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## The Constitutionality Of Iowa's Sex Offender Residency Restriction

Jacob Salsburg

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# The Constitutionality of Iowa's Sex Offender Residency Restriction

JACOB SALSBURG†

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## I. INTRODUCTION

The denial of due process in parole revocation simply mirrors society's overall attitude of degradation and defilement of a convicted felon. It is sad 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison; it cares even less for his future when he is released from prison. He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime.<sup>1</sup>

Imagine you are convicted of a felony and sentenced to ten years in

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1. *Doe v. Miller*, 298 F. Supp. 2d 844, 846 (S.D. Iowa 2004), (quoting *Morrissey v. Brewer*,

prison. Every day for those ten years, you look forward to being free. However, upon completion of your prison sentence, you may reconsider your desire to be part of society again, depending on what type of felony you committed. If you committed a robbery, you are now free to live anywhere you want, even next to the store that you robbed. However, if you are a sex offender, you may have to resort to homelessness due to a residency restriction for sex offenders, and wish you were back in prison.<sup>2</sup>

Perhaps no criminal is subject to more severe restrictions after serving his prison sentence than the sex offender. Not only must sex offenders register with law enforcement and deal with limited housing availability,<sup>3</sup> but they also face a social stigma that prevents them from being rehabilitated and rejoining society.<sup>4</sup> In fact, “research has shown that isolation, unemployment, depression, and instability . . . correlate with increased recidivism,” which is exactly what residency restrictions are meant to prevent.<sup>5</sup> Nonetheless, sex offender residency restrictions currently exist in twenty-two states,<sup>6</sup> and twelve states had bills to estab-

443 F.2d 942, 952–53 (8th Cir. 1971) (Lay, J., dissenting), *rev'd*, 408 U.S. 471 (1972), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

2. Jill Levenson et al., *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, FED. PROBATION, Dec. 2007, at 2, 4 (“Within six months of the implementation of Iowa’s 2,000-foot law, thousands of sex offenders became homeless or transient . . .”); *see also* DYERSVILLE, IOWA, CODE OF ORDINANCES ch. 49, § 3 (2005), available at <http://www.cityofdyersville.com/CityAdServ/Ordinances/Chapter49.pdf> (“A sex offender shall not reside within the corporate City limits of Dyersville.”).

3. Levenson et al., *supra* note 2, at 4 (“[I]n Orange County, Florida, . . . 95 percent of over 137,000 residences were located within 1,000 feet of schools, parks, daycare centers, or school bus stops, and virtually all housing was within 2,500 feet of such venues.”).

4. *Id.* (noting that known sex offenders suffer unemployment, relationship loss, denial of housing, threats, harassment, physical assault, or property damage, in addition to “psychological symptoms such as shame, embarrassment, depression, or hopelessness”).

5. Brief Amicus Curiae of Ass’n for the Treatment of Sexual Abusers in Support of Petition for Writ of Certiorari at 4, *Doe v. Miller*, 546 U.S. 1034 (2005) (No. 05-428).

6. Chiraag Bains, Comment, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.–C.L. L. REV. 483, 483 & n.5 (2007) (citing ALA. CODE § 15-20-26 (LexisNexis 2006) (amended 2009); ARK. CODE ANN. § 5-14-128 (2003) (amended 2009); CAL. PENAL CODE § 3003.5 (West 2007); DEL. CODE ANN. tit. 11, § 1112 (2006); FLA. STAT. § 794.065 (2007); GA. CODE ANN. § 42-1-15 (2006); IDAHO CODE ANN. § 18-8329 (2006) (amended 2008); 720 ILL. COMP. STAT. ANN. 5/11-9.3(b-5) (West 2002 & Supp. 2006); IND. CODE ANN. § 35-42-4-11(c) (West 2006); IOWA CODE ANN. § 692A.2A (West 2003); KY. REV. STAT. ANN. § 17.545 (West 2006); LA. REV. STAT. ANN. § 14:91.1 (2004) (amended 2009); MICH. COMP. LAWS ANN. § 28.735 (West 2006); MISS. CODE ANN. § 45-33-25 (West 2006) (amended 2008); MO. ANN. STAT. § 566.147 (West 2006), *invalidated in part by* R.L. v. Dep’t of Corr., 245 S.W.3d 236 (Mo. 2008) (en banc) (amended 2010); N.C. GEN. STAT. § 14-208.16 (2006) (amended 2007); OHIO REV. CODE ANN. § 2950.031(A) (West 2006); OKLA. STAT. ANN. tit. 57, § 590 (West 2004 & Supp. 2006); OR. REV. STAT. § 144.642 (2006); S.D. CODIFIED LAWS §§ 22-24B-22 to -23 (2006); TENN. CODE ANN. § 40-39-211 (2007) (amended 2009); TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2005)).

lish residency restrictions pending between 2005 and 2007,<sup>7</sup> because legislatures believe that the negative effects the restrictions have on sex offenders are outweighed by the state's interest in protecting children from sex offender recidivism.<sup>8</sup>

Sex offender residency restrictions have consistently been challenged as unconstitutional and ineffective. While the Supreme Court has never ruled on the constitutionality of sex offender residency restrictions, *Doe v. Miller*,<sup>9</sup> which upheld Iowa's sex offender residency statute,<sup>10</sup> analyzed several constitutional issues. The Supreme Court denied the sex offenders' petition for writ of certiorari in 2005,<sup>11</sup> but because of the increasing number and severity of residency restrictions, there is bound to be sufficient statistical evidence that such restrictions are ineffective, which could prompt the Supreme Court to consider a restriction and strike it down. However, even if courts continue to uphold the restrictions, legislatures should be aware of the risk that the restrictions are ineffective, and possibly counter to their purpose.

This casenote will examine restrictions placed on sex offenders following completion of their prison sentences, how courts have handled challenges to the restrictions, and whether those courts' rulings were correct. Part II provides a brief history of post-sentence restrictions placed on certain types of criminals, and specifically, sex offenders. Part III discusses the Eighth Circuit's *Doe v. Miller* decision and its constitutional analysis. Part IV then concludes that because the court in *Doe v. Miller* did not go out of its way to specify that its ruling only applied to the statute in front of it and could not be applied to other residency restrictions, there is a risk that courts will rely on the decision to uphold more restrictive residency restrictions in the future.

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7. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 103 & n.17 (2007); see, e.g., H.R. 2380, 47th Leg., 2d Reg. Sess. (Ariz. 2006); H.R. 1089, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006).

8. See, e.g., 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, 798-99 (2005) ("[S]ex offenders are 'virtually impossible to rehabilitate and these crimes are so difficult to detect and control, those persons who are convicted of sexual offenses against children and thus, are apt to be repeat offenders, must have at least some restrictions on the location of their residence.'" (quoting Samantha Imber, *Crimes and Offenses: Sexual Offenses: Prohibit Sexual Predators From Residing Within Proximity of Schools or Areas Where Minors Congregate*, 20 GA. ST. U. L. REV. 100, 101 (2003) (discussing a state senator's public comments on sex offenders))).

9. 405 F.3d 700 (8th Cir. 2005).

10. IOWA CODE ANN. § 692A.2A (West 2003).

11. *Miller*, 405 F.3d 700, cert. denied, 546 U.S. 1034 (2005).

