

July 2015

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Recommended Citation

Lester, Joseph L. (2007) "Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions," *Akron Law Review*: Vol. 40 : Iss. 2 , Article 4.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol40/iss2/4>

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OFF TO ELBA!¹ THE LEGITIMACY OF SEX OFFENDER RESIDENCE AND EMPLOYMENT RESTRICTIONS

Joseph L. Lester^{*}

There are times when politicians are hostages to the lusts of their constituents. They dare not oppose bills that, if defeated, would serve only to aggravate those who placed them into office.² Regardless of whether they actually favor the measures, the political risk is too great not to allow their constituents' passions to overrun their own common sense. As a consequence, laws are passed with little or no resistance.³ These laws can fundamentally alter the liberties and freedom of a few to satisfy the ignorant fear of the masses. As a result, laws that in theory appear to protect society, in practice only exacerbate the perceived problem. In situations like this, an independent judiciary must do what needs to be done. Because sometimes the desire of the majority overbears individual liberty, it is critical that the courts protect the

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1. Elba is the island Napoleon was exiled to until his attempt to retake the French Crown after which he was sent to St. Helena to live in exile the remaining six years of his life.

2. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-530 (2001).

3. See e.g., Georgia General Assembly Homepage, http://www.legis.ga.gov/legis/2005_06/sum/hb1059.htm (last visited March 4, 2007) (showing that H.B. 1059, 148th Gen. Assem., Reg. Sess. (Ga. 2006), available at http://www.legis.state.ga.us/legis/2005_06/versions/hb1059_HB_1059_AP_11.htm, which radically limited the areas in which a sex offender could live and work passed the State Senate 52 to 1); Activist Judges Last Hope of Democratic Party, Georgia Republican Party, (July 10, 2006), <http://www.gagop.org/default.asp?pt=newsdescr&RI=211>; John Curran, *Sex-offender Zones Assailed – Critics Say Ordinances Limiting Where Offenders can Live are Ineffective and too Broad*, PHILADELPHIA INQUIRER, Aug. 22, 2005, at B01. The town of Brick, New Jersey, included school bus stops in its list of locations an offender is prohibited from living 2,500 feet from. *Id.* “With more than 2,000 bus stops . . . the measure effectively bars offenders from living anywhere in the town.” *Id.* “It’s pretty tough, if someone introduces an ordinance like this, to vote no,” said Brick Mayor Joseph Scarpelli. *Id.* “I know they’ll probably have a case that tests all these ordinances, and there’s a good possibility a lot will be thrown out as unconstitutional. But it makes a town feel that they care about their children.” *Id.*

legitimate interests of “the others.”⁴ When such laws are passed and the political process is broken, it is necessary for the judicial branch to step forward and protect those who are politically impotent.⁵

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions. Politicians across the country will approve almost any measure that deals with sex offenders to appear strong on crime.⁶ Given that the sex offender lobby is neither large nor vocal, it will be up to the courts to protect the interests of this disenfranchised group.⁷

This article does not dispute the idea that sex offenders should be dealt with harshly. But there has to be a time when enough is enough. The law should provide some opportunity for repentance.⁸ Individuals make mistakes, but they should be allowed an opportunity to change. Individuals like Lori Sue Collins, who after serving three years for having sex with a teenage boy, found God.⁹ Upon her release, she worked as the residence director at the Door of Hope, a halfway house for sex offenders.¹⁰ She believed her calling was to help others like her

4. See The Other, Otherness, and Alterity, <http://www.postcolonialweb.org/poldiscourse/themes/other.html> (last modified: April 8, 2002).

5. See Wayne A. Logan, “Democratic Despotism” and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439, 495-96 (2004).

6. See Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REGISTER & TRIBUNE, Jan. 22, 2006 (quoting state Sen. Dick Deardon, Dem. who thought sex offender registration requirement would be “difficult to change” since “[n]o one wants a postcard to come out two weeks before the election saying they are lax on sex offenders”).

7. Relying on politicians to act against their constituents’ wishes to benefit an unpopular minority is wishful thinking. “There is obviously little legislative hay to be made in cultivating the multiple murderer vote.” Cal. Dep’t of Corr. v. Morales, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting). See also Reynolds v. Sims, 377 U.S. 533, 554-55 (1964) (standing for the proposition that the political process should be balanced and fair to everyone, providing “one person, one vote”).

