

Has Georgia Gone Too Far—or Will Sex Offenders Have To?

by JACQUELINE CANLAS-LAFLAM*

There is no shortage of seemingly ordinary people who have been forced to register as sex offenders in the State of Georgia. Ms. Whitaker is a twenty-six-year-old college student studying criminal justice and has been married for six years.¹ At age seventeen, she had consensual oral sex with a fifteen-year-old male.² She was convicted of sodomy and served five years of probation.³ As a result of her conviction, she had to register as a sex offender.⁴ Ms. Allison, a mother of five, was convicted as a party to statutory rape when her daughter became pregnant at the age of fifteen and she later allowed the boy who impregnated her daughter to move into their house.⁵ Ms. Allison was sentenced to fifteen years of probation and is included on the Georgia sex offender registry.⁶ Mr. Wilson is a twenty-three-year-old college student at Georgia State University.⁷ When he was a freshman in college, he pled guilty to a sexual offense for “inappropriately touching an adult female college friend while highly intoxicated at a freshman party.”⁸ He was sentenced to five years of probation.⁹ He is

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1. Complaint at 7, *Whitaker v. Perdue*, No. 4:06-cv-140 (N.D. Ga. filed June 20, 2006) [hereinafter *Complaint*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 10.

6. *Id.*

7. *Id.* at 11.

8. *Id.*

9. *Id.*

registered as a “level I” sex offender, “the lowest possible designation [in Georgia], reflecting the unlikeliest possibility of re-offending.”¹⁰

There are few criminals in our society that receive more contempt and deserve less sympathy than convicted sex offenders. Lawmakers hesitate to question the strictness of statutes aimed at sex offenders because “lawmakers who change the rules could be called ‘soft on crime.’”¹¹ It is not surprising that across political party lines, there is no strong interest in protecting the Constitutional rights of convicted sex offenders. Because state legislatures may not represent the interests of sex offenders fairly, and, in order to maintain the integrity of our legal system, it is important to consider the legality of statutes aimed at sex offenders, no matter how unpopular it may be.

Statutes aimed at sex offenders often require registrants to register personal information or place restrictions on where they may live. A number of states have enacted mandatory residency *registration* statutes that divulge the identities and addresses of convicted sex offenders.¹² States have also enacted laws, such as Florida’s Jessica Lunsford Act, to set minimum sentencing for sex offenders and provide for lifetime electronic monitoring for certain types of offenders.¹³ In November of 2006, for example, California passed an initiative requiring certain registered sex offenders to be monitored by global positioning systems for life.¹⁴ In the last ten years, twenty-seven states and many cities have passed residency *restrictions*, limiting where a convicted sex offender may live within the state.¹⁵ In some situations, the statutes have barred registered sex offenders from large parts of the cities, if not made it nearly impossible for them to find anywhere to live legally in the state.¹⁶ The general purpose of these residency restrictions is to protect the health and safety of the public,¹⁷ specifically the children.¹⁸

10. *Id.* at 12.

11. Wendy Koch, *Sex-offender Residency Laws Get Second Look*, USA TODAY, Feb. 25, 2007, at A1, available at http://www.usatoday.com/news/nation/2007-02-25-sex-offender-laws-cover_x.htm.

12. Bret R. Hobson, Note, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away From Children?*, 40 GA. L. REV. 961, 963 (2006) (discussing the present state of statutes aimed at convicted sex offenders).

13. *Id.* at 963-64.

14. CAL. PENAL CODE § 3004(b) (Deering 2007).

15. Koch, *supra* note 11.

16. *Id.*

17. See 2006 Ga. Laws 379, § 1 (“The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. . . . The General Assembly further finds that the high level of threat that a sexual predator presents to the public

Currently, at least twenty-seven states have enacted residency restriction laws.¹⁹ The statutes generally state that a sex offender cannot live within some specified distance of a school or childcare center. This distance is most frequently either within one thousand or two thousand feet.²⁰ For instance, as of November 2006, California prohibits registered sex offenders from living within two thousand feet of “any public or private school, or park where children regularly gather.”²¹ However, some states have made their statutes even stricter by lengthening this distance, adding more prohibited locations to the enumerated list, or placing restrictions on other activities such as employment.²² A few statutes allow for some type of individualized assessment of dangerousness.²³

Thus far, statutes in states such as Iowa²⁴ and Georgia²⁵ have come under fire in the federal courts for an assortment of alleged constitutional violations. The circuit courts have not invalidated such statutes.²⁶ Residency restriction statutes have sustained constitutional challenges in federal court that they are:

[O]verbroad and vague; permit[ting] a regulatory taking without just compensation; interfer[ing] with the right to contract; constitut[ing] a bill of attainder; and violat[ing] substantive due process, procedural due process, the Ex Post Facto Clause, the Fifth Amendment right against self-incrimination, the Eighth Amendment ban on cruel and

safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement . . . [our] strategy.”)

18. Hobson, *supra* note 12, at 965.

19. Koch, *supra* note 11 (table titled “State restrictions” summarizes sex offender statutes in several states). The following states have residency restrictions: Alabama, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia. *Id.*

20. *Id.*

21. CAL. PENAL CODE § 3003.5(b) (Deering 2007). Note also that in California, “[e]very inmate who has been convicted for any felony violation of a ‘registerable sex offense’ . . . or any attempt . . . and who is committed to prison and released on parole . . . shall be monitored by a global positioning system *for life*.” CAL. PENAL CODE § 3004(b) (Deering 2007) (emphasis added).

22. *Id.*

23. *Id.* See also ARK. CODE ANN. § 5-14-128 (2006) (residency restriction in Arkansas allowing for a particularized risk assessment for sex offenders).

24. Doe v. Miller, 405 F.3d 700 (8th Cir. 2005). See also IOWA CODE § 692A.2A (2005).

25. Doe v. Baker, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925 (N.D. Ga. April 5, 2006). See also GA. CODE ANN. § 42-1-13 (2006).

26. See, e.g., Miller, 405 F.3d at 704-05; Baker, 2006 U.S. Dist. LEXIS 67925, at *26-27.

unusual punishment, and the right to equal protection under the law.²⁷

The Supreme Court has yet to review any of these residency restrictions statutes.²⁸ The Court has, however, upheld the validity of registration-notification statutes.²⁹

In June of 2003, Georgia passed a statute prohibiting registered sex offenders from living within one thousand feet of schools, childcare facilities, or “where minors congregate.”³⁰ A registered sex offender challenged the statute in federal district court as violating the Ex Post Facto Clause, the Eighth Amendment, Fifth Amendment Takings Clause, and the Fourteenth Amendment under due process and the right to privacy.³¹

The District Court for the Northern District of Georgia upheld the statute as constitutional.³² First, the court rejected the plaintiff’s claim that the statute violated the Ex Post Facto Clause by subjecting him to additional punishment, reasoning that Congress enacted the statute with a clear regulatory intent and that any punitive effects of the statute did not violate the clause.³³ Further, the court rejected the plaintiff’s claim that the statute was cruel and unusual punishment under the Eighth Amendment.³⁴ Because the statute was not punishment, there could be no Eighth Amendment violation.³⁵ The court granted the defendants’ motion to dismiss the Procedural Due Process claim without addressing the merits of the claim because the plaintiff failed to respond to the defendants’ motion.³⁶ The court rejected the Substantive Due Process claim that the statute impeded on his right of privacy and right for his extended family to live together.³⁷ The plaintiff claimed that his family would be forced to decide whether to move with him or live without him.³⁸ The court declined to recognize a new liberty interest particularly where the statute did not

27. Hobson, *supra* note 12, at 970-72 (citations omitted). But note the recent Georgia Supreme Court decision invalidating Georgia’s residency restriction living provision under a state and federal Takings Clause analysis. *See infra* notes 59-63 and accompanying text.

28. Hobson, *supra* note 12, at 969.

29. *Id.* See also *Smith v. Doe*, 538 U.S. 84 (2003).

30. GA. CODE ANN. § 42-1-13 (2006).

31. *Baker*, 2006 U.S. Dist. LEXIS 67925, at *3.

32. *Id.* at *27.

33. *Id.* at *17-*18.

34. *Id.* at *18.

35. *Id.*

36. *Id.* at *18-*19.

37. *Id.* at *21.

38. *Id.*

dictate *who* he lived with, but rather *where* he lived.³⁹ Lastly, the plaintiff claimed that the regulation denied him all economic or productive use of his land without compensation in violation of the Fifth Amendment Takings Clause.⁴⁰ The court rejected this argument, finding that the regulation did little to affect his economic interest or investment-backed expectations in his land.⁴¹

In 2006, Georgia passed an even harsher statute⁴² that was considered, at the time, to be the strictest sex offender statute in the country.⁴³ The new statute prohibited registered sex offenders from residing,⁴⁴ working,⁴⁵ or loitering⁴⁶ within one thousand feet of “any child care facility, church, school, or area where minors congregate.”⁴⁷ A violation of the statute is a felony and the punishment for a violation is a minimum of ten to a maximum of thirty years in prison.⁴⁸ The statute explains that “the term ‘[a]rea where minors congregate’ shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public and community swimming pools.”⁴⁹ Two noteworthy aspects of this law are that it applies to school bus stops, which are unmarked and scattered in suburban areas,⁵⁰ and that the statute applies to everyone on the registry without exception for illness, age, financial hardship, or disability.⁵¹ Georgia has in excess of 10,000 sex offenders and 150,000 school bus

39. *Id.* at *21-*23.

