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## Sex Offender Residency Restrictions: Government Regulation of Public Health, Safety, and Morality

John Kip Cornwell

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**SEX OFFENDER RESIDENCY RESTRICTIONS:  
GOVERNMENT REGULATION OF PUBLIC HEALTH,  
SAFETY, AND MORALITY**

John Kip Cornwell\*

ABSTRACT

Sex offender residency restrictions have proliferated throughout the United States over the past decade. A number of commentators have likened these laws to medieval banishment, when political outcasts and undesirables are exiled to remote areas where they cannot threaten civilized society. This Article argues first that likening modern residency restrictions to “banishment” largely misconstrues this practice as it has been practiced historically. Instead, these statutory initiatives are better understood as an assertion of governments’ police power to protect public health, safety, and morality. Seen through this lens, this Article evaluates the laws’ constitutional sufficiency with attention to their allegedly punitive nature and the effect, if any, of the modern use of quarantine to justify deprivations of liberty in the interest of public safety. It also discusses the relevance of substantive due process in this context, with particular focus on the Supreme Court of California’s groundbreaking March 2015 decision invalidating its sex offender residency statute on this basis. Recognizing the uncertainty inherent in constitutional challenges to sex offender residency laws, this Article concludes with recommendations on how best to implement sensible public policy reform in the present landscape.

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\* Professor of Law, Seton Hall University School of Law. J.D., Yale Law School; M.Phil., University of Cambridge; A.B., Harvard University. Many thanks to the invaluable help of research assistants Cristina Finetti Baragona, Casey Wertheim, Ryan Saylor, Tzvi Dolinger, Angelo Cerimele, and Daniel Tagliente.

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## INTRODUCTION

In the universe of individuals who commit heinous crimes, few evoke greater fear and loathing than sexual predators, particularly those who prey upon children. As a result of media fascination with this subset of offenders, certain predators, such as Jeffrey Dahmer<sup>1</sup> and John Wayne Gacy,<sup>2</sup> have gained widespread infamy.<sup>3</sup> Some of their victims have also become widely known, often through legislation bearing their names. For example, Megan Kanka, a seven-year-old girl raped and killed in 1994 by

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<sup>1</sup> Jeffrey Dahmer confessed to gruesomely murdering seventeen men and boys between 1978 and 1991. His murders involved rape, torture, dismemberment, necrophilia, and cannibalism. On November 28, 1994, he was beaten to death by an inmate at the Columbia Correctional Institute, where he had been incarcerated. *See* Don Terry, *Jeffrey Dahmer, Multiple Killer, Is Bludgeoned to Death in Prison*, N.Y. TIMES, Nov. 29, 1994, at A1.

<sup>2</sup> A happily married and successful businessman with political connections, John Wayne Gacy hardly fit the profile of a serial killer. He even dressed up like a clown to visit sick children in the hospital. However, after a police investigation following the disappearance of his final victim, Gacy admitted to murdering thirty-three young men between 1972 and 1978. Gacy would often pretend to be a detective and lure his victims into being handcuffed; he would then sodomize them as he strangled them to death with a rope or cord. The bodies of most of his victims were found in a flooded crawl space under Gacy's home. Additional bodies were also recovered from the Des Plaines River near Gacy's home in Illinois. *See* TRUE CRIME: SERIAL KILLERS 48–90 (Time-Life Books ed., 1992).

<sup>3</sup> While the egregiousness of Dahmer's and Gacy's offenses led the national press to follow police investigations and their subsequent prosecutions in great detail, few predators have received this much attention on the national stage. However, local television and print media have reported the exploits of many other sexual predators who operated within their region. For example, Robert Zarinsky, a New Jersey man convicted in 1975 for the murder of a teenage girl, was followed in the *Star-Ledger* series "Deadly Secrets," linking him to numerous unsolved murders from the 1960s and 1970s. Robin Gaby Fisher & Judith Lucas, *Chapter One: Shootout in the Storm*, STAR-LEDGER (Aug. 26, 2007, 12:02 AM), [http://blog.nj.com/deadlysecrets/2007/08/chapter\\_one\\_shootout\\_in\\_the\\_st.html](http://blog.nj.com/deadlysecrets/2007/08/chapter_one_shootout_in_the_st.html) [<http://perma.cc/JC9G-NNCS>]; Robin Gaby Fisher & Judith Lucas, *Chapter Fifteen: The Man Who Would Go Free*, STAR-LEDGER (Aug. 26, 2007, 12:02 AM), [http://blog.nj.com/deadlysecrets/2007/08/chapter\\_fifteen.html](http://blog.nj.com/deadlysecrets/2007/08/chapter_fifteen.html) [<http://perma.cc/PYW2-7VXD>].

a released sex offender living in her neighborhood, spawned the so-called “Megan’s Laws” that now require community notification of a sex offender’s residential address in all fifty states.<sup>4</sup>

Historically, the criminal justice system served as the primary means of protecting society from sex offenders. In the 1990s, mounting dissatisfaction with the ability of parole officers to stop recidivism led states to rely increasingly on civil law initiatives to reduce the risk of reoffending. The community notification requirements referenced above are one such remedy. Additionally, a number of jurisdictions enacted legislation that facilitated the indefinite, post-incarceration detention for mental health treatment of offenders convicted of a wide range of sex crimes<sup>5</sup> based on proof of a “mental abnormality” that made them likely to reoffend.<sup>6</sup> In 1997, the Supreme Court deemed these statutes constitutional in *Kansas v. Hendricks*.<sup>7</sup> Currently, twenty states have passed or proposed sex offender commitment laws;<sup>8</sup>

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<sup>4</sup> See, e.g., 42 U.S.C. §§ 16901–16962 (2012); MICH. COMP. LAWS ANN. § 28.723 (West 2015); N.Y. CORRECT. LAW § 168-c (McKinney 2015); TEX. CODE CRIM. PROC. ANN. art. 62.051 (West 2015). Likewise, media coverage of other victims of sexual predation, such as Joan D’Alessandro and Jessica Lunsford, fueled public outrage and led to legislative reform at the state and federal levels. See, e.g., 18 U.S.C. § 1111 (2012) (amending the definition of first degree murder to include killings committed in the perpetration of child abuse or during an assault or torture of a child); FLA. STAT. § 800.04 (2014) (requiring a mandatory minimum twenty-five years to life sentence for lewd and lascivious molestation of a child under twelve years of age); N.J. STAT. ANN. § 2C:11-3 (West 2015) (amending the murder statute to provide a lifetime prison sentence without parole to anyone convicted of both sexual assault and murder of a victim under the age of fourteen).

<sup>5</sup> See, e.g., IOWA CODE ANN. § 229A.2 (West 2015); VA. CODE ANN. § 37.2-900 (West 2015); WASH. REV. CODE ANN. § 71.09.020 (West 2015).

<sup>6</sup> KAN. STAT. ANN. § 59-29a01 (2015) (providing that “because of the nature of the mental abnormalities or personality disorders from which sexually violent predators suffer, and the dangers they present, it is necessary to house involuntarily committed sexually violent predators”); N.J. STAT. ANN. § 30:4-27.25 (West 2015); VA. CODE ANN. § 37.2-900 (West 2015). See generally John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1295 (1996) (“[R]etention’ statutes facilitate the involuntary commitment of sex offenders to psychiatric hospitals after their criminal sentences have expired . . .”).

<sup>7</sup> 521 U.S. 346 (1997).

<sup>8</sup> See Cynthia Calkins et al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 PSYCHOL. PUB. POL’Y & L. 443, 444 (2014) (“Currently, the federal government, 20 states, and the District of Columbia have some form of sex-offender-specific civil commitment legislation that allows for the indeterminate confinement of a subclass of offenders deemed to be at particularly high risk for sexual reoffense.” (citation omitted)); Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439, 441 (2008). Sex offenders may be involuntarily committed for mental health treatment under “traditional” civil commitment standards as well. See, e.g., *In re D.C.*, 679 A.2d 634 (N.J. 1996) (affirming the commitment of a sex offender under the regular civil commitment standard).

under their authority, some 5,200 sex offenders are presently detained in state institutions designed to treat their mental disorders.<sup>9</sup>

Thus, by the turn of the century, scores of released sex offenders across the country faced indefinite detention to treat the “mental abnormality” linked to their sexual offending. Those who were not subject to commitment, or who gained release from it,<sup>10</sup> often had difficulty finding employment<sup>11</sup> and faced hostility and harassment from communities that did not want sex offenders living in their midst.<sup>12</sup> In the past several years, however, the challenge to find suitable housing has become far more serious as state and local governments in ever-increasing numbers have enacted a spate of residency restrictions so severe that some released sex offenders have sought shelter under bridges,<sup>13</sup> having concluded that all other locations in their immediate area were unavailable to them by law.<sup>14</sup>

Some have cheered the proliferation of these civil law initiatives as innovative and necessary to protect society from dangerous predators living among us.<sup>15</sup> Others

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<sup>9</sup> See Martiga Lohn, *\$175,000 Per Offender? Get-Tough Sex Predator ‘Treatment’ Busts State Budgets*, ASSOCIATED PRESS (June 21, 2010, 10:54 PM), [http://www.cleveland.com/nation/index.ssf/2010/06/175000\\_per\\_offender\\_get-tough.html](http://www.cleveland.com/nation/index.ssf/2010/06/175000_per_offender_get-tough.html) [<http://perma.cc/G2MQ-9PW4>] (discussing a study of states with civil commitment laws for sexually violent predators).

<sup>10</sup> In order to gain release from civil commitment, a mental health professional must determine, either clinically or actuarially, that the sex offender does not pose a high risk of recidivating. Making such determinations with any degree of accuracy is often difficult. See NATHAN JAMES ET AL., CONG. RESEARCH SERV., RL 34068, CIVIL COMMITMENT OF SEXUALLY DANGEROUS PERSONS 27–30 (2007), <http://www.policyarchive.org/handle/10207/bitstreams/18628.pdf> [<http://perma.cc/Y8YF-FBW7>].

<sup>11</sup> Almost one-third of registered sex offenders reported losing their jobs, harassment, and damage to their property as a result of community notification. See Jill S. Levenson & Leo P. Cotter, *The Effect of Megan’s Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 56 (2005); see also ERIC SELEZNOW, CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, TIME TO WORK: MANAGING THE EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION 1 (Kristin Littel & Scott Matson eds., 2002), <http://www.csom.org/pubs/timetowork.pdf> [<http://perma.cc/5WYF-9AG7>] (“[A]cquiring appropriate employment for sex offenders presents formidable obstacles.”).

<sup>12</sup> Some offenders, for example, are forced to retreat from interactions with their community for fear that their status as a sex offender will become known. This has led to a lack of job stability and safe and affordable housing. See Keri B. Burchfield & William Mingus, *Not in My Neighborhood: Assessing Registered Sex Offenders’ Experiences with Local Social Capital and Social Control*, 35 CRIM. JUST. & BEHAV. 356, 359 (2008).

<sup>13</sup> See Ryan Saylor, *Living Under a Bridge Down by the River—An Eighth Amendment Look at the Government’s Housing of Paroled Sex Offenders Under a Bridge in Miami*, in 4 THE SEXUAL PREDATOR 5-1, 5-2 (Anita Schlank ed., 2010).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Lee Rood, *Keep Iowa’s Sex Offender Laws Strict, One City Says*, DES MOINES REG., Feb. 13, 2007, at A1; Jenifer Warren, *Sex Offender Crackdown Is Tied to Trend*, L.A. TIMES, Sept. 18, 2006, <http://articles.latimes.com/2006/sep/18/local/me-offender18> [<http://perma.cc/5WYF-9AG7>].

have vilified them as ineffectual, symbolic gestures concerned more with political expediency than public safety.<sup>16</sup> Some critics have gone even further, comparing residency restrictions to “banishment,” wherein governments relegate social outcasts to the geographical fringes of society.<sup>17</sup>

This Article argues first that likening modern residency restrictions to “banishment” largely misconstrues this practice as it has been practiced historically; instead, these statutory initiatives are better understood as an assertion of the governments’ police power to protect public health, safety, and morality. Seen through this lens, I evaluate the laws’ constitutional sufficiency with special attention to their allegedly punitive nature and the effect, if any, of the modern use of quarantine to justify deprivations of liberty in the interest of public safety. I next discuss the relevance of substantive due process in this context, with particular focus on the Supreme Court of California’s groundbreaking March 2015 decision invalidating its statute on this basis. Recognizing the uncertainty inherent in constitutional challenges to sex offender residency laws, I conclude with recommendations on sensible public policy reform in this context.

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.cc/Z3VH-N84M]; Press Release, Senator Norm Coleman, Coleman Applauds Senate Passage of Sex Offender Registry Legislation (May 5, 2006), <http://www.votesmart.org/public-statement/170105/coleman-applauds-senate-passage-of-sex-offender-registry-legislation#.VWUDaUazkZA> [<http://perma.cc/JA6M-PFCZ>] (“This legislation will remove the cloak that offenders have been using to shield themselves by combining all 50 state registries of sex offenders into one national database that the public can access online.”).

<sup>16</sup> See, e.g., Rose Corrigan, *Making Meaning of Megan’s Law*, 31 LAW & SOC. INQUIRY 267, 274 (2006); Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 339–40 (2007); Jill S. Levenson et al., *Views of Sexual Abuse Professionals About Sex Offender Notification Policies*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 150, 164 (2010); Jacob Salsburg, Note, *The Constitutionality of Iowa’s Sex Offender Residency Restriction*, 64 U. MIAMI L. REV. 1091, 1115 (2010).