## II. HISTORICAL PERSPECTIVE

A. *Criminals with Post-Sentence Restrictions*<sup>12</sup>

The Tennessee Code conditions the restoration of felons' voting rights upon their payment of certain financial obligations, namely restitution and child support.<sup>13</sup> In *Johnson v. Bredesen*, the court upheld that provision of the Tennessee Code on the ground that it did not violate the Twenty Fourth Amendment or the Ex Post Facto Clause.<sup>14</sup>

The Twenty Fourth Amendment states that the right to vote cannot be conditioned upon payment of a poll tax.<sup>15</sup> In *Johnson*, the court ruled that "[i]t is not unreasonable or impermissible for a state to require a convicted felon to complete his entire sentence, including the payment of restitution, prior to having his voting rights restored."<sup>16</sup> Additionally, regarding the condition of child support payments, the court found that payment of child support is not considered part of a criminal's sentence—it is a legal obligation arising from a court order.<sup>17</sup> Thus, child support payments are not a "tax" on voting, and subsections (b) and (c) of § 40-29-202 do not violate the Twenty Fourth Amendment.<sup>18</sup>

While the Twenty Fourth Amendment is at issue for some post-

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12. While sex offender residency restrictions are the focus of this casenote, a brief description of post-sentence restrictions placed on other categories of criminals and how courts have treated them will precede the analysis of post-sentence restrictions on sex offenders to illustrate that courts are reluctant to strike down such restrictions in the face of constitutionally based challenges.

13. The statute states in relevant part:

(b) . . . [A] person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence.

(c) . . . [A] person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person is current in all child support obligations.

TENN. CODE ANN. § 40-29-202 (2006); see also Neema Trivedi, Op-Ed., *Ease Ex-Offenders' Voting Restrictions*, ARIZ. DAILY STAR, Oct. 9, 2006, available at <http://www.freerepublic.com/focus/f-news/1716299/posts> (discussing statute similar to Tennessee Code section 40-29-202 that exists in Arizona, and stating that, in 2006, it prohibited more than 140,000 individuals who had completed their prison sentences from voting).

14. 579 F. Supp. 2d 1044, 1048 (M.D. Tenn. 2008). The court also held that the provision does not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* However, this note will not discuss that issue because it is collateral to the issue of post-incarceration restrictions.

15. The Twenty Fourth Amendment states:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. CONST. amend. XXIV, § 1.

16. *Johnson*, 579 F. Supp. 2d at 1058–59 (footnote omitted).

17. *Id.* at 1059.

18. *Id.*

sentence restrictions, the Ex Post Facto Clause is the more pertinent issue to post-sentence restrictions on sex offenders. In *Johnson*, disenfranchised felons claimed that the Tennessee Code retroactively increased their penalties because subsections (b) and (c) of § 40-29-202 were enacted after the felons had been sentenced, thus violating the Ex Post Facto Clause.<sup>19</sup> The court stated that payment of child support as a condition to voting does not violate the Ex Post Facto Clause because it does not increase “the penalty by which [a] crime is punishable.”<sup>20</sup>

## B. Sex Offender Post-Sentence Restrictions

### 1. PURPOSE OF POST-SENTENCE RESTRICTIONS ON SEX OFFENDERS

“Sexual predators are some of the most feared and despised criminal offenders in society.”<sup>21</sup> While restrictions placed on sex offenders may be emotionally charged based on anger towards the offenders, legislatures use the rationale of fear when enacting the restrictions—fear that the sex offenders will re-offend against vulnerable children.<sup>22</sup> The fear is founded upon the belief that “[t]hey can’t help themselves”<sup>23</sup> from committing crimes that are “so offensive to human dignity and so atrocious that many [citizens] would be comfortable using any means necessary to prevent even the possibility of re-offense.”<sup>24</sup>

### 2. SEX OFFENDER RESTRICTIONS

#### a. Sex Offender Registration Laws

In 1994, in New Jersey, seven-year-old Megan Kanka disappeared, and after the police questioned several individuals, Jesse Timmende-

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19. *Id.*; see also U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . ex post facto Law . . .”).

20. *Johnson*, 579 F. Supp. 2d at 1060 (quoting *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995)) (internal quotation marks omitted). A more extensive ex post facto analysis will be described later in this casenote in relation to sex offender residency restrictions.

21. Megan A. Janicki, Note, *Better Seen Than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 B.U. PUB. INT. L.J. 285, 285 (2007).

22. See *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (“Sex offenders are a serious threat in this Nation. [T]he victims of sex assault are most often juveniles, and [w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.” (alterations in original) (citation omitted) (quoting *McKune v. Lile*, 536 U.S. 24, 32–33 (2002) (plurality opinion)) (internal quotation marks omitted)).

23. Janicki, *supra* note 21, at 285 (alteration in original) (quoting Robert F. Worth, *Exiling Sex Offenders from Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1).

24. *Id.* at 285–86 (alteration in original) (quoting *Doe v. Miller*, 298 F. Supp. 2d 844, 846 (S.D. Iowa 2004), *rev’d*, 405 F.3d 700 (8th Cir. 2005)). However, critics of residency restrictions placed on sex offenders point out that “[t]here is no evidence . . . that residential proximity to schools or parks affects re-offense.” *Miller*, 298 F. Supp. 2d at 876 (alterations in original).

quas, who lived across the street from the victim, confessed to the location of Megan's body, "where it was discovered that she was raped, sodomized, and strangled to death."<sup>25</sup> Timmendequas was charged and convicted for the murder of Megan.<sup>26</sup> Megan's parents were informed that Timmendequas had "previous convictions for sexual offenses against young children."<sup>27</sup> As a result, they campaigned for the state legislature to enact Megan's Law under the premise that "[e]very parent should have the right to know if a dangerous sexual predator moves into their neighborhood."<sup>28</sup> New Jersey passed Megan's Law three months after Megan's death.<sup>29</sup>

The purpose of Megan's Law is to "provid[e] a means of protecting the public, especially our children, from victimization by sexual offenders."<sup>30</sup> Megan's Law seeks to achieve its goal by "tracking the whereabouts of convicted sex offenders and providing notification to the public of the presence of a sex offender in [the] community."<sup>31</sup> Thus, the law requires convicted sex offenders to register with the state and requires law enforcement to give notice to the public that a registered sex offender lives in their community.<sup>32</sup>

Even though Megan's Law is seen as the first legislation of its kind, at least twenty-five other states had required sex offenders to register with law enforcement officials at the completion of their prison sentence.<sup>33</sup> While most states did not adopt sex offender registration statutes until the 1990s,<sup>34</sup> California was the first to adopt a registration requirement for sex offenders in 1947.<sup>35</sup>

States are now required to adopt their own form of Megan's Law under the Wetterling Act, which Congress passed in 1994 after the enactment of the first Megan's Law.<sup>36</sup> As punishment for not adopting a

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25. Karen A. Salvemini, Comment, *Sex-Offender Parents: Megan's Law and Schools' Legal Options in Protecting Students Within Their Walls*, 17 WIDENER L.J. 1031, 1035 (2008).

26. *State v. Timmendequas*, 737 A.2d 55, 64 (N.J. 1999).

27. Salvemini, *supra* note 25, at 1035 (quoting Maureen S. Hopbell, Comment, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331, 336 (2004)).

28. Megan Nicole Kanka Foundation, Inc., <http://www.megannicolekankafoundation.org/mission.htm> (last visited Mar. 29, 2009).

