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"Where Can I Go?": Excessiveness of the Geographical Restraints Imposed by the Sexual Assault Reform Act in Urban Neighborhoods

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"WHERE CAN I GO?": EXCESSIVENESS OF THE GEOGRAPHICAL RESTRAINTS IMPOSED BY THE SEXUAL ASSAULT REFORM ACT IN URBAN NEIGHBORHOODS

Leslie Anne Mendoza[*]

SUPREME COURT OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT WILLIAMS V. DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION[1] (DECIDED JANUARY 12, 2016)

I. INTRODUCTION

Imagine an elderly gentleman who has spent twenty years of his life in a correctional facility. Imagine how he longed for the day when he finally gets out; thinking he has already served his time. Imagine his yearning for his family, friends, and the place he has called home for more than forty years. Imagine his disappointment when he finds out that he is prohibited from visiting not only his home but also his lawyer's office and his treatment programs. With nowhere else to go, he attempts to move into a homeless shelter; only to find that being in the shelter is a violation of his parole. At that point, he thinks to himself, "Where *can* I go?"

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[1] 24 N.Y.S.3d 18 (App. Div. 1st Dep't 2016), *appeal docketed*, No. APL-2016-00031 (2016).

Article I, Section 9 of the United States Constitution provides, "No . . . ex post facto Law shall be passed."[2] The *ex post facto* clause prohibits retroactive laws that criminalize innocent acts when committed, imposes additional punishment for a crime after its commission, and alters the evidentiary requirements for a conviction to the detriment of the defendant.[3] The *ex post facto* clause generally applies to criminal statutes.[4] However, it may apply to a civil regulatory scheme that is excessively punitive in intent or effect.[5] In determining whether a statute is punitive in intent or effect, courts consider several factors.[6] Courts have discretion in considering which factor is more significant than the other.[7]

Williams, a sex offender on parole, claimed that the Sexual Assault Reform Act (SARA)[8] violated the *ex post facto* clause because its geographical restraints are so limiting that he is prohibited from residing or traveling in the city where he lived before he was incarcerated, New York City.[9] The Appellate Division, First Department, after applying the factors enumerated in the Supreme Court case *Kennedy v. Mendoza-Martinez*,[10] reached the conclusion

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[2] U.S. CONST. art I, § 9.

[3] Calder v. Bull, 3 U.S. 386, 388-89 (1798).

[4] *Id.*

[5] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

[6] *See infra* text accompanying note 95.

[7] *Id.*

[8] The Sexual Assault Reform Act (hereinafter "SARA") provides in pertinent part:

> Notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25, 255.26 or 255.27 of the penal law and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release*, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of* section 220.00 of the penal law*, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present*.

N.Y. EXEC. LAW § 259-c (14) (McKinney 2016) (emphasis added).

[9] Williams v. Dep't of Corrs. & Cmty. Supervision, 24 N.Y.S.3d 18, 20-21 (App. Div. 1st Dep't 2016).

[10] 372 U.S. 144 (1963).

that SARA is not punitive in intent or character and does not violate the *ex post facto* clause.[11]

Although the *Williams* court held that SARA does not violate the *ex post facto* clause, there is limited case law that involves the constitutionality of SARA with regard to the *ex post facto* clause as applied to parolees in urban neighborhoods.[12] This Note suggests that there must be an assessment that considers the additional limitations of SARA as applied to a densely populated area, which makes it unreasonably difficult for a parolee to find suitable housing or to travel. Specifically, this Note will propose conducting individual assessments on parolees in urban neighborhoods to prevent the potential excessive and unreasonable effect of the SARA.

This Note will be divided into nine parts. Part II of this Note will discuss the facts and procedural history of *Williams*. Part III will provide a discussion of its majority opinion and an analysis of the Appellate Division's reasoning in applying the *ex post facto* clause framework outlined in *Kennedy*. Part IV will then discuss Justice Kapnick's dissenting opinion. Parts V and VI will compare *ex post facto* clauses of the United States and New York State Constitutions and the analysis applied by the Federal and the New York State courts, and discuss SARA's history and its *ex post facto* clause analysis. In Part VII, the holding of *Williams* and its effect on parolees in urban neighborhoods will be explored, as well as how the court could have reached a more reasonable decision through an individualized assessment that takes into consideration both the sex offender's risk of recidivism as well as residency before incarceration. Lastly, Part VIII will provide a summary and a suggestion to the New York Court of Appeals and courts which hear similar cases.