<sup>17</sup> See, e.g., Shelley Ross Saxon, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1397 (2009); Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. REV. 531, 531–32 (2007); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 102–06 (2007); Amber Leigh Bagley, Comment, “*An Era of Human Zoning*”: *Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1347–50 (2008); Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 714 (2005); Ryan Hawkins, Note, *Human Zoning: The Constitutionality of Sex-Offender Residency Restrictions as Applied to Post-Conviction Offenders*, 5 PIERCE L. REV. 331, 335 (2007); see also *Williams v. Dep’t of Corr. & Cmty. Supervision*, 979 N.Y.S.2d 489, 500–01 (N.Y. Sup. Ct. 2014) (rejecting a petitioner’s claim that a local sex offender residency ordinance rendered him “essentially banished from New York County, and that banishment is a traditional form of punishment,” and finding that “a temporary restriction . . . on how close he may live, in this case, to a school . . . cannot be equated with a forced exile from one’s home or country” (citing *United States v. Ju Toy*, 198 U.S. 253, 269–70 (1905))).



## I. THE RISING TIDE OF RESIDENCY RESTRICTIONS

Sex offender residency restrictions currently exist in more than thirty states<sup>18</sup> and generally prohibit anyone previously convicted of a qualifying offense<sup>19</sup> from living within a certain distance of specified locations where children commonly congregate. Accordingly, most prohibit sex offenders from living within 300 feet to 3,000 feet<sup>20</sup> of a school or childcare facility.<sup>21</sup> Many include parks and playgrounds, prohibiting sex offender residency within 500 to 2,000 feet of either.<sup>22</sup>

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<sup>18</sup> See, e.g., ALA. CODE § 15-20A-10(a) (2015); ARIZ. REV. STAT. ANN. § 13-3727(A) (2015); ARK. CODE ANN. § 5-14-128(a) (2014); CAL. PENAL CODE § 3003.5 (Deering 2015), *invalidated by In re Taylor*, 343 P.3d 867 (Cal. 2015); DEL. CODE ANN. tit. 11, § 1112(a) (2015); FLA. STAT. § 948.30(1) (2014); GA. CODE ANN. § 42-1-15(b) (2014); HAW. REV. STAT. § 706-624(2) (2014); IDAHO CODE ANN. § 18-8329(1) (West 2014); 720 ILL. COMP. STAT. 5/11-9.3 (2015); IND. CODE § 35-38-2-2.2 (2014); IOWA CODE § 692A.114(2) (2015); KY. REV. STAT. ANN. § 17.545(1) (West 2010); LA. STAT. ANN. § 15:538(D) (2014); MASS. GEN. LAWS ch. 127, § 133D1/2 (2015); MICH. COMP. LAWS § 28.735 (2009), *invalidated by Doe v. Snyder*, No. 12-11194, 2015 WL 1497852 (E.D. Mich. 2015); MINN. STAT. § 244.052(3)(k) (2014); MISS. CODE ANN. § 45-33-25(4)(a) (2014); MO. REV. STAT. § 566.147 (2014); MONT. CODE ANN. § 46-18-255 (2014); NEV. REV. STAT. ANN. § 213.1243(4) (LexisNexis 2013); N.Y. EXEC. LAW § 259-c (McKinney 2015) (prohibiting persons on parole for certain categories of sex crimes from living or traveling within 1,000 feet of a school); N.C. GEN. STAT. § 14-208.16 (2014); OHIO REV. CODE ANN. § 2950.034 (LexisNexis 2015); OKLA. STAT. tit. 57, § 590 (2015), *amended by* 2015 Okla. Sess. Law Serv. Ch. 270 (West); OR. REV. STAT. §§ 144.642, 144.644 (2013); 11 R.I. GEN. LAWS § 11-37.1-10 (2015); S.C. CODE ANN. § 23-3-535 (2014); S.D. CODIFIED LAWS § 22-24B-23 (2015); TENN. CODE ANN. § 40-39-211 (2014); VT. STAT. ANN. tit. 28, § 710 (2015); VA. CODE ANN. § 18.2-370.3 (2014); WASH. REV. CODE ANN. § 72.09.340 (LexisNexis 2015); W. VA. CODE ANN. § 62-12-26 (West 2015); WIS. STAT. § 302.116(2) (2013); see also Calkins et al., *supra* note 8, at 453 (“Residence restrictions barring sex offenders from living near certain statutorily defined public places have been enacted in at least 30 states and hundreds of local municipalities.” (citation omitted)).

<sup>19</sup> In most states, qualifying offenses that prohibit the convicted from residing near children are usually codified sexual crimes. See, e.g., VA. CODE ANN. § 18.2-370.3 (defining a qualifying offense as rape, under VA. CODE ANN. § 18.2-61, forcible sodomy under VA. CODE ANN. § 18.2-67.1, or forcible sexual penetration with an object under VA. CODE ANN. § 18.2-67.2); see also FLA. STAT. § 948.30(1) (allowing for residency restriction for those convicted of buying and selling child pornography and trafficking children).

<sup>20</sup> See *supra* note 18 and accompanying text.

<sup>21</sup> See, e.g., ALA. CODE § 15-20A-10(a); ARIZ. REV. STAT. ANN. § 13-3727(A); ARK. CODE ANN. § 5-14-128(a); CAL. PENAL CODE § 3003.5(b); DEL. CODE ANN. tit. 11, § 1112(a); FLA. STAT. § 948.30(1); GA. CODE ANN. § 42-1-15(b); IDAHO CODE ANN. § 18-8329(1); 720 ILL. COMP. STAT. 5/11-9.3(b); IND. CODE § 35-38-2-2.2(2); IOWA CODE § 692A.114(2); KY. REV. STAT. ANN. § 17.545(1); LA. STAT. ANN. § 15:538(D); MICH. COMP. LAWS § 28.735; MISS. CODE ANN. § 45-33-25(4)(a); MO. REV. STAT. § 566.147(1); NEV. REV. STAT. ANN. § 213.1243(4); N.C. GEN. STAT. § 14-208.16(a); OHIO REV. CODE ANN. § 2950.034; OKLA. STAT. tit. 57, § 590(A); 11 R.I. GEN. LAWS § 11-37.1-10(c); S.C. CODE ANN. § 23-3-535(B); S.D. CODIFIED LAWS § 22-24B-23; TENN. CODE ANN. § 40-39-211(a); VA. CODE ANN. § 18.2-370.3(c).

While the statutes most frequently target schools, childcare facilities, parks, and playgrounds, some include additional, miscellaneous locations. For example, Georgia prohibits sex offenders from living within 1,000 feet of a church.<sup>23</sup> Nevada and Louisiana apply this same restriction to arcades.<sup>24</sup> Nevada also includes bus stops, amusement parks, and movie theaters,<sup>25</sup> Louisiana adds youth centers and, along with South Dakota,<sup>26</sup> pools.<sup>27</sup>

In lieu of, or in addition to, specifying certain locations that are off-limits *per se* to sex offenders, some states have enacted more general prohibitions. In Illinois, for example, sex offenders cannot “be present within 100 feet of a . . . pick-up or discharge stop.”<sup>28</sup> Likewise, California, Florida, Georgia, Illinois, Oregon, and Washington prohibit sex offenders from living near places where children gather.<sup>29</sup> Two of these states, Oregon and Washington, are among those that assign plenary responsibility for making sex offender residency determinations to the court or a state agency.<sup>30</sup> In addition, several states allow municipalities within them to enact their own restrictions, either in lieu of or in addition to statewide regulation.<sup>31</sup>

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<sup>22</sup> See, e.g., ARK. CODE ANN. § 5-14-128(a); CAL. PENAL CODE § 3003.5(b); FLA. STAT. § 948.30(1); 720 ILL. COMP. STAT. 5/11-9.3(b); KY. REV. STAT. ANN. § 17.545(1); LA. STAT. ANN. § 15:538(D); MISS. CODE ANN. § 45-33-25(4)(a); NEV. REV. STAT. ANN. § 213.1243(4); OKLA. STAT. tit. 57, § 590(A); S.C. CODE ANN. § 23-3-535(B); S.D. CODIFIED LAWS § 22-24B-23; TENN. CODE ANN. § 40-39-211(a); VA. CODE ANN. § 18.2-370.3(c).

<sup>23</sup> GA. CODE ANN. § 42-1-15(b).

<sup>24</sup> LA. STAT. ANN. § 15:538(D)(1)(c); NEV. REV. STAT. ANN. § 213.1243(4).

<sup>25</sup> NEV. REV. STAT. ANN. § 213.1243(4).

<sup>26</sup> S.D. CODIFIED LAWS § 22-24B-23.

<sup>27</sup> LA. STAT. ANN. § 15:538(D).

<sup>28</sup> 720 ILL. COMP. STAT. 5/11-9.3(a) (2015).

<sup>29</sup> CAL. PENAL CODE § 3003.5(b) (Deering 2015), *invalidated by In re Taylor*, 343 P.3d 867 (Cal. 2015); FLA. STAT. § 948.30(1)(b) (2014); GA. CODE ANN. § 42-1-15(b) (2014); 720 ILL. COMP. STAT. 5/11-9.3(b); OR. REV. STAT. §§ 144.642, 144.644 (2013); WASH. REV. CODE ANN. § 72.09.340(3)(a) (LexisNexis 2015).

<sup>30</sup> See HAW. REV. STAT. § 706-624(2)(k) (2014); MASS. GEN. LAWS ch. 127, § 133D1/2 (2015); MINN. STAT. § 244.052(3)(k) (2014); MONT. CODE ANN. § 46-18-255(2) (2014); OR. REV. STAT. §§ 144.642, 144.644; VT. STAT. ANN. tit. 28, § 710(a) (2015); WASH. REV. CODE ANN. § 72.09.340; WIS. STAT. § 302.116(2) (2013). The legislature sometimes provides guidance to the decision maker. For example, Montana instructs courts to consider proximity to churches when determining where released sex offenders should reside. MONT. CODE ANN. § 46-18-255(2).

<sup>31</sup> See, e.g., NEB. REV. STAT. ANN. § 29-4017 (LexisNexis 2015); OHIO REV. CODE ANN. § 503.60 (LexisNexis 2015). Many municipalities impose restrictions on sex offenders. See, e.g., ARCADIA, CAL., CODE OF ORDINANCES ch. 9.4, §§ 4940.5–9 (2015), <https://www.municode.com/library/ca/arcadia> [<http://perma.cc/26DP-E9QH>] (prohibiting sex offenders from residing or occupying single-family homes, apartment complexes, and hotels where other sex offenders reside unless they are related by blood, marriage, or adoption); BAY HARBOR ISLANDS, FLA., CODE OF ORDINANCES ch. 14, art. I, § 14-17 (2013), [https://www.municode.com/library/fl/bay\\_harbor\\_islands](https://www.municode.com/library/fl/bay_harbor_islands) [<http://perma.cc/3E9L-LSGD>] (prohibiting sex offenders from living within



Aside from residency restrictions, some states prohibit sex offenders from working within a proscribed distance of certain locations.<sup>32</sup> For example, Alabama prohibits sex offenders from being employed within 2,000 feet of a school or childcare facility and “within 500 feet of a playground, park, athletic field or facility, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors.”<sup>33</sup> Sex offenders may also be subject to a state-imposed curfew. In Florida, sex offenders have a mandatory curfew from ten o’clock at night to six o’clock in the morning,<sup>34</sup> and in Hawaii, courts have the discretion to impose a curfew.<sup>35</sup>

## II. THE “BANISHMENT” ANALOGY

The breadth of the restrictions described in the previous section has led a number of commentators to liken these laws to banishment, a practice used throughout history to exclude individuals out of favor with the power elite.<sup>36</sup> However, while a certain facial verisimilitude may exist between residency restrictions and banishment, closer scrutiny reveals that the two have less in common than one might initially expect.

### *A. Banishment in Historical Context*

From Ancient Greece through the eighteenth century, individuals have been forced to relocate, often to faraway lands where they would be unable to influence or otherwise infect day-to-day life back home. Viewed collectively, banishment served two purposes: safeguarding political power and preserving safety and security. These objectives appear inapposite to modern sex offender restrictions, which are not designed to preserve the political supremacy of a close-knit power elite, nor do they effectively protect society from harm perpetrated by affected parties. The laws’ embodiment of

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“2,500 feet of any school, designated public school bus stop, day care center, park, playground, or other place where children regularly congregate”); CHI. HEIGHTS, ILL., CODE OF ORDINANCES ch. 30, art. XVI, § 30-255 (2015), [https://www.municode.com/library/il/chicago\\_heights](https://www.municode.com/library/il/chicago_heights) [<http://perma.cc/N9G8-KU4F>] (prohibiting registered sex offenders from loitering on a public way within 1,000 feet of “a school building or the real property comprising any school, public or private park, playground, or athletic field, while persons under the age of eighteen (18) are present”).

<sup>32</sup> See, e.g., ALA. CODE § 15-20A-13 (2014); GA. CODE ANN. § 42-1-15; MICH. COMP. LAWS § 28.734 (2009); TENN. CODE ANN. § 40-39-211 (2014).

<sup>33</sup> ALA. CODE § 15-20A-13.

<sup>34</sup> FLA. STAT. § 948.30(1)(a) (2014).

<sup>35</sup> HAW. REV. STAT. § 706-624(2)(o).

<sup>36</sup> See Katherine Beckett & Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 LAW & SOC. INQUIRY 1, 2 (2010); Lee H. Bowker, *Exile, Banishment and Transportation*, 24 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 67, 67 (1980); Matthew D. Borrelli, Note, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 471 (2003).

widespread public vilification of targeted offenders provides, therefore, the lone resonance with historical antecedents.