40. *Id.* at *23.

41. *Id.* at *24-*26.

42. Complaint, *supra* note 1, at 2 (explaining that the statute was to go into effect on July 1, 2006).

43. Jenny Jarvie, *Georgia Sex-offender Rules Create Stir*, SEATTLE TIMES, July 3, 2006, at A5, available at http://seattletimes.nwsourc.com/html/nationworld/2003101190_offender03.html.

44. GA. CODE ANN. § 42-1-15(a) (2006). Note that this statute has been invalidated in part. See *infra* notes 70-74 and accompanying text.

45. § 42-1-15(b). This provision prohibits sex offenders from being “employed by any child care facility, school, or church or by any business or entity that is located within 1,000 feet of a child care facility, a school, or a church.” § 42-1-15(b)(1). Further, “sexually dangerous predator[s]” are prohibited from “be[ing] employed by any business or entity that is located within 1,000 feet of an area where minors congregate.” § 42-1-15(b)(2).

46. § 42-1-15(a).

47. § 42-1-15(a), (b).

48. § 42-1-15(d).

49. § 42-1-12(a)(3).

50. Although it appears that there have been no studies on the subject, it is the experience of the author that school bus stops are generally unmarked.

51. Complaint, *supra* note 1, at 26.

stops.⁵² Further, for purposes of the new statute, Georgia does not distinguish between types or dangerousness of sexual offenders.⁵³ Teenagers who have consensual sexual relations with other minors are treated the same as violent rapists.⁵⁴

In 2006, as a result of the previous Georgia sex offender statute, Ms. Whitaker, the young woman who engaged in consensual oral sex as a minor with another minor, had already been forced to move from the home that she and her husband own and on which they still pay a mortgage.⁵⁵ They found temporary housing, but realized they would probably be forced to move if the school bus stop provision of the new statute was enforced.⁵⁶ As a result, the Whitakers have endured financial strain and uncertainty as to whether or not they will find housing, jobs, and if they will be able to simultaneously live together and make a living while remaining within the constraints of the new law.⁵⁷

Ms. Allison, the mother who was convicted of being a party to the crime of statutory rape when she allowed her underage daughter to become pregnant, was told she was in violation of the new Georgia statute.⁵⁸ Two weeks after the enactment of the law, a deputy from the county sheriff's office came to her door and told her that her home was within one thousand feet of a school bus stop.⁵⁹ She and her family have had difficulty finding a home that they can afford that complies with the statute.⁶⁰ Even many mobile home parks have been found to be off-limits as they are frequently within one thousand feet of playgrounds, swimming pools, or school bus stops.⁶¹ Ms. Allison's court-ordered treatment provider has also warned her that the new statute prohibits registered sex offenders from attending church.⁶²

Mr. Wilson, the young man who was convicted of inappropriately touching an adult female friend from college, co-owns a home that is

52. Jarvie, *supra* note 43.

53. *Id.*

54. *Id.*

55. Complaint, *supra* note 1, at 7. Under the former Georgia residency restriction statute, Ms. Whitaker's house was within one thousand feet of a church that operated a daycare within its walls. *Id.*

56. *Id.* at 8.

57. *Id.*

58. *Id.* at 10.

59. *Id.*

60. *Id.* at 10-11.

61. *Id.* at 11.

62. *Id.*

within one thousand feet of a school bus stop.⁶³ Furthermore, he works within one thousand feet of a church.⁶⁴ Enforcement of the new statute would require him to find a new place to live and a new place to work.⁶⁵ After six weeks of looking for a place to live that would comply with the statute in the metro Atlanta area, he believed he found a motel in an industrial area, but was uncertain as to whether he will ultimately end up in violation of the school bus stop provision because the locations of the bus stops were scheduled to change in the next six weeks.⁶⁶

A class consisting of the registered sex offenders above and other sex offenders challenged the statute, with a special focus on the bus stop provision.⁶⁷ The plaintiffs argued that the statute is unconstitutional for violating the following: the Ex Post Facto Clause, the Eighth Amendment (by placing an unconstitutional punishment based on status), both procedural and substantive due process, the Free Exercise Clause and the right to freedom of association, the Fifth Amendment Takings Clause, and the rights to interstate and intrastate travel.⁶⁸ The plaintiffs also claimed that the statute violates the Religious Land Use and Institutionalized Persons Act.⁶⁹

However, on November 21, 2007, before the case could be decided in federal district court, the Georgia Supreme Court considered *Mann v. Georgia Department of Corrections*, in which it invalidated the living provision (§ 45-1-15(a)) of the latest Georgia residency restriction statute on a Fifth Amendment Takings theory.⁷⁰ The Georgia Supreme Court said that forcing sex offenders who are homeowners to leave their homes can be tantamount to an unlawful taking under both the federal and state constitutions.⁷¹ Justice Hunstein explained that “there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected.”⁷² “[S]ex offenders face the possibility of being repeatedly uprooted and forced to abandon [their] homes in order to

63. *Id.* at 11-12.

64. *Id.* at 12.

65. Complaint, *supra* note 1, at 12.

66. *Id.*

67. *Id.* at 2, 32-34.

68. *Id.* at 32.

69. *Id.*

70. *Mann v. Geor. Dep’t of Corr.*, 2007 Ga. LEXIS 849, *14 (2007). This case was decided as this note was going to press and the opinion is not final until expiration of the rehearing period.

71. *Id.* at *3, *8.

72. *Id.* at *3.

comply with the [law's] restrictions”⁷³ This is so because, unlike states that provide a “grandfather” exception for offenders living near childcare facilities that were established within the restricted zone after the enactment of the statute, Georgia provides no such exception.⁷⁴ Thus, under the Georgia statute, sex offenders who have otherwise complied with the provisions of the statute are forced to move whenever one decides to open a school, church, or child care facility within the restricted zone.

Nonetheless, the federal case is still pending in district court and many of the issues raised by those plaintiffs are still alive, including those relating to the statute’s other provisions. Further, by invalidating this provision solely on a Takings Clause theory, it is still important to consider the other constitutional issues raised by the plaintiffs. After all, it is likely Georgia’s legislature will simply seek to rewrite the statute to pass muster under a Takings analysis. For instance, the opinion suggests that a “grandfather” clause might cure the unconstitutionality of the statute. In fact, Georgia House Majority Leader Jerry Keen intends on taking another stab at the living provision in January.⁷⁵ Even if this change is made, the other constitutional challenges will still be relevant and should be taken into consideration in rewriting the new provision. Keen hopes the state will appeal *Mann* so that the Takings question can be ultimately be heard by the United States Supreme Court.⁷⁶ However, if these other constitutional concerns are ignored by the legislature, then the courts will ultimately be faced with such challenges and Keen may get his wish of Supreme Court review.

Because *Mann* was decided on a Takings analysis alone, this note will discuss alternative theories that state legislatures and courts should consider in the context of sex offender residency restrictions. Specifically, Georgia serves as a revealing case study of the constitutionality of restrictive residency restrictions targeting sex offenders. Given the wide range of issues that were presented by Georgia’s latest sex offender residency restriction, this note will discuss how Georgia’s new residency restriction

73. *Id.* at *5.

74. *See infra* notes 120, 114-130 and accompanying text.

75. InsiderAdvantageGeorgia.com, *Jerry Keen: Supreme Court Ruling Last Week Makes Georgia a Safe Haven for Sex Offenders*, Nov. 26, 2007, http://www.insideradvantagegeorgia.com/restricted/2007/November%202007/11-26-07/Keen_Safe_Haven112619633.php. Keen says he is “looking at a new law that would re-establish the residency requirement except for those who could prove they were in compliance with the law when they initially moved to a new location, even if subsequent developments put them out of compliance with the law.” *Id.* It sounds as though the state legislature believes a grandfather clause is enough to remedy the statute of its unconstitutional nature.

76. *Id.*

statute, as originally written, violated (1) the Ex Post Facto Clause, (2) the Eighth Amendment, (3) Procedural Due Process under the Fourteenth Amendment, and (4) the Free Exercise Clause of the First Amendment.⁷⁷ Lastly, the note will analyze potential issues under the Dormant Commerce Clause and other policy considerations to argue that, in practice, the use of such harsh residency restrictions might make for a more dangerous situation for children, sex offenders, and the rest of society.

I. Background History of New Georgia Statute

As with most sex offender residency restriction statutes, one stated purpose of the new Georgia statute is to protect the health and safety of Georgia's citizens,⁷⁸ including protecting Georgia's children from sex offenders.⁷⁹ However, there is another purpose. The chief sponsor of the statute, House Majority Leader Jerry Keen, has made clear that the purpose of the statute is to force registered sex offenders out of Georgia, stating:

We want people running away from Georgia. Given the toughest laws here, we think a lot of people could move to another state If it becomes too onerous and too inconvenient, they just may want to live somewhere else. And I don't care where, as long as it's not in Georgia.⁸⁰

A class of registered sex offenders sued the Georgia Governor, State Attorney General, and a Chief Probation Officer⁸¹ in district court, to enjoin the State from enforcing the new law.⁸² On June 26, 2006, the court granted a temporary restraining order for certain individuals from enforcement of the law,⁸³ and three days later, the court granted a temporary restraining order for the narrow class of those registered sex offenders affected by the bus stop provision.⁸⁴ Whether or not the plaintiff

77. For a discussion on challenges not discussed in this note, see Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. 483 (2007).