8. See, e.g., State v. Chaney, 477 P.2d 441, 443 (Alaska 1970) (“The primary goal of such legislation is an attempt to implement Alaska’s constitutional mandate that [p]enal administration shall be based on the principle of reformation and upon the need for protecting the public.”) (citation omitted). See also ALA. CODE § 13A-1-3(5)-(6) (Westlaw through 2006 Reg. Sess.) (stating that the purpose of the criminal code is “[t]o insure the public safety by . . . the rehabilitation of those convicted . . . [t]o prevent the arbitrary or oppressive treatment of persons accused or convicted of offenses”).

9. Complaint ¶ 39, Whitaker v. Perdue, No. 4:06-cv-140-CC, (N.D. Ga. June 20, 2006), available at http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/LegalDocuments/HB1059_Complaint.pdf.

10. *Id.* ¶ 38.

turn away from the sins of their past and live as productive members of society.¹¹ But because the Door of Hope is located within 1,000 feet of a school bus stop, Lori had to quit her job and move because of residence and employment restrictions.¹²

This article will look at why sex offenders are treated differently than other criminal offenders. Sex offenders are subject to sanctions and prohibitions above and beyond what other criminal offenders must face. Next, the article will look at some of the residence and employment restrictions placed on sex offenders to determine if they are rationally related to any legitimate government interest without overbearing the sex offender's constitutional rights. Finally, the article will offer an alternate means of sex offense prevention that encourages sex offender assimilation back into society instead of further exclusion.

This article will focus on those individuals who have been classified as sex offenders and who have successfully completed their sentence, however long it may have been. This article does not deal with laws aimed at restricting the freedom of individuals released on probation or parole. Any type of supervised release is a contractual agreement between the individual and the state and any rights an individual wishes to waive to have some limited degree of freedom are within the individual's discretion and the state's prerogative to require. There is no such bargain for those who have completed their sentence. Society has an obligation to those who have paid their debt for the wrong committed to accept a convict's repentance.¹³ There should be at least some opportunity for that individual to assimilate back into society. However, the residence and employment laws currently promulgated by twenty-four states and many other local communities around the country serve only to exile those who desire a second chance at life.¹⁴ Instead of

11. *Id.*

12. *Id.* ¶ 40.

13. Provided that the offender has served his/her time and actually seeks to turn away from his/her previous deviant behavior.

14. There are nineteen states with residence restrictions, not a condition of probation/parole/supervision, in order of enactment or latest amendments. The terms in parentheses indicate whether the classification is Offense Driven (OD), Registration Driven (RD), or applies to Sexually Violent Predators (SVP). Delaware (July 25, 1995) (OD); Alabama (Sept. 1, 1999) (OD); Illinois (July 7, 2000) (OD, SVP); Louisiana (June 28, 2001) (SVP); Iowa (July 1, 2002) (OD); Arkansas (July 16, 2003) (RD+SVP); Ohio (July 31, 2003) (OD); Oklahoma (Nov. 1, 2003) (RD); Tennessee (June 8, 2004) (RD); Missouri (June 14, 2004) (OD); Florida (Oct. 1, 2004) (OD); Michigan (Jan. 1, 2006) (RD); Georgia (July 1, 2006) (RD); Idaho (July 1, 2006) (RD); Indiana (July 1, 2006) (RD); Mississippi (July 1, 2006) (RD); South Dakota (July 1, 2006) (RD); Virginia (July 1, 2006) (OD); Kentucky (July 12, 2006) (RD). See *infra* Table 1 for citations. Eight states have a residence restriction as a condition of probation/parole/supervision: ARIZ. REV. STAT.

protecting society, these laws actually push individuals into antisocial behavior and likely back into trouble with the law. But besides simply being bad public policy, these laws are contrary to the ordered scheme of liberty that we hold so dear. As Justice McKenna so eloquently put it almost 100 years ago:

His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the “authority immediately in charge of his surveillance,” and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stonewalls, oppress as much by their continuity, and deprive of essential liberty.¹⁵

I. WHO IS A SEX OFFENDER?

A lawbreaker is a sex offender if he or she is guilty of one of the many enumerated crimes that constitute a sex offense. The definition of what is a sex offense is set forth by statute and varies from state to state. In some states the list is short, while in others the list is extensive. The status of being a sex offender may not be limited to individuals with felony convictions. Even a Class A misdemeanor conviction can result in being labeled a sex offender.¹⁶ For most states there is a three prong

§ 41-1604.07(F) (LexisNexis 2006); CAL. PENAL CODE § 3003(g) (West, Westlaw through Ch. 910 of 2006 Reg. Sess.); FLA. STAT. § 947.1405(7)(a)(2) (2006); FLA. STAT. § 948.30(1)(b) (2006); IND. CODE ANN. § 11-13-3-4(g)(2)(B) (West 2006); IND. CODE ANN. § 35-38-2-2.2(2) (West 2006); LA. CODE CRIM. PROC. ANN. art. 15:538(D)(1)(c) (2006); OR. REV. STAT. § 144.642(1)(a) (2006); TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2006); W. VA. CODE § 62-12-26(b)(1) (2006).