### 1. Preserving Power

At its inception in Ancient Greece, banishment was used primarily to advance political aims. Accordingly, from 750 to 500 B.C., ruling families would consolidate power by regularly forcing rival elites into exile.<sup>37</sup> In fact, the Athenian elite formally sanctioned this practice following an unsuccessful attempt by one of their members to assume unilateral control in 636 B.C.<sup>38</sup> To protect the authority of the ruling coalition of elite families, they passed a law against tyranny that set banishment as the punishment and granted immunity to anyone who murdered a potential tyrant.<sup>39</sup>

The use of banishment to preserve power persisted in the medieval period. In England, kings from Edward the Confessor to Williams I and II forced political rivals into exile as an alternative to imprisonment or execution following an uprising or attempted rebellion.<sup>40</sup> From 1000 to 1200, the Dukes of Normandy likewise banished political opponents.<sup>41</sup> Many other Normans who had fallen out of favor with the Duke exiled themselves voluntarily to Italy, fearing harsh treatment.<sup>42</sup> Those who remained faced deprivation of not merely political, but material sustenance as well, within Normandy.<sup>43</sup>

### 2. Ensuring Peace and Public Safety

Banishment also protected the public from the danger ascribed to individuals charged with or convicted of certain crimes. Not infrequently, the public safety objective was linked inextricably to the maintenance of political superiority, especially in ancient Roman and Greek societies. For example, in the Roman Republic, when losing parties in a political struggle were subsequently charged with capital offenses, they could choose exile in lieu of trial.<sup>44</sup> This alternative avoided resort to armed conflict that may have otherwise been inevitable, since the defendants faced death at the hands of victorious political enemies.<sup>45</sup> Likewise, Athenian courts regularly

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<sup>37</sup> See SARA FORSDYKE, *EXILE, OSTRACISM, AND DEMOCRACY: THE POLITICS OF EXPULSION IN ANCIENT GREECE* 1, 77–78 (2005).

<sup>38</sup> *Id.* at 82–83 (citation omitted).

<sup>39</sup> *Id.*

<sup>40</sup> See Ewan Johnson, *The Process of Norman Exile into Southern Italy*, in *EXILE IN THE MIDDLE AGES: SELECTED PROCEEDINGS FROM THE INTERNATIONAL MEDIEVAL CONGRESS, UNIVERSITY OF LEEDS, 8–11 JULY 2002*, 29 (Laura Napran & Elisabeth van Houts eds., 2004).

<sup>41</sup> *Id.* at 34.

<sup>42</sup> *Id.* at 32–35.

<sup>43</sup> See 3 ORDERIC VITALIS, *THE ECCLESIASTICAL HISTORY OF ORDERIC VITALIS* 307–17 (Marjorie Chibnall ed. & trans., Oxford Univ. Press 1972).

<sup>44</sup> ANDREW LINTOTT, *THE CONSTITUTION OF THE ROMAN REPUBLIC* 146–62 (1999).

<sup>45</sup> GORDON P. KELLY, *A HISTORY OF EXILE IN THE ROMAN REPUBLIC* 5, 13, 19 (2006).

imposed exile as a punishment for offenses such as attempted tyranny and failure to perform one's military duty.<sup>46</sup>

Egregious criminal misconduct in and of itself could also result in banishment during the ancient and classical periods. For example, ancient Athenian courts regularly imposed exile as a punishment for homicide.<sup>47</sup> Likewise, in twelfth-century England, individuals found guilty of murder, theft, or arson after failing the requisite trial by "ordeal"<sup>48</sup> were forced to "abjure the kingdom."<sup>49</sup> The use of banishment as a means of social control hit its zenith centuries later, however, when English lawmakers passed the Transportation Act of 1718 to "relocate" felons to colonial settlements in America.<sup>50</sup>

The Transportation Act was a response to the alarming rise in crime that plagued increasingly overcrowded English cities in the early eighteenth century.<sup>51</sup> Lacking a professional police force to protect its citizens from persistent crime, lawmakers relied on banishment to keep the peace. The Act prescribed exile for a term of either seven or fourteen years.<sup>52</sup> The former applied most significantly to larceny; the latter applied to a host of more serious crimes, including murder, rape, arson, burglary, highway robbery, and piracy.<sup>53</sup> All tolled, British criminal courts exiled more than 50,000 convicts to the American colonies under the Transportation Act.<sup>54</sup>

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<sup>46</sup> FORSDYKE, *supra* note 37, at 178–80.

<sup>47</sup> See MICHAEL GAGARIN, *DRAKON AND EARLY ATHENIAN HOMICIDE LAW 2–4* (1981).

<sup>48</sup> Pursuant to the Assize of Clarendon, enacted in 1166, the accused were required to undergo an "ordeal" of water by which they were tied under the arms and thrown into a river. Margaret H. Kerr et al., *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. INTERDISC. HIST. 573, 573, 582–83 (1992). If the accused sank to the bottom, they were found not guilty and drawn up by the cord; if, however, they floated, they were found guilty based on the belief that the water had rejected them. See F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND 119–20* (1963). The Assize of Northampton, enacted ten years later, reaffirmed this practice for individuals charged with theft, murder, and arson, providing, in addition, that those failing the ordeal faced not only banishment, but also the loss of a hand and a foot. See GEORGE J. EDWARDS, JR., *THE GRAND JURY 8–9* (1906).

<sup>49</sup> Even those who passed the ordeal faced abjuration if they could not obtain a "pledge." Kenneth Frederick Meredith, *The Penalty of Banishment in Medieval France and England 148* (May 1979) (unpublished Ph.D. dissertation, University of Virginia) (on file with University of Virginia Library). The pledge was essentially a guarantee of good behavior from a friend or relative of the guilty. Those unable to find a pledge were forced to abjure the kingdom. See *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 313–14* (William Stubbs ed., H. W. C. Davis rev. ed. 1921); see also Kerr et al., *supra* note 48, at 579 n.11.

<sup>50</sup> See A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718–1775*, 17 (1987).

<sup>51</sup> See *id.* at 11 (discussing statistical data indicating the rise in crime).

<sup>52</sup> Transportation Act 1718, 4 Geo. I, c. 11 (Eng.).

<sup>53</sup> See EKIRCH, *supra* note 50, at 17.

<sup>54</sup> JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 620* (2009).

### *B. Sex Offender Residency Restrictions Distinguished*

Based on the foregoing, one can discern very broad parallels between sex offender residency restrictions and the historical use of banishment. For example, inasmuch as public outrage fueled passage of these initiatives,<sup>55</sup> one may reasonably posit that lawmakers' motivations were based, at least in part, on concerns that inaction on their part could diminish re-election prospects prospectively. In addition, because these laws apply exclusively to individuals convicted of sexual offending, one may consider them an effort to promote public safety, particularly in light of their special focus on children, who are especially vulnerable. However, as we will see, pervasive differences in form and context overwhelm these facial similarities.

#### 1. The "Power Preservation" Analogue

While promoting the re-election prospects of elected officials may fuel interest in enacting sex offender residency restrictions, the historical use of banishment was of an altogether different quality. First, in the classical and medieval periods, the power elite exiled political rivals to avoid challenges to their authority *from the very individuals sent away*. By contrast, the "exiled" parties in residency restriction statutes pose no threat to lawmakers personally; the risk is based, instead, on the purported reaction of *voters* angered by legislators' failure to address their concerns.

The uncertain effect of legislative indifference further attenuates the "power preservation" analogue. Even assuming, *arguendo*, that failing to restrict sex offender residency would anger constituents, this issue would inevitably be only one among many raised during a re-election campaign. It is impossible to know, therefore, how heavily a candidate's response *vel non* would influence people at the polls, particularly in light of research indicating that pocketbook issues typically figure most prominently in voters' minds, especially in challenging economic times.<sup>56</sup>

#### 2. Safety and Security Challenges

It is also difficult to analogize sex offender residency restrictions to banishment's historical role in preserving peace and public safety. From the classical period forward, the ruling elite banished individuals to distant lands where they could no longer threaten the safety and security of citizens back home.<sup>57</sup> Modern residency restrictions, by contrast, generally do not foreclose access to potential victims; they merely make access more difficult.<sup>58</sup>

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<sup>55</sup> See *supra* note 4 and accompanying text.

<sup>56</sup> See Ezra Klein, *It's Always the Economy Stupid*, NEWSWEEK, July 19, 2010, at 22; see also Thomas J. Scotto et al., *The Dynamic Political Economy of Support for Barack Obama During the 2008 Presidential Election Campaign*, 29 ELECTORAL STUD. 545, 547 (2010).

<sup>57</sup> See, e.g., Transportation Act 1718, 4 Geo. I, c. 11 (Eng.).

<sup>58</sup> In essence, modern residency restrictions are a form of internal exile that removes sex offenders from a relatively small geographic area closely associated with the site(s) of their

For example, some statutes create an exclusionary zone—sometimes referred to as a “brown zone”<sup>59</sup>—near specified areas such as schools, parks, playgrounds, and childcare facilities where sex offenders cannot live;<sup>60</sup> others use potentially broader language encompassing “[all] places where children gather.”<sup>61</sup> Either way, these provisions are plainly generally under-inclusive, since most do not prevent pedophiles from *entering* these areas. Therefore, offenders can choose jobs that provide access to these areas during the day, the very times children are most likely to be present.

A handful of jurisdictions have imposed more extensive provisions that include curfews and restrictions on employment.<sup>62</sup> Curiously, in the one state with specific curfew hours, the relevant period is from ten o’clock at night to six o’clock in the morning,<sup>63</sup> the time of day when most children would be inside under parental supervision. While the employment restrictions are tailored more closely to the laws’ underlying purpose, they suffer from another problem that also pervades residency restrictions: the relatively small reach of the exclusionary zone. Ranging from as little as 500 feet<sup>64</sup> to a maximum of only 2,000 feet,<sup>65</sup> even the most stringent restrictions on housing and employment do not meaningfully preclude access to children. For example, even in a jurisdiction with a 2,000-foot restriction, a sex offender can lawfully work a half-mile from an elementary or middle school. As such, it would be quite easy for him to be present in a school’s immediate vicinity at the end of the day when students would be walking home. Likewise, even offenders who are required to live 2,000 feet from schools, parks, and other places “where children gather” can still *enter* those areas at will any time of the day or night.

Cognizant of these troubling loopholes, various county and municipal governments have enacted ordinances designed to supplement state law restrictions. For example, Florida enacted legislation forbidding released sex offenders from living within 1,000 feet of “any school, day care center, park, or playground.”<sup>66</sup> The Miami-Dade County Commission augmented the state law through its own Sexual Offender

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prior offending. As such, Corey Rayburn Yung has appropriately likened these laws to the Soviet “propiska” system that relocated undesirables such as criminals, the homeless, and political dissidents to the 101st kilometer, far away from population centers. Yung, *supra* note 17, at 102–03.

<sup>59</sup> JERSEY CITY, N.J., CODE OF ORDINANCES § 282-4 (2015), [https://www.municode.com/library/nj/jersey\\_city](https://www.municode.com/library/nj/jersey_city) [<http://perma.cc/2SF2-KZFC>] (prohibiting registered sex offenders from loitering within 150 feet of any public or private school, daycare, day camp, convenience store, or public library).

<sup>60</sup> See *supra* notes 21–22 and accompanying text.

<sup>61</sup> See *supra* note 29 and accompanying text.

<sup>62</sup> See *supra* notes 32–35 and accompanying text.

<sup>63</sup> See FLA. STAT. § 948.30(1)(a) (2014).

<sup>64</sup> See 720 ILL. COMP. STAT. 5/11-9.4(b-5) (2015) (preventing sex offenders from “knowingly resid[ing] within 500 feet of a school building”).

<sup>65</sup> See, e.g., ALA. CODE § 15-20A-13 (2014).

<sup>66</sup> FLA. STAT. § 794.065 (2004) (current version at § 775.215).

and Sexual Predator Ordinance that both extended the restricted zone to 2,500 feet and added “bus stops” to the list of targeted areas.<sup>67</sup> Nearly another decade later (2014), the American Civil Liberties Union (ACLU) and the ACLU of Florida “filed suit against Miami-Dade County and the Florida Department of Corrections, seeking a permanent injunction against” this restriction for leaving “about fifty former offenders with nowhere to live other than an outdoor area along railroad tracks on the outskirts of Miami-Dade county.”<sup>68</sup>

The Town of Taylors Falls, Minnesota, also prohibits “Level III”<sup>69</sup> sex offenders from establishing residence within 1,000 feet of any designated public school bus stop, place of worship, or any “other places where children are known to congregate.”<sup>70</sup> The ordinance also prohibits these qualifying offenders from residing, even temporarily, “within 2,000 feet of any school, licensed day care center, park, or playground.”<sup>71</sup>

A plethora of municipal ordinances have also emerged in states with no fixed, statewide residency restrictions for sex offenders. While many mirror those discussed previously, some are decidedly novel and provocative. For example, in Lubbock, Texas, prospective buyers in one new housing development must submit to screening for sex offenses, and exclusion is mandatory for any person whose background check discloses a qualifying offense.<sup>72</sup> In addition, any homeowner convicted of a sex offense must leave the subdivision immediately or incur a \$1,500 fine for each day he remains in his home.<sup>73</sup> By contrast, instead of requiring high-risk sex

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<sup>67</sup> MIAMI-DADE COUNTY, FLA., Art. XVII, CODE OF ORDINANCES §§ 21-277–21-285 (2015), [https://www.municode.com/library/fl/miami\\_-\\_dade\\_county/codes/code\\_of\\_ordinances](https://www.municode.com/library/fl/miami_-_dade_county/codes/code_of_ordinances) [<http://perma.cc/J3AZ-BX6Y>] (the Ordinance has since been renamed “The Lauren Book Child Safety Ordinance”).