II. FACTS AND PROCEDURAL HISTORY

On November 21, 1995, Williams was convicted of first degree crimes of rape and sodomy, as well as endangering the

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[11] *Williams*, 24 N.Y.S.3d at 20.

[12] *See* Berlin v. Evans, 923 N.Y.S.2d 828, 829 (N.Y. Cnty. Sup. Ct. 2011) (holding that as applied to the low-risk level one sex offender petitioner, SARA violates the prohibition on *ex post facto laws*. In that case, SARA banned Petitioner from his New York City apartment of forty years because of the geographical restraints imposed); *see* discussion *infra* Section VI.B.

welfare of a child.[13] Williams was sentenced to four concurrent terms of seven to twenty-one years.[14] He was sixty-four years old when he was released to parole supervision on December 20, 2012.[15] His sentence is due for completion on November 18, 2016.[16]

Williams's parole was granted subject to restrictions on his place of residence and his travel.[17] Under SARA, Williams can neither live nor travel within 1000 feet of school grounds.[18] Williams claimed that this mandatory condition rendered the possibility of finding housing within New York City futile.[19] For example, Williams was living in a homeless shelter for men at Bellevue, but that residence violated SARA because it was within the prohibited buffer zone.[20] Williams also claimed that the travel restrictions made it impossible for him to travel within Manhattan to satisfy his requirements of visiting his parole officer and his drug and sex offender treatment programs and, similarly, made it impossible for him to visit his "doctors, lawyers, social workers, friends or family."[21] Williams submitted into the record a map entitled "Manhattan No-go Zones and Public Bus Network," which showed that a significant area of Manhattan was off-limits to him.[22]

As a result, Williams claimed that "SARA violates the *Ex Post Facto* clause of the United States Constitution and his substantive due process rights under the Federal and New York State Constitutions."[23] He initially filed a hybrid declaratory judgment and Article 78 petition.[24] The Department of Corrections and Community Supervision, in turn, claimed SARA was constitutional and denied most of Williams's assertions about SARA's ramifications on him.[25]

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[13] *Williams*, 24 N.Y.S.3d at 20-22.

[14] *Id.* (citing People v. Williams, 682 N.Y.S.2d 581 (App. Div. 1st Dep't 1999)).

[15] *Id.* at 20.

[16] *Id.*

[17] *Id.*

[18] *Williams*, 24 N.Y.S.3d at 20.

[19] *Id.*

[20] *Id*. The Department of Corrections and Community Supervision had formerly placed parolees subject to SARA at the Bellevue center; however, it has changed its policy and concluded that the shelter was no longer a SARA-compliant residence. *Id.*

[21] *Id.* at 20-21.

[22] *Williams*, 24 N.Y.S.3d at 20-21.

[23] *Id.* (capitalization in original).

[24] *Id.* at 21.

[25] *Id.*

The Supreme Court of New York for New York County held that SARA was constitutional.[26]

III. THE FIRST DEPARTMENT'S REASONING

Williams appealed, and the issue before the Appellate Division of the First Department was whether SARA's mandatory 1000-foot buffer zone violates the *ex post facto* clause of the United States Constitution.[27] The 1000-foot buffer zone bars sex offender parolees from living or traveling near areas where children usually gather such as schools and parks.[28] The *ex post facto* clause prohibits states from passing laws that impose additional punishments for past offenses.[29] "Two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."[30] In this case, there was no contention as to the retrospective character of SARA which was both passed and amended years after the conviction of Williams and imposes compulsory limitations on him as a parolee.[31]

To determine whether a retrospective enactment violates the *ex post facto* clause, the Appellate Division applied an intent-effects test.[32] The first step was to ascertain whether the intent of the Legislature was to enact a punitive statute or a nonpunitive civil regulatory scheme.[33] If the legislative intent of the statute was to impose punishment, then the retroactive enactment violates the *ex post facto* clause.[34] If a civil regulatory scheme was intended, then the court must decide whether its purpose or effect is so extensively punitive that it negates the State's civil intention.[35]

Based on SARA's text and legislative history and its amendments, the Appellate Division concluded that the statute was intended to be a civil regulatory scheme for the protection of children

