singling out the most vulnerable neighborhood[s].”²⁷³ In conjunction with these approaches, state enabling legislation for SOCZs could require a National Environmental Policy Act-like²⁷⁴ process to ensure that governments “carefully consider” the impact of the siting of an SOCZ on neighboring communities.²⁷⁵ Indeed, state enabling legislation for SOCZs may help inoculate local politicians from community resistance toward SOCZs.

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 reoffend, not fall solely on communities that are most at risk or that have the most disorder. For fairness’s sake, the sacrifice should be shared.

271. See *supra* note 268 and accompanying text.

272. See Garnett, *supra* note 176, at 1132 (“[P]ublic participation is an integral part of the American land-use planning process . . .”).

273. *Id.*

274. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2000) (requiring all federal agencies to issue environmental-impact statements for all “major Federal actions significantly affecting the quality of the . . . environment”).

275. See Foster, *supra* note 265, at 557 (noting that while the National Environmental Policy Act’s environmental-impact statements have been “[w]idely criticized as lacking substantive ‘teeth’ . . . [and] cannot impose a substantive duty to mitigate,” the information gleaned from 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”).

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 and aggravated by SORRs, it is the vulnerable and already disordered communities that largely bear the consequences of bad policy choices. Rent is minimal or nonexistent in these areas, and many times, law 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 banishment that troubled Justice Souter about Alaska's registration-notification regime in *Smith v. Doe*.²⁷⁶ However, any stigma that a resident of an SOCZ may face would be less than that incurred under SORRs, where broad classes of convicted sex offenders are zoned de facto to living on the margins.²⁷⁷ In addition, to the extent that residents of many types of formal and informal zones who potentially live "on the wrong side of the tracks"—including the impoverished, racial minorities, the homeless, and homosexuals—face social stigma because of where they live, residents of the SOCZ undoubtedly would incur some social shame. On the other hand, any deleterious social consequences that offenders incur from living in the zones would be mitigated by the overwhelming social advantages of their increased access to society, housing, and treatment.

e. Opting Out

While participation in an SOCZ is highly incentivized,²⁷⁸ it is also voluntary in order to mitigate the significant constitutional risk posed by the Ex Post Facto Clause,²⁷⁹ especially in light of increasing consensus that SOCZs' informal analogues, SORRs, run afoul of this Clause.²⁸⁰ On the other hand, SOCZs' voluntariness 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 be subject to individualized restrictions set by probation or parole officers,²⁸¹ the norm before the SORR era. 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

276. See *supra* notes 170–71 and accompanying text.

277. See *supra* Part I.C.

278. See *supra* Part III.A.2.c.iii.

279. See *infra* Part III.C (analyzing SOCZs under the Ex Post Facto Clause).

280. See *supra* note 72 and accompanying text.

281. See Loudon-Brown, *supra* note 19, at 797 (arguing for individualized determinations by parole officers).

between the divergent concerns of constitutionality under the Ex Post Facto Clause and those in policy and politics who regard enhancing public safety.

C. THE FEDERAL CONSTITUTIONAL CASE FOR SOCZs UNDER THE
EX POST FACTO CLAUSE

This Article has 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.²⁸² It now turns to a similar analysis of SOCZs.²⁸³

1. Legislative Intent

The first question in the ex post facto analysis centers on the legislature's intent. Unlike SORRs,²⁸⁴ the impetus for SOCZs is to ensure public safety, a clearly civil intent. This conclusion is suggested by their core emphasis on treatment and providing a positive and supportive environment for sex offenders, especially high-risk individuals.²⁸⁵ In addition, and in contrast to many SORR regimes, zoning high-risk sex offenders in SOCZs near urban cores allows them access not only to transportation, family, treatment, and employment, but also to law enforcement. On the off chance that there is a violation of treatment, supervising officers would swiftly step in to curb the violation. 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, simply is not an option in many SORR regimes, which place sex offenders on the margins.

2. Effects

a. "Clearest Proof" Burden

Because SOCZs are geared toward treatment and rehabilitation, it likely would be unnecessary for a court to use a lower plaintiff's burden of proof—as called for by Justice Souter in *Smith* when the legislative intent is equivocal—rather than the "clearest proof" standard already required.²⁸⁶

282. See *supra* Part II.

283. Similarly, SORRs and SOCZs are arguably subject to challenge on equal-protection grounds under *City of 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 Article.