78. See *supra* note 17 and accompanying text.

79. Complaint, *supra* note 1, at 3.

80. Kaffie Sledge, 'Toughest' Isn't Justice, COLUMBUS LEDGER ENQUIRER, June 26, 2006, available at http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/NewsArticles/news_hb1059_columbus03.htm.

81. Complaint, *supra* note 1, at 20-21.

82. *Id.*

83. Greg Bluestein, *Judge Blocks Bus-Stop Limits on Sex Offenders*, ASSOCIATED PRESS, June 29, 2006, available at http://onlineathens.com/stories/063006/news_20060630061.shtml.

84. *Id.*

class will succeed in court on the remaining alleged constitutional violations is uncertain.

II. Ex Post Facto Clause

Residency restriction statutes have been challenged in courts for allegedly violating the Ex Post Facto Clause of Article I, Section 10, Clause 1 of the Constitution.⁸⁵ Thus far, these challenges have been unsuccessful.⁸⁶ However, dissents in these cases have been common.⁸⁷

An ex post facto law is commonly defined as “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.”⁸⁸ Thus, a law is ex post facto whenever the legislature enacts a law that “imposes a greater punishment upon an individual than the law previously attached at the time when the crime was committed.”⁸⁹ In the context of residency restrictions, convicted sex offenders have already been punished for the crimes for which they were convicted.⁹⁰ Residency restrictions, if considered punishment, add additional punishment for the sex offense after the crime was committed. Furthermore, those people who legally lived in restricted areas before the law was enacted suffer ex post facto punishment when living there is criminalized without an exemption for them—they would be punished for living somewhere that was not illegal at the time they decided to do so.

As of yet, no residency restriction statutes have been invalidated based on a finding of punishment.⁹¹ As discussed below, unlike the statutes in *Doe v. Miller*,⁹² *Doe v. Baker*,⁹³ and *Smith v. Doe*,⁹⁴ the new Georgia statute as originally written closely resembles punishment and, therefore, would not withstand the same constitutional challenges as the previously upheld statutes.

85. Hobson, *supra* note 12, at 980. See also U.S. CONST. art. I, § 10, cl. 1.

86. Hobson, *supra* note 12, at 980.

87. *Id.* at 981.

88. Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 727 (2005) (citing BLACK’S LAW DICTIONARY 640 (8th ed. 2004)).

89. *Id.*

90. Duster, *supra* note 88, at 726-27.

91. See *supra* notes 24-29 and accompanying text.

92. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005). See also IOWA CODE § 692A.2A (2005).

93. *Doe v. Baker*, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925 (N.D. Ga. April 5, 2006). See also GA. CODE ANN. § 42-1-13 (2006).

94. *Smith v. Doe*, 538 U.S. 84 (2003). See also ALASKA STAT. § 12.63.010 (2007).

In *Doe v. Miller*, the Eighth Circuit reviewed a number of constitutional challenges to an Iowa residency restriction statute.⁹⁵ The Iowa statute prohibited registered sex offenders from living within two thousand feet of a school or registered childcare facility.⁹⁶ The statute did not apply, however, to sex offenders who established their residence prior to the law's enactment, or to schools and childcare facilities established after its enactment.⁹⁷ The Eighth Circuit reversed the district court's finding that the statute violated the Ex Post Facto Clause (for those sex offenders who committed the crime before the statute was enacted), the right to avoid self-incrimination,⁹⁸ and both procedural and substantive due process under the Fourteenth Amendment.⁹⁹

The plaintiffs in *Miller* argued that the statute was retroactive punishment for sex offenders whose criminal conduct took place prior to the enactment of the law.¹⁰⁰ The court looked to the test in *Smith v. Doe* to determine whether a state statute violates the Ex Post Facto Clause.¹⁰¹

In *Smith*, the Supreme Court reviewed the validity of the Alaskan Sex Offender Registration Act of 1994 ("the Act").¹⁰² This was the first time the Supreme Court reviewed the validity of a sex offender registration statute under the Ex Post Facto Clause.¹⁰³ The Act required that sex offenders register with the state law enforcement agencies.¹⁰⁴ Opponents of the Act claimed that the Act was punitive in nature and was therefore retroactive punishment in violation of the Ex Post Facto Clause.¹⁰⁵ The Court reasoned that if the purpose of the statute was to punish, then this would be a violation of the clause, but if the statute were merely regulatory, then the Court would need to "further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it civil."¹⁰⁶

95. *Miller*, 405 F.3d at 704-05.

96. *Id.* at 704.

97. *Id.* at 705.

98. *Id.* at 708, 716-18. The self-incrimination clause was arguably violated when convicted sex offenders are required to report their address of residence even if not in compliance with the residency restriction statute. *Id.* at 716.

99. *Id.* at 708.

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

101. *Id.*

102. *Smith v. Doe*, 538 U.S. 84, 89 (2003).

103. *Id.* at 92.

104. *Id.* at 89.

105. *Id.* at 91-92.

106. *Id.* at 92.

The Court applied a test to determine that the Act was not punitive, but instead was a civil regulatory statute, and therefore did not violate the Ex Post Facto Clause.¹⁰⁷ The *Smith* test looks to: (1) whether the effect of the sex offender statute was historically regarded as punishment; (2) whether the statute promotes the traditional aims of punishment; (3) whether the statute imposes an “affirmative disability or restraint;” and, (4) whether the statute has a rational connection to a non-punitive purpose, or whether the restriction is excessive in relation to that purpose.¹⁰⁸

A. The Georgia Residency Restriction Was Effectively a Form of Punishment

In *Miller*, the plaintiffs argued that the Iowa residency restriction was the practical equivalent to banishment, a form of punishment.¹⁰⁹ The Court of Appeals for the Eighth Circuit applied the *Smith* test, the test formulated by the Supreme Court in regards to Alaskan sex offender registration statute, to determine whether the statute was effectively punishment.¹¹⁰

The first issue under the *Smith* test is whether the law has been historically considered to be punishment.¹¹¹ The *Miller* court conceded that the Supreme Court considered banishment to be historically a form of punishment in *Smith*.¹¹² However, the court rejected the idea that Iowa’s statute was tantamount to banishment.¹¹³ The court explained that:

[B]anishment . . . involves an extreme form of residency restriction . . . Unlike Banishment, § 692A.2A restricts only where offenders may reside. It 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. With respect to many offenders, the statute does not even require a change of residence: the Iowa General Assembly included a grandfather provision that permits sex offenders to maintain a residence that was established prior . . . [to its enactment].¹¹⁴

Further, the court pointed out that the Iowa statute included a “grandfather provision” that exempted those sex offenders already living within the

107. *Id.* at 97.

108. *Id.*

109. *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005).

110. *Id.*

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

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

113. *Id.*

114. *Id.* (emphasis added).

restricted areas from violation of the law if “[t]he person has established residence prior to [the date of enactment] or a school or child care facility is newly located on or after” the date of enactment.¹¹⁵ Thus, there was no threat of the statute violating the Ex Post Facto Clause for those who established residency before the Iowa law was enacted.

Here, the new Georgia statute involves not merely a restriction on residency, but also a restraint on where a registered sex offender may work or loiter.¹¹⁶ Currently there is no U.S. Supreme Court authority on sex offender residency restriction statutes that prohibit where one may work and loiter.¹¹⁷ The court in *Miller* did not find the Iowa statute was effectively banishment because the statute only restricted where a registered sex offender may live.¹¹⁸ Consequently, the Eighth Circuit implied that restrictions on the right to work or engage in commercial transactions in the restricted area, as well as expelling sex offenders from their community, might be tantamount to banishment.

Unlike the Iowa statute, the new Georgia statute as originally written is precisely the type of statute that the Eighth Circuit would consider to be banishment. That the statute also prohibits “loitering” (which is ambiguous as to the behavior it seeks to deter) reinforces that registered sex offenders are not to be in the restricted areas for any reason. Even if that was not the intended meaning behind the word “loiter,” it is probable that sex offenders would avoid crossing into these areas for fear that their presence would be construed as “loitering” and would land them ten to thirty years in prison. Unlike other residency restriction statutes that have been challenged for violating the Ex Post Facto Clause of the Constitution, the new Georgia statute so effectively takes registered sex offenders out of communities with schools, churches, childcare centers, and other areas where minors congregate, that it can only be considered banishment. Further, there is no “grandfather” provision under the new Georgia statute, so those who established residency prior to the enactment of the law will be forced to move.¹¹⁹

In April of 2006, in *Doe v. Baker*, the District Court for the Northern District of Georgia reviewed the 2003 Georgia residency restriction statute, which prohibited registered sex offenders from living within one thousand

115. *Id.*; IOWA CODE § 692A.2A(4)(c) (2005).

116. GA. CODE ANN. § 42-1-15(a), (b) (2006).

117. Hobson, *supra* note 12, at 969.

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

119. *See* § 42-1-15.

feet of any school, childcare facility, or area “where minors congregate.”¹²⁰ The court also applied the *Smith* four-factor test. On the question of whether the statute equated to banishment, and therefore punishment, the court in *Baker* expanded on both *Smith* and *Miller*, positing that “[a] more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem if applied retroactively to those convicted prior to its passage.”¹²¹

The new Georgia law is more restrictive than the 2003 law. The new law prohibits not only where one may live, but additionally, where one may work or loiter.¹²² The practical consequences of the new statute are striking. First, the prohibited areas have been expanded to include churches, parks, and school bus stops, among other places minors may congregate. Thus, it is questionable whether a registered sex offender may even attend mass at church, prayer services, weddings, or funerals for fear of being found to be “loitering” in the restricted zone. In terms of employment, registrants would need to change jobs if their work location is in the newly restricted zone. Alternatively, they might have to change jobs because their residence is in a newly restricted zone and it is impracticable to commute to the same work location. Additionally, the law poses an interesting question for people whose work takes them to different locations, including gardeners, delivery people, sales people, and construction workers. To what extent will they be able to move about the community without violating the new Georgia statute?