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[26] *Id.*
[27] *Williams*, 24 N.Y.S.3d at 20.
[28] *Id.*
[29] Kellogg v. Travis, 796 N.E.2d 467, 469 (N.Y. 2003).
[30] Weaver v. Graham, 450 U.S. 24, 29 (1980).
[31] *Id.* at 9.
[32] *Williams*, 24 N.Y.S.3d at 23; *see* discussion *infra* Section VI.B.
[33] *Williams*, 24 N.Y.S.3d at 23 (citing Smith v. Doe, 538 U.S. 84, 92 (2003)).
[34] *Id.*
[35] *Id.*

from sexual predators.[36] The court concluded that the residential and travel restrictions found in the statute's text were limited to areas where children were expected to be and to times when children were there.[37] In addition, the restriction only applies to sex offenders whom the Legislature thinks were highly likely to reoffend against child victims.[38] It is evident from the language of the statute that the Legislature intended to protect children rather than punish offenders.[39]

Nonetheless, Williams argued that SARA was punitive in intent because it incorporated the definition of "school grounds" provided by Penal Law § 220.00(14),[40] and because the statute only applied to parolees.[41] The court rejected this argument.[42] It reasoned that the reference to the Penal Law was insufficient to show criminal intent.[43] The court also pointed out that SARA imposes no additional restrictions or punishment on parolees.[44] For these reasons, the court concluded that SARA was not intended to be punitive.[45]

The court thereafter considered whether the scheme was so punitive in its effect or purpose as to run afoul of the State's intention for it to be a civil statutory scheme.[46] In determining whether a statute is punitive in purpose or effect, courts consider seven

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[36] *Williams*, 24 N.Y.S.3d at 23.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] School grounds is defined as:

> (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.

N.Y. PENAL LAW § 220.00(14) (McKinney 2009).

[41] *Williams*, 24 N.Y.S.3d at 25.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Williams,* 24 N.Y.S.3d at 25.

factors.[47] The court in *Williams* identified five factors relevant to the case.[48] The five factors were whether the restriction was an imposition of affirmative disability or restraint; has been historically regarded as punishment; promotes traditional aims of punishment; has a rational connection to a nonpunitive purpose; and was excessive with respect to its nonpunitive purpose.[49]

The court agreed with Williams that SARA's geographical restrictions are affirmative restraints, can be historically regarded as punishment, and promote deterrence, which is a traditional goal of punishment.[50] The geographical restraints SARA imposes are affirmative and may be compared to "banishment" or a way of compelling a person to leave a place for a certain amount of time.[51] Historically, banishment has been viewed as criminal punishment.[52] While SARA's restraint on residence and travel is akin to banishment, the court noted that this label was insignificant as a way of establishing punitive effect.[53] The court reasoned that these factors were inadequate because SARA only applies to parolees who have limited liberty rights.[54] Therefore, the court disagreed with Williams and held that SARA is not punitive in effect.[55] Moreover, the court also rejected Williams's argument that, because SARA promotes traditional goals of punishment, it is punitive.[56] The court reasoned that promoting a traditional goal of punishment does not necessarily entail that a statute is a criminal penalty.[57]

The *Williams* court deemed the last two factors, rational connection to a nonpunitive purpose and excessiveness, most important in determining whether SARA has a punitive effect.[58]

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[47] *Kennedy*, 372 U.S. at 168. *See* Smith v. Doe, 538 U.S. 84, 97 (2003) (citation omitted) (explaining that these factors are neither exhaustive nor dispositive and are only guidelines in determining whether a retroactive law is punitive and consequently violates the *ex post facto* clause); *see also infra* text accompanying note 95 (enumerating the factors of the intent-effects test).

[48] *Williams*, 24 N.Y.S.3d at 25.

[49] *Id*.

[50] *Id*. at 26.

[51] *Id.* (citing United States v. Ju Toy, 198 U.S. 253 (1905)).

[52] *Id.* at 27 (citing *Kennedy*, 372 U.S. 144 at n.23 (1963)).

[53] *Williams*, 24 N.Y.S.3d at 27.

[54] *Id.*

[55] *Id.* at 25.

[56] *Id.* at 27.

[57] *Id*.

[58] *Williams*, 24 N.Y.S.3d at 28.