29. Salvemini, *supra* note 25, at 1035.

30. Pennsylvania State Police Megan's Law Website, <http://www.pameganslaw.state.pa.us> (follow "Frequently Asked Questions" hyperlink) (last visited Mar. 29, 2009).

31. *Id.*

32. *Id.*

33. Hopbell, *supra* note 27, at 337 (citing Jerry Gray, *Sex Offender Legislation Passes in the Senate*, N.Y. TIMES, Oct. 4, 1994, at B6).

34. Salvemini, *supra* note 25, at 1034 (citing Janicki, *supra* note 21, at 289).

35. *Id.*

36. *See* Hopbell, *supra* note 27, at 339 (citing 42 U.S.C. § 14071 (2006)).

Megan's Law under the Wetterling Act, states forfeit their right to a portion of the federal funding allocated under the Omnibus Crime Bill.<sup>37</sup> Under this pressure, "by 1996, every state and the District of Columbia had enacted a version of Megan's Law legislation."<sup>38</sup>

The Supreme Court has twice upheld state sex offender registration laws. In *Smith v. Doe*, the Supreme Court upheld Alaska's registration law against an ex post facto challenge.<sup>39</sup> Under the Alaska Sex Offender Registration Act, a sex offender is required to register with the Department of Corrections or local law enforcement within thirty days before his release from jail, or within one business day of entering the state if the sex offender is not still incarcerated, even if the sex offender was convicted before the Act's passage.<sup>40</sup> Because the legislature's intent was to establish "civil proceedings," rather than to impose a punishment, the Court held that the law did not unconstitutionally violate the Ex Post Facto Clause.<sup>41</sup>

The Court also upheld a state sex offender registration law in *Connecticut Department of Public Safety v. Doe*.<sup>42</sup> A convicted sex offender challenged the law's provision requiring the Department of Public Safety to post the sex offender registry containing sex registrants' names, addresses, photographs, and descriptions on an Internet website and to make the registry available to the public as violative of the Fourteenth Amendment's Due Process Clause.<sup>43</sup> The Court ruled that "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."<sup>44</sup>

#### b. Federal Rules of Evidence

The Violent Crime Control and Law Enforcement Act of 1994 ("Violent Crime Act")<sup>45</sup> amended the Federal Rules of Evidence and "modifie[d] the longstanding rule barring evidence of a defendant's character as proof of action in conformity therewith on a particular occasion."<sup>46</sup> The Act added Rules 413, 414, and 415 to the Federal Rules of

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37. *Id.*

38. *Id.*

39. 538 U.S. 84, 105-06 (2003).

40. *Id.* at 90-91.

41. *Id.* at 92, 96 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

42. 538 U.S. 1, 7-8 (2003).

43. *Id.* at 4-6.

44. *Id.* at 6-7 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

45. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

46. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 4:85, at 355-56 (3d ed. 2007).

Evidence.<sup>47</sup> Rules 413<sup>48</sup> and 414<sup>49</sup> permit the introduction of sex offenses into evidence as character evidence to prove action in conformity therewith. Rule 415 simply applies Rules 413 and 414 to civil cases.<sup>50</sup>

Ever since these Rules were initially proposed, they “have been met with hostility by the legal establishment.”<sup>51</sup> The Judicial Conference’s Advisory Committee on Evidence Rules, with what was noted as “highly unusual unanimity,” ardently opposed the new rules, fearing that they “could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice.”<sup>52</sup>

Even though there was strong opposition to Rules 413–415, the Violent Crime Act was the result of a public response to several high-profile crimes against children.<sup>53</sup> While this public response indicates that the Rules may have been adopted to punish sex offenders, there are

47. See § 320935, 108 Stat. at 2135–37.

48. FED. R. EVID. 413:

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

49. FED. R. EVID. 414:

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

50. FED. R. EVID. 415:

(a) In a civil case in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party’s commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

51. *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 151 (3d Cir. 2002) (citing JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 159 F.R.D. 51, 52 (1995) [hereinafter JUDICIAL CONFERENCE REPORT]).

52. JUDICIAL CONFERENCE REPORT, *supra* note 51, at 53.

53. Mueller, *supra* note 46, at 357 (noting that just a year earlier, “12-year-old Polly Klass had been raped and murdered in California. Just months before the [crime] bill passed, seven-year-old Megan Kanka had been raped and murdered in New Jersey, and both crimes were committed by men with previous convictions for child molesting.”).

evidential reasons for allowing prior sex offenses to be admitted. Rules 413–415 permit the use of prior sex offenses to prove character, and action in conformity therewith, based on the belief that persons who commit sex offenses are peculiarly likely to be repeat offenders.<sup>54</sup> Additionally, in trials for sexual assault and child molestation, so much turns on who the fact finder believes; however, victims of sex offenses “often cannot testify effectively, and there is a great risk . . . that having to testify is itself traumatic, and perhaps damaging over the long run, to the victim.”<sup>55</sup> Notwithstanding legislative belief that evidence of a prior sex offense is extremely probative of the commission of a later sex offense, the probative value is not automatically high enough such that the admission of such evidence is exempt from Rule 403’s balancing test;<sup>56</sup> thus, for a prior sex offense to be admissible, the probative value of the prior sex offense must not be substantially outweighed by the risk of unfair prejudice.<sup>57</sup>

### c. Iowa’s Sex Offender Residency Restriction

As a result of legislatures’ and the public’s fear of sex offenders recidivating, states began passing residency restriction laws almost a decade ago.<sup>58</sup> State residency restrictions typically prohibit sex offenders from residing within a certain distance—sometimes as far as two-thousand feet—of schools, day cares, and sometimes even any area where children congregate.<sup>59</sup> Generally, local residency restrictions are even stricter than state restrictions.<sup>60</sup> For example, local residency restrictions may prohibit sex offenders from “living, working, or . . . even being within 2,500 feet of a school, day care [facility], park, or school bus stop.”<sup>61</sup> Sex offenders cannot even drive through Binghamton, New

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54. *Id.* (citing *Rivera v. Rivera*, 262 F. Supp. 2d 1217, 1226 (D. Kan. 2003) (noting that a history of molestation is “exceptionally probative” in showing “an unusual disposition” that “does not exist in ordinary people”); see Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 *IND. L.J.* 315, 335–36 (2001) (describing legislative reactions to high recidivism rates for sexual predators).

55. Mueller, *supra* note 46, at 356.

56. See *FED. R. EVID.* 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

57. See Mueller, *supra* note 46, § 4:86, at 361–62.

58. Janicki, *supra* note 21, at 291 (citing Worth, *supra* note 23).

59. *IOWA CODE ANN.* § 692A.2A (West 2003); see also *GA. CODE ANN.* § 42-1-15 (Supp. 2009) (stating that registered sex offenders cannot live within one thousand feet of “any child care facility, church, school, or area where minors congregate”).