According to the plaintiff sex offenders opposing the law, the practical effect of the statute is to make it impossible to live in the community;¹²³ indeed, House Majority Leader Jerry Keen would love nothing more!¹²⁴ As far as what the Georgia district court in *Baker* said about such a statute being applied retroactively to people who were convicted before the law came into effect, this is exactly what the new Georgia law as originally written does. The Iowa statute did not present this latter problem because of the exemption that its “grandfather” provision provided. Georgia has no such provision.¹²⁵ Under the logic of the district court in *Baker*, the new

120. *Doe v. Baker*, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at *2 (N.D. Ga. April 5, 2006).

121. *Id.* at *12 (emphasis added).

122. GA. CODE ANN. § 42-1-15(a), (b) (2006). Note that the working and loitering provisions are still valid after *Mann*.

123. See Complaint, *supra* note 1, at 24-25.

124. See *supra* note 80 and accompanying text.

125. § 42-1-15.

Georgia law would constitute banishment, which is historically regarded as a form of punishment.

B. The Georgia Residency Restriction Promotes the Traditional Aims of Punishment

The second factor under the *Smith* test is whether the residency restriction promotes the traditional aims of punishment: deterrence and retribution.¹²⁶ While admitting that the question was a difficult one to measure, the Eighth Circuit cited the Supreme Court's emphasis in *Smith* that Alaska's reporting requirements were "reasonably related to the danger of recidivism in a way that was consistent with the regulatory objective," and therefore did not support the contention that the registration requirement was punitive (despite the Ninth Circuit finding punishment where the length of reporting requirements correlated to the degree of the crime committed and not to the degree of risk a sex offender posed to society).¹²⁷

The restrictions under the new Georgia statute do not necessarily prevent recidivism. In regards to the relationship between the restriction imposed by the statute and the danger of recidivism, David Finkelhor, a University of New Hampshire sociology professor who is Director of the Crimes Against Children Research Center, explains that "[r]esearch has yet to show that such buffer zones are effective at reducing sex crimes" and that "[s]ex offenders typically meet their victims through their jobs, volunteer groups or other social networks, not because they live in the same neighborhood."¹²⁸ Georgia's residency restriction as originally written will not necessarily reduce an appreciable number of sexual offenses against children. Thus, the correlation between the imposed restriction imposed by the statute and the danger of recidivism is weaker than that in the regulatory objective and registration requirement in *Smith*.

The new Georgia statute promotes the traditional aims of punishment. The harsh effects of being virtually banished from the community would serve as a great deterrent¹²⁹ against committing a sex offense because it helps to discourage anyone considering committing a sex offense from

126. *Smith v. Doe*, 538 U.S. 84, 97 (2003); *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005).

127. *Miller*, 405 F.3d at 720 (citing *Smith*, 538 U.S. at 102) (internal quotations omitted).

128. Greg Bluestein, *Georgia's Tough Sex-offender Law Set to Launch*, ASSOCIATED PRESS, June 23, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/06/23/AR2006062300899_pf.html [hereinafter *Set to Launch*].

129. Black's Law Dictionary defines "deterrence" as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment." BLACK'S LAW DICTIONARY 187 (Pocket ed. 1996).

doing so. The statute theoretically has an incapacitating¹³⁰ effect because its purpose is to remove sex offenders from places where there are likely to be children, thus attempting to remove the temptation and opportunity to commit the crime. Lastly, the statute also serves a denouncing¹³¹ purpose. By expelling the registrants from their communities, the statute condemns the offense and conveys society's disapproval of the offender's conduct. Thus, the new Georgia statute promotes traditional aims of punishment.

C. The Georgia Residency Restriction Subjects Registered Sex Offenders to an Affirmative Disability or Restraint

The third prong of the *Smith* test is whether the new Georgia statute subjects registered sex offenders to an affirmative disability or restraint.¹³² A restraint may be defined as a “[c]onfinement, abridgement, or limitation.”¹³³ If the statute imposes a “minor and indirect” restraint or disability, a court will unlikely find there to be a punitive effect.¹³⁴

In *Smith*, the Supreme Court found that the registration system was not an affirmative restraint similar to probation or supervised release where “offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision.”¹³⁵ In *Miller*, the Eighth Circuit conceded that, unlike Alaska's registration requirement, the Iowa residency restriction imposes “an element of affirmative disability or restraint” based on the fact that some sex offenders are restricted from living in areas where they lived with their parents or spouses.¹³⁶ However, the court also noted that the residency restriction is not as disabling or restraining as the involuntary civil commitment scheme in *Kansas v. Hendricks*.¹³⁷ The court emphasized that the third factor is not dispositive, but should be reviewed in conjunction with the fourth factor, legislative purpose.¹³⁸

Even though the courts apply the same test to both residency restrictions and registration requirements, residency restrictions impose a

130. “Incapacitation” is defined as “[t]he action of disabling or depriving of legal capacity.” *Id.* at 303.

131. To “denounce” is defined as “[t]o condemn openly, esp. publicly,” “[t]o declare (an act or thing) to be a crime and prescribe a punishment for it,” or “[t]o accuse or inform against.” *Id.* at 181.

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

133. Duster, *supra* note 88, at 731 (quoting BLACK'S LAW DICTIONARY 1340 (8th ed. 2004)).

134. *Id.* (quoting *Smith*, 538 U.S. at 100).

135. *Smith*, 538 U.S. at 101.

136. *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005).

137. *Id.* (citing *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).

138. *Id.*

greater restraint on convicted sex offenders than statutes that merely require registration of personal information. The courts have conceded that sex offenders who are prohibited from living in specified areas face physical restraints that are not present in mere registration statutes.¹³⁹ However, judges disagree on how much weight to give this concession.¹⁴⁰

The new Georgia statute as originally written is even more disabling and restraining than the registration statute in *Smith* and the residency restriction in *Miller*. The statute covers more types of locations and increases the prohibition from *only* residency to residency, working, and loitering.¹⁴¹ Even post-*Mann*, the state legislature will probably write a new residency provision, so the thrust of these components working together is a real threat in Georgia. Unlike the mere registration system in *Smith*, the Georgia statute deprives a registrant the freedom of deciding where he may live and work. The plaintiff sex offender class in Georgia claims that they are being completely pushed out of most of the state and because many offenders are on parole and cannot just leave the state, many will be pushed out onto the streets.¹⁴² Certainly the restraint or disability imposed by this new residency restriction that bans sex offenders from living in large parts of the state is far greater than the registration imposed by Alaska's statute.

Iowa's statute allowed for registrants who had already made their homes in the restrictive areas prior to the law's enactment to remain living there without violating the statute.¹⁴³ This shows that the Iowa state legislature made a conscious decision to mitigate any affirmative disability resulting from the statute. The new Georgia statute imposes an affirmative disability or restraint on registered sex offenders.

Both the *Smith* and *Miller* courts rejected the argument that the Alaskan registration statute and the Iowa residency restriction, respectively, imposed an affirmative disability or restraint where the difficulties were not as extreme as the involuntary commitment scheme in *Hendricks*.¹⁴⁴ In *Hendricks*, the Supreme Court held that the involuntary commitment of a violent sexual predator pursuant to Kansas's Sexually Violent Predator Act did not violate the Ex Post Facto Clause where the commitment did not

139. Hobson, *supra* note 12, at 983.

140. *Id.*

141. GA. CODE ANN. § 42-1-15 (2006).

142. Complaint, *supra* note 1, at 24-25.

143. IOWA CODE § 692A.2A(4)(c) (2005). *See also* Doe v. Miller, 405 F.3d 700, 705 (8th Cir. 2005).

144. *Smith v. Doe*, 538 U.S. 84, 103-04 (2003); *Miller*, 405 F.3d at 720-21.

constitute punishment or criminalize past conduct.¹⁴⁵ The Court did not find punitive intent where the state legislature “‘disavowed any punitive intent;’ limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; . . . and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired.”¹⁴⁶

Hendricks is distinguishable from these residency restriction cases. While the disability or restraint of involuntary commitment is obviously greater than a residency restriction prohibiting where one may live, work, or loiter, the class of persons affected by the Kansas statute was more narrowly tailored. In *Hendricks*, the statute only applied to those *individuals* who, “‘due to a ‘mental abnormality’ or a ‘personality disorder,’ are likely to engage in ‘predatory acts of sexual violence’” after an individual assessment of risk.¹⁴⁷ Furthermore, the Court considered other factors in addition to the degree of restraint in determining that the law was civil regulation and not tantamount to punishment.¹⁴⁸ It is especially striking that the Kansas statute was based on individual assessment and that the person, once shown to no longer suffer from the problem, was allowed immediate release. Georgia’s new residency restriction treats all registered sex offenders as the worst type, absent any individualized assessment of risk of recidivism.¹⁴⁹ Further, the residency restriction was indefinite.¹⁵⁰ There is no chance to make a showing that a registrant is no longer—or never was—a threat to the community.¹⁵¹

The courts’ use of *Hendricks* to conclude that a residency or registration requirement does not impose a large enough affirmative disability or restraint is unpersuasive. A statute that dictates where one may live is certainly a restraint. One that also affects where a person may work, visit, or loiter would affect “an offender’s right to contract and pursue employment by limiting where he may purchase a home, rent an apartment,” and even “inflict additional restraint[s] upon family living arrangements and relationships.”¹⁵² The restraint in *Hendricks* may have been acceptable given the premise of a mental abnormality and individual risk assessment. Where those considerations are absent, however, the

145. *Kansas v. Hendricks*, 521 U.S. 346, 348 (1997).