"SARA's legitimate governmental interest is the protection of children against people proven to be capable of committing sex crimes."[59] SARA's rationale is that limiting access to children would greatly reduce the likelihood of sex offenders reoffending.[60] Thus, there is a rational connection between SARA's nonpunitive intent and its effect. As for excessiveness, Williams argued that the statute was punitive because there were no individualized risk assessments relative to the restrictions.[61] Williams further argued that the restrictions applied to all sex offenders on parole, even those who have not shown any risk of reoffending.[62] However, the court rejected these arguments and reasoned that SARA only applies to parolees who have limited liberty rights, and thus, its "restraints are not of a sufficient magnitude to require individualized assessments."[63] In addition, SARA applies only to level 3 sex offenders under the New York State Sex Offender Registration Act (SORA).[64] This limits SARA's application to those who are most likely to reoffend among sex offenders and not to all sex offenders on parole.[65]

The Appellate Division for the First Department held that SARA and its amendments did not violate the *ex post facto* clause of the United States Constitution because it is a retrospective civil regulatory scheme that is neither punitive in intent nor effect.[66]

IV. DISSENTING OPINION

Justice Kapnick dissented in part and disagreed with the majority's holding that the statute is not punitive in effect and does not violate the *ex post facto* clause of the United States Constitution.[67] She opined that the 1000-foot buffer zone is a retroactive punishment and the civil intent of SARA is negated by the statute's punitive effect.[68] She also emphasized the unrebutted

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[59] *Id.*
[60] *Id.*
[61] *Id.* at 30.
[62] *Id.*
[63] *Williams*, 24 N.Y.S.3d at 31.
[64] N.Y. CORR. LAW § 168 et seq. (McKinney 1996).
[65] *Williams*, 24 N.Y.S.3d at 31.
[66] *Id.* at 20.
[67] *Id.* at 32 (Kapnick, J., dissenting).
[68] *Id.*

evidence that Williams was banned from living in or traveling to almost all parts of Manhattan, where Williams lived for more than twenty years prior to his incarceration, as well as to large areas of the other boroughs of New York City.[69] SARA also requires Williams to enter prohibited zones to satisfy his requirements as a parolee such as to visit his parole officer and his substance abuse and sex offender treatment programs.[70]

Justice Kapnick found that there was not enough factual evidence to show that the 1000-foot buffer around schools has a rational connection to the legitimate state interest of keeping sex offenders away from children.[71] She added that there was also a lack of rational relationship between SARA and its stated purpose to the effect that it only applies to parolees when there is no reference or data suggesting parolees are more likely to reoffend than those released without parole.[72] Finally, Justice Kapnick also found the statute to be excessive in relation to its purpose as SARA applies to level 3 sex offenders under SORA regardless of the age of their victims and that the geographical restraints are effective twenty-four hours a day, 365 days a year.[73] For these reasons, she concluded that SARA was punitive in effect, and thus, violates the *ex post facto* clause.[74]

V. THE FEDERAL APPROACH

A. The Ex Post Facto Clause of the United States Constitution

Article I, Section 9 of the United States Constitution provides, "No . . . ex post facto Law shall be passed."[75] Any statute, which criminalizes an act that was legal when committed, which imposes additional or harsher punishment after its commission, or which deprives a criminal defendant of any legal defense available at the

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[69] *Id.* at 32.
[70] *Williams*, 24 N.Y.S.3d at 32 (Kapnick, J., dissenting).
[71] *Id.* at 33-34.
[72] *Id.* at 34.
[73] *Id.*
[74] *Id.*
[75] U.S. CONST. art I, § 9.

time when the act was committed, is prohibited under the Constitution as *ex post facto*.[76]

When the Constitution was adopted, *ex post facto* laws were considered to "embrace all retrospective laws, or laws governing, or controlling past transactions, whether they are of a civil or a criminal nature."[77] The plain meaning and intention of the prohibition on *ex post facto* laws are that legislatures of states shall not pass laws after a person commits an act and that the law should not impose punishment on that person for having done such act.[78] However, this prohibition may not be evaded by passing a civil measure that is essentially criminal.[79] Generally, *ex post facto* laws are known to apply to acts of a criminal nature only.[80] The prohibition applies to all laws that declare an act criminal when the act was not criminal when committed; or aggravate the punishment of a crime already committed; or lessen or set a different quantum of evidence necessary to convict an offender than what was required when the act was committed.[81] All of these are prohibited for being "manifestly unjust and oppressive."[82]

B. Intent-Effects Test

To determine whether the *ex post facto* clause is violated, federal courts first ascertain whether a retroactive statute is intended to impose punishment or to establish a civil proceeding.[83] If it is punitive, then it is automatically a violation of the *ex post facto* clause.[84] If it is civil and nonpunitive, then courts further examine whether the statute is so extensively punitive, either in purpose or effect, that it negates the State's intention for it to be a civil regulatory scheme.[85] The federal courts "ordinarily defer to the

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[76] Collins v. Youngblood, 497 U.S. 37, 42 (2001) (quoting Beazell v. Ohio, 269 U.S. 167 (1925)).

[77] JOSEPH STORY, J., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 485 (1833).