<sup>68</sup> *ACLU Challenges Miami-Dade Housing Restriction Forcing Former Sex Offenders to Live by Railroad Tracks*, AM. CIVIL LIBERTIES UNION (Oct. 23, 2014), <https://www.aclu.org/news/aclu-challenges-miami-dade-housing-restriction-forcing-former-sex-offenders-live-railroad> [<http://perma.cc/84T7-PYV7>]; *see also infra* note 75.

<sup>69</sup> TAYLORS FALLS, MINN., CODE OF ORDINANCES ch. 5, § 540.02(1) (2014), [http://www.ci.taylors-falls.mn.us/vertical/sites/%7BC4DF7AF2-3980-4104-AEC5-C0A9A2B6536D%7D/uploads/Chapter\\_5\\_Nuisance\\_and\\_Offenses\\_City\\_Code\\_.pdf](http://www.ci.taylors-falls.mn.us/vertical/sites/%7BC4DF7AF2-3980-4104-AEC5-C0A9A2B6536D%7D/uploads/Chapter_5_Nuisance_and_Offenses_City_Code_.pdf) [<http://perma.cc/X7ZD-2V5F>] (defining “Level III sex offender under Minnesota Statute § 244.052 or successor statute”). Generally, “Level III” sex offenders are regarded as the most likely to reoffend. *See, e.g., infra* note 198 and accompanying text.

<sup>70</sup> TAYLORS FALLS, MINN., CODE OF ORDINANCES ch. 5, § 540.03(1)(b).

<sup>71</sup> *Id.* § 540.03(1)(a).

<sup>72</sup> Beth Aaron, *Sex Offenders Not Welcome in Subdivision*, LUBBOCK AVALANCHE-J. (June 16, 2006), [http://www.lubbockonline.com/stories/061606/upd\\_3502349.shtml#.VVJ2SJO2VsU](http://www.lubbockonline.com/stories/061606/upd_3502349.shtml#.VVJ2SJO2VsU) [<http://perma.cc/J6KD-TV99>].

<sup>73</sup> *Lubbock Neighborhood Says Sex Offenders Are Not Welcome*, TEXOMASHOMEPAGE.COM (June 19, 2006, 6:02 AM), <http://www.texomashomepage.com/story/d/story/lubbock-neighborhood-says-sex-offenders-are-not-welcome> [<http://perma.cc/Z79S-27QP>].



offenders to relocate, the town of Cuero, Texas, requires them to place a sign in their yard that reads, “A registered sex offender lives here.”<sup>74</sup>

Ironically, this patchwork of state and local laws designed to redress the *under-inclusive* nature of statewide restrictions has created unanticipated problems of *over-inclusivity* that significantly undermine public safety. For example, by sharply limiting the availability of suitable housing, over-inclusive regulations have produced growing populations of homeless parolees who may end up forming makeshift communities of their own. For example, in Miami-Dade County, Florida, more than fifty released sex offenders—unable to find affordable housing due to the tangle of state, county, and local laws restricting residency—lived under a busy causeway connecting Miami to Miami Beach.<sup>75</sup> These conditions alarmed citizens and angered the dislocated offenders who lived in squalor with no access to affordable, unrestricted housing.<sup>76</sup> Voicing their outrage, the residents spray-painted the slope and the pillars supporting the bridge with messages such as “We ‘R’ Not Monsters,” “They Treat Animals Better!!!,” and “Why?”<sup>77</sup>

Unsurprisingly, as the number and severity of residency restrictions have proliferated, so has the number of transient sex offenders. For example, after “Jessica’s Law”<sup>78</sup> went into effect in November 2006, California saw an alarming increase in sex-offense parolees registering as transient.<sup>79</sup> Thus, as the California Sex Offender Management Board recognized in a report to the state legislature, over-inclusive restrictions may actually reduce public safety by driving sex offenders underground where they cannot be monitored by correctional and mental health agencies.<sup>80</sup>

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<sup>74</sup> Lara Loewenstein, *Sex Offenders Deserve Second Chance*, DAILY BRUIN (Mar. 8, 2006, 9:00 PM), <http://www.dailybruin.com/2006/03/08/isex-offenders-deserve-second/> [<http://perma.cc/2HCT-DPP2>].

<sup>75</sup> *Miami Sex Offenders Still Living Under Bridge*, NBCNEWS.COM, [http://www.nbcnews.com/id/29918460/ns/us\\_news-crime\\_and\\_courts/t/miami-sex-offenders-still-living-under-bridge/#.VPy\\_92d0w9Y](http://www.nbcnews.com/id/29918460/ns/us_news-crime_and_courts/t/miami-sex-offenders-still-living-under-bridge/#.VPy_92d0w9Y) [<http://perma.cc/2S67-Y2W9>] (last updated Mar. 27, 2009, 6:17 PM).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Voters approved this law, known as Proposition 83, by a 70% margin in 2006. See Frank D. Russo, *All California Statewide Bonds Pass as Does Proposition 83 on Sex Offenders: Propositions 85 through 90 All Fail*, CAL. PROGRESS REP. (Nov. 8, 2006), <http://www.californiaprogressreport.com/site/print/5243> [<http://perma.cc/EXF5-9CPC>]. It requires sex offenders to be monitored by GPS devices while on parole or for life, prohibits them from living within 2,000 feet (2,640 feet for high-risk offenders) of a school or park, and subjects them to civil commitment. *Jessica’s Law, California Proposition 83 (2006)*, BALLOTPEDIA, [http://ballotpedia.org/Jessica’s\\_Law,\\_California\\_Proposition\\_83\\_\(2006\)](http://ballotpedia.org/Jessica’s_Law,_California_Proposition_83_(2006)) [<http://perma.cc/F6K6-VD8B>].

<sup>79</sup> See Stephanie N.K. Robbins, Comment, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & C.R. L. REV. 205, 214 (2010).

<sup>80</sup> See CAL. SEX OFFENDER MGMT. BD., HOMELESSNESS AMONG CALIFORNIA’S REGISTERED SEX OFFENDERS: AN UPDATE I (2011), [http://www.casomb.org/docs/Residence\\_Paper\\_Final.pdf](http://www.casomb.org/docs/Residence_Paper_Final.pdf) [<http://perma.cc/NM5C-MX7N>].

Moreover, by failing to differentiate high- and low-risk offenders, restrictions like those in California overwhelm the system and force governments to make choices for financial reasons that may undermine public safety.

For example, cash-strapped California limits enforcement of its residency restrictions to parolees.<sup>81</sup> As such, high-risk offenders not subject to parole can unlawfully reside in restricted neighborhoods without government intervention or oversight. And they do: state officials have acknowledged that numerous convicted sex offenders presently live adjacent to schools and other areas where children congregate.<sup>82</sup> In an ironic twist of fate, one of the state's top administrators in the Department of Corrections experienced the problem personally. Robert Ambroselli, Deputy Director of California's Division of Adult Parole Operations, spoke openly about a sex offender living illegally in his own neighborhood.<sup>83</sup> "You've got a law that says you can't do it, and it's happening," Ambroselli commented, adding that he is "as upset about it as anybody is."<sup>84</sup>

At least one state has heeded the advice of California's Sex Offender Management Board. Following a twofold increase in the number of sex offenders who listed their whereabouts as "unknown" after the enactment of statewide residency restrictions in 2005, Iowa distinguished high- and low-risk offenders in statutory modifications enacted in 2010.<sup>85</sup> Accordingly, the prohibition on residing within 2,000 feet of any school or day care center now applies only to those convicted of high-level sex offenses against children.<sup>86</sup> Individuals convicted of less serious sex offenses involving minors are subject instead to a 300-foot "exclusion zone" around places where minors congregate—including schools, day care centers, and public libraries.<sup>87</sup> To access these areas, offenders must obtain express, written consent from the facilities located within the prohibited area.<sup>88</sup>

Focusing residency restrictions on a smaller group of high-risk sex offenders is consistent, moreover, with data on recidivism. Contrary to public perception,<sup>89</sup>

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<sup>81</sup> *Id.* at 4–5.

<sup>82</sup> S.B. 1178, 2005-06 Reg. Sess. (Cal. 2006), [http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb\\_1151-1200/sb\\_1178\\_cfa\\_20060831\\_212404\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1151-1200/sb_1178_cfa_20060831_212404_sen_floor.html) [<http://perma.cc/SQH7-WFMD>].

<sup>83</sup> See Karl Vick, *Laws to Track Sex Offenders Encouraging Homelessness*, WASH. POST (Dec. 27, 2008), [http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601722\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601722_pf.html) [<http://perma.cc/43SK-L95D>].

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

<sup>85</sup> See IOWA CODE § 692A.101 (2015) (explaining which offenses qualify as an "aggravated offense").

<sup>86</sup> *Id.* § 692A.114. Those offenses include: sexual abuse in the first or second degree and sexual abuse in the third degree. *Id.* § 692A.101.

<sup>87</sup> *Id.* § 692A.113.

<sup>88</sup> *Id.*

<sup>89</sup> Sex crime sells newspapers. The corresponding sensationalism by the media has distorted public perception of sexual offending by, among other things, forging a false link

reoffense rates among sex offenders *as a group* are relatively low in general.<sup>90</sup> There is, however, a subset with a combination of characteristics—including deviant sexual preferences (especially sexual interest in children) and convictions for diverse sex crimes—who researchers believe reoffend at rates in excess of 50%.<sup>91</sup> Targeting individuals based on these identifiable high-risk factors makes far more sense than arbitrary reliance on factors such as parolee status in making statutory enforcement decisions.<sup>92</sup>

### III. SEX OFFENDER RESIDENCY RESTRICTIONS AND THE REGULATION OF PUBLIC CONDUCT

As the foregoing illustrates, banishment is a poor analogue for modern sex offender residency restrictions. These provisions function instead as affirmative restraints—civil “disabilities” that, like myriad others, restrict freedom to preserve the public order and promote communitarian values. As such, their legitimacy rests on the state’s ability to regulate public health, safety, and morality through its police power. This authority appears broad enough to justify these initiatives in general, though constitutional principles call into question provisions that impose the most severe restraints. While *ex post facto* challenges have been the most common in the constitutional arena, the California Supreme Court has injected substantive due process into the equation forcefully in 2015, being the first state supreme court to

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between sex crimes like rape and other analytically distinct crimes of violence, such as homicide. As a result, public and professional discourse in this area has become “increasingly discrepant.” See Keith Soothill, *Sex Offender Recidivism*, in 39 CRIME AND JUSTICE: A REVIEW OF RESEARCH 145, 145, 151, 195 (Michael Tonry ed., 2010). This phenomenon is not new. Estelle Freedman reports that discussions of sexual psychopathy in the 1930s and 1950s created a “new image of aggressive male sexual deviance” that, while not supported by data on recidivism, contributed to “a complex redefinition of sexual boundaries in modern America.” Estelle B. Freedman, “*Uncontrolled Desires*”: *The Response to the Sexual Psychopath, 1920–1960*, 74 J. AM. HIST. 83, 84 (1987).

<sup>90</sup> See, e.g., R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 348 (1998) (finding a sexual reoffense rate of 13.4% over five years).

<sup>91</sup> See R. Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 63, 66, 71–72 (Bruce J. Winick & John Q. La Fond eds., 2003).

<sup>92</sup> Identification of such factors is not an easy task, of course. While recidivism studies focus disproportionately on five-year follow-up periods, those using longer time frames suggest that the former miss as much as 30% of new charges. See, e.g., Robert A. Prentky et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635, 645 (1997). Newer studies can also shed doubt on conclusions drawn in earlier ones. For example, while studies conducted before 2000 had identified juvenile sexual offending as a significant recidivist risk factor, more recent data have questioned this finding. See, e.g., Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 107 (2007).

invalidate sex offender residency restrictions on this basis.<sup>93</sup> Whether other courts will follow its lead is unclear. Advocacy groups and law enforcement groups should, therefore, work with legislatures to address statutory excesses in the interest of sound, restrained public policy.

#### A. *The Police Power in Context*

The police power, derived from the Tenth Amendment to the U.S. Constitution,<sup>94</sup> empowers states “to provide for the public health, safety, and morals.”<sup>95</sup> The Supreme Court has interpreted this power broadly, upholding a wide variety of state regulations throughout history. For example, in 1884, the Court recognized states’ authority to prohibit the sale and manufacture of intoxicating liquors, acknowledging their right “to control their purely internal affairs” through laws “that do not interfere with the execution of the powers of the general government.”<sup>96</sup> State courts and legislatures have repeatedly relied on this pronouncement in upholding a wide array of alcohol-related restrictions, including: the imposition of closing hours for the sale of alcoholic beverages;<sup>97</sup> the right of citizens by popular vote to forbid the sale of alcohol within a municipality;<sup>98</sup> and the denial of a grocery store owner’s license to sell beer.<sup>99</sup>

Family law is likewise replete with morality-based legislation that reflects communitarian values and preserves the social order. The laws pertaining to incestuous marriage exemplify these dual objectives particularly well. Prohibitions on consanguineous marriage are widespread in the United States: “All states and the District of Columbia prohibit marriages between parent and child, brother and sister, aunt and nephew, and uncle and niece.”<sup>100</sup> When blood ties become weaker, this universality disappears. For example, “twenty states and the District of Columbia permit marriages between first cousins.”<sup>101</sup>

The treatment of adopted children has posed interesting challenges in this context. After all, marriages between adopted children and other family members present none of the health risks associated with consanguineous unions.<sup>102</sup> Still, the Uniform

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<sup>93</sup> *In re Taylor*, 343 P.3d 867 (Cal. 2015).