146. *Id.* at 368-69.

147. *Id.* at 346.

148. *See supra* note 127 and accompanying text.

149. Complaint, *supra* note 1, at 3. *See also* GA. CODE ANN. § 42-1-15 (2006).

150. *See* GA. CODE ANN. § 42-1-15 (2006).

151. *See id.* *See also* Complaint, *supra* note 1, at 1-4.

152. Duster, *supra* note 88, at 731.

restraints imposed by the new Georgia sex offender statute should weigh heavily under this part of the *Smith* test.

D. Even if the Georgia Residency Restriction Has a Rational Connection to a Nonpunitive Purpose, the Restriction is Impermissibly Excessive in Relation to That Purpose

The fourth factor of the *Smith* test is whether the statute has a “rational connection to a nonpunitive purpose.”¹⁵³ According to the Supreme Court in *Smith*, this is the most important factor.¹⁵⁴ Further, the Court explained that a “statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.”¹⁵⁵ The Court in *Smith* found that the registration requirement had a rational connection to the non-punitive purpose of preventing recidivism, explaining that “[t]he excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.”¹⁵⁶ Thus, the question becomes whether the regulatory means are reasonable or excessive as they relate to the non-punitive objective.

In *Miller*, the Eighth Circuit found that the residency restriction statute had a rational connection to the non-punitive purpose of protecting the public.¹⁵⁷ The Eighth Circuit then deferred to the wisdom of the state legislature, and rejected the contention that the restriction was excessive without lending any guidance as to what would be excessive.¹⁵⁸

Circuit Judge Melloy, in his dissent regarding the *ex post facto* challenge, disagreed with how the majority applied the *Smith* test to the facts.¹⁵⁹ While he agreed with the majority that the statute did bear a rational connection to a non-punitive legislative purpose, he believed that the statute was excessive.¹⁶⁰ Judge Melloy reasoned that “the severity of [the] residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders’ lives, makes the residency restriction excessive.”¹⁶¹ After analyzing the

153. *Smith v. Doe*, 538 U.S. 84, 102 (2003).

154. *Id.*

155. *Id.* at 103.

156. *Id.* at 105.

157. *Doe v. Miller*, 405 F.3d 700, 721-23 (8th Cir. 2005).

158. *Miller*, 405 F.3d at 721-23.

159. *Id.* at 723.

160. *Id.* at 725.

161. *Id.* at 726.

other factors of the test, Judge Melloy ultimately concluded that “only one [factor] weigh[ed] in favor of finding the statute nonpunitive,” that the residency restriction was punitive, and that the Iowa statute “is an unconstitutional ex post facto law that cannot be applied to persons who committed their offenses before the law was enacted.”¹⁶²

More recently, the Eighth Circuit upheld the validity of an Arkansas residency restriction in *Weems v. Little Rock Police Department*.¹⁶³ The registration act in question required registration and prohibited high level sex offenders from living within two thousand feet of a school or daycare center.¹⁶⁴ In discussing whether or not the restriction was excessive, the court considered that the statute was only aimed at “high risk offenders” and “sexually violent predators,” determined through a particularized risk assessment, and that the sex offenders were allowed to challenge the findings of the assessment.¹⁶⁵ The statute also exempted those high-level sex offenders who lived in and occupied the property before the enactment of the statute.¹⁶⁶ The Eighth Circuit decided that, because of the detailed risk assessment, the law was not excessive in relation to the legislative purpose of protecting the public from those sex offenders most likely to commit repeat offenses.¹⁶⁷

In evaluating whether or not the 2003 Georgia statute that restricted *mere* residency was excessive in relation to its purpose, the Eleventh Circuit accepted that the fact that “some sex offenders will be forced to move from their current homes” was a reasonable consequence of the statute and consistent with its purpose.¹⁶⁸ In regards to those who had established residency before the enactment of the statute, the court reasoned that allowing an exemption would defeat the purpose of the statute.¹⁶⁹ Because the plaintiffs lacked standing, the court declined to consider the constitutionality of the statute as it related to new schools or daycare centers built after an offender had established residence.¹⁷⁰

162. *Id.*

163. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1010 (8th Cir. 2006) (holding that the residency restriction applying to the most dangerous sexual predators rationally advanced the state's legitimate interest in protecting children and violated neither the Due Process, Equal Protection, or Ex Post Facto clauses, nor the right to intrastate travel).

164. *Id.*

165. *Id.* at 1013.

166. *Id.*

167. *Id.* at 1017.

168. *Doe v. Baker*, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at *17 (N.D. Ga. April 5, 2006) (emphasis added).

169. *Id.*

170. *Id.*

The new Georgia statute is distinguishable from the Alaskan registration statute, the residency restrictions in Iowa and Arkansas, and Georgia's previous residency restriction statute. Georgia's new residency restriction is more excessive than mere registration, because it dictates where one may live, work, and loiter.¹⁷¹ Just because there may be a rational connection between evidence of high recidivism rates among sex offenders and merely having to register, it does not follow that practically banishing convicted sex offenders from entire communities within the state has a rational connection and is not excessive.

The Iowa and Arkansas statutes only applied to one's residency, not to where one works or visits.¹⁷² Those statutes also did not apply to those who had established residency before the enactment of the law or to schools and daycare centers constructed after the law was enactment.¹⁷³ The Arkansas statute is even more distinguishable from the new Georgia statute because it only affects those sex offenders found particularly dangerous after individual assessment, and it creates a procedural method for a sex offender to challenge the finding.¹⁷⁴ Lastly, Georgia's previous law only affected residency and had fewer enumerated prohibited locations.¹⁷⁵ The new Georgia statute as originally written is more excessive than any others held valid in the country. Beyond establishing where sex offenders may not live, it also prohibits where they may work and loiter.¹⁷⁶ Unlike the Iowa statute where registrants can still visit areas in which they are not allowed to live,¹⁷⁷ the Georgia statute expels sex offenders from these restricted areas altogether.

Judge Melloy made the argument in his dissent in *Miller* that "the severity of [the] residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders' lives, makes the residency restriction excessive."¹⁷⁸ His dissent is more realistic, reasonable, and lends more guidance than the majority's opinion. It should be adopted here. This statute is more excessive than any other. The legislative purpose to protect the public is a worthy one, and courts will not judge the wisdom of the statute, but merely look to find a

171. GA. CODE ANN. § 42-1-15 (2006).

172. IOWA CODE § 692A.2A (2005); ARK. CODE ANN. § 5-14-128(a) (2006).

173. IOWA CODE § 692A.2A(4)(c); § 5-14-128(b), (c) (2005).

174. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1012-14 (8th Cir. 2006) (explaining the risk assessment and administrative review in relation to the residency restriction).

175. *Compare* GA. CODE ANN. § 42-1-13 (2006) *with* GA. CODE ANN. § 42-1-15 (2006).

176. § 42-1-15.

177. *Doe v. Miller*, 405 F.3d 700, 713 (8th Cir. 2005).

178. *Id.* at 726.

rational connection between the statute and a nonpunitive purpose.¹⁷⁹ However, here, where thousands of sex offenders at every level of offense are effectively being banished from their communities,¹⁸⁰ the restriction is excessive in relation to the purpose. It would be hard to imagine what the courts would deem to be excessive if not this new Georgia statute.

Under the *Smith* test and subsequent case law, the new Georgia statute makes a strong case for punishment, specifically where the practical effect of the statute is to banish convicted sex offenders from the state. Unlike the other challenges under the Ex Post Facto Clause, this statute is punitive in nature.

III. Eighth Amendment Cruel and Unusual Punishment

The Eighth Amendment of the Constitution declares that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁸¹ Because the *Smith*, *Miller*, and *Baker* courts found that the sex offender statutes were not punishment, the courts held that the statutes could not be cruel and unusual punishment under the Eighth Amendment and stopped the inquiry there.¹⁸²

There is a much stronger argument that the new Georgia statute is punishment, as determined in the ex post facto analysis above. If the new Georgia statute is found to be tantamount to punishment, the courts must then address whether or not such punishment is cruel and unusual in the context of this more sweeping residency restriction statute.

It is rare for Eighth Amendment challenges to be successful in non-capital punishment cases.¹⁸³ However, the Eighth Amendment prohibition on cruel and unusual punishment may be implicated where the punishment is based on an individual’s status.¹⁸⁴

The Supreme Court has addressed the issue of punishment based on status under the Eighth Amendment. In *Robinson v. California*, the appellant alleged an Eighth Amendment violation of cruel and unusual punishment when he was arrested and prosecuted pursuant to a California statute for being a drug addict.¹⁸⁵ His guilt was premised on the presence

179. *Id.* at 721-23.

180. *See supra* notes 90-106 and accompanying text.

181. U.S. CONST. amend. VIII.

182. *Smith v. Doe*, 538 U.S. 84, 97 (2003); *Miller*, 405 F.3d at 723 n.6; *Doe v. Baker*, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at *18 (N.D. Ga. April 5, 2006).

183. *Ewing v. California*, 538 U.S. 11, 21 (2003).