[78] Calder v. Bull, 3 U.S. 386, 388 (1798).

[79] Burgess v. Salmon, 97 U.S. 381 (1878).

[80] STORY, *supra* note 77.

[81] STORY, *supra* note 77.

[82] *Calder*, 3 U.S. at 386.

[83] S*mith*, 538 U.S. at 92.

[84] *Id.*

[85] *Id.*

legislature's stated intent[;]"[86] thus, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[87] In determining whether the effects of a statute are punitive, courts are also guided by the factors established in *Kennedy*.[88]

In *Kennedy*, certain sections of the Nationality Act of 1940 were challenged.[89] The United States brought actions against two native-born citizens of the United States who left the country allegedly to evade the military draft service obligations.[90] As a result, both were denied access to the United States on the ground that they lost their citizenship by remaining outside the jurisdiction of the country during the war for the purpose of evading service in the Nation's armed forces.[91] On appeal, the appellate court found that the statutes were unconstitutional.[92] On review, the Supreme Court affirmed the appellate court's decision concluding that the statutes were punitive in nature and lacked the procedural standards the Constitution required.[93]

In determining whether an Act of Congress is penal or regulatory, the Supreme Court established factors that must be considered in relation to the statute, on its face, if there is no conclusive evidence of congressional intent.[94] These factors are:

> whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment -- retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for

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[86] Kansas v. Hendricks, 521 U.S. 346, 361 (1996).
[87] Hudson v. United States, 522 U.S. 93, 100 (1997).
[88] *Smith,* 538 U.S. at 97.
[89] *Kennedy*, 372 U.S. at 147.
[90] *Id.*
[91] *Id.* at 148.
[92] *Id.*
[93] *Id.* at 165.
[94] *Kennedy*, 372 U.S. at 169.

> it; and whether it appears excessive in relation to the alternative purpose assigned . . . .[95]

The Supreme Court further noted that an examination of these factors may result in different outcomes.[96] Although the Court in *Kennedy* did not go into the details of these factors and based its decision on congressional debates regarding the punitive nature of the statute, many federal courts continue to apply the *Kennedy* factors.[97]

Forty years later, in *Smith v. Doe*,[98] the United States Supreme Court illustrated the application of the *Kennedy* factors in cases involving laws regulating the activity of sexual offenders and the prohibition against *ex post facto* laws.[99] The statute at issue in *Smith* was Alaska's Sex Offender Registration Act, which required persons convicted of sex and child-kidnapping offenses to register with state or local law enforcement authorities and provide information such as their names and addresses which the authorities made public.[100] The statute applied retroactively to offenders who had been convicted before the law's enactment.[101] Two such individuals brought an *ex post facto* action and sought to have the statute declared void as applied to them.[102] The district court granted summary judgment against the offenders who appealed.[103] The United States Court of Appeals for the Ninth Circuit determined that the statute was intended to be a nonpunitive civil regulatory scheme, but held that its effects were punitive.[104] Thus, the Ninth Circuit held that the Act violated the *ex post facto* clause.[105]

The United States Supreme Court granted certiorari and reversed the Ninth Circuit's decision, holding that the statute did not violate the prohibition against *ex post facto* laws despite the statute's retroactive application to offenders who were convicted before the

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[95] *Id.* at 168-69.

[96] *Id.* at 169.

[97] *Id*. *See, e.g.,* Hudson v. U.S., 522 U.S. 93 (1997); Allen v. Illinois, 478 U.S. 364 (1986); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009); Abuzaid v. Mattox, 726 F.3d 311 (2d Cir. 2013).

[98] 538 U.S. 84 (2003).

[99] *Id.* at 89, 97.

[100] *Id.* at 90.

[101] *Id.*

[102] *Id.* at 91.

[103] *Smith*, 538 U.S. at 91.

[104] *Id.* at 91-92.