15. *Weems v. United States*, 217 U.S. 349, 366 (1910).

16. For example, in Illinois, where the residence restrictions is offense driven, one of the offenses is “indecent solicitation of an adult.” 720 ILL. COMP. STAT. 5/11-9.3(c)(2.5) (2006). A person who arranges for a person 17 years of age or over to commit an act of sexual conduct with a person 13 or older but under 17 commits a Class A misdemeanor. 720 ILL. COMP. STAT. 5/11-6.5 (2006). In Michigan, a second or subsequent conviction for indecent exposure subjects you to the residence restriction. MICH. COMP. LAWS § 28.722(e)(iii) (2006). Indecent exposure is a misdemeanor punishable by imprisonment up to two years, or a fine up to \$2,000, or both. MICH. COMP. LAWS § 750.335a(2)(b) (2006). In Missouri, furnishing pornographic material to minors subjects you to the residence restriction. MO. ANN. STAT. § 566.147(1) (West 2006). Furnishing pornographic material to minors is a Class A misdemeanor. MO. ANN. STAT. § 573.040(2) (West 2006). Indecent exposure subjects you to the residence restriction in Oklahoma. OKLA. STAT. ANN. tit. 57, § 582(A) (West 2006). Although the crime is categorized as a felony, the punishment ranges

designation for sex offender registration which subjects them to the residence and employment restrictions. A sex offender typically is a person convicted of a sexually violent offense, deemed a sexually violent predator, or convicted of a criminal offense against a victim who is a minor.¹⁷

The interesting aspect about this classification scheme as it relates to residence and employment restrictions is that for two of the three categories it does not matter whether the victim of the underlying crime is a child. So a person who is convicted of sex abuse against another adult is prohibited from living or working where children congregate as if he or she were a child molester. Focusing on the child victim is not clear enough either. Some states limit the status of “sex offender” to “child sex offender” in which case only crimes where the victim is a minor are considered.¹⁸ Crimes against adults are not used in that particular classification.¹⁹ For this classification, it does not matter if there is any sexual intent involved—only that the victim of the crime is a child. For these restrictions to be rationally related to the interests of protecting children from sexual criminals, the crimes which classify convicts as sex offenders should at a minimum include a sexual act and a child.²⁰

from a fine of \$500 to \$20,000, imprisonment from 30 days to 10 years, or both. OKLA. STAT. ANN. tit. 21, § 1021(A) (West 2006). You could plead guilty, pay a \$500 fine, and be forced out of your home.

17. See GA. CODE ANN. § 42-1-12 (2006); IOWA CODE ANN. § 692A.1 (West 2006).

18. See, e.g., 720 ILL. COMP. STAT. 5/11-9.3(c)(1) (defining a “child sex offender” as a “person who[] (i) has been charged . . . with a sex offense . . . or the attempt to commit an included sex offense, and (A) is convicted . . . (B) is found not guilty by reason of insanity . . . or (D) is the subject of a finding not resulting in an acquittal at a hearing . . . or (ii) is certified as a sexually dangerous person . . . when any conduct giving rise to such certification is committed or attempted against a person less than 18 years of age . . .”).

19. See, e.g., 720 ILL. COMP. STAT. 5/11-9.3(c)(2.5) (defining sex offenses as child luring, aiding and abetting in child abduction, indecent solicitation of a child, indecent solicitation of an adult, soliciting for a juvenile prostitution, keeping a place of juvenile prostitution, patronizing a juvenile prostitute, juvenile pimping, exploitation of a child, child pornography, predatory criminal sexual assault of a child, ritualized abuse of a child, criminal sexual assault (when victim under 18 years of age), aggravated criminal sexual assault (when victim under 18 years of age), aggravated criminal sexual abuse (when victim under 18 years of age), criminal sexual abuse (when victim under 18 years of age), kidnapping (when victim under 18 years of age and defendant not parent), aggravated kidnapping (when victim under 18 years of age and defendant not parent), unlawful restraint (when victim under 18 years of age and defendant not parent), aggravated unlawful restraint (when victim under 18 years of age and defendant not parent), and an attempt to commit any of the aforementioned offenses).

20. See *Raines v. State*, 805 So.2d 999, 1003 (Fla. App. 4th 2001) (holding that “including an offender convicted of false imprisonment in the definition of ‘sexual offender,’ without a concomitant sexual component, renders the sexual offender registration statute overinclusive” and in violation of equal protection).