184. *See infra* text accompanying notes 185-98.

185. *Robinson v. California*, 370 U.S. 660, 660 (1962).

of needle marks on his arms.¹⁸⁶ At the time he was arrested, there was no evidence that he was under the influence of illegal narcotics, nor did he have symptoms of withdrawal.¹⁸⁷ He did, however, admit to occasionally using narcotics.¹⁸⁸ The Supreme Court found that a statute that “makes the ‘status’ of narcotic addiction a criminal offense, for which the offender may be prosecuted” inflicts cruel and unusual punishment on the defendant.¹⁸⁹ The Court distinguished between the *act* of using drugs and the *status* of being a drug addict,¹⁹⁰ one may be punished for the former, but not the latter.¹⁹¹ The Court explained:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [A] law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment We cannot but consider the statute before us as of the same category.¹⁹²

The Supreme Court also took up the issue of status in *Powell v. Texas*.¹⁹³ The Court upheld a Texas statute prohibiting being intoxicated in public.¹⁹⁴ The appellant was arrested and convicted under the statute.¹⁹⁵ Invoking *Robinson*, the appellant claimed he was impermissibly punished for his status as an alcoholic.¹⁹⁶ The Court distinguished this case from *Robinson*, where the appellant was punished “not for being a chronic alcoholic, but for being in public while drunk on a particular occasion.”¹⁹⁷ The Court reaffirmed *Robinson*’s holding that “criminal penalties may be inflicted only if the accused has committed some act,” and found that the appellant was not impermissibly punished for his status, but for his conduct.¹⁹⁸

186. *Id.* at 661-63.

187. *Id.* at 662.

188. *Id.* at 661.

189. *Id.* at 666.

190. *Id.*

191. *Id.*

192. *Id.* at 666-67.

193. *Powell v. Texas*, 392 U.S. 514 (1968).

194. *Id.* at 537.

195. *Powell*, 392 U.S. 514 at 517.

196. *Id.* at 532.

197. *Id.*

198. *Id.* at 533.

The new Georgia statute treats every offender on the registry as the worst type.¹⁹⁹ Those on the registry have already been punished for their prior conduct.²⁰⁰ If the residency restriction is tantamount to punishment where registrants are effectively banished from their communities absent any new illegal conduct, then the new Georgia statute punishes registrants by virtue of their status as sex offenders. Arguably, *Robinson's* holding is specific to those who suffer from some sort of involuntary illness. Even if *Robinson's* holding were construed this narrowly, many judges accept that sex offenders need some sort of psychological treatment.²⁰¹ This may be taken to mean that at least some sex offenders suffer from an involuntary illness. Thus, the sex offenders are impermissibly punished by virtue of the status of having a mental illness, as in *Robinson*. The problem with punishment based on status is clear in a situation like this one where a registered sex offender's status is static. Those registered sex offenders who are already on the registry do not choose to be on it and cannot voluntarily come off of it.²⁰² If the residency restriction effectively banishes these sex offenders, they are being punished for a status over which they no longer have control—being a registrant. Thus, registered sex offenders should receive the same status treatment as a drug addict, leper, or alcoholic. The punishment inflicted by the new Georgia statute is not only punishment after the fact, but it impermissibly punishes sex offenders based on their status in violation of the Eighth Amendment's ban on cruel and unusual punishment.

IV. Procedural Due Process

The new Georgia statute prohibits a registered sex offender from living, working, or loitering within one thousand feet of a church.²⁰³ The

199. Complaint, *supra* note 1, at 3.

200. *Id.* at 2. See also Sledge, *supra* note 61.

201. Michael P. Griffin & Desiree A. West, Student Article, *The Lowest of the Low? Addressing the Disparity Between Community View, Public Policy, and Treatment Effectiveness for Sex Offenders*, 30 LAW & PSYCHOL. REV. 143, 150 (2006).

202. GA. CODE ANN. § 42-1-12 (2006). Registered sex offenders must “[c]ontinue to comply with the registration requirements of this Code section for the entire life of the sexual offender.” § 42-1-12(f)(7). A registered sex offender may petition the court to be released from the registration requirement if the court finds that the offender does not pose a substantial risk of recidivism, has been sentenced for punishment for the sexual offense, and ten years have lapsed since the sex offender's release from prison, parole, supervised release, or probation. § 42-1-12(g).

203. GA. CODE ANN. § 42-1-15(a), (b) (2006).

statute defines “church” as a “place of public religious worship.”²⁰⁴ However, “loitering” is not defined meaningfully in the statute.²⁰⁵

The ambiguity in the definition of “loitering” is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment. The Supreme Court has recognized that a criminal law may be invalidated due to vagueness when it “fail[s] to provide the kind of notice that enables ordinary people to understand what conduct it prohibits” or it “authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.”²⁰⁶ If people do not know what behavior is unlawful, they do not have proper notice and cannot be expected to know how to conform to the law.²⁰⁷

In *City of Chicago v. Morales*, the city enacted a gang congregation ordinance that prohibited loitering²⁰⁸ in public places in groups of two or more where at least one person was a criminal gang member.²⁰⁹ In a plurality opinion, the Supreme Court held that the ordinance was impermissibly vague on its face,²¹⁰ in part because it did not specify the prohibited conduct²¹¹ and, therefore, did not give adequate notice to citizens who wished to use public streets.²¹²

The new Georgia statute prohibits registered sex offenders from living, working, or loitering within one thousand feet of a church.²¹³ For an example of the uncertainty regarding “loitering,” registrants will not know from the text of the statute whether their conduct in attending mass, weddings, funerals, Bible study, or support groups qualifies as “loitering” in violation of the church provision of the new statute. It is possible that attending mass is not prohibited, but lingering around the church after mass to speak with others or to wait for traffic in a crowded parking lot to disperse may be. Another example would be if a registrant parent were to pick-up his or her daughter from a school or school bus stop. Would waiting in the car for the child’s arrival constitute loitering? Any

204. § 42-1-12(a)(7).

205. § 42-1-12.

206. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

207. *Id.*

208. *Id.* at 45-46. The Supreme Court recognizes that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 53.

209. *Id.* at 45-46.

210. *Id.* at 51 (Stevens, J., joined by O’Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.).

211. *Id.* at 56-57 (finding an impermissibly vague definition where “loitering” was defined in the ordinance as “to remain in any one place with no apparent purpose”).

212. *Id.* at 60. (Stevens, J., joined by Souter and Ginsburg, JJ.).

213. GA. CODE ANN. § 42-1-15(a), (b) (2006).

reasonable person would not want to risk ten to thirty years in prison in order to find out exactly what “loitering” means. The registered sex offenders are not given a clear enough idea in this new statute of what constitutes illegal “loitering.” Thus, they do not have adequate notice of what prohibited conduct will result in criminal penalties. They will not know how to conform to the law and, in all likelihood, will steer clear of prohibited areas, including churches, to avoid the potentially harsh penalties of the law.

V. Free Exercise Clause Under the First Amendment

The First Amendment prohibits the government from making any laws “prohibiting the free exercise” of religion.²¹⁴ The new Georgia law prohibits sex offenders from living, working, or loitering within one thousand feet of churches.²¹⁵

The Free Exercise Clause is invoked when the government prevents a person from engaging in conduct required by his or her religion,²¹⁶ when the government requires conduct that is prohibited by a person’s religion,²¹⁷ or when a law makes it more burdensome for an individual to practice his or her religion.²¹⁸ The first and third of these situations may be implicated by the new Georgia statute.

For example, a person’s religion may require them to attend mass or get married at a church. If “loitering” includes the attendance of these events or being on the premises for some time thereafter, the attendant would be in violation of the law. This statute might also affect religions that require proselytizing by their followers. The act of going from house to house may violate the “loitering” or “work” provisions of the statute and would require an unreasonable amount of research in determining what zones in which they may proselytize. The law would arguably make this latter example more burdensome on members of that religion. The vagueness of the “loitering” provision would likely deter many from stepping within one thousand feet of a church, thus burdening the practice of one’s religion.

214. U.S. CONST. amend. I.

215. GA. CODE ANN. § 42-1-15(a), (b) (2006).

216. *See Reynolds v. United States*, 98 U.S. 145 (1878) (upholding the constitutionality of a law forbidding polygamy despite claim that it was required by Mormon religion).

217. *See United States v. Lee*, 455 U.S. 252 (1982) (rejecting argument that providing Social Security numbers and paying Social Security taxes was prohibited by the Amish religion).

218. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (First Amendment right to free exercise of religion was violated where the state employment agency denied unemployment benefits to claimant who terminated his employment due to conflicting religious beliefs).

From a policy standpoint, it would seem to be impractical to cut registered sex offenders off from any means of rehabilitation. Prohibiting or discouraging sex offenders from participating in a faith-based community may isolate them from various sources of support that might otherwise help to rehabilitate them and integrate them into the community of law-abiding citizens.²¹⁹ Such rehabilitation might be helpful in preventing recidivism.²²⁰ Obstructing rehabilitation by taking away the arguably healthy influence and support of a faith-based community may be counterproductive to the state's goal of preventing future sex offenses.