<sup>94</sup> The amendment specifies that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

<sup>95</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

<sup>96</sup> *Mugler v. Kansas*, 123 U.S. 623, 659 (1887).

<sup>97</sup> *See Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861, 863 (Fla. Dist. Ct. App. 1977).

<sup>98</sup> *See ALA. CODE* § 28-2A-3 (2015).

<sup>99</sup> *See MacArthur v. Sierota*, 221 P.2d 346, 346 (Colo. 1950).

<sup>100</sup> JUDITH AREEN ET AL., *FAMILY LAW: CASES AND MATERIALS* 71 (6th ed. 2012).

<sup>101</sup> *Id.*

<sup>102</sup> For example, a study of Czechoslovakian children whose fathers were first-degree relatives revealed that “[f]ewer than half of the children who were the product of incestuous

Marriage and Divorce Act and at least five states apply statutory prohibitions on incestuous marriage to adopted children.<sup>103</sup> The Roman Catholic Church extends the impediment to unions among stepfamily members,<sup>104</sup> consistent with the traditional Christian imperative to protect individuals living together in a single household.<sup>105</sup>

In fact, restrictions on marriage between individuals related merely by “affinity” is rare in the United States today.<sup>106</sup> One might logically presume that limiting the marriage prohibition to consanguinity reflects a singular concern about the genetic defects suffered by children born of such unions. This, however, is not the case. While courts have referenced genetic harm in upholding laws banning incest between biologically related individuals,<sup>107</sup> other factors, such as the promotion of family harmony and curbing abuses of parental authority,<sup>108</sup> merit equal consideration. This diminishment of genetic harm in the incest calculus may reflect, to some degree, evidence challenging the likelihood of such occurrences,<sup>109</sup> especially as the strength of the blood tie diminishes.<sup>110</sup>

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unions were completely healthy. Forty-two percent of them were born with severe birth defects or suffered early death and another 11[%] were mildly mentally impaired.” Hal Herzog, *The Problem with Incest*, PSYCHOL. TODAY (Oct. 11, 2012), <https://www.psychologytoday.com/blog/animals-and-us/201210/the-problem-incest> [<http://perma.cc/W7ZK-N75Z>].

<sup>103</sup> The Uniform Marriage and Divorce Act expressly prohibits “a marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or the whole blood, or by adoption.” UNIF. MARRIAGE & DIVORCE ACT § 207(a)(2) (1973); see also ALA. CODE § 13A-13-3; MASS. GEN. LAWS ch. 210, § 6C (2015); MISS. CODE ANN. § 93-1-1 (2014); N.C. GEN. STAT. § 14-178 (2014); TEX. FAM. CODE ANN. § 6.201 (West 2013).

<sup>104</sup> See Richard Burtzell, *Affinity (in Canon Law)*, NEW ADVENT, <http://www.newadvent.org/cathen/01178a.htm> [<http://perma.cc/G2BK-25NX>].

<sup>105</sup> Margaret Mead, *Anomalies in American Postdivorce Relationships*, in DIVORCE AND AFTER: AN ANALYSIS OF THE EMOTIONAL AND SOCIAL PROBLEMS OF DIVORCE 103, 104–08 (Paul Bohannon ed., 1970).

<sup>106</sup> See Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 443 (2005).

<sup>107</sup> See, e.g., *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1978) (en banc) (referencing “[t]he physical detriment to the offspring of persons related by blood” (quoting 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 183 (1931))); *In re Tiffany Nicole M.*, 571 N.W.2d 872, 874 n.7 (Wis. Ct. App. 1997) (noting the risk of “autosomal recessive syndromic disorder”).

<sup>108</sup> *State v. Kaiser*, 663 P.2d 839, 843 (Wash. Ct. App. 1983); see also Joyce McConnell, *Incest as Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143, 150 (1992) (arguing that the principal motivation for the prosecution of incest is incest’s potential to destabilize the family).

<sup>109</sup> See Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 267–81 (1984) (“A cursory examination of . . . autosomal dominant and recessive inheritance reveals that [the assertion that consanguineous coupling causes genetically defective offspring] is simply inaccurate.” (citations omitted)).

<sup>110</sup> See Robin L. Bennett et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97, 115–16 (2002) (suggesting that the genetic dangers of cousins marrying is not appreciably greater than that of other couplings).



If the risk of genetic abnormality is not the primary motivating force behind the incest taboo, then what is? Courtney Cahill posits that the answer lies in the widespread disgust that incest provokes in American society.<sup>111</sup> Courts have noted, to this end, a “natural repugnance . . . toward marriages of blood relatives.”<sup>112</sup> And researchers have found that incest inspires pervasive moral condemnation among individuals, regardless of their association as conservative or liberal, with respect to issues of sexual morality.<sup>113</sup>

Unsurprisingly, sexual offending inspires even greater societal disgust. Sex offenders are universally feared and reviled.<sup>114</sup> Even in the correctional setting, they hold the lowest status, leading to ostracization<sup>115</sup> and victimization<sup>116</sup> by other inmates. This loathing, shared by lawmakers, appeared influential in the passage of federal legislation aimed at sex offenders, including: the creation of a national sexual predator database; enhancing punishments for sex offenses against children; and criminalizing the web-based transmission of sexually charged materials to minors.<sup>117</sup> These initiatives, debated with emotionally charged rhetoric, eschew any attempt to tailor their provisions to clearly delineated societal risks; their breadth presumes, instead,

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<sup>111</sup> Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1546 (2005). If genetic harm is of such great legislative concern, why, Cahill queries, does the law fail to require members of the Ashkenazi Jewish community believed to be carrying the recessive trait for Tay-Sachs disease to undergo genetic testing before having children? *Id.* at 1570.

<sup>112</sup> *Israel*, 577 P.2d at 764; see also *In re Marriage of MEW and MLB*, 4 Pa. D. & C.3d 51, 57–59 (Pa. Ct. C.P. 1977) (denying a marriage of adopted siblings “on the ground of public policy and decency” and, noting that, if allowed, such marriages would “undermine the fabric of family life”).

<sup>113</sup> See Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191, 213 (2001).

<sup>114</sup> See Kristen Marie Budd, *Moral Panics and Changing Sociolegal Responses Toward Stigmatized Outsiders: Public Perceptions of Convicted Sex Offenders and Sex Offender Laws* xiii (Aug. 2011) (unpublished Ph.D. dissertation, Purdue University), <http://search.proquest.com/docview/905778478> (stating that sex offenders “present an empirical example of deviant and stigmatized outsiders”); see also Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Community Integration*, 22 TEMP. POL. & C.R. L. REV. 1, 2 (2012) (explaining that sex offenders are “more despised [and] more vilified” than any other population).

<sup>115</sup> See Malin Åkerström, *Outcasts in Prison: The Cases of Informers and Sex Offenders*, 7 DEVIANT BEHAV. 1, 1 (1986); Allen D. Sapp & Michael S. Vaughn, *The Social Status of Adult and Juvenile Sex Offenders in Prison: An Analysis of the Importation Model*, 6 J. POLICE & CRIM. PSYCHOL. 2, 2 (1990).

<sup>116</sup> See JANE L. IRELAND, *BULLYING AMONG PRISONERS: EVIDENCE, RESEARCH AND INTERVENTION STRATEGIES* 99–104 (2002).

<sup>117</sup> See Mona Lynch, *Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 541–47 (2002).



a pervasive toxic threat from a group believed to be “supernaturally dangerous and contaminating to the idealized social body.”<sup>118</sup>

This idea that sex offenders present a sort of plague that threatens the safety of those around them provides another potential justification for residency restrictions: quarantine. The Supreme Court first recognized the state’s authority to isolate individuals for the protection of society in *Jacobson v. Massachusetts*,<sup>119</sup> where the justices upheld the compulsory vaccination of persons for the prevention of smallpox.<sup>120</sup> Years later, in *O’Connor v. Donaldson*,<sup>121</sup> Chief Justice Burger cited *Jacobson* to support states’ authority to commit mentally ill persons civilly for purposes other than treatment.<sup>122</sup> The Chief Justice also referenced *Minnesota ex rel. Pearson v. Probate Court*,<sup>123</sup> which upheld the psychiatric detention of individuals with “psychopathic personalities,”<sup>124</sup> concluding that there was “little doubt that . . . a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.”<sup>125</sup>

The Supreme Court returned to quarantine in *Kansas v. Hendricks*,<sup>126</sup> when considering the constitutionality of a state statute that authorized the civil commitment of sexually violent predators.<sup>127</sup> Rejecting the petitioner’s claim that detention based on a “mental abnormality” was unconstitutional, the Court cited *Jacobson* for the proposition that an individual must sometimes sacrifice his liberty interest in freedom from restraint for the “common good”;<sup>128</sup> otherwise, “organized society could not exist with safety to its members.”<sup>129</sup> This use of quarantine to justify psychiatric commitment is surprising, as it was neither briefed by the parties nor raised in oral argument.

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<sup>118</sup> *Id.* at 557. Illustrative of the hyperbolic vitriol surrounding the sex offenders, particularly those who target children, then-Congressman Charles Schumer of New York remarked:

Long prison terms do not deter them. All too often, special rehabilitation programs do not cure them. No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children to molest, abuse, and in the worst cases, to kill. So we need to do all we can to stop these predators.

*Id.* at 554 (quoting 142 CONG. REC. H4453 (daily ed. May 7, 1996) (statement of then-Rep. Charles Schumer)).

<sup>119</sup> 197 U.S. 11 (1905).

<sup>120</sup> *Id.* at 11–12.

<sup>121</sup> 422 U.S. 563 (1975).

<sup>122</sup> *Id.* at 582–83 (Burger, C.J., concurring) (citing *Jacobson*, 197 U.S. at 25–29).

<sup>123</sup> 309 U.S. 270 (1940).

<sup>124</sup> *Id.*

<sup>125</sup> *Donaldson*, 422 U.S. at 582–83 (Burger, C.J., concurring).

<sup>126</sup> 521 U.S. 346 (1997).

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

<sup>128</sup> *Id.* at 356–57 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).

<sup>129</sup> *Id.* at 357 (quoting *Jacobson*, 197 U.S. at 26).

By gratuitously referencing quarantine in *Hendricks*,<sup>130</sup> the Court seemingly embraced an expansive view of the police power in the context of preventive detention. That is, if concern about the risk of contagion justified coercive state action to safeguard public health, so too might the danger posed by sexual predators justify their civil incapacitation for purposes of public safety.<sup>131</sup> If so, this same “jurisprudence of prevention” might, in equal measure, justify regulations restricting the residency of sex offenders upon release from state custody.<sup>132</sup>

Interestingly, the American Civil Liberties Union (ACLU) relied on *Jacobson* three years ago in its amicus brief in support of the Affordable Care Act in *Department of Health and Human Services v. Florida*.<sup>133</sup> According to the ACLU, the law’s “individual mandate” does not infringe on bodily integrity under *Jacobson*’s “fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.”<sup>134</sup> That the ACLU would apply quarantine principles to an area as disparate as the universal healthcare mandate to justify restrictions on liberty for the common good is surprising, to say the least. It suggests, moreover, greater acceptance of a broad police power than one might have expected.<sup>135</sup>

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<sup>130</sup> *Id.* at 366 (citing *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380 (1902)).

<sup>131</sup> While incapacitation of dangerous offenders is an objective of criminal punishment, *Hendricks* clarified that it is also “a legitimate end of the civil law.” *Id.* at 365–66.

<sup>132</sup> Some have advocated this degree of breadth in states’ police power authority. *See, e.g.*, Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 329–32 (1989); Alan Wertheimer, *A Philosophical Examination of Coercion for Mental Health Issues*, 11 BEHAV. SCI. & L. 239, 255–57 (1993). Others do not believe that *Hendricks* and *Jacobson* support unbridled discretion by states in the preventive detention context. *See, e.g.*, Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 781–92 (1998).

<sup>133</sup> Brief for NAACP Legal Def. & Educ. Fund, Inc., Am. Civil Liberties Union, and the Leadership Conference on Civil and Human Rights as Amici Curiae Supporting Petitioners, *Dep’t of Health & Human Servs. v. Florida* (2012) (No. 11-398), 2012 WL 121241.

<sup>134</sup> *Id.* at 15 n.9 (quoting *Jacobson*, 197 U.S. at 26).

<sup>135</sup> Professor Eric Janus has pushed back strongly on the argument that *Jacobson* vindicates the use of civil law to justify broad-based deprivations of liberty. He notes, in particular, that *Jacobson* involved the use of criminal penalties for failure to comply with public health regulations requiring adults to be vaccinated for smallpox; it did not sanction the imposition of onerous civil deprivations of liberty, such as involuntary civil commitment or forced vaccination, to accomplish its ends. *See* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 167–68 (1996). Sex offender residency restrictions vary in terms of their enforcement mechanisms. Most impose criminal sanctions for noncompliance. *See, e.g.*, ARK. CODE ANN. § 5-14-128(d) (2014) (violation is Class D felony); GA. CODE ANN. § 42-1-15(g) (2014) (knowing violation of statute is a felony punishable by imprisonment for not less than ten nor more than 30 years); IND. CODE § 35-42-4-11(c)(2) (2015) (Level 6 felony); IOWA CODE § 692A.111 (2015) (aggravated misdemeanor for first offense; class D felony for subsequent offenses);

### B. Ex Post Facto Considerations

On their face, statutory restrictions on sex offender residency are civil in nature. However, if societal disgust has created laws that are punitive in effect, they would violate the *Ex Post Facto* Clause of the U.S. Constitution<sup>136</sup> by changing the penalty associated with the prior sex offense(s).<sup>137</sup> A number of courts, both state and federal, have considered *ex post facto* challenges to sex offender residency restrictions. Most have found the laws constitutional; however, the breadth of some of the restrictions provides ammunition for dissenting courts and commentators.