Many people may think of sex offenders as “dirty old men prowling the streets,” but with the wide spectrum of offenses that automatically lead to being classified as a sex offender, many times sex offenders are decent people who made a mistake.²¹ Take Wendy Whitaker, for example.²² At 17, she had consensual sexual relations with a 15-year-old boy.²³ Now 26, and without any other mark on her criminal record, she is a sex offender who is captured under Georgia’s sex offender restrictions.²⁴ Or Jay Hikes, who at the age of 19 had consensual sex with a 15-year-old girl in New Jersey.²⁵ Now 36, married and with a small child, he too will be caught up in the broad net of sex offender residence and employment restrictions.²⁶ Silly mistakes and actions that many people other would not have had qualms about doing could earn individual the sex offender label.²⁷ So, it is not just those who commit rape, incest, and sex abuse who are branded a sex offender. There is a significant probability that individuals with little potential to re-offend are treated the same as those who actually are predators.²⁸

In the handful of states where there are sex offender employment and residence restrictions, sex offender status can be earned automatically with a conviction of a particular crime. In Alabama, for example, a conviction, even a nolo contendere plea, of the following will result in sex offender classification: rape in the first or second degree; sodomy in the first or second degree; sexual torture; sex abuse in the first or second degree; enticing a child to enter a vehicle, room, house, office, or other place for immoral purposes; promoting prostitution in the

21. See, e.g., Jenny Jarvie, *Suit Target’s Georgia Sex Offender Law*, L.A. TIMES, July 2, 2006, at A24.

22. *Id.*

23. *Id.*

24. *Id.*

25. Doug Nurse, *Many Feel Impact of New Sex Offender Law*, ATLANTA J. CONST., July 6, 2006.

26. *Id.*

27. A sex offender could just be a person who committed a mischievous act such as mooning or streaking. See generally, Kaffie Sledge, *Labels May Mislead*, COLUMBUS LEDGER-ENQUIRER, June 29, 2006. “For instance, if reported, relieving oneself outdoors (behind a tree on the golf course or behind a building) could result in being charged with a sex offense. It’s a misdemeanor if the witness is an adult; a felony if witnessed by a minor.” *Id.*

28. Sometimes innocent fun can be criminal. *8-Year-Old Charged For Sexual Conduct With Sitter*, (KUTV television broadcast July 28, 2005), available at http://kutv.com/topstories/local_story_210004013.html. For example, a fourteen-year-old female baby-sitter “dared” the 8-year-old boy, in a game of truth-or-dare, to touch her breasts, which he did. *Id.* When he told his mother about it, she called the police and both the eight-year-old boy and the fourteen-year-old baby-sitter were charged with lewdness with a minor. *Id.* The charges were later dropped. *Id.*

first or second degree; violation of the Alabama Child Pornography Act; kidnapping of a minor, except by a parent, in the first or second degree; incest, when the offender is an adult and the victim is a minor; soliciting a child by computer for the purposes of committing a sexual act and transmitting obscene material to a child by computer; any solicitation, attempt, or conspiracy to commit any of the aforementioned offenses²⁹ and a conviction for any criminal sex offense when the victim was under the age of 12 and any offense involving child pornography.³⁰

Sex offender status is painted with a broad brush, marking more individuals than necessary. The label is one that should be avoided at all costs. As a result, statutes that require automatic inclusion by those convicted of particular crimes will likely make convictions for those crimes more difficult to come by. As the time frame for potential punishment is extended, many individuals accused of such crimes will not be willing to accept a guilty plea regardless of the suggested punishment.³¹ The status of being a sex offender is a long-term, even a lifetime, marking. Such a stigma should be very narrowly applied, if at all.

II. WHY ALL THE FUSS OVER THIS CRIME?

Sex offenders are a special cast of criminals that excite the general public more than other run-of-the-mill criminals.³² The combination of sex and violence makes for a story line that sells.³³ Readers and viewers are titillated by these often NC-17 rated stories. Throw a story line that includes children into the mix with sex and violence and you have a potential to create a lynch mob. Stories of just a few abused children can unite the public to demand change.³⁴ Media attention can blow a

29. ALA. CODE § 15-20-21(4) (Westlaw through 2006 Reg. Sess.).

30. *Id.* § 15-20-21(5).

31. Even an offer of probated sentence might be rejected as a matter of course if the sex offender label must attach. The fewer plea bargains the more trials. One might speculate that within a brief period of time the bulk of the criminal cases tried will be sex offenses.