60. See Janicki, *supra* note 21, at 291–92.

61. Worth, *supra* note 23.

York.<sup>62</sup> Ely, Iowa “‘passed an ordinance banning sex offenders from residing in nearly the entire town,’ despite the fact that not a single school or day care exists within town lines.”<sup>63</sup>

Iowa’s residency restriction rivals local restrictions, as it is one of the most restrictive state laws.<sup>64</sup> Passed by the Iowa Legislature in the spring of 2002 and effective on July 1, 2002,<sup>65</sup> section 692A.2A of the Iowa Code provides that a sex offender “shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.”<sup>66</sup> Iowa defines “residence” as “the place where a person sleeps, which may include more than one location, and may be mobile or transitory.”<sup>67</sup> In addition to being broad in its restrictions, the Iowa statute is also broad in how many people it applies to.<sup>68</sup> At the close of 2003, Iowa had approxi-

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62. Janicki, *supra* note 21, at 292; James Bone, *Child Molesters Sue the City that Banned Them*, TIMES (U.K.), Aug. 25, 2005, available at 2005 WLNR 13364494.

63. Janicki, *supra* note 21, at 292 (citing Press Release, ACLU, ACLU Asks U.S. Supreme Court to Review Iowa’s Sex Offender Residency Restriction (Sept. 29, 2005), available at <http://www.aclu.org/crimjustice/gen/20127prs20050929.html>).

64. § 692A.2A.

65. Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 720–21 (2005).

66. § 692A.2A. The entire statute provides:

1. For purposes of this section, “person” means 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.
2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.
4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply:
  - a. The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.
  - b. The person is subject to an order of commitment under chapter 229A.
  - c. The person has established a residence prior to the July 1, 2002, or a school or child care facility is newly located on or July 1, 2002 [sic].
  - d. The person is a minor or a ward under a guardianship.

*Id.*

67. *Id.* § 692A.1(8) (2003 & Supp. 2009). Ohio has a broader definition of “residence,” which further limits the areas sex offenders can live. See Duster, *supra* note 65, at 721 n.55 (citing 2005 Ohio Op. Att’y Gen. 2-1 (2005) (stating that a residence in Ohio includes “premises in a nursing home, adult care facility, residential group home, homeless shelter, hotel, motel, boarding house, or facility operated by an independent housing agency that is located within 1000 feet of any school premises”)).

68. Duster, *supra* note 65, at 722.

mately 5,674 registered sex offenders.<sup>69</sup> Of those sex offenders, 5,073, or eighty-three percent, had preyed on minors.<sup>70</sup>

While Iowa's statute has been challenged as unconstitutional, it has also been criticized as not being strict enough to meet its intended purpose—to protect the community.<sup>71</sup> Even though Iowa's statute restricts where sex offenders can reside, it does not prohibit sex offenders from simply being in the restricted area, as some of its local counterparts do.<sup>72</sup> In other words, the “affected persons are free to travel, work, or generally move about within any area.”<sup>73</sup>

Although Iowa's statute has been criticized as not being broad enough in that it does not prohibit sex offenders from being within 2,000 feet of a school or day care facility, in reality there is no risk that sex offenders will be anywhere near a school in some cities because there is nowhere sex offenders can live in those cities. In Johnson County, Iowa, for example, “a map of Iowa City showing the restricted areas was described as having ‘virtually no place . . . for a sex offender to live.’”<sup>74</sup> Additionally, sex offenders are effectively banned from residing in Des Moines, the largest city in Iowa.<sup>75</sup> The only areas in Des Moines not off-limits to sex offenders by Iowa's statute are “industrial areas or some of the city's newest and most expensive neighborhoods.”<sup>76</sup>

Towns like Davenport and Bettendorf, due to their 344 day-care facilities and thirty-four schools, are also almost completely covered by Iowa's statute.<sup>77</sup> In Bettendorf, the only areas not covered by the residency restriction are “a golf course, a mall, and a few affluent neighborhoods.”<sup>78</sup> The effect of Iowa's broad restriction is to banish sex offenders from “many small towns or densely populated cities.”<sup>79</sup> Sex offenders do not even have the choice of being homeless in those cities where they are almost completely banned because, in Des Moines for example, sex offenders are “not allowed to sleep in homeless shelters.”<sup>80</sup> An additional effect of Iowa's statute is “forced . . . ‘involuntary civil

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69. *Id.* (citing *Doe v. Miller*, 298 F. Supp. 2d 844, 852 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005)).

70. *Id.*

71. *Id.*

72. *Id.* (citing *Miller*, 298 F. Supp. 2d at 849).

73. *Id.* (quoting *Doe v. Miller*, 216 F.R.D. 462, 464 (S.D. Iowa 2003)).

74. *Id.* at 723 (alteration in original) (quoting *Miller*, 216 F.R.D. at 468).

75. *Id.* (citing *Miller*, 298 F. Supp. 2d at 851).

76. *Id.* (quoting *Miller*, 298 F. Supp. 2d at 851).

77. *Id.* (citing Marc Chase, *Sex Offenders in Q-C Have Few Places to Live*, QUAD CITY TIMES (Davenport, Iowa), Feb. 8, 2003, at A1).

78. *Id.* (citing Chase, *supra* note 77).

79. *Id.* at 722 (citing *All Things Considered* (NPR radio broadcast, Jan. 9, 2003)).

80. *Id.* at 723 (quoting Morgan McChurch, *ICLU Challenges Banishment Law for Iowa Sex Offenders*, IOWA ST. DAILY, July 17, 2003, at 1).

commitment.’”<sup>81</sup> In *Doe v. Miller*, John Doe IV, who was incarcerated for drunk driving, was unable to leave jail because he could not find a residence comporting with Iowa’s residency restriction.<sup>82</sup>

### III. IOWA RESIDENCY RESTRICTION’S CONSTITUTIONAL ISSUES AND ANALYSIS OF *DOE V. MILLER*’S TREATMENT OF THEM

The effects of residency restrictions on sex offenders have been embraced in communities because of the communities’ belief that individuals who choose, “because of life experiences or any other reason, to sexually offend, especially against minors,” can constitutionally have their freedoms reduced.<sup>83</sup> This belief is based on a refusal “to sympathize with individuals who ‘have dramatically affected their victims’ lives.’”<sup>84</sup>

In the face of emotionally charged approvals of sex offender residency restrictions, it is important that the Constitution is not forgotten. Thus, the Iowa ACLU filed what it “believed to be the first class action suit in the nation” on behalf of various “John Doe[s].”<sup>85</sup> Each John Doe who was subject to section 692A.2A “had committed a range of sexual crimes, including indecent exposure, ‘indecent liberties with a child,’ sexual exploitation of a minor, assault with intent to commit sexual abuse, lascivious acts with a child, and second and third degree sexual abuse.”<sup>86</sup> Each John Doe could legally reside in only a small number of areas under Iowa’s statute and had difficulty finding housing in permitted areas.<sup>87</sup> For example, “John Doe XIV testified that the only available compliant housing in his hometown . . . was too expensive,” so he and his wife had to purchase a home forty-five miles from the town.<sup>88</sup> “John Doe VI was renting an apartment in compliance with [the residency restriction], but had to move out when [his] landlord decided that he did not want to rent to a sex offender.”<sup>89</sup> Additionally, John Doe VIII and John Doe XI each applied to rent compliant apartments, “but their applications were denied because of their criminal records.”<sup>90</sup> However, in contrast to the John Does’ testimony, a parole and probation officer tes-

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81. *Id.* at 723–724 (alteration in original) (quoting McChurch, *supra* note 80).

82. 298 F. Supp. 2d 844, 853–54 (S.D. Iowa 2004), *rev’d*, 405 F.3d 700 (8th Cir. 2005).