*Smith v. Doe*,<sup>138</sup> which found that the Alaska Sex Offender Registration Act was not an *ex post facto* law, provides the analytical framework that most courts use in evaluating whether a civil statute is impermissibly punitive. The inquiry first asks whether the legislature intended to impose punishment.<sup>139</sup> If so, the relevant statutory provisions are necessarily punitive and thus violate the *ex post facto* clause.

The residency restrictions at issue here do not clearly manifest this intent. Their enactment does not spring primarily from a desire to punish—or, more accurately, to “re-punish”—the sex offenders to whom they apply. Rather, as Senator Schumer’s comments illustrate,<sup>140</sup> it flows from the desire to protect potential victims from the risk of reoffense. Accordingly, even courts hostile to these laws have had difficulty finding express punitive intent on the part of lawmakers.<sup>141</sup>

An intent to establish civil proceedings is not, however, dispositive. If a plaintiff provides “the clearest proof” that the *effect* of statutory provisions is so punitive as to negate their civil or regulatory label, courts will consider a statute criminal for *ex post facto* purposes.<sup>142</sup> Certain factors, highlighted in *Smith v. Doe* and drawn from

KY. REV. STAT. ANN. § 17.545(4) (West 2015) (same). Others favor civil remedies. *See, e.g.*, MASS. GEN. LAWS ch. 127, § 133D1/2 (2015) (violation taken into temporary custody pending further action); OHIO REV. CODE ANN. § 2950.034(B) (LexisNexis 2015) (specifying “a cause of action for injunctive relief” against a violator). The use of criminal sanctions mirrors *Jacobson*. As the Ohio and Massachusetts statutes illustrate, the civil sanctions are relatively modest and do not evoke the serious deprivations of liberty about which Professor Janus is concerned.

<sup>136</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>137</sup> A law violates the *Ex Post Facto* Clause when it “*changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 390 (1798).

<sup>138</sup> 538 U.S. 84 (2003).

<sup>139</sup> *Id.* at 92.

<sup>140</sup> *See supra* note 118 and accompanying text.

<sup>141</sup> *See, e.g.*, *Commonwealth v. Baker*, 295 S.W.3d 437, 443 (Ky. 2009) (noting that residency restrictions, like sex offender registration requirements, “are directly related to the nonpunitive goals of protecting the safety of the public” (quoting *Hyatt v. Commonwealth*, 72 S.W.3d 566, 572 (2002))); *see also* *Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268, at \*8 (N.D. Ohio Sept. 4, 2007) (calling the statutory intent “unclear”).

<sup>142</sup> *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (citing *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

*Kennedy v. Mendoza-Martinez*,<sup>143</sup> figure most prominently in this inquiry: whether the regulatory scheme has been historically regarded as, or promotes the traditional objectives of, punishment; whether it creates “an affirmative disability or restraint;” and whether it “has a rational connection to a nonpunitive purpose, or is excessive with respect to this purpose.”<sup>144</sup>

With respect to the relationship between sex offender residency restrictions and traditional forms of punishment, several commentators have likened these laws to banishment, which has been historically regarded as punitive.<sup>145</sup> Corey Rayburn Yung argues, for example, that the residency restrictions illustrate what he considers the critical features of banishment: expulsion to a noninstitutional setting with the intent to permanently sever ties with the community of origin.<sup>146</sup> Shelley Ross Saxer prefers a “de facto banishment” label, noting the laws’ “cumulative effect” of precluding residential access to the entirety of certain municipalities.<sup>147</sup> Amber Leigh Bagley emphasizes the similarity between the burdens created by sex offender residency restrictions and traditional banishment, including stigma, separation from one’s community, and decreased opportunity for rehabilitation.<sup>148</sup>

While these observations accurately identify the effect that sex offender residency restrictions may have on those to whom they apply, this reality does not lead inexorably to the laws’ classification as banishment. As discussed previously,<sup>149</sup> historical banishment not only reflected the desire to sever ties between individuals and their homeland, it achieved that goal through relocation to faraway lands from which exiled individuals’ ability to access their home community or threaten its political power structure was effectively impossible. By contrast, the restrictions at issue here complicate, but do not prohibit, access to the areas where children are likely to be present. Most, for example, disallow residency only; they do not constrain the ability to work or otherwise congregate in areas where children gather.<sup>150</sup> Even those that restrict employment do not prohibit offenders from visiting the restricted areas,<sup>151</sup> which is not at all difficult if the offender is working just outside the exclusionary zone.

There is no question that residency restrictions impose significant hardship. Judge Michael Melloy, dissenting from the U.S. Court of Appeals for the Eighth

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<sup>143</sup> 372 U.S. 144, 168–69 (1963).

<sup>144</sup> *Smith*, 538 U.S. at 97.

<sup>145</sup> *See id.* at 98 (citing THOMAS G. BLOMBERG & KAROL LUCKEN, *AMERICAN PENOLOGY: A HISTORY OF CONTROL* 30–31 (2000)).

<sup>146</sup> *See Yung, supra* note 17, at 134.

<sup>147</sup> Saxer, *supra* note 17, at 1412; *see also* Kari White, Note, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 *CASE W. RES. L. REV.* 161, 178 (2008) (sex offender residency restrictions impose banishment “under a more palatable name”).

<sup>148</sup> Bagley, *supra* note 17, at 1385.

<sup>149</sup> *See supra* Part II.A.1–2.

<sup>150</sup> *See supra* Part II.B.

<sup>151</sup> *See id.*

Circuit's decision upholding an Iowa sex offender residency restriction statute,<sup>152</sup> noted that the state's larger population centers are generally unavailable to many sex offenders, requiring them to either live in rural areas or leave the state.<sup>153</sup> County and local ordinances that extend state-based areas of exclusion create added pressure to find housing, which can foster homelessness and undermine access to mental health treatment.<sup>154</sup>

That these constraints on daily life are significant does not mean, however, that they constitute banishment. They suggest instead that those laws, which are most restrictive and have the broadest reach, are misguided as a matter of public policy. If, for example, a state hopes to eliminate the danger posed by recidivist sex offenders, requiring them to reside in rural areas miles away from qualified clinicians and treatment options seems counterproductive.<sup>155</sup> Imposing analogous restrictions on employment is also problematic; constraining an offender's ability to support himself makes him more likely to be a financial burden on the state while failing, at the same time, to preclude access to vulnerable populations.

Critics have also assailed residency restrictions as impermissibly promoting the deterrent and retributive objectives of criminal law.<sup>156</sup> A statute's deterrent effect fails, however, to render it facially punitive. The Supreme Court has noted repeatedly that, while deterrence is a common objective of criminal sanctions, it is also an acceptable concomitant of effective civil regulation. For example, in *Hudson v. United States*,<sup>157</sup> federal officials imposed monetary penalties and occupational debarment

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<sup>152</sup> *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005). The Iowa legislature subsequently replaced the statute upheld in *Miller* with legislation that was, at the same time, both broader and more restrictive. For example, whereas the original statute disallowed residency for *all* sex offenders within 2,000 feet of schools or childcare facilities, the new law applies this restriction only to those designated as high risk. Compare IOWA CODE § 692A.2A (2002), with IOWA CODE § 629A.114(2) (2015). On the other hand, both higher- and lower-risk offenders face new non-residential restrictions that prohibit loitering "on or within three hundred feet . . . of any place intended primarily for the use of minors." IOWA CODE § 692A.113(h) (2015). See generally Jacquelyn M. Meirick, Note, *Through the Tiers: Are Iowa's New Sex-Offender Laws Unconstitutional?*, 96 IOWA L. REV. 1013, 1028–30 (2011).

<sup>153</sup> *Miller*, 405 F.3d at 724 (Melloy, J., concurring and dissenting).

<sup>154</sup> See *supra* notes 75–80 and accompanying text.

<sup>155</sup> See Yung, *supra* note 17, at 144–45 (noting that sex offender treatment facilities are located predominantly in urban areas).

<sup>156</sup> See, e.g., *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009) (Kentucky's residency restriction statute "promotes the traditional aims of punishment"); *Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268, at \*8 (N.D. Ohio Sept. 4, 2007) (Ohio statute imposes general deterrence and retribution); Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1255 (2009) (labeling residency restrictions "plainly retributive in both purpose and effect").

<sup>157</sup> 522 U.S. 93 (1997).

on bank officials for misapplication of bank funds. That these civil sanctions were designed, in part, to deter others from engaging in similar misconduct did not render them punitive, since regulation of the banking industry to promote its stability is a legitimate goal of effective regulatory legislation.<sup>158</sup>

In *United States v. Ursery*,<sup>159</sup> the defendant lost his home through civil *in rem* forfeiture proceedings, based on proof that he used the home to cultivate and distribute marijuana.<sup>160</sup> While acknowledging the law's deterrent purpose, the Court also recognized its "nonpunitive goal of ensuring that persons do not profit from their illegal acts."<sup>161</sup> Because deterrence "may serve civil as well as criminal goals," the Court affirmed its fundamentally civil nature.<sup>162</sup>

Retribution, typically defined as repayment and moral desert for past wrongs,<sup>163</sup> is more clearly criminal in nature. Some courts have viewed retribution as embracing "vengeance for its own sake" without any desire "to affect future conduct or solve any problem except realizing 'justice.'"<sup>164</sup> This conception does not fit residency restrictions which, as discussed above, vindicate nonpunitive, regulatory goals. Even if we assume, *arguendo*, that the statutes have a potentially retributive impact on sex offenders, this effect is incidental to the statutes' primary motivation: protecting the health and safety of children.<sup>165</sup> As such, "clear proof" of retribution is lacking.

A regulatory scheme that neither reflects nor promotes traditional forms of punishment may still constitute an *ex post facto* law if it represents an affirmative disability or restraint that is either irrational or excessive with respect to a rational purpose.<sup>166</sup> In *Smith*, the Supreme Court found that the requirements of Alaska's Sex Offender Registration Act created no affirmative disability or restraint since, *inter alia*, it imposed no physical restraint; that is, it did not constrain sex offenders' freedom to live and work wherever they wished.<sup>167</sup> The residency restrictions at issue here are quite different in this regard. While the extent of the infringement on liberty varies from jurisdiction to jurisdiction, all statutes limit to a significant degree the areas where affected individuals may live and, in some cases, work.<sup>168</sup> It seems clear, then, that these laws create an affirmative disability or restraint within the meaning of *Smith* and other cases.

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<sup>158</sup> *Id.* at 105.

<sup>159</sup> 518 U.S. 267 (1996).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 291.

<sup>162</sup> *Id.* at 292; *see also* *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("[F]orfeiture . . . serves a deterrent purpose distinct from any punitive purpose.").

<sup>163</sup> *See* Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 27–28 (2003).

<sup>164</sup> *State v. Cook*, 700 N.E.2d 570, 583 (Ohio 1998) (quoting *Artway v. Attorney Gen.*, 81 F.3d 1235, 1255 (3rd Cir. 1996)).

<sup>165</sup> *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

<sup>166</sup> *Smith v. Doe*, 538 U.S. 84, 97 (2003).

<sup>167</sup> *Id.* at 101.

<sup>168</sup> *See supra* Part II.B.



To determine if these restrictions violate *ex post facto* principles, therefore, we must evaluate whether they are excessive or irrational in relation to their underlying purpose. The *Smith* Court distinguished, in this regard, restraints that mimic incarceration from those that are “minor and indirect,” noting that typically only the former are impermissibly punitive.<sup>169</sup> The Justices pointed to the occupational disbarment at issue in *Hudson* and other cases as illustrative of this less serious, permissible type of disability.<sup>170</sup> For example, in *De Veau v. Braisted*, the Court upheld a state law precluding the collection of dues from New York’s dock workers on behalf of any union with an officer or agent previously convicted of a felony.<sup>171</sup> While the statute restricted to a limited degree the employment opportunity of a small group of workers, the majority found no *ex post facto* violation, deeming the prohibition a “much-needed” and “reasonable means” of addressing the problem of corruption on the New York waterfront.<sup>172</sup>

While the prevention of sexual offending is clearly as important an interest as diminishing the corrupting influence of union officials, the means used to address the problem are much further reaching. The law challenged in *De Veau* addressed only the eligibility of felons for supervisory positions in the local union.<sup>173</sup> It did not prevent the hiring or retention of any such employees, nor did it affect their ability to join the union and participate in its activities alongside other members. Sex offender residency restrictions, by contrast, designate many areas off-limits, potentially complicating affected class members’ access to these areas for employment purposes. While these encroachments on liberty are not akin to incarceration, neither, it seems, are they “minor and indirect.”<sup>174</sup> To assess their constitutionality, it is instructive to consider other contexts where the Court has parsed the civil/criminal distinction regarding practices entailing significant incursions on freedom.