32. See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 881-82 (2000). "Stories about crime involving children in particular tap into a complex of concerns about modern life. Indeed, it is noteworthy that so many of the moral panics of the nineties involved children in either a victim or an offender role (or in the case of drug use, both victim and offender)." *Id.*

33. Popular television shows such as *Law & Order: Special Victims Unit* or *Dateline NBC* use sex stories to capture and audience.

34. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

SEC. 2. IN RECOGNITION OF JOHN AND REVÉ WALSH ON THE OCCASION OF THE 25TH ANNIVERSARY OF ADAM WALSH'S ABDUCTION AND MURDER.

situation out of proportion so that it appears that isolated events are really an epidemic.³⁵ The laws often reflect the plight of the particular

(a) ADAM WALSH'S ABDUCTION AND MURDER.—On July 27, 1981, in Hollywood, Florida, 6-year-old Adam Walsh was abducted at a mall. Two weeks later, some of Adam's remains were discovered in a canal more than 100 miles from his home.

Id. at 589.

SEC. 102. DECLARATION OF PURPOSE.

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders:

- (1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.
- (2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.
- (3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.
- (4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.
- (5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.
- (6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.
- (7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.
- (8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.
- (9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.
- (10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.
- (11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.
- (12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.
- (13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.
- (14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.
- (15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.
- (16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.
- (17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

Id. at 590-91.

35. For example, anytime there is a shark attack, news coverage of such an event gives people a false perception that shark attacks are common. Jennifer Hile, *Great White Shark Attacks: Defanging the Myths*, NAT'L GEOGRAPHIC CHANNEL, Jan. 23, 2004, http://news.nationalgeographic.com/news/2004/01/0123_040123_tvgreatwhiteshark.html. In

child who precipitated the law by carrying their names, such as Kyle, Megan, or Jessica.³⁶

Crimes involving sex, especially when the victim is a child, are perceived as more heinous crimes because the degree of violation of our personal privacy and innocence. Victims of sex crimes rarely just walk away from the incident without some physical or emotional scarring. In fact, nearly one-third of all rape victims, regardless of age, suffer some sort of post-traumatic stress disorder.³⁷

Anger is easily stirred against those who commit sex crimes. Sex offenders are not even honored among thieves.³⁸ It is not uncommon for prisoners to dole out jailhouse justice to those who commit sex crimes,

reality, the likelihood of being attacked by a shark is extremely rare. From 1670 to 2001 there were only 2,110 reported shark attacks worldwide. Shark Attacks, <http://www.sharkattackphotos.com/Images/Misc/attackmap.jpg>. See also C.T. Sharp, Letter to the Editor, *C'mon*, ST. LOUIS JOURNALISM REV., Dec. 2003-Jan 2004.

In November, KSDK (Channel 5) promoted a story about sex offenders living near school bus stops as if it had discovered a plague epidemic in St. Louis. I know that November is sweeps month, but this promo was ridiculous. . . It has to be at the top of the list of sensationalistic non-stories fabricated by Channel 5.

Id.

36. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994) (codified as amended as 42 U.S.C. § 14071 (2006)); *The Jacob Wetterling Disappearance*, MINNEAPOLIS-ST. PAUL STAR TRIB., August 3, 2006, at 1A, available at 2006 WLNR 13423673. See also Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (naming a law after Megan Nicole Kanka); L. Steinhilf, *Megan's Law Interests Britain*, STAR-LEDGER, July 23, 2006, at 29, available at 2006 WLNR 12671260; Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) (codified as amended as 42 U.S.C. § 14072 (2006)); Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, 1996 Fla. Laws 338 (1996); David Hancock, *Kidnappers Are Seldom Strangers*, CBSNEWS.COM, June 19, 2002, <http://www.cbsnews.com/stories/2002/06/19/national/main512745.shtml>; Jessica Lunsford Act, 2005 Fla. Laws 28 (2005); Gary Fineout & Mary Ellen Klas, *Dead Kids are Campaign Fodder for Crist*, MIAMI HERALD, Aug. 3, 2006, available at <http://www.miami.com/mld/miamiherald/news/15184792.htm>; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006); Roberto Santiago & Wanda J. Demarzo, *New Law Marks Adam Walsh Case Anniversary: On the Anniversary of 6-year-old Adam Walsh's Abduction, President Bush Today Will Sign an Act Creating a National Sex Offender Registry*, MIAMI HERALD, July 27, 2006, available at <http://www.miami.com/mld/miamiherald/news/15184792.htm>.