83. Duster, *supra* note 65, at 724 (quoting McChurch, *supra* note 80).

84. *Id.* (quoting McChurch, *supra* note 80).

85. Press Release, ACLU of Iowa, ACLU-IA Challenges Sex Offender Banishment Law with Class Action Lawsuit (June 25, 2003), available at <http://www.aclu-ia.org/News.aspx> (follow hyperlink next to “6/25/2003”).

86. *Doe v. Miller*, 405 F.3d 700, 705 (8th Cir. 2005).

87. *Id.* at 706.

88. *Id.*

89. *Id.*

90. *Id.* at 706–07.

tified that “‘virtually everyone’ . . . whom he supervised between July 2002 and July 2003 was able to locate housing in compliance with [section 692A.2A].”<sup>91</sup> Regardless, the Iowa ACLU challenged section 692A.2A as a violation of several constitutional guarantees: the right to travel, the right to due process, the prohibition on ex post facto laws, the Fifth Amendment’s protection against self-incrimination, and the right to family association and privacy.<sup>92</sup>

The Eighth Circuit, in *Doe v. Miller*, addressed each of the constitutional issues raised in the Iowa ACLU’s complaint and concluded that the ACLU’s arguments were fruitless—the court upheld section 692A.2A.<sup>93</sup>

### A. *Due Process of Law Under the Fourteenth Amendment*

#### 1. PROCEDURAL DUE PROCESS

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>94</sup> The plaintiffs argued that section 692A.2A, in violation of guaranteed procedural due process, both deprived them of notice and foreclosed an opportunity for them to be heard.<sup>95</sup>

##### a. Notice

“Procedural due process ‘insists that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.’”<sup>96</sup> The plaintiffs claimed that “some cities in Iowa are unable to provide sex offenders with information about the location of all schools” and child care facilities.<sup>97</sup> Additionally, “it is difficult to measure the restricted areas” because they are measured “‘as the crow flies’ from a school or child care facility.”<sup>98</sup> Thus, sex offenders have a burdensome task in determining whether they are residing in a permissible area.

Section 692A.2A’s lack of notice is evidenced by the experience of “Doug,” one of the first sex offenders charged under the statute.<sup>99</sup> When Doug was released from prison, he moved into a residence and contacted

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91. *Id.* at 707.

92. Complaint at 2, *Doe v. Miller*, 298 F. Supp. 2d 844 (S.D. Iowa 2004) (No. 3:03-CV-90067), 2003 WL 23908516.

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

94. U.S. CONST. amend. XIV, § 1.

95. *Miller*, 405 F.3d at 708–09.

96. *Miller*, 298 F. Supp. 2d at 877.

97. *Miller*, 405 F.3d at 708.

98. *Id.*

99. Duster, *supra* note 65, at 764 (citing *All Things Considered*, *supra* note 79).

law enforcement to determine whether his chosen residence comported with the statute, to no avail.<sup>100</sup> Doug measured the distance to the nearest school twice in his car and believed he was further than 2,000 feet from it.<sup>101</sup> However, Doug's residence was in fact within 2,000 feet of a school because he did not measure the distance "as the crow flies."<sup>102</sup> After two months of waiting to hear from law enforcement regarding his inquiry, Doug was arrested for violating the statute.<sup>103</sup>

In addition to sex offenders being denied notice as to the distances of their homes to the nearest school or day-care facility, they are also denied notice of where day-care facilities are located. While the locations of schools are easy for state officials to identify, day-care facilities are more difficult to identify.<sup>104</sup> The only list of child-care facilities in Iowa is not published.<sup>105</sup> However, even if it were published, changes in the list are frequent, including 1,921 new listings between 2002 and 2003, and "[i]n several instances, the listings contain no physical address or only a post office box number."<sup>106</sup>

Clearly, Doug and other sex offenders are not provided notice by section 692A.2A of whether they are in compliance with the statute. However, the Eighth Circuit in *Doe v. Miller* disregarded the fact that, despite their best efforts, sex offenders sometimes cannot determine whether they are violating the statute; the court ultimately did not find the statute to be unconstitutionally vague.<sup>107</sup> The court did state that "the judicial doctrine of vagueness . . . requires that a criminal statute 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'"<sup>108</sup> However, the court articulated that "a criminal statute is not vague on its face unless it is 'impermissibly vague in all of its applications.'"<sup>109</sup> Additionally, "the possibility that an individual might be prosecuted in a particular case in a particular community despite his best efforts to comply with the restriction is not a sufficient reason to invalidate the entire statute."<sup>110</sup>

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 765.

105. *Doe v. Miller*, 298 F. Supp. 2d 844, 849 (S.D. Iowa 2004) (stating that John Does received a list of child-care facilities "only after filing an open records request and paying a seventy dollar fee"), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

106. *Id.*

107. *See Doe v. Miller*, 405 F.3d 700, 708 (8th Cir. 2005).

108. *Id.*

109. *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982)).

110. *Id.*

The court did, however, leave open the possibility that “[a] sex offender subject to prosecution under those circumstances may seek to establish a violation of due process through a challenge to enforcement of the statute as applied to him in a specific case.”<sup>111</sup>

b. Opportunity to Be Heard

Section 692A.2A states that a conviction alone makes the residency restriction applicable.<sup>112</sup> On the other hand, the Court in *Kansas v. Hendricks*<sup>113</sup> dealt with “a law that permitted the civil commitment of past sex offenders”<sup>114</sup> upon a showing of “‘mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.’”<sup>115</sup> In upholding the statute, the Court relied on the fact “‘that a conviction standing alone did not make anyone eligible for the burden imposed by that statute.’”<sup>116</sup> However, Iowa’s residency restriction does make a conviction sufficient to impose the restriction.<sup>117</sup> While Iowa’s residency restriction may not infringe upon sex offenders’ liberty to the extent the law in *Hendricks* did,<sup>118</sup> it applies to a broader class—all sex offenders—than the subset of sex offenders that the civil commitment statute applied to.

The plaintiffs argued that the residency restriction “foreclose[d] an ‘opportunity to be heard’ because the statute provides no process for individual determinations of dangerousness.”<sup>119</sup> By stating that individual determinations of dangerousness are required, the plaintiffs demonstrate their belief that residency restrictions—because their purposes, as previously stated, are to protect the community from recidivating sex offenders—are intended to keep only dangerous, not all, sex offenders from residing near children. However, based on the text of section 692A.2A, the court found no such intent because the statute does not state that it distinguishes between dangerous and nondangerous sex offenders; the statute unambiguously distinguishes only between sex

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111. *Id.*

112. *See* IOWA CODE ANN. § 692A.2A(1) (West 2003).

113. 521 U.S. 346 (1997).

114. Duster, *supra* note 65, at 762 (citing *Hendricks*, 521 U.S. at 371).

115. *Id.* (quoting *Hendricks*, 521 U.S. at 352).

116. *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting)).

117. *See* IOWA CODE ANN. § 692A.2A(1) (West 2003).

118. Because “liberty” is a subjective term, some sex offenders may feel as if their liberty is infringed upon to a lesser extent if they are forced to live in a psychiatric hospital than if, like five sex offenders in Florida, they are forced to live under a bridge with no electricity or clean water. *See* Sarah E. Agudo, Comment, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 Nw. U. L. REV. 307, 313 (2008) (citing 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/index.html>).