VI. The Dormant Commerce Clause

Georgia's statute has been called one of the toughest sex offender statutes in the country.²²¹ It is no secret that the Georgia state legislature hoped to drive convicted sex offenders out of the state of Georgia with the enactment of the new law.²²² When California enacted its three strikes law, many felons left the state.²²³ A statute as harsh as Georgia's sex offender residency restriction might have a similar effect, not only deterring potential sex offenders from offending, but causing registrants to leave the state and deterring out-of-state sex offenders from entering Georgia.²²⁴ Ironically, with Georgia's living restriction currently invalid and unenforceable, House Majority Leader Jerry Keen is afraid that as of the *Mann* decision, "any convicted sex offender can live anywhere in Georgia . . . with no restriction . . . Florida has a residency requirement.

219. Koch, *supra* note 11.

220. See Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1188-1189 (2006) (explaining that residency restrictions can result in higher rates of recidivism where prohibited areas tend to be located near "areas where sex offenders work, socialize and receive treatment").

221. Robbie Schwartz, *Sheriff Looking for Ways to Enforce Law*, THE WALTON TRIBUNE, July 2, 2006, available at [http://waltontribune.com/story.lasso?ewcd=b70146b7c7a07714%20\(last%20visited%209/17/07\)](http://waltontribune.com/story.lasso?ewcd=b70146b7c7a07714%20(last%20visited%209/17/07)) (last visited Oct. 15, 2007).

222. See *supra* note 78 and accompanying text.

223. See *Ewing v. California*, 538 U.S. 11, 26-28, 30-31 (2003) (holding that California's three strikes law was not grossly disproportionate, and therefore, did not violate the Eighth Amendment's ban on cruel and unusual punishment). The Court noted that after the three strikes law was implemented, "[m]ore California parolees are now leaving the state than parolees from other jurisdictions entering California," a "striking turnaround" that began in 1994. *Id.* at 26-28.

224. See Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006 (noting that Iowa's neighboring states have enacted their own residency restriction laws in order to prevent from becoming a "dumping ground" for Iowa's sex offenders), available at <http://www.nytimes.com/2006/03/15/national/15offenders.html> (last visited Oct. 15, 2007).

Alabama has a residency requirement. Where do you think those people are going to go?"²²⁵

The plaintiffs in the federal class action case claimed that sex offenders are being forced to leave Georgia.²²⁶ The concern is primarily with the now invalid living restriction. Regardless of whether Georgia's state legislature succeeds in rewriting a tough living provision, this concern is relevant to other states that seek to enact such stringent residency restrictions. The Dormant Commerce Clause may be implicated where a state statute is, in effect, dumping its convicted sex offenders into neighboring states and keeping out-of-state sex offenders from entering.

Congress has the power to regulate commerce among the states.²²⁷ Where Congress is silent in a particular area, however, the states are free to legislate in that area unless the state statute violates "the restraints imposed by the Commerce Clause itself."²²⁸ The scope of these "restraints" is not defined in the Commerce Clause, but through case law.²²⁹ In *Baldwin v. Seelig*, Justice Cardozo explained that the Constitution "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."²³⁰ Thus, a state generally cannot legislate for its own benefit to the detriment of the other states and the country as a whole.

In *Philadelphia v. New Jersey*, the Supreme Court invalidated a New Jersey statute that prohibited other states from bringing most types of waste within its borders.²³¹ The Court found that the statute violated the Commerce Clause²³² by applying the following test set forth in *Pike v. Bruce Church*:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such

225. *Jerry Keen, supra* note 75.

226. *Set to Launch, supra* note 128. *See also* Complaint, *supra* note 1, at 23-25. It will be difficult for registrants on parole to immediately leave the state because they need to obtain permission from their parole officers before leaving Georgia and special arrangements must be made for their supervision in the new state. *Id.* at 24-25. The plaintiffs argue, therefore, that those on parole will instead end up living on the street rather than being forced out of the state. *Id.*

227. *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

228. *Id.*

229. *Id.*

230. 294 U.S. 511, 523 (holding that preserving the local price structure was an impermissible reason for excluding out-of-state products).

231. *Philadelphia*, 437 U.S. at 618.

232. *Id.*

commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.²³³

The majority in *Philadelphia* decided that the crucial issue was whether or not the New Jersey statute was a “basically protectionist measure” or whether it could “fairly be viewed as a law directed to legitimate local concerns,” with only “incidental” effects on interstate commerce.²³⁴

New Jersey claimed that the legislative purpose of the statute was to protect the environment, rather than the local economy, because the state’s landfills were rapidly filling up, arguing that “the public health, safety, and welfare require[d] that the treatment of disposal within this State of all wastes generated outside of the State be prohibited.”²³⁵ However, the Court explained that the legislative intent was not relevant where “the evil of protectionism can reside in the legislative means as well as the legislative ends.”²³⁶ The Court said that it did not matter whether the statute’s purpose was to “reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution,” because the statute discriminated, both on its face and in effect, against individuals from out-of-state.²³⁷ The Court invalidated the discriminatory statute, and explained that consistently prohibiting these types of isolationist statutes will benefit New Jersey, and every other state, in the long run.²³⁸

Where the new Georgia statute as originally written dumps its sex offenders into other states and creates a disincentive to entry by out-of-staters, it can be argued under the Dormant Commerce Clause that Georgia is impermissibly adopting an isolationist approach to sex offenders released from prison.

In *Edwards v. California*, the Court invalidated a California statute that made it illegal to knowingly transport a non-resident indigent into the

233. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (citation omitted).

234. *Philadelphia*, 437 U.S. at 624.

235. *Id.* at 625.

236. *Id.* at 627.

237. *Id.*

238. *Id.* at 629 (“The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.”).

state.²³⁹ California asserted that the increase of migrants coming into the state caused financial, health, and moral problems for California.²⁴⁰ The Court did not comment on the “wisdom, need, or appropriateness” of the statute, but instead found that California sought to “isolate itself from difficulties common to all . . . [states] by restraining the transportation of persons and property across its borders.”²⁴¹ The Court held that the statute was an unconstitutional burden on interstate commerce.²⁴² Like the majority in *Philadelphia*, the Court in *Edwards* found the prohibition against transporting the non-resident indigents to be “an open invitation to retaliatory measures” by the other states.²⁴³

The waste statute in *Philadelphia* and the new Georgia residency restriction are not entirely alike. In *Philadelphia* the statute sought to prevent out-of-state waste from coming into state landfills.²⁴⁴ The chief sponsor of the Georgia statute acknowledges that one of state’s purposes is to make it undesirable, if not impossible, for sex offenders to remain in the state.²⁴⁵ One of the practical effects of the statute is that sex offenders cannot find a place to live legally.²⁴⁶ The Georgia statute differs from that in *Philadelphia* in that it is not prohibiting out-of-state sex offenders from entering the state to live, work, and loiter wherever they want to. Instead, it applies to, and affects mostly, in-state sex offenders. Thus, unlike the New Jersey statute, the Georgia statute is not discriminatory on its face. Nor is the practical effect of the statute that out-of-state sex offenders cannot live, work, or loiter wherever they want to in Georgia, while in-state sex offenders can. It would be as if New Jersey disallowed *anyone* to dump trash in its landfills and as a result, New Jersey citizens had to bring their trash into other states.

Even though the new Georgia statute is non-discriminatory, it seems protectionist where Georgia seeks to “dump” its sex offenders into other states and let those other states deal with the problem. Justice Cardozo said the states must “sink or swim together.”²⁴⁷ If all the states were to retaliate and enact the same laws, sex offenders would have little choice of where to

239. *Edwards v. California*, 314 U.S. 160, 172 (1941).

240. *Edwards*, 314 U.S. at 173.

241. *Id.*

242. *Id.*

243. *Id.* at 176.

244. *Philadelphia v. New Jersey*, 437 U.S. 617, 618-19 (1978).

245. See *supra* note 80 and accompanying text.

246. Complaint, *supra* note 1, at 2.

247. See *supra* note 244 and accompanying text.

live in the country. Despite the legitimate goal of public safety,²⁴⁸ like the indigents in *Edwards* and the trash in *Philadelphia*, Georgia seeks to avoid “a problem shared by all”²⁴⁹ states by enacting this unreasonably harsh residency restriction statute. Thus, the new Georgia statute is protectionist and might be found to violate the Dormant Commerce Clause. As states compete to enact the toughest residency restrictions to not only contain, but to keep sex offenders out of the state, it is increasingly likely that courts will have to address Dormant Commerce Clause problems posed by “dumping” these sex offenders into other states.

VII. Other Considerations

Aside from other legal considerations not herein discussed, the new Georgia statute raises some practical concerns and policy issues for other states enacting residency restrictions. First, the very purpose of protecting the public may not be realized through the new Georgia statute. With harsh restrictions and many offenders who believe there are few places they could live, work, and loiter legally,²⁵⁰ they may either become homeless²⁵¹ or give fake addresses to law enforcement.²⁵² For example, the Iowa residency restriction statute “brought unintended and disturbing consequences,” including that “[i]t has rendered some offenders homeless and left others sleeping in cars or in the cabs of their trucks.”²⁵³ Because of state and local sex offender residency restrictions, sex offenders have been effectively barred (*banished*, I would argue) from large parts of cities.²⁵⁴ “They can’t live in most of downtown Tulsa, Atlanta or Des Moines, for example, because of overlapping exclusion zones around schools and day care centers.”²⁵⁵ In any event, these registered sex offenders will fall under the radar of law enforcement. Without knowledge of where convicted sex offenders actually reside, the whole point of the sex offender registration, let alone residency restrictions, is defeated. This may also give a false sense of safety to the public if it thinks that law enforcement is keeping

248. See *supra* note 17 and accompanying text.

249. *Philadelphia*, 437 U.S. at 629.