[105] *Id.* at 92.

enactment of the statute.[106] The Court reasoned that Alaska's legislature intended to create a civil and nonpunitive scheme and those challenging the statute were not able to show, by the clearest proof, that the statute's effect was so punitive that it negated its nonpunitive intent.[107]

The United States Supreme Court noted that the framework necessary for determining whether a law constituted retroactive punishment forbidden by the *ex post facto* clause was well established.[108] First, it was necessary to ascertain the intent of the legislature to impose punishment or civil proceedings.[109] If the statute was intended to impose punishment, then it violates the *ex post facto* prohibition.[110] On the other hand, if a nonpunitive regulatory scheme was intended, then it was necessary to further ascertain whether the scheme's effects were so punitive as to negate its civil intent.[111] If the effect of the statute is deemed to be punitive, the statute is unconstitutional for violating the *ex post facto* clause.[112]

C. Banishment

It is not unusual for sex offender statutes to be challenged as violations of the *ex post facto* clause because the restraints the statutes impose are akin to banishment.[113] Banishment is defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life."[114] Historically, banishment has been regarded as punishment of the most severe kind.[115] In the case of *Doe v. Pataki*, the district court held that the public notification provisions of SORA constituted punishment and violated the *ex post facto* clause.[116] One reason for the court's holding was that history suggested that public notification

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[106] *Id.* at 92, 105-06.
[107] *Id.* at 105-06.
[108] *Smith*, 538 U.S at 92.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *See* Roe v. Office of Adult Probation, 125 F.3d 47, 52, 55 (2d Cir. 1997) (In *Roe*, the petitioner claimed that he was asked to leave by his landlord and he was ostracized at his workplace due to the notification system being put into effect).
[114] United States v. Ju Toy, 198 U.S. 253, 269 (1905) (Brewer, J., dissenting).
[115] *Id.*
[116] Doe v. Pataki, 940 F. Supp. 603, 605 (1996), *rev'd*, 120 F.3d 1263 (2d Cir. 1997).

was punitive as it was akin to branding and other public forms of shaming used to punish offenders;[117] banishment was imposed for more severe offenses.[118] However, the Second Circuit Court of Appeals reversed and held that SORA did not impose punishment, but merely conditions for the protection of the general public. [119]

VI. NEW YORK STATE APPROACH

Article III, Section 1 of the New York State Constitution provides, "The legislative power of this state shall be vested in the senate and assembly."[120] The legislature may "make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which, by the Constitution of the state, is committed to the discretion of the legislative body."[121] However, the inalienable rights secured by the Constitution limit the New York State legislature.[122] Accordingly, with regard to *ex post facto* laws, the New York State applies the limitations and prohibitions set forth in Article I, Section 9 of the United States Constitution.[123] It provides, "No State shall . . . pass any . . . ex post facto Law."[124]

A. Sexual Assault Reform Act (SARA)

SARA provides that sex offenders released on parole are required,

> [a]s a mandatory condition of such release[,] . . . [to] refrain from knowingly entering into or upon any school grounds . . . or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present.[125]

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117 *Id.*
118 *Id.*
119 *See* Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997).
120 N.Y. CONST. art. III, § 1.
121 *Id.*
122 Lawton v. Steele, 23 N.E. 878, 878 (N.Y. 1890).
123 U.S. CONST. art I, § 10.
124 *Id.*
125 N.Y. EXEC. LAW § 259-c (14) (McKinney 2015).

The statute's legislative history supports that it was enacted to keep sex offenders away from children and not to impose additional punishment on sex offenders for their past criminal acts.[126] The memoranda of the State Education Department, the New York Attorney General and the sponsor of the bill, Assemblyman Harvey Weisenberg, all expressed the goal of the statute to protect children from threats posed by sex offenders.[127]

SARA was first enacted in 2000, and its geographical restrictions only applied to sex offenders convicted of certain enumerated offenses and whose victims were under eighteen years old when the crime was committed.[128] The restriction on entering school grounds applied twenty-four hours a day, while the restriction on other facilities only applied when children were present.[129] "A violation of SARA was a violation of parole"; however, no separate sanction was provided for a violation.[130]

In 2005, SARA was amended to expand the definition of "school grounds" and incorporated the definition found in Penal Law § 220.00.[131] SARA was also amended to cover sex offenders classified as high risk, level 3 sex offenders under SORA and to apply the geographical restraints regardless of the victims' age.[132] The statute does not expressly mention any residential restraints, but the expanded definition of "school grounds" is found to operate as a restriction on both residence and travel.[133]

B. SARA and the Intent-Effects Test in New York State

New York State courts mirror the analysis of federal courts when it comes to determining whether a statute violates the prohibition on *ex post facto* laws.[134] SARA establishes restraints similar to SORA restraints, and thus, the *ex post facto* clause analysis

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126 *Williams*, 24 N.Y.S.3d at 23.
127 *Id.*
128 *Id.* at 21.
129 *Id.*
130 *Id.*
131 *Williams*, 24 N.Y.S.3d at 21.
132 *Id.*
133 *Id.*
134 *Id.* at 24.