119. *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005).

offenders and non-sex offenders.<sup>120</sup> Once a determination on whether an individual is a sex offender has been made, “additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren.”<sup>121</sup> There is no need for an opportunity to be heard, because a sex offender has already had his opportunity to be heard when he was originally convicted as a sex offender.<sup>122</sup> If, on the other hand, Iowa’s residency restriction stated that it only applies to “dangerous” sex offenders, then, according to the court, all sex offenders would have the right to an individual determination of dangerousness.<sup>123</sup>

The court in *Doe v. Miller* did not read a requirement of dangerousness into section 692A.2A.<sup>124</sup> The court stated that the plain language of the statute did not indicate such a requirement.<sup>125</sup> However, because the statute’s purpose is to prevent sex offenders from recidivating against minors, there is arguably an intent to require a showing of dangerousness; there is no need to protect children from past sex offenders who have no risk of recidivating. Additionally, there is no argument that requiring a showing of dangerousness would be administratively burdensome because “[a]t the time of the district court decision in *Doe v. Miller*, Iowa had a process already in place which would have easily allowed for an individualized determination of dangerousness.”<sup>126</sup>

## 2. SUBSTANTIVE DUE PROCESS

In addition to arguing that section 692A.2A violates procedural due process, the plaintiffs in *Doe v. Miller* “also assert[ed] that the residency restriction is unconstitutional under the doctrine of substantive due pro-

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120. *See id.* (“The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings.”).

121. *Id.*; *see also* Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (“[D]ue process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme.”).

122. *See Miller*, 405 F.3d at 709.

123. *See id.*

124. *See id.*; *see also* Bains, *supra* note 6, at 490 (“In states like Arkansas and California that do draw distinctions among classes of sex offenders, registrants may win the opportunity to establish their membership in the group exempted from the statutory restrictions.” (citing *Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1019 (8th Cir. 2006))).

125. *See Miller*, 405 F.3d at 709.

126. Duster, *supra* note 65, at 762–63. In the District Court for the Southern District of Iowa, which struck down section 692A.2A, Judge Pratt was “at a loss to understand why the State would do away with” high, low, or moderate risk classifications used under sex offender registration laws when imposing the more severe residency restrictions on sex offenders. *Id.* at 763 n.377 (quoting *Doe v. Miller*, 298 F. Supp. 2d 844, 877 (S.D. Iowa 2004), *rev’d*, 405 F.3d 700).

cess.”<sup>127</sup> They relied on Supreme Court decisions finding that “certain liberty interests are so fundamental that a State may not interfere with them . . . unless the infringement is ‘narrowly tailored to serve a compelling state interest.’”<sup>128</sup> The plaintiffs believed that several “fundamental rights” were infringed by the residency restriction, “including the ‘right to privacy and choice in family matters,’ the right to travel, and ‘the fundamental right to live where you want.’”<sup>129</sup>

a. The Right to Personal Choice Regarding the Family

The plaintiffs argued that the residency restriction infringes on the fundamental right to have “freedom of personal choice in matters of marriage and family life.”<sup>130</sup> In doing so, they relied on the decision in *Moore v. City of East Cleveland*,<sup>131</sup> which held unconstitutional a zoning ordinance that prohibited a grandmother from living with her two grandsons.<sup>132</sup> However, the court distinguished *Moore* from *Miller* in that the ordinance in *Moore* operated directly on the family relationship, whereas the residency restriction in *Miller* had only an indirect effect on the family relationship.<sup>133</sup> The residency restriction only restricts where a residence may be located, not who may live with a sex offender, and therefore does not infringe on the fundamental right of choice in family matters.<sup>134</sup>

However the court’s argument that the residency restriction does not restrict who may live with a sex offender is weak. Because the residency restriction nearly bans sex offenders from some communities, the only way that those sex offenders can live with their families is if their families also move out of the community. This is an unreasonable request for the families of sex offenders, especially if a sex offender has children. If a sex offender has a child, the sex offender may not live near a school, so as to prevent him from being near children. However, if the offender’s child wants to live with his sex offender parent, the child also has to live far from any school. Opponents of this view could argue that the child can still reasonably get to school. But that argument would be admitting that keeping sex offenders two-thousand feet from schools does not meet the purpose of protecting the community—if two-thou-

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127. *Miller*, 405 F.3d at 709.

128. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)).

129. *Id.*

130. *Id.* at 710 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion)).

131. 431 U.S. 494.

132. *Miller*, 405 F.3d at 710.

133. *Id.*

134. *Id.*

sand feet is close enough that a child can reasonably get to school, then two-thousand feet is close enough that sex offenders might be tempted to also be near the school.

#### b. Right to Travel

The Supreme Court has established components of the fundamental right to travel, including “the right of a citizen of one State to enter and to leave another State . . . and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”<sup>135</sup> The plaintiffs claim that the residency restriction violates the right to travel because “by substantially limiting the ability of sex offenders to establish residences in any town or urban area in Iowa,” the statute deters sex offenders “from migrating from other States to Iowa.”<sup>136</sup> The court in *Doe v. Miller* disagreed by finding that there is “free ingress and regress to and from” Iowa for sex offenders in addition to the fact that the statute does not “discriminat[e] against citizens of other States who wish to establish residence in Iowa.”<sup>137</sup> The court stated that just because the prospects for affordable and convenient residence are less likely for sex offenders in Iowa than elsewhere, that does not implicate the right to travel.<sup>138</sup> Thus, the court determined that the residency restriction does not violate the fundamental right to travel.<sup>139</sup>

The right to travel is implicated when a state denies a person moving to that state of a necessity, thus denying a migrant the right to move to a state.<sup>140</sup> *Doe v. Miller* incorrectly equalizes “affordable” housing and “convenient” housing.<sup>141</sup> While “convenient” housing is surely not a necessity, “affordable” housing is. If affordable housing exists in a state, that state cannot deny a person the right to reside in the affordable housing. Denying that right is analogous to denying a person welfare benefits, which was exactly what the Court in *Saenz v. Roe* found that a state could not do, because without welfare benefits, a person cannot live in that state.<sup>142</sup>

Additionally, the right to travel is implicated when a state discriminates against a certain class of migrants to that state.<sup>143</sup> In the case of section 692A.2A, there is no doubt that it treats sex offenders who want

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135. *Id.* at 711 (quoting *Saenz v. Roe*, 526 U.S. 489, 500 (1999)).

136. *Id.*

137. *Id.* at 712.

138. *Id.*

139. *Id.*

140. See *Saenz*, 526 U.S. 489.

141. See *Miller*, 405 F.3d at 712.

142. *Saenz*, 526 U.S. at 500–06.

143. *Id.* at 504–08.

to move to Iowa differently than it treats other migrants. Therefore, the court in *Doe v. Miller* was incorrect in holding that Iowa's residency restriction does not violate the fundamental right to travel.