37. NAT'L CTR. FOR VICTIMS OF CRIME, RAPE-RELATED POSTTRAUMATIC STRESS DISORDER (2002), <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentAction=ViewProperties&DocumentID=32366&UrlToReturn=http%3a%2f%2fwww.ncvc.org%2fncvc%2fmmain.aspx%3fdbName%3dAdvancedSearch>.

38. Sex offenders, especially child sex offenders, are treated poorly in prison. See HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS pt. IV (2001), available at http://www.hrw.org/reports/2001/prison/report4.html#N_222_. Among prisoners, sex offenders are considered the lowest prisoners of all. *Id.*

especially if the crime involved a minor.³⁹ Up until June 2006, in Illinois, the sex offender classification included those who murder children.⁴⁰ A child-murderer's mother asked for and received a new separate classification because she did not want her son to be labeled as a sex offender because of the stigma.⁴¹ When abusing a child is considered worse than murdering a child, there is little doubt the term "sex offender" brands a deep mark.

Finally, there is a dangerousness myth that surrounds sex offenders.⁴² Studies in the 1970s and 1980s that suggested sex offender recidivism was not affected by treatment led many to the conclusion that there was nothing that could be done to curb the deviant behavior.⁴³ Couple the misuse of research data with a media that sensationalizes sex crimes and sex offenders, and it is no wonder the public sentiment against sex offenders is so high.⁴⁴

39. *See id.* (discussing the targeting of prisoners convicted of sexually abusing minors). For example, one inmate said,

Inmates confined for sexual offenses, especially those against juvenile victims, are at the bottom of the pecking order and consequentially most often victimized. Because of their crime, the general population justifies using their weakness by labeling rape 'just punishment' for their crime. Sexual offenders are the number one target group for prisoner rape.

Id.

40. Sex Offender and Child Murderer Community Notification Law, 730 ILL. COMP. STAT. 152/101 (1996) (amended 2006).

41. Jocelyn Black, *Illinois House and Senate Agree to Send 'Sex Offender Only' Bill*, MEDILL NEWS SERVICE, Apr. 6, 2006, available at http://mesh.medill.northwestern.edu/mnschicago/archives/2006/04/sexoffdb_the_il.html. On June 27, 2006, the governor signed into law the Child Murderer and Violent Offender Against Youth Registration Act. The Act provides for the registration of persons who were previously registered as sex offenders under the Sex Offender Registration Act for the offenses of kidnapping, aggravated kidnapping, unlawful restraint, aggravated unlawful restraint, first degree murder, child abduction, and forcible detention when those offenses were committed against persons under 18 years of age. *See* Child Murder and Violent Offender Against Youth Registration Act, Pub. Act 94-945, 2006 Ill. Laws 945.

State rep. John Fritchey (D-Chicago) introduced the bill in November 2005. He said that he was inspired by a woman, whose son would have to register as a sex offender even though his murder conviction didn't have anything to do with a sexual crime. "As a father, I know firsthand how terrifying the words 'sex offender' are to a parent and I have zero tolerance for those individuals," Rep. Fritchey said in a press release. "But we're essentially talking about truth in labeling here. We were attaching a very powerful and inaccurate stigma to someone whose transgression did not warrant it. He was essentially facing a second sentence for a crime he did not commit."

Black, *supra*.

42. *See* Association for the Treatment of Sexual Abuse, Facts About Adult Sex Offenders (2001), <http://www.atsa.com/ppOffenderFacts.html> (last visited Mar. 6, 2006).

43. *Id.*

44. *See* Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 569 (2002).

III. COMPARATIVE RECIDIVISM RATES

Contrary to popular public opinion, the recidivism rate for sex crimes is no worse than the recidivism rate for other crimes.⁴⁵ In fact, sex offense recidivism is extremely low compared to recidivism for other crimes.⁴⁶ According to the Department of Justice's statistics of sex offender recidivism, 5.3 percent of sex offenders were rearrested for a sex offense within three years of their release.⁴⁷ Forty-three percent of convicted sex offenders were arrested for all crimes during this same period, but the overwhelming majority of those arrests were for other non-sexual allegations.⁴⁸ Also, using arrests as proof of behavior is misleading because those with a criminal record are often the first ones blamed for new criminal activity.

While a 24 percent recidivism rate⁴⁹ might sound high, using it as a call to arms when most other crimes have a similar propensity or worse is fallacious. For example, 67 percent of drug convicts are rearrested within three years with a conviction rate of 47 percent,⁵⁰ yet there is no restriction keeping drug offenders from living or working near schools. While most states have laws that enhance a drug crime if it takes place within a certain distance from a school, there is nothing to prevent drug offenders from living there after they are released.⁵¹ Thus, sex offender employment and residence restrictions are either precursors of what is to come to all criminal offenders or a special sanction for only the sex offender.