250. Koch, *supra* note 11.

251. Davey, *supra* note 224 (noting that the Iowa statute “brought unintended and disturbing consequences,” including that “[i]t has rendered some offenders homeless and left others sleeping in cars or in the cabs of their trucks.”).

252. Koch, *supra* note 11.

253. Davey, *supra* note 224.

254. Koch, *supra* note 11.

255. *Id.*

track of these offenders, when it is in fact unable to do so.²⁵⁶ There is also concern that the strictness of residency restrictions will cause sex offenders not to register at all, leading to more unregistered and unmonitored sex offenders.²⁵⁷ As a result, the new statute might even make conditions more dangerous for children.

Second, the new Georgia statute may prevent rehabilitation, which is important for both the well being of the sex offender and for public safety. According to Jill Levenson, professor of human services at Lynn University, many offenders are more likely to commit additional crimes if forced into rural areas due to lack of employment and mental health services—both of which contribute to “needed stability.”²⁵⁸ Another factor that might contribute to stability for sex offenders is church-related services. The church provision already prevents sex offenders from living, working, or loitering at churches.²⁵⁹ As discussed above, religious communities might help sex offenders to lead lives absent of crime. However, under the new statute, sex offenders’ exposure to the church community may be severely limited. Further, this church provision as originally written may affect church halfway houses that are in close proximity to the church or where residents engage in religious worship.²⁶⁰ If sex offenders cannot live near a place of worship and worship takes place at these church-run halfway houses or the houses are within one thousand feet of a church, then these church halfway houses are off-limits to those who may benefit from the housing and counseling services more than non-criminals. The restrictions in this statute prevent sex offender rehabilitation. This is not only detrimental to the sex offenders, but to the public as a whole. The greater the number of unstable sex offenders there are, the more danger to society.

Another problem with the new Georgia statute is that it is overly broad for the purpose of protecting children. Aside from failing to distinguish between the types of sex offense committed,²⁶¹ the statute fails to take into serious account the relationship between the victim and offender. The statute removes convicted sex offenders from areas where children are likely to be with what can only be assumed for the purpose of preventing sex offenders from preying on children they do not know. This statute is not written to protect the children of sex offender’s neighbors, family

256. *Set to Launch*, *supra* note 128.

257. Duster, *supra* note 88, at 773-74.

258. Koch, *supra* note 11.

259. GA. CODE ANN. § 42-1-15 (2006).

260. *See supra* notes 184-85 and accompanying text.

261. Jarvie, *supra* note 43.

members, or friends. Any protection they receive is incidental. However, most abused children “suffer at the hands of people they know.”²⁶² The typical victim-offender relationship in sexual assaults against children is vastly ignored. According to the U.S. Department of Justice, Bureau of Justice Statistics, approximately ninety-three percent of sexual offenders against juveniles are family members or acquaintances, while only seven percent of the offenders are strangers.²⁶³ Thus, the statute that affects in excess of ten thousand registered sex offenders²⁶⁴ casts its net too widely in proportion to those who actually commit sexual crimes against children they do not already know.

The school bus stop provision also raises some potential questions for future enforcement. Procedural due process under the Fourteenth Amendment requires that an individual have notice as to what conduct is prohibited by a statute for the statute to pass constitutional muster.²⁶⁵ There has been litigation as to the meaning of “bus stop” and as of September 11, 2006, the three counties that have made the most serious threats to enforce the provision have been temporarily prevented from doing so by a consent order.²⁶⁶ The plaintiffs argue that the law would displace thousands of Georgia’s eleven thousand sex offenders.²⁶⁷ Before the law came into effect, local law enforcement notified registered sex

262. Koch, *supra* note 11.

263. HOWARD N. SNYDER, U.S. DEPT. OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf>.

264. *Set to Launch*, *supra* note 128.

265. *See supra* notes 206-207 and accompanying text.

266. Overview of *Whitaker v. Perdue*, <http://sexoffenderissues.blogspot.com/2007/04/overview-of-whitaker-v-perdue.html> [hereinafter Overview] (last visited Sept. 17, 2007). On June 29, the District Court for the Northern District of Georgia in Atlanta issued a temporary restraining order to prevent the government from enforcing the school bus stop provision of the statute. *Id.* On July 25, after a hearing on the issue, the court denied the plaintiffs’ motion for a preliminary injunction, finding that the statute defines school bus stops as those “designated by local school boards of education or by a private school.” *Id.* The court found that no such bus stop existed in the state of Georgia, so law enforcement could not enforce the provision until such “designated” school bus stops were in existence. *Id.* Hours after the court’s decision, Columbia County’s school board successfully voted to “designate” the county’s bus stops. Greg Bluestein, *School Districts Now Face Tough Decision over Sex Offender Law*, ASSOCIATED PRESS, July 26, 2006, http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/NewsArticles/news_hb1059_ap09.htm. The court once again issued a consent order to prevent the enforcement of the provision until the constitutional issues could be heard on the merits. Overview. Two additional counties designated school bus stops and were similarly prevented from doing so. *Id.* In order to evaluate the merits of the constitutional claim, this note will presume that the school bus stop provision is enforced and that most school boards have “designated” their school bus stops, as Columbia County was able to do within hours of the judgment.

267. Complaint, *supra* note 1, at 2-4.

offenders living within one thousand feet of school bus stops that they had to move in order to avoid criminal penalties.²⁶⁸ Thus, the sex offenders were initially notified that they were within the prohibited radius of a school bus stop and needed to move.

Georgia has in excess of ten thousand sex offenders and somewhere between 150,000 and 290,000 school bus stops.²⁶⁹ School districts change school bus stop locations during the school year.²⁷⁰ Further, school bus stops generally are not marked.²⁷¹ The new law puts “virtually every residential neighborhood off limits to Georgia’s” registered sex offenders.²⁷² For example, in Bibb County, where there currently are 4700 school bus stops, 227 of the 230 registered sex offenders would be forced to move solely based on the school bus stop provision.²⁷³ Combine this with the fact that school bus stops can change throughout the school year, and some say that this provision could force sex offenders to have to move repeatedly.²⁷⁴

There is no indication that such information will be made available to registered sex offenders in a timely and meaningful way every time a school bus stop location changes. If the school bus stop provision is enforced and there is no way for sex offenders to know in advance that school bus stop locations are changing, they may lack adequate notice to move. As a policy matter, it is extremely unreasonable to place this burden on registered sex offenders. Even if there was some type of website that they could check on a daily basis to see if locations have changed, this is not reasonable for them to have to do so. Without advance notice of bus stop location changes, sex offenders would find themselves in violation of the statute.

Even if the government or school officials made such information available, it is unsettling that these registrants might have to move not only upon such short notice, but also so frequently. For instance, a sex offender may buy a house or lease an apartment in an unrestricted zone. If a school bus stop is relocated at some point within the year, if not within the

268. *Id.* at 9-17.

269. *Set to Launch*, *supra* note 128; Greg Bluestein, *Federal Judge Weighs Challenge to Sex Offender Law*, ASSOCIATED PRESS, July 11, 2006, http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/NewsArticles/news_hb1059_ap06.htm.

270. *Set to Launch*, *supra* note 128.

271. *See supra* note 39.

272. *Set to Launch*, *supra* note 128.

273. *Id.*

274. *Id.*

month,²⁷⁵ the sex offender will once again have to move. There is little incentive for registrants to enter into any long-term commitment for housing. This might also affect employment. If housing is very difficult to find, then it is conceivable that one would have to move far away, which might require a change of employment. This perpetual uncertainty as to living and working conditions seems like an extreme punishment under what purports to be a regulatory scheme. If there is not enough notice of school bus stop location changes, this provision should be struck down as a violation of procedural due process under the Fourteenth Amendment.

VIII. Conclusion

Given what has become a race between the states to enact the toughest residency restrictions, it is imperative to take a step back to consider the constitutionality of such laws and their actual effects. The purpose of this note is not to champion sexually violent predators or be overly sympathetic to the plight of the registered sex offender. The goal of protecting children, and the public at large, is a laudable one indeed. However, Georgia's latest sex offender statute, as originally written, defies common sense and common decency where its scope is so broad as to effectively banish people who were convicted of non-violent offenses, what some might consider mere improprieties, from the state of Georgia. The residency restriction is unconstitutional because it constitutes punishment after the fact, is cruel and unusual punishment, lacks proper notice of the prohibited conduct and interferes with one's right to exercise his or her religion.

The statute violates: (1) the Ex Post Facto Clause; (2) the Eighth Amendment; (3) Procedural Due Process under the Fourteenth Amendment; and, (4) the Free Exercise Clause of the First Amendment. Despite the Georgia Supreme Court's decision striking down part of the statute on a Takings Clause theory, these additional constitutional concerns are still alive and relevant, not only to Georgia, where we will likely see the state legislature take a second stab at this provision, but to other states that seek to enact stringent residency restrictions for sex offenders. Georgia's residency restriction statute also invokes protectionism prohibited by the Dormant Commerce Clause. Given the other policy considerations discussed and others not presented in this note, upholding the constitutionality of laws similar to Georgia's would not only make

275. Visits to the Savannah-Chatham County Public School System website between March 6, 2007 and October 5, 2007 reflect that the school bus route can change on a week-to-week basis. Savannah-Chatham County Public School System, <http://www.savannah.chatham.k12.ga.us/District/Operations/Transportation/2007-08+School+Bus+Schedules.htm> (last visited October 5, 2007).

ineffectual the text of the specific constitutional clauses, but also would lessen faith in, and respect for, the law of the state.