### c. Right to Live Where You Want

The plaintiffs also urged the court to recognize a fundamental right "to live where you want."<sup>144</sup> However, consistent with other courts that have not found that right to be a fundamental right,<sup>145</sup> *Doe v. Miller* stated that the right to "live where you want" is not "deeply rooted in this Nation's history and tradition."<sup>146</sup> Thus, because the right to "live where your want" is not fundamental, the court reviewed section 692A.2A to determine "whether it meets the standard of 'rationally advancing some legitimate governmental purpose.'"<sup>147</sup> The sex offenders argued that the statute did not rationally advance the legitimate governmental purpose of protecting children "because there is no scientific study that supports the legislature's conclusion that excluding sex offenders from residing within 2000 feet of a school or child care facility is likely to enhance the safety of children."<sup>148</sup> The court, however, rejected this argument because in the absence of precise statistical data in an area where human behavior is unpredictable, the legislature has the authority "to make judgments about the best means" to protect children.<sup>149</sup>

## B. *Ex Post Facto*

The most litigated claim regarding sex offender residency statutes is that the restrictions violate the constitutional guarantee that "[n]o state shall . . . pass any . . . ex post facto Law."<sup>150</sup> An ex post facto law is "[a] law that impermissibly applies retroactively, especially in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed."<sup>151</sup> Thus, a law violates the Ex Post Facto Clause when it imposes a greater punishment upon an individual than the punishment that attached to the crime when the individual originally committed it.<sup>152</sup> The plaintiffs in *Doe v. Miller* contended that sec-

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144. *Miller*, 405 F.3d at 713.

145. *See id.* at 714 (citing *Prostrollo v. Univ. of S.D.*, 507 F.2d 775, 781 (8th Cir. 1974)).

146. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

147. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

148. *Id.*

149. *Id.*

150. Bains, *supra* note 6, at 485 (alterations in original) (quoting U.S. CONST. art. I, § 10, cl. 1).

151. Duster, *supra* note 65, at 727 (alteration in original) (quoting BLACK'S LAW DICTIONARY 620 (8th ed. 2004)).

152. *See Miller*, 405 F.3d at 718 (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

tion 692A.2A is unconstitutional under the Ex Post Facto Clause “because it imposes retroactive punishment on those who committed a sex offense prior to July 1, 2002,” the date the statute went into effect.<sup>153</sup> Of importance to sex offender residency statutes is the purpose of the Ex Post Facto Clause: “to prevent the legislature from abusing its authority by enacting arbitrary or vindictive legislation retroactively applicable to disfavored groups.”<sup>154</sup>

In finding that section 629A.2A does not violate the Ex Post Facto Clause, the court in *Doe v. Miller* followed the framework employed in *Smith v. Doe*.<sup>155</sup> Under that framework, a court must first “ascertain whether the legislature meant the statute to establish civil proceedings.”<sup>156</sup> If the legislature’s intent was to establish criminal proceedings, then that ends the inquiry, and the law violates the Ex Post Facto Clause because it is necessarily punitive.<sup>157</sup> However, if the legislature intended the law to be civil and nonpunitive, then the court must next determine if the law is nonetheless “so punitive either in purpose or effect as to negate” the legislature’s nonpunitive intent.<sup>158</sup> In finding that a law, which the legislature intended to be civil, is effectively a criminal punishment, a court needs “[o]nly the clearest proof.”<sup>159</sup>

Even though section 692A.2A “does not contain any clear statement of [its] purpose,” the residency restriction is within chapter 692A of the Iowa Code, which also contains Iowa’s sex offender registration system.<sup>160</sup> The Supreme Court of Iowa has stated that the registration system has a purpose of “protect[ing] society.”<sup>161</sup> “[W]here a legislative restriction is an incident of the State’s power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.”<sup>162</sup> Thus, a law with a purpose of “protecting society” indicates that it is a “nonpunitive, regulatory law.”<sup>163</sup> The court inferred from the available evidence that section 692A.2A was intended “to protect the health and safety of Iowa citizens,” similar to the state’s sex offender

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153. *Id.*

154. Agudo, *supra* note 118, at 321–22 (citing *State v. Cook*, 700 N.E.2d 570, 580 (Ohio 1998)).

155. *Miller*, 405 F.3d at 718.

156. *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 92 (2003)) (internal quotation marks omitted).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* (alteration in original) (quoting *Ex rel. S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997)).

162. *Id.* (alteration in original) (quoting *Smith v. Doe*, 538 U.S. 84, 93–94 (2003)).

163. *See id.*

registration system.<sup>164</sup> Therefore, the court concluded that section 692A.2A was intended to be nonpunitive.<sup>165</sup>

Next, despite its finding that the legislative intent was for the law to be a civil, nonpunitive regulatory scheme, the court considered whether the law was nonetheless so punitive in effect as to negate that intent.<sup>166</sup> *Smith v. Doe* pointed to several factors initially drawn from *Kennedy v. Mendoza-Martinez*,<sup>167</sup> including “whether the law has been regarded in our history and traditions as punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, and whether it has a rational connection to a nonpunitive purpose . . . .”<sup>168</sup> While *Doe v. Miller* acknowledged these factors as an aid in its analysis, it stressed that the factors are not dispositive and that the “ultimate question always remains whether the punitive effects of the law are so severe as to constitute the ‘clearest proof’ that [the] statute . . . should nonetheless be deemed to impose ex post facto punishment.”<sup>169</sup>

The first factor the court used was whether the law has historically been regarded as punishment.<sup>170</sup> The plaintiffs argued that section 692A.2A had the effect of banishing sex offenders.<sup>171</sup> They also contended that banishment has historically been regarded as punishment.<sup>172</sup> However, while the court does not deny that banishment is a form of punishment, it denies that Iowa’s statute banishes sex offenders because “[i]t does not ‘expel’ the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for . . . any purpose other than establishing a residence.”<sup>173</sup>

While it is true that the residency restriction is not textually an outright banishment because it only limits where sex offenders can reside, it sometimes has the effect of prohibiting residence in vast areas, which, in this case, is sometimes the equivalent of banishment. For example, some offenders are forced to remain in prison beyond their parole dates, choosing between living with their families or complying with the Act, going homeless or breaking the law, or simply leaving the State because no community has a legal space for them. The differences between a law that would leave a man in prison or cause him to go homeless rather than have him reside in the community, and an

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164. *Id.* at 719.

165. *Id.*

166. *Id.*

167. 372 U.S. 144, 168–69 (1963).

168. *Miller*, 405 F.3d at 719 (citing *Smith v. Doe*, 538 U.S. 84, 97 (2003)).

169. *Id.* (emphasis omitted).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

order forever banishing him, are very slight.<sup>174</sup>

If sex offenders cannot live near communities, the effect will likely be that they will not make the trek to enter those communities at all. The residency restriction's aim is the same as the aim of pure banishment laws: "to remove the subjects of the laws from the areas that the laws have been enacted to protect."<sup>175</sup> Therefore, the residency restriction has the same effect of banishment, and should thus be considered punishment.

The second *Mendoza-Martinez* factor is "whether the law promotes the traditional aims of punishment—deterrence and retribution."<sup>176</sup> *Doe v. Miller* stated that, while the law could have a deterrent effect, the deterrent effect does not provide a strong enough inference that the residency restriction is punishment.<sup>177</sup> The court found that the primary purpose of the restriction "is not to alter the offenders' incentive structure," but instead is to "reduce the likelihood of reoffense."<sup>178</sup> The court's analysis of whether the law is "retributive" was analogous to its "deterrence" analysis: while any restraint imposed on criminals is "at least potentially retributive in effect," the purpose of the law is to protect the health and safety of children.<sup>179</sup> It is difficult to see how the court came to its conclusion. The factor is whether the law has the *effect* of promoting deterrence and retribution, not whether the law's *purpose* is to promote deterrence and retribution. When the court conceded that section 692A.2A does in fact have the effect of deterrence and retribution, that should have ended its discussion. Additionally, because the residency restriction does not distinguish between dangerous and nondangerous sex offenders in that it applies to all sex offenders, the restriction promotes retribution at least regarding the nondangerous sex offenders because there is no need to protect the public from them.