*Kansas v. Hendricks* addressed a state law permitting detention in a secure facility for individuals found to be “sexually violent predators.”<sup>175</sup> The majority acknowledged that the potentially indefinite nature of the commitment created an affirmative restraint, but deemed the statute nonpunitive, emphasizing, *inter alia*: segregation from the general prison population; the opportunity to gain release; and the State’s disavowal of punitive intent.<sup>176</sup> Noting that the confinement of dangerous, mentally

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<sup>169</sup> *Smith*, 538 U.S. at 100.

<sup>170</sup> *Id.* (citing *Hudson v. United States*, 522 U.S. 93, 104 (1997); *De Veau v. Braisted*, 363 U.S. 144 (1960); *Hawker v. New York*, 170 U.S. 189 (1898)).

<sup>171</sup> 363 U.S. at 144.

<sup>172</sup> *Id.* at 157, 160; *see also Hawker*, 170 U.S. at 189 (rejecting an *ex post facto* challenge to state law prohibiting convicted felons from practicing medicine).

<sup>173</sup> 363 U.S. at 145, 152.

<sup>174</sup> 538 U.S. at 100.

<sup>175</sup> 521 U.S. 346, 351 (1997).

<sup>176</sup> *Id.* at 368–69; *see also Jones v. United States*, 463 U.S. 354, 370 (1983) (recognizing the constitutionality of indefinite inpatient commitment to psychiatric hospitals of persons

disordered persons is a legitimate, noncriminal objective,<sup>177</sup> the Court added that the provision of a variety of safeguards associated with the criminal law—such as proof beyond a reasonable doubt and the rights to counsel, jury trial, and to present and cross-examine witnesses<sup>178</sup>—were insufficient in and of themselves to “transform a civil commitment proceeding into a criminal prosecution.”<sup>179</sup>

The Court has also recognized the essentially nonpunitive nature of pretrial detention. *Schall v. Martin*<sup>180</sup> approved the post-arrest regulatory detention of juveniles who present a continuing danger to the community.<sup>181</sup> Three years later, *United States v. Salerno*<sup>182</sup> upheld the federal Bail Reform Act of 1984, which authorized the pretrial detention of adults charged with certain serious crimes and recidivist felons.<sup>183</sup> While the strength of the government’s regulatory interest in community safety carried the day, the majority emphasized the “narrow circumstances” under which the statute operated.<sup>184</sup> The Court highlighted, in particular, the Act’s limitation to certain offenders believed to be more likely to commit “dangerous acts” upon release; the manifold procedural safeguards that apply at detention hearings;<sup>185</sup> and the government’s burden of proof by clear and convincing evidence “that no conditions of release can reasonably assure the safety of the community or any person.”<sup>186</sup>

These pretrial detention and civil commitment cases underscore the challenges inherent in establishing that a statutory scheme is punitive when the government asserts that its purpose was regulatory. “Clear proof” of a punitive effect seems a largely illusory construct, even when the regulations prescribe significant infringements on liberty coupled with proceedings that, to a large degree, look criminal.<sup>187</sup>

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acquitted of crimes by reason of insanity).

<sup>177</sup> *Hendricks*, 521 U.S. at 363.

<sup>178</sup> KAN. STAT. ANN. §§ 59-29a06, 59-29a07 (2015).

<sup>179</sup> *Hendricks*, 521 U.S. at 364–65. A decade before *Hendricks*, the Court likewise found Illinois’s detention of “sexually dangerous persons” to be nonpunitive. *See Allen v. Illinois*, 478 U.S. 364 (1986). The Illinois law is similar in many respects to Kansas’s Sexually Violent Predator Act. However, unlike the Kansas statute, Illinois’s provisions require proof of a mental disorder for commitment as a sexually dangerous person, *see* 725 ILL. COMP. STAT. 205/1.01 (2015), and create “a system under which committed persons may be released after the briefest time in confinement.” *Allen*, 478 U.S. at 370.

<sup>180</sup> 467 U.S. 253 (1984).

<sup>181</sup> *Id.*

<sup>182</sup> 481 U.S. 739 (1987).

<sup>183</sup> *See id.* (discussing 18 U.S.C. § 3142(f) (Supp. III 1982) (pretrial detention available for crimes of violence, offenses for which the sentence is life imprisonment or death, high-level drug offenses, and individuals with history of felonious offending)).

<sup>184</sup> *Salerno*, 481 U.S. at 750.

<sup>185</sup> *Id.* For example, detainees are afforded the right to counsel, the right to testify on their own behalf, the right to present information, and the right to cross-examine witnesses. *See* 18 U.S.C. § 3142(f).

<sup>186</sup> *Salerno*, 481 U.S. at 750.

<sup>187</sup> *See Allen v. Illinois*, 478 U.S. 364, 369 (1986).

This bleak landscape for plaintiffs has led Professor Erin Murphy to identify the “jail-house door” as the functional line between punitive and regulatory measures.<sup>188</sup> While this may seem hyperbolic, it is troubling to note the relative paucity of modern cases since *Kennedy v. Mendoza-Martinez* where plaintiffs have prevailed.<sup>189</sup> It is against this backdrop, however, that we must evaluate sex offender residency restrictions.

As discussed above, to prevail in proving the punitive effect of the affirmative restraint imposed by these restrictions, plaintiffs must show that they are either irrational or excessive in relation to their regulatory purpose.<sup>190</sup> We can quickly dispose of the former, since courts have consistently recognized the propriety of legislative efforts to separate victims, especially children, from those who may harm them.<sup>191</sup> Moreover, the pretrial detention and civil commitment cases clearly embrace community safety as a legitimate goal of civil statutes.<sup>192</sup> It is more fruitful, then, to argue that the means chosen to accomplish this objective are excessive.

In making this showing, plaintiffs inevitably face a fundamental problem: the restraint imposed by sex offender residency laws infringes individuals’ liberty interest less than civil commitment and, perhaps, pretrial detention as well. While these laws limit the areas in which sex offenders can live, individuals retain the ability to choose from among the available housing options. By contrast, individuals detained pending trial under the Bail Reform Act of 1984 and sexually violent predators subject to involuntary detention in Kansas and in other states with similar laws must reside in secure, state-run institutions.<sup>193</sup> And, for sexual predators, this loss of freedom may last for the rest of their lives.

The fact that the restraint imposed by residency restrictions is less severe than that of other regulatory contexts does not, however, preclude a finding of impermissible punitive effect. In finding that *Hendricks*’s civil commitment scheme was not excessive in relation to its purpose, the Court emphasized that detention was available only for “a narrow class of particularly dangerous individuals”<sup>194</sup> through a

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<sup>188</sup> Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1349 (2008).

<sup>189</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), which created the constitutional framework for evaluating the civil-criminal distinction, deemed a federal law punitive where it stripped Americans of citizenship whenever they departed from or remained outside the jurisdiction of the United States for the purpose of evading military obligations. *Id.* at 168–69, 186.

<sup>190</sup> See *infra* notes 166–67 and accompanying text.

<sup>191</sup> See, e.g., *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005) (discussing the propriety of legislating “to protect the health and safety of Iowa citizens”).

<sup>192</sup> See, e.g., *United States v. Salerno*, 481 U.S. 739, 748 (1987).

<sup>193</sup> 18 U.S.C. § 3142(e) (Supp. III 1982); KAN. STAT. ANN. § 59-29a07 (2015).

<sup>194</sup> *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997). The Act’s preamble explained that “a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute].” *Id.* at 351 (quoting KAN. STAT. ANN. § 59-29a01 (1994)).

hearing conducted under “the strictest procedural standards.”<sup>195</sup> Moreover, after one year, the State must reestablish the grounds for commitment by the same reasonable doubt standard to ensure confinement persists no longer than is necessary to ensure community safety.<sup>196</sup> The Court highlighted similar features of the Bail Reform Act in *Salerno*, noting its limitation to “a specific category of extremely serious offenses” and the “convincing proof” necessary to justify pretrial detention in a “full-blown adversary hearing.”<sup>197</sup>

Sex offender residency restrictions in some jurisdictions focus, like pretrial detention and civil commitment, on a select group of individuals who pose a heightened risk of danger to the community. For example, Arkansas, which has a four-tier classification system, imposes housing restrictions on only Level III “high-risk” offenders and Level IV “sexually violent predators.”<sup>198</sup> While offenders do not have the right to counsel or to confront witnesses in proceedings that determine the appropriate risk level, the review of the Sex Offender Assessment Committee and its representatives considers official records, historical data, psychological testing, and a personal interview with the offender.<sup>199</sup>

Statutes in other jurisdictions lack any individualized risk assessment, the absence of which has concerned courts, leading some to find an *ex post facto* violation. For example, a federal district court judge found Ohio’s statute “excessive with respect to its stated purpose” based on its lack of individualized risk assessment.<sup>200</sup> This omission is all the more troubling in light of the breadth of the restriction: it applies to all persons who have been convicted of, or pled guilty to, “a sexually oriented offense or a child-victim oriented offense.”<sup>201</sup> Thus, a “feeble, aging paraplegic”<sup>202</sup> convicted years earlier of a low-level sex crime has no greater right to remain in his home, or challenge his eviction, than a recently released sexually violent predator in his twenties.

The Supreme Court of Kentucky also deemed its law excessive based on the lack of individualized risk assessment, coupled with the restrictions’ “fluidity.”<sup>203</sup> Regarding

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<sup>195</sup> *Id.* at 364.

<sup>196</sup> *Id.*

<sup>197</sup> *Salerno*, 481 U.S. at 750.

<sup>198</sup> Level III and IV offenders cannot “reside within two thousand feet (2,000’) of the property on which any public or private elementary or secondary school, public park, youth center, or daycare facility is located.” ARK. CODE ANN. § 5-14-128(a) (2015); *see also* N.Y. EXEC. LAW § 259-c(14) (McKinney 2015); N.Y. PENAL LAW § 65.10(4-a) (McKinney 2015) (limiting residency restrictions to Level III sex offenders and all sex offenders who have committed an offense against a child under the age of eighteen).

<sup>199</sup> ARK. CODE ANN. § 12-12-917.

<sup>200</sup> *See Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268, at \*12 (N.D. Ohio Sept. 4, 2007).

<sup>201</sup> *Id.* at \*2 (quoting OHIO REV. CODE § 2950.034(A) (2007)).

<sup>202</sup> *Id.* at \*11.

<sup>203</sup> *Commonwealth v. Baker*, 295 S.W.3d 437, 446 (Ky. 2009).

the latter, the court assailed the uncertainty confronting sex offenders who may, at any moment, find that they are required to move due to the opening of a school, playground, or day care facility near their residence.<sup>204</sup> Population density in and around the state urban centers compounds the problem, leaving offenders with ever-dwindling housing options loosely tethered to the state's public safety objective.<sup>205</sup>

Unlike Kentucky, some states have included a "grandfather clause" that creates an exception for homeowners whose property interest predates the residency restrictions. For example, Arkansas's residency restrictions do not apply to sex offenders living in a property owned and occupied before a school or a day care center opened or before the statute's effective date.<sup>206</sup> Some courts have found that the absence of such an exception creates a constitutional red flag, though not necessarily on federal *ex post facto* grounds. In *Mann v. Georgia Department of Corrections*,<sup>207</sup> the Georgia Supreme Court held that lack of a "move to the offender" exception in its statute violated the Takings Clause of the Fifth Amendment to the U.S. Constitution,<sup>208</sup> whereas the Indiana Supreme Court found that its statute's lack of a grandfather clause violated the state constitutional provision prohibiting *ex post facto* laws.<sup>209</sup>

### C. A Difficult Road

As discussed above, the police power has enjoyed broad reach both historically and today. From approval of the state's power to limit the sale of liquor in the nineteenth century to sanctioning the contemporary use of "civil incapacitation" of dangerous individuals,<sup>210</sup> the Supreme Court has given governmental officials tremendous leeway to legislate in the interest of public "health, safety, and morals."<sup>211</sup> The Court's seemingly expansive view of quarantine undergirds this authority, a principle that even the ACLU paradoxically embraced in 2012 in its defense of the Affordable Care Act.<sup>212</sup>

Such breadth lends strong constitutional support to the sex offender residency restrictions enacted nationwide by state and local governments. *Ex post facto* principles have presented the strongest challenge,<sup>213</sup> but they have met with limited success

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<sup>204</sup> *Id.* at 446–47.

<sup>205</sup> *Id.* at 447.

<sup>206</sup> ARK. CODE ANN. § 5-14-128(b)(1), (c)(1) (2015).

<sup>207</sup> 653 S.E.2d 740, 745 (Ga. 2007). The Georgia legislature subsequently redrafted its statute to comply with *Mann*. See GA. CODE ANN. § 42-1-15 (2014).

<sup>208</sup> *Mann*, 653 S.E.2d at 745.

<sup>209</sup> See *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009).

<sup>210</sup> See *supra* Part III.A.

<sup>211</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

<sup>212</sup> See *supra* notes 133–35 and accompanying text.

<sup>213</sup> Plaintiffs have also challenged residency restrictions without success under a host of other constitutional principles, including: equal protection, vagueness and overbreadth,

and sometimes rely on state rather than federal grounds.<sup>214</sup> Courts have viewed statutes that fail to differentiate among sex offenders—by, for example, including an individualized risk assessment—as more constitutionally suspect, but most have refused to invalidate them on this basis nonetheless. The reasoning of the Eighth Circuit is especially illuminating. In *Doe v. Miller*, the court upheld Iowa’s residency restriction statute, which lacked any particularized risk assessment.<sup>215</sup> The following year, when considering Arkansas’s law, the court praised the statute’s inclusion of such an assessment, noting that it rendered the law “on even stronger constitutional footing than the Iowa statute.”<sup>216</sup> It stopped short, however, of revisiting its reasoning in *Miller*.