45. See IOWA DEP'T OF HUM. RIGHTS, DIV. OF CRIM. & JUV. JUSTICE PLANNING & STATISTICAL ANALYSIS CTR., IOWA SEX OFFENDER REGISTRY AND RECIDIVISM (2000); PATRICK A. LANGAN, ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 14, (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>. "The 43% re-arrest rate of the 9,691 released sex offenders was low by comparison." *Id.*

46. See PATRICK A. LANGAM & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002).

47. *Id.* at 1.

48. *Id.* at 2, 14.

49. *Id.* at 14 ("the reconviction rate for . . . 9,691 released sex offenders was 24.0% . . .").

50. *Id.*

51. See, e.g., 18 PA. CONS. STAT. ANN. § 6314(b)(3-4) (West, Westlaw through 2006 Reg. Sess.).

In addition to the mandatory minimum sentence set forth in subsection (a), the person shall be sentenced to an additional minimum sentence of at least two years total confinement, notwithstanding any other provision of this title or other statute to the contrary, if the person did any of the following: . . . 3) Committed the offense within 1,000 feet of the real property on which is located a public, private or parochial school or a college or university. (4) Committed the offense on a school bus or within 500 feet of a school bus stop.

Id.

Data can be used to mislead. As often stated, there are “lies, damn lies – and statistics.”⁵² The data collected for sex offender recidivism could fit into all three categories. The Department of Justice is guilty of misleading the public with non-informative information. In its introduction and highlights section the report lists that “sex offenders are four times more likely to be arrested for a new sex crime” than non-sex offenders.⁵³ Statistics make this true because only 1.3 percent of the non-sex offenders committed sex crimes.⁵⁴ Looking at the raw numbers, the actual incidences of sexual recidivism is much greater for the non-sex offenders than the sex offenders.⁵⁵ So, with all the focus on the convicted sex offenders, we miss approximately 86.5 percent of the new sex crimes.⁵⁶

IV. RESTRICTIONS

With the belief that proximity leads to promiscuity, twenty-four states, including California, which recently joined the fray, currently have some form of residence and/or employment restrictions for convicted sex offenders.⁵⁷ These restrictions may last for only the designated period of supervised release or apply for the remainder of an offender’s life.⁵⁸ Nineteen states have residence and/or employment restrictions that apply beyond the period of any probation or parole period.⁵⁹ In some states these restrictions are permanent, with no process or ability to remove the burden.⁶⁰ These restrictions have disastrous effects on convicted sex offenders who are trying to be decent

52. Quote . . . Unquote, The Most Quoted Remarks, <http://www1c.btwebworld.com/quote-unquote/p0000149.htm> (last visited Nov. 11, 2006) (quoting MARK TWAIN, AUTOBIOGRAPHY (1924)). Twain gives credit for the quote to Disraeli. *Id.*

53. LANGAM ET AL., *supra* note 45, at 1.

54. *Id.* A percent of 5.3 is four times more than 1.3 percent, but neither is very high. *Id.*

55. *Id.* Five hundred-seventeen of 9,691 sex offenders were rearrested for a new sex crime within three years compared to 3,328 out of 262,420 non-sex offenders. *Id.*

56. *Id.* Of the 3,845 new sex crime arrests, 3,328 were from non-sex offenders. *Id.*

57. CAL. PENAL CODE § 209 (West, Westlaw through 2007 Reg. Sess.) (codifying California Ballot Initiative Proposition 83, available at <http://ca.lwv.org/lwvc/edfund/elections/2006nov/id/prop83.html>).

58. See, e.g., ALA. CODE § 15-20-33(a) (Westlaw through 2006 Reg. Sess.) (setting the restrictive period at life); IDAHO CODE ANN. § 18-8310(1) (2006) (setting the restrictive period at 10 years).

59. See *supra* note 14.

60. For example, Iowa has no means for a sex offender subject to residence and employment restrictions to ever have those restrictions lifted. IOWA CODE ANN. § 692A.2A (West 2006). See *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005) (citing *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003)) (“[T]here is no requirement that the State provide a process to establish an exemption from a legislative classification.”).

members of the community. Often they are forced to quit their jobs and move.⁶¹ By having these restrictions, a state's public policy demonstrates a preference for sex offenders to be unemployed and living in an "RV in old K-Mart parking lot" or in a "truck near the river" or "under the 7th street bridge."⁶² With these laws, sex offenders are forced to live nomadic lives.