of SORA in *People v. Parilla*[135] is identical to the one applied in *Williams*. In analyzing the statute's effects and determining whether they are punitive, the court used the seven *Kennedy* factors.[136] However, the court in *Parilla* noted that the United States Supreme Court has not indicated which factors are more significant than others; thus, no one factor is determinative.[137]

In addition, in *Berlin v. Evans*,[138] the Supreme Court of New York in New York County applied the same *ex post facto* clause analysis to the geographical restraints imposed by SARA on an elderly gentleman with a prior sex conviction who was prohibited from returning to his New York City apartment.[139] In *Berlin*, the court applied the framework outlined in *Smith* in determining whether the statute at issue violated the *ex post facto* clause.[140]

VII. DISCUSSION

Williams v. Department of Corrections and Community Supervision raised the issue of whether the 1000-foot buffer zone provided in New York's SARA is a violation of the *ex post facto* clause because it is unreasonable and excessive when applied to sex offender parolees residing in urban neighborhoods such as New York City.[141] It is unlikely that SARA would be held unconstitutional for excessiveness due to the deference to legislative intent of civil regulatory schemes given by the courts.[142]

After assessing the various federal and state cases applying the *Kennedy* factors, it is reasonable to conclude that the court in *Williams* correctly held that SARA does not violate the constitutional

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[135] 970 N.Y.S.2d 497 (App. Div. 1st Dep't 2013) (holding that SORA and its registration and notification requirements were not punitive in nature and did not violate the *ex post facto* clause).

[136] *Id.* at 497.

[137] *Id.* at 501.

[138] 923 N.Y.S.2d 828 (N.Y. Cnty. Sup. Ct. 2011) (holding that SARA was punitive in nature and violated the *ex post facto* clause as applied to a parolee who was seventy-seven years old, a first-time offender, and a low-risk, level 1 sex offender. The court reasoned that the absence of individual assessment rendered the statute punitive).

[139] *Id.* at 834-35.

[140] *Id. at* 834 (showing the *Berlin* court's indirect application of the *Kennedy* factors by applying the *Smith* framework); *see supra* note 98 and accompanying text (illustrating the *Smith* court's application of the *Kennedy* factors).

[141] *Williams*, 24 N.Y.S.3d at 18.

[142] *Id.* at 20.

prohibition on *ex post facto* laws.[143] Courts have also held that SORA, which is similar to SARA in many aspects, does not impose punishment, and thus, is not a violation of the *ex post facto* clause.[144] In addition, SORA's public notification registry does not result in the banishment of sexual offenders in their communities.[145] The exclusion sexual offenders experience as a result of SORA, such as the eviction by a landlord or community pressure to move, are private actions and, however unfortunate, were not intended by the New York legislature when SORA was enacted.[146]

However, SARA is distinguishable from SORA in that SARA expressly prohibits parolees from residing or traveling within 1000 feet of a place where children often congregate.[147] Thus, this involves state action that results in the removal of the parolee from his community and consequently, banishment.[148] Moreover, there is apparently no case precedent to show that a 1000-foot buffer zone in an urban neighborhood can be considered excessive to the extent that it is punitive for making it unreasonably difficult for sex offender parolees to find suitable housing and travel within the city.[149] A geographic restraint with a 1000-foot radius can result in banishment in highly urbanized areas such as New York City, which is what happened in the *Williams* case.[150]

When Williams raised the argument of banishment, the court did not provide sufficient reasoning to support the finding that the geographical restraints of SARA are not punishment.[151] The court simply reasoned that its resemblance to "banishment" is only a label that does little to prove punitive effect.[152] However, the geographical restraints imposed result in an excessive and unreasonable limitation

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[143] *Id.*

[144] *Parilla,* 970 N.Y.S.2d at 499. The defendant in this case argued that the SORA was punitive in nature and violated the *ex post facto* clause because the statute imposed more stringent registration and notice requirements for convicted sex offenders. *Id.*

[145] *Id.* at 503.

[146] *Pataki*, 120 F.3d at 1284.

[147] *Williams*, 24 N.Y.S.3d at 23.

[148] *Parilla*, 970 N.Y.S.2d at 503 ("[B]anishment involved state action in removing the offender from a locality . . . .").

[149] *See supra* note 12 (Apart from the New York Supreme Court case, *Berlin*, there is no case that discusses similar issues in *Williams.* Thus, there is no binding authority on the New York Court of Appeals on defendant's appeal).

[150] *Williams,* 24 N.Y.S.3d at 26-27.