284. See *supra* Part II.A (arguing that analysis of the intent behind SORRs would reveal "close cases").

285. See generally *supra* Part III.A.2.

286. See *supra* Part II.B.1 (discussing the challenger's burden of proof).

b. Traditional Punishment

While a legislature may evince regulatory intent in enacting a particular statutory regime, a court may still deem the scheme an unconstitutional retroactive punishment if the effects are punitive, as measured by the *Mendoza-Martinez* test.²⁸⁷ The first question in the effects test is whether the regime is regarded as a traditional punishment.²⁸⁸ While this Article, as well as numerous commentators and judges, has 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 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. 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. 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, largely would face none of these barriers. Far from being banished from the city, sex offenders legally could live in it.²⁸⁹

c. Affirmative Disability or Restraint

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

287. See *supra* notes 73–76 and accompanying text (outlining the ex post facto framework); see also Part II.B (applying the *Mendoza-Martinez* effects test to SORRs).

288. See *supra* Part II.B.2.a.

289. See also *supra* Part III.B.2.d (discussing potential social banishment of offenders residing in the SOCZ).

290. See *supra* Part II.B.2.b.

291. See *supra* notes 113–14 and accompanying text.

292. Ideally, an agreement would document the offender's consent to reside in an SOCZ. In this agreement, the offender would also consent to abiding by the rules of residency, as well as to accepting the consequences for failing to adhere to these rules.

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: deterrence and retribution.²⁹³ SOCZs' emphasis on treatment creates the positive by-product of deterring reoffenses by high-risk sex offenders. Yet, as argued previously, retribution is the primary concern of this prong of the *Mendoza-Martinez* test.²⁹⁴

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, which diffuses arguments that they are enacted for the sheer purpose of seeking revenge from offenders for past sexual crimes. For example, in contrast 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 individualized assessments of dangerousness, thereby tailoring policy and treatment to individual offenders.

e. *Rational Connection to a Nonpunitive Purpose*

The fourth factor of the *Mendoza-Martinez* test is whether there is a rational connection to a nonpunitive purpose.²⁹⁵ Unlike SORR regimes, which arguably are not based on anything approaching rationality, SOCZs are grounded in evidence-based SLAs and containment methodology.²⁹⁶ Studies have proven that SLAs result in low recidivism rates for sex offenders, especially those determined to be of high risk.²⁹⁷ In addition, and unlike many SORR schemes, SOCZs target a narrow population—those convicted sex offenders who are determined by common actuarial assessments to be at high risk to reoffend.²⁹⁸ All of these indicators lead to the conclusion that SOCZs are rationally connected to public safety.

293. See *supra* Part II.B.2.c.

294. See *supra* Part II.B.2.c (noting that deterrence is frequently an aim of civil regulation, and, consistent with Justice Souter's concerns in *Smith*, proceeding to focus on retributive aspects of SORRs).

295. See *supra* Part II.B.2.d.

296. See *supra* Part III.A.2.a–b (discussing the conceptual foundation of SOCZs).

297. See *supra* notes 199–203 and accompanying text (discussing the favorable data presented in SEX OFFENDER MGMT. BD., *supra* note 14).

298. See *supra* Part III.A.2.a (distinguishing SOCZs from other containment models on the ground that SOCZs would target high-risk offenders); see also *supra* notes 213–14 (recommending that, like SLAs, SOCZs apply only to high-risk offenders).

f. Excessive in Relation to Its Nonpunitive Purpose

The fifth factor of the *Mendoza-Martinez* test is whether the regime is excessive in relation to its nonpunitive purpose, or, as stated by the *Smith* Court, whether “the regulatory means chosen are reasonable in light of the non-punitive objective.”²⁹⁹

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.³⁰⁰ Moreover, in comparison to most SORRs, SOCZs would apply only to certain offenders assessed as high risk by actuarial tools.³⁰¹

Furthermore, to address Justice Ginsburg’s concern in *Smith* that there was no way to be free or have reduced time under Alaska’s registration-notification scheme, the design of an SOCZ provides that an offender can have “time off or time reduced” from living within the zone pursuant to certain guidelines.³⁰² Because the program is voluntary, offenders can choose not 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 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 feet³⁰³—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 reoffend. Therefore, the means that SOCZs employ to ensure the safety of the public are not excessive, especially as compared to those used by many current SORR regimes.

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 convicted child sex abusers. This particular form of human-waste management not only is unconstitutional under Ex Post Facto Clause 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 effectively have

299. See *supra* Part II.B.2.e.

300. See *supra* Part III.A.2.c.iii (discussing the duration of participation in SOCZs).

301. See *supra* notes 213–14 and accompanying text.

302. See *supra* Part III.A.2.c.iii (discussing the duration of participation in SOCZs).

303. See *supra* Part I.B (discussing state and local SORR regimes).

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banished them, no matter the crime, to society's literal and social margins. In contrast, the Sex-Offender Containment Zone, 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.