It is not uncommon to have laws that prevent activities from taking place within a certain distance of a school, church, or residential area.⁶³ What is unique about these restrictions is the lack of any criminal desire required.⁶⁴ These zoning restrictions do not involve a crime, as in the case with selling or possessing drugs or guns near schools.⁶⁵ In this case, the mere physical presence of a former sex offender is the offense. The thrust of the injustice in these laws is against those who have completed their sentence and are not released as parolees or probationers. It is these individuals who are ready to start their lives over; but with these residence and employment restrictions hanging over their heads, they will have a difficult time assimilating.

A. Residence

Nineteen states⁶⁶ and many other local communities have enacted residence restrictions on former sex offenders, prohibiting them from living a certain distance away from schools,⁶⁷ child-care facilities,⁶⁸ public swimming pools,⁶⁹ public playgrounds,⁷⁰ churches, or any area

61. See Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?* 49 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 168 (2005).

62. These are actual responses by individuals forced to move and list their new address with their sex offender treatment providers in Iowa. See Kansas Dep't of Corrections, *Twenty Findings of Research on Residential Restrictions for Sex Offenders and the Iowa Experience with Similar Policies*, http://www.dc.state.ks.us/SOHR/Twenty_Findings_on_Restrictions_for_Sex_Offenders.htm (last visited March 7, 2007).

63. See, e.g., FLA. STAT. § 790.115(1) (2006) (prohibiting a firearm or weapon within 1,000 feet of a school); *Id.* § 790.115(2)(b) (prohibiting the possession of an electric weapon or device, destructive device, or other weapon on school property); *Id.* § 790.115(2)(c) (prohibiting the possession a firearm on school property).

64. § 790.115.

65. See, e.g., N.J. STAT. ANN. 2C:11-5 (West 2006) (stating that death by vehicular manslaughter is worse if the perpetrator was intoxicated and the victim was on school grounds).

66. See *infra* Table 1.

67. See e.g., ALA. CODE § 15-20-26(a) (Westlaw through 2006 Reg. Sess.).

68. *Id.*

69. See, e.g., LA. REV. STAT. ANN. § 14:91.1(A)(2) (2006).

70. See, e.g., KY. REV. STAT. ANN. § 17.545(1) (West 2006).

where minors congregate, such as parks, arcades, and even school bus stops.⁷¹ Restrictions from living 500, 1,000, 1,500 or 2,000 feet from the above mentioned areas seems like a quick and simple fix to the perceived recidivism problem. However, this final solution actually solves nothing while presenting a host of new problems, the least of which is a violation of the individual's constitutional rights.

The residence restrictions are typically from property line to property line and not door-to-door, so the prohibited area is often larger than one might expect.⁷² Communities that have restrictions of 2,000 feet essentially block out all of the urban areas as the overlapping bubbles leave few, if any, reasonable places to reside.⁷³ A quick look at an urban area map will demonstrate how such restrictions severely limit housing options for sex offenders.⁷⁴ The purpose, it seems, is to drive sex offenders out of the community. Some legislators are even so brazen as to admit such intent.⁷⁵ Whether or not banishment is the purpose, it is the result.

Among the states that have residence restrictions, there is some discrepancy in determining which sex offenders qualify for residence restrictions. In Arkansas, Georgia, Indiana, Kentucky, Michigan, Oklahoma, South Dakota, and Tennessee, the residence restrictions are registration driven.⁷⁶ In other words, all individuals who have to register as sex offenders are subject to residence restrictions.⁷⁷ In Alabama, Illinois, Iowa, Missouri, and Ohio, the residence restrictions are offense driven, so the application is not as facially broad, but it is still significant.⁷⁸ In Louisiana, the residence restrictions apply only to those

71. See, e.g., FLA. STAT. § 947.1405(7)(a)(2) (2006). See also *infra* Table 1.

72. In Georgia, the distance is measured from the property boundary of the sex offender's residence to the property boundary of the child care facility, school, or area where minors congregate, at their closest points. GA. CODE ANN. § 42-1-15(a) (2006). But in Kentucky, the measurement is taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence. KY. REV. STAT. ANN. § 17.545.

73. By reasonable, I mean an affordable, safe living space. It is not reasonable to say that an individual has a theoretical option to move to a certain neighborhood when the cost of living space far exceeds the individual's financial means. Likewise, it is not reasonable to force people to move into a "high crime area."

74. See *infra* app. 1.

75. See e.g., Complaint, *supra* note 9, ¶ 56.

76. See *infra* Table 1.

77. In Arkansas, being subject to registration is just the first part of the analysis. A registrant will also have to be declared dangerous with a score of three or four on a four point scale. ARK. CODE ANN. § 