[151] *Id.*

[152] *Id.* at 27.

on parolees who have already done their time. Thus, the courts should highly consider focusing more on excessiveness as a factor in determining whether SARA is punitive. Accordingly, an individualized assessment can prevent this unreasonable and excessive burden on the parolee. Although the *Williams* court already rejected such a proposal because parolees have limited liberties, it is still necessary to consider the effects of the restraint as applied to a parolee.[153]

The residential restrictions imposed by SARA only apply when certain offenses are committed and if the victim was under 18 years old at the time of the crime.[154] However, if the offender is determined to be a level three sex offender, the residential restrictions are applied regardless of the victim's age due to the high risk of recidivism.[155] SARA adopts the three-tier SORA Risk Assessment Instrument in considering the risk of recidivism of each sex offender.[156] In that regard, the individual assessment that courts should apply must include an assessment that not only addresses the recidivism of the sex offender but also his residency before incarceration. It is not surprising that residency restrictions cause sex offenders to be homeless due to the inability to find law-compliant housing.[157] There are studies that show that the residency restrictions only force sex offenders to slip to the "fringes of society," which may later be problematic since "community reintegration, therapy, and stability help reduce recidivism among the majority of offenders."[158] This takes into account both the dangers that sex offenders pose to

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[153] *Id.* at 31.

[154] *Id.* at 21.

[155] *Williams,* 24 N.Y.S.3d at 21.

[156] *See* N.Y. St. Unified Ct. Sys., *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary,* http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf (discussing the factors in determining a sex offender's level of risk) (last visited Feb. 16, 2017).

[157] Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. TIMES, Aug. 21, 2014, http://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html?_r=0 (illustrating how a previously convicted sex offender is forced to live in a homeless shelter and even potentially be asked to leave the homeless shelter due to limited facilities and its proximity to schools or places where children congregate).

[158] Amanda Moghaddam, Comment, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Statutes from an Empirical Perspective*, 40 SW. L. REV. 223, 236 (2010); *see also* Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 1 International J. of Offender Therapy and Comparative Criminology 168-78 (2005).

children in communities and the potential for rehabilitation of sex offenders.[159]

This proposed solution would yield a different result in *Williams*. If the assessment found that the 1000-foot barrier is unduly restrictive and burdensome to the parolee, then a court would determine whether to give more leeway to the parolee by putting more weight on whether the statute is excessive.[160] Given that Williams was barred from finding suitable housing and from traveling in New York City, the place where he lived before he was incarcerated, the *Williams* court would have taken this excessive burden into consideration and would have allowed Williams to access places within SARA's 1000-foot radius restriction.

VIII. CONCLUSION

Williams v. Department of Corrections and Community Supervision concerned an issue of first impression of whether SARA's geographical restraints in an urban neighborhood were punitive in intent and effect, and thus, a violation of the *ex post facto* clause.[161] In determining whether a statute violates the *ex post facto* clause, courts use the factors established in *Kennedy*.[162] Statutes involving *ex post facto* claims are not exactly alike, and courts have the discretion to decide which factors to emphasize because the factors are only guidelines.[163] As a result, the courts more often than not give deference to the legislature and uphold the constitutionality of the law.[164]

The *Williams* court rejected the argument that the statute is akin to banishment without considering the repercussions on a parolee living in an urban neighborhood such as Manhattan.[165] The New York Court of Appeals and courts hearing similar cases should take the density of an urban neighborhood into consideration in assessing whether the restraints are so excessive that they impose additional punishment for the parolee. SARA was enacted with the

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[159] *See* LEVENSON, *supra* note 158, at 173.
[160] *See* discussion, *supra* Section VI.B.
[161] *Williams,* 24 N.Y.S.3d at 31.
[162] 372 U.S. at 168.
[163] *See* discussion, *supra* Section VI.B.
[164] *See* discussion, *supra* Section VII.
[165] *Williams*, 24 N.Y.S.3d at 27.

aim of protecting children from sex offenders.[166] However, as Judge Damon Keith, in his dissenting opinion, articulated in *Doe v. Bredesen*,[167] "We must be careful, in our rush to condemn one of the most despicable crimes in our society, not to undermine the freedom and constitutional rights that make our nation great."[168]

[166] *See* discussion *infra* Section VI.A.

[167] 521 F.3d 680 (6th Cir. 2008) (The issue in this case was whether the ex post facto clause was violated by the Registration Act and Surveillance Act for sexual offenders).

[168] 521 F.3d 680, 681 (6th Cir. 2008) (Keith, J., dissenting).