California’s statute, known as “Jessica’s Law,” lacks another feature whose exclusion has given courts pause: a grandfather clause exempting those who owned their home before the law’s effective date.<sup>217</sup> In a recent decision addressing the law, *People v. Mosley*,<sup>218</sup> the California Supreme Court acknowledged the hardship that some would experience without the exemption, expressly referencing the possibility that an offender would need to continually relocate, live apart from his family, and suffer negative consequences with respect to “medical care, rehabilitation programs, and elder assistance.”<sup>219</sup> Notwithstanding these “significant difficulties and inconveniences,” the court found that the law was not impermissibly punitive.<sup>220</sup> The excessiveness inquiry, the court opined, looks only to the reasonableness of the legislature’s actions and not whether its approach is “the most efficacious and least disruptive” to the problem identified.<sup>221</sup>

The California Supreme Court’s decision in *Mosley* underscores the difficulty that plaintiffs have faced, and will continue to face, in characterizing sex offender residency laws as punitive. While they may score occasional victories, there is a natural limit to what they can reasonably expect in an era of federal *ex post facto*

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substantive and procedural due process, and the right to travel. *See generally* Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 13 (2006).

<sup>214</sup> *See* *Indiana v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009); *see also* *F.R. v. St. Charles Cty. Sheriff’s Dep’t*, 301 S.W.3d 56, 63, 66 (Mo. 2010) (en banc) (finding residency restrictions violated *ex post facto* clause of Missouri Constitution by changing the “legal effect” of past convictions).

<sup>215</sup> *Doe v. Miller*, 405 F.3d 700, 721, 723 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

<sup>216</sup> *Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1017 (8th Cir. 2006).

<sup>217</sup> CAL. PENAL CODE § 3003.5 (Deering 2015), *invalidated by In re Taylor*, 343 P.3d 867 (Cal. 2015).

<sup>218</sup> No. S187965, 2015 WL 858216, at \*1 (Cal. Mar. 2, 2015).

<sup>219</sup> *Id.* at \*14. In *Mosley*, the determination of whether the residency restrictions were punitive was necessary to resolve a separate issue related to the defendant’s right to a jury determination of registration obligations that subjected him de facto to Jessica’s Law. *Id.* In an earlier case, the court had found the statute nonpunitive for *ex post facto* purposes. *See In re E.J.*, 223 P.3d 31, 47 (Cal. 2010).

<sup>220</sup> *Mosley*, 2015 WL 858216, at \*14.

<sup>221</sup> *Id.* at \*17.



“permissiveness” that defers strongly to states’ authority to label as regulatory statutory schemes that engender significant incursion on liberty and incorporate various features of the criminal law. Because decades of Supreme Court case law have fostered and nurtured this understanding, there is little reason to expect any appreciable shift in reasoning in the near future.

#### *D. New Directions*

On March 2, 2015, the same day it issued *Mosley*, the California Supreme Court unanimously decided a second case sure to send shockwaves across the country.<sup>222</sup> This case, *In re Taylor*, invalidated Jessica’s Law on substantive due process grounds, finding that, as applied to petitioners, it was not rationally related “to advancing the state’s legitimate goal of protecting children from sexual predators, and has infringed the . . . basic constitutional right to be free of official action that is unreasonable, arbitrary, and oppressive.”<sup>223</sup> While the decision applies only to San Diego County, where the petitioners reside, its reasoning will no doubt lead to like challenges in other counties across the state that have experienced similar problems in implementing Jessica’s Law.<sup>224</sup>

This decision is remarkable in many respects. First, the very difficulties and inconveniences deemed irrelevant in the *ex post facto* context were critical to the court’s due process analysis.<sup>225</sup> The differential treatment of these factors was a function of the analytical framework associated with the claims; whereas the *ex post facto* analysis considered the statute *on its face*, the due process analysis addressed the residency restrictions *as applied* to the petitioners.<sup>226</sup> To that end, noting that 97% of multi-family housing units were off-limits to affected sex offenders by virtue of the residency restrictions,<sup>227</sup> the court highlighted the following adverse effects: disruption of family life; lack of access to public transportation and medical, psychological, and substance abuse services; diminished employment prospects; and increased homelessness.<sup>228</sup> That one-third of the individuals subject to Jessica’s Law in San Diego County were homeless was especially troubling to the court, since it has severely compromised law enforcement’s ability to effectively monitor and supervise

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<sup>222</sup> *Taylor*, 343 P.3d at 867.

<sup>223</sup> *Id.* at 879.

<sup>224</sup> See *supra* text accompanying notes 78–84 (discussing the impact of Jessica’s Law).

<sup>225</sup> *Taylor*, 343 P.3d at 879.

<sup>226</sup> Compare *Mosley*, 2015 WL 858216, at \*17 (failure to establish that Jessica’s Law was “facially punitive in intent or effect”), with *Taylor*, 343 P.3d at 880 (petitioners are “challenging the constitutionality of the residency restrictions *as applied* to them and other similarly situated registered sex offenders on supervised parole in San Diego County”).

<sup>227</sup> CAL. PENAL CODE § 3003.5(b) (Deering 2015), *invalidated by Taylor*, 343 P.3d at 867, makes it “unlawful for any person for whom registration [as a sex offender] is required . . . to reside within 2000 feet of any public or private school, or park where children regularly gather.”

<sup>228</sup> *Taylor*, 343 P.3d at 880–81.

that population.<sup>229</sup> In short, “[h]omeless sex offenders put the public at risk.”<sup>230</sup> This reality, coupled with the impediments to rehabilitation, removed any rational relationship between Jessica’s Law and protecting children from sex offenders.

*Taylor* is not the first case to address substantive due process; it is, however, the first to vindicate the claim. *Doe v. Miller*, for example, addressed the argument at some length.<sup>231</sup> Like California, the Eighth Circuit did not question the state’s interest in protecting children from sexual violence. However, in finding a rational connection between that objective and Iowa’s law, the *Miller* court was far more deferential to the legislature, commenting that it is better able to determine “the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable.”<sup>232</sup>

The Eighth Circuit also relied on testimony from a parole and probation officer that “virtually everyone” whom he supervised over a one-year period was able to find housing that complied with statutory restrictions.<sup>233</sup> Since homelessness figured prominently in the court’s reasoning in *Taylor*, the California Supreme Court might have decided *Miller* just as the Eighth Circuit did, depending on the weight it gave to the government official’s testimony. His testimony conflicted, to that end, with that of the plaintiffs’, who disclosed great difficulty and hardship in finding suitable housing.<sup>234</sup> Most commentators have been sympathetic to the plaintiffs’ complaints, emphasizing the vastly limited housing options available to sex offenders in Iowa and the resultant creation of “so called sex-offender colonies” in certain communities.<sup>235</sup>

It is unclear whether *Taylor* will breathe new life into plaintiffs’ efforts to strike down sex offender residency laws outside of California. The rational basis test is typically a low bar. If other jurisdictions apply such low-level scrutiny, the challenge for plaintiffs will be significant, particularly in light of the imperative to protect children from sexual predation and the deference courts typically show to legislatures in fashioning an appropriate response to the problem. The centrality of homelessness in the court’s reasoning is another wild card in the constitutional equation. Some jurisdictions, like Florida, have had well-publicized housing challenges rivaling those of San Diego County, at least in some parts of the state.<sup>236</sup> In others, particularly states

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<sup>229</sup> *Id.* at 881.

<sup>230</sup> *Id.*

<sup>231</sup> *Doe v. Miller*, 405 F.3d 700, 709–16 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

<sup>232</sup> *Id.* at 714. *Doe v. Baker*, No. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006), also rejected the petitioner’s substantive due process challenge to Georgia’s sex offender residency law, finding that no fundamental rights were implicated by the regulations and they were “rationally related to the legitimate government interest of protecting children.” *Id.* at \*7.

<sup>233</sup> *Miller*, 405 F.3d at 707.

<sup>234</sup> For example, one offender said that all forty residences he investigated were within a restricted zone. *Id.* at 706. Several others wanted to live with friends or family but could not do so because the homes were within restricted areas. *Id.*

<sup>235</sup> Meirick, *supra* note 152, at 1026.

<sup>236</sup> *See supra* notes 66–68 and accompanying text (providing a discussion of displaced homeless in Florida).

with lower population density, sex offenders have been better able to find housing, but the more rural location of such residences has compromised access to employment and supportive services. The latter, standing alone, seems insufficient to render residency restrictions irrationally related to their purpose unless the problems were especially pervasive and severe. Significantly, the focus of the court's finding of a due process violation in *Taylor* was on the inability of law enforcement to monitor and supervise homeless sex offender parolees to ensure public safety; the rehabilitative challenge, while mentioned, seemed a secondary concern.<sup>237</sup>

Moreover, the inability of *one-third* of parolees subject to Jessica's Law to find housing was enough to trigger due process concerns for the California Supreme Court.<sup>238</sup> Supreme courts in other states might find the problem less alarming, focusing instead on the fact that two-thirds were able to find housing. *Taylor* also noted that the trial court had taken judicial notice of a report issued by the California Department of Corrections and Rehabilitation that recommended repeal of Jessica's Law due to the public safety concerns it created through a twenty-four-fold increase in homeless sex offender parolees between 2007 and 2010.<sup>239</sup> That type of evidence is extraordinarily useful in justifying bold action that invalidates a state law passed with overwhelming voter support. Other courts, armed with less powerful evidence, may be far less inclined to pull the constitutional trigger.

If courts do not remove the excesses of sex offender residency laws, we must rely on legislative initiative fueled by shifting public opinion on the propriety of wide-scale relocation of people to the geographic fringes of society. To achieve this objective will not be easy in light of the pervasive disgust that surrounds these offenders and the horrific, and sometimes high-profile, offenses committed by the worst among them. Nonetheless, as the experience in San Diego County demonstrates, overbroad statutes benefit no one. The legislature must, therefore, listen to plaintiffs, advocacy groups, and government agencies that enforce these laws to evaluate their efficacy with a willingness to make sensible and necessary changes to maximize freedom without compromising public safety.

The odyssey of Iowa's residency law provides hope that cooperative communication leading to reform is indeed possible. In 2006, the Iowa County Attorney's Association released a statement strongly critical of the State's sex offender residency law.<sup>240</sup> Less than two years later, the Iowa legislature created the Iowa Sex Offender

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<sup>237</sup> *In re Taylor*, 343 P.3d 867, 881 (Cal. 2015).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 876 (citation omitted).

<sup>240</sup> IOWA CTY. ATTORNEYS ASS'N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA 1 (Dec. 11, 2006), [http://www.csom.org/pubs/Iowa%20DAs%20Association\\_Sex%20Offender%20Residency%20Statement%20Dec%2011%2006.pdf](http://www.csom.org/pubs/Iowa%20DAs%20Association_Sex%20Offender%20Residency%20Statement%20Dec%2011%2006.pdf) [<http://perma.cc/WF5Z-LE53>] (The law "does not provide the protection that was originally intended . . . [its] cost . . . and the unintended effects on families of offenders warrant replacing the restriction with more effective protective measures.").

Research Council to “help avoid or fix problematic sex offense policies and practices,”<sup>241</sup> which paved the way for broad statutory changes enacted in 2009 that restricted the individuals to whom residency restrictions applied.<sup>242</sup> The legislature’s actions were all the more noteworthy considering they were not based on constitutional concern, since the Eighth Circuit had upheld the original, broader statute years earlier in *Miller*.<sup>243</sup>

Modifications in the enforcement of Georgia’s law also materialized through the interplay of advocacy, public opinion, and official action. After a massive statutory expansion of Georgia’s sex offender residency law in 2006, the Southern Center for Human Rights (SCHR) in Atlanta, Georgia, and the ACLU of Georgia moved to enjoin a new provision that disallowed residency within 1,000 feet of a bus stop.<sup>244</sup> Following widespread criticism of the bus stop provision from law enforcement officials and newspaper editorials, the attorney general ceased defending it in court.<sup>245</sup> In 2013, the judge dismissed the SCHR’s complaint on standing grounds, since no county was currently enforcing the bus stop restriction.<sup>246</sup>

#### CONCLUSION

In sum, sex offender residency restrictions may represent cogent public policy in certain cases as applied to the most dangerous offenders. Too often, however, legislatures have been overzealous, with untoward effects on both civil liberties and public safety. *Ex post facto* principles are an unreliable means of curbing these excesses. The California Supreme Court has now injected substantive due process into the mix. Whether other jurisdictions will follow its lead, only time will tell. In the meantime, lawmakers must seek out, and work with, a broad array of interested parties to create defensible and wise public policy.

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<sup>241</sup> IOWA SEX OFFENDER RESEARCH COUNCIL, REPORT TO THE IOWA GENERAL ASSEMBLY; (Jan. 22, 2009), <http://publications.iowa.gov/15040/1/SOTF%201-15-09%20Final%20Report.pdf> [<http://perma.cc/UKD7-2X2R>].

<sup>242</sup> See *supra* note 152 (discussing Iowa’s statutory reform); see also Meirick, *supra* note 152, at 1027.

<sup>243</sup> 405 F.3d 700 (8th Cir. 2005), *cert denied*, 546 U.S. 1043 (2005).

<sup>244</sup> Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 513, 515–16 (2007).

<sup>245</sup> *Id.* at 525–28.

<sup>246</sup> *Sex Offender Registration: Challenging Georgia’s Unjust Sex Offender Laws*, S. CTR. FOR HUMAN RIGHTS, <https://www.schr.org/our-work/public-safety/sex-offenders> [<http://perma.cc/G3H2-NWP3>].