The third factor is "whether the law 'imposes an affirmative disability or restraint.'"<sup>180</sup> "Restraint is typically defined as '[c]onfinement, abridgement, or limitation.'"<sup>181</sup> *Doe v. Miller* stated that "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be

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174. Duster, *supra* note 65, at 732–33 (quoting *Doe v. Miller*, 298 F. Supp. 2d 844, 869 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700) (internal quotation marks omitted).

175. Agudo, *supra* note 118, at 324.

176. *Miller*, 405 F.3d at 720.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Duster, *supra* note 65, at 731 (alteration in original) (quoting BLACK'S LAW DICTIONARY 1340 (8th ed. 2004)).

punitive.”<sup>182</sup> The court did acknowledge that section 692A.2A is more disabling than some of the sex offender registration requirements previously review by the Supreme Court, but quickly moved on to the next factor.<sup>183</sup>

The final and “most significant” factor is “whether the regulatory scheme has a ‘rational connection to a nonpunitive purpose.’”<sup>184</sup> A “rational connection” is not a demanding requirement, as it does not require “a close or perfect fit with the nonpunitive aims.”<sup>185</sup> Therefore, the court found that the legislature could reasonably conclude that the residency restriction would protect the public by minimizing the risk that past sex offenders would recidivate against minors.<sup>186</sup> The sex offender plaintiffs, however, argued that the residency restriction is excessive because it does not exempt nondangerous past sex offenders.<sup>187</sup> In striking down this argument, the court stated that “there are never any guarantees that [sex offenders] won’t reoffend” and “any sex offender is always going to be of some concern forever.”<sup>188</sup> However, in *State v. Seering*,<sup>189</sup> it was established that there is “no sociological or empirical proof that any [residency] restriction . . . enhances the safety of children.”<sup>190</sup> Nonetheless, because there was expert testimony at trial stating that there is no such thing as a nondangerous sex offender,<sup>191</sup> the court concluded that the residency restriction has a rational connection to the purpose of protecting the public.

In sum, the Eighth Circuit in *Doe v. Miller* incorrectly found that all of the *Mendoza-Martinez* factors favored characterizing section 692A.2A as nonpunitive. In fact, three of the *Mendoza-Martinez* factors suggest that the residency restriction is so punitive in effect as to negate its nonpunitive, regulatory purpose.

### C. Self-Incrimination

The plaintiffs argued that the residency restriction violates the Fifth and Fourteenth Amendments’ protection against self-incrimination.<sup>192</sup>

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182. *Miller*, 405 F.3d at 720 (alteration in original) (quoting *Smith v. Doe*, 538 U.S. 84, 100 (2003)).

183. *See id.* at 721.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* at 722.

188. *Id.* (alteration in original).

189. No. CRIM AGIN006718, 2003 WL 21738894 (Iowa Dist. Ct. Apr. 30, 2003), *rev'd*, 701 N.W.2d 655 (Iowa 2005).

190. Duster, *supra* note 65, at 734 (emphasis omitted).

191. *See Miller*, 405 F.3d at 722.

192. *Id.* at 716.

The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>193</sup> The protection against self-incrimination applies when a person faces a “substantial and real hazard of subjecting [oneself] to criminal liability.”<sup>194</sup> “The privilege applies only to testimony about crimes that were already committed or are in the process of being committed at the time the testimony is given.”<sup>195</sup> The court in *Doe v. Miller* concluded that the residency restriction does not violate the privilege against self-incrimination because it does not compel a sex offender to be a witness against himself.<sup>196</sup> Instead, section 692A.2A regulates where a sex offender may reside; residing in a permissible area is not equivalent to providing any information that might be used against the sex offender in a criminal case.<sup>197</sup>

Even though the residency restriction alone does not violate the right against self-incrimination, when acting in concert with sex offender registration laws, it makes those registration laws self-incriminatory.<sup>198</sup> Because registration laws require a sex offender to disclose his address, if he is living in an impermissible area under the residency restriction, he is being forced to give incriminating testimony against himself—he must admit that he is violating section 692A.2A.<sup>199</sup> In an analogous case, *United States v. Ansani*, “[t]he court held that a statute requiring a person to report his past business transactions to the government . . . violated the Fifth Amendment” because the person is forced to report unlawful transactions, thus incriminating himself.<sup>200</sup>

The privilege against self-incrimination can be waived if done voluntarily, knowingly, intelligently, and with a full understanding of the consequences of waiving the right.<sup>201</sup> Thus, to cure the Fifth Amendment issue regarding sex offender residency restrictions in combination with registration requirements, either one of the laws would have to be repealed, or the registration requirement would have to be optional.<sup>202</sup> Presumably, most sex offenders would not register if registering were optional. Thus, the purpose of registration requirements—to trace where sex offenders reside—would not be met, and law enforcement could not

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193. U.S. CONST. amend. V.

194. Agudo, *supra* note 118, at 326 (alteration in original) (quoting *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980)).

195. *Id.* (citing *United States v. Harvey*, 869 F.2d 1439, 1446 (11th Cir. 1989)).

196. *Miller*, 405 F.3d at 716.

197. *Id.*

198. Agudo, *supra* note 118, at 327.

199. *Id.*

200. *Id.* (citing *United States v. Ansani*, 138 F. Supp. 451 (N.D. Ill. 1955)).

201. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

202. Agudo, *supra* note 118, at 328.

determine whether sex offenders were violating the residency restriction.<sup>203</sup> Because the only way to determine whether a sex offender is residing in a permissible area is to require him to provide his address, residency restrictions would be useless if registration laws were either repealed or made optional. Therefore, since registration requirements and residency restrictions cannot constitutionally coexist, legislatures would be wise to keep the registration laws to track where sex offenders are residing and repeal the residency restrictions.

#### IV. CONCLUSION

This casenote illustrates the tension between the constitutional rights provided to all citizens of the United States and the strong interest in protecting children from dangerous sex offenders. It concludes that “[n]o matter how repulsed society is concerning sex offenders, we cannot place offenders in a unique, separate class bereft of constitutional rights,”<sup>204</sup> and contrary to the court’s finding in *Doe v. Miller*, Iowa’s 2,000-foot residency restriction on sex offenders is unconstitutional.

While the public may agree with the policy behind *Doe v. Miller*, the court’s decision did not go out of its way to limit the applicability of its holding to the Iowa residency restriction exclusively. Thus, as the public becomes increasingly supportive of residency restrictions, states may begin expanding their restrictions beyond even the strictest local residency ordinances. As those ordinances are challenged, states will point courts towards *Doe v. Miller*, and courts will continue to find even more restrictive residency statutes constitutional.

Even if courts continue to find sex offenders residency restrictions constitutional, however, legislatures have the responsibility to limit them to only sex offenders designated as “dangerous.” While it may be acceptable to protect children from “dangerous” sex offenders, “nondangerous” past sex offenders are of no risk to children and thus should not be subject to the residency restrictions.

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203. *See id.*

204. Duster, *supra* note 65, at 778 (quoting Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 *DRAKE L. REV.* 635, 659 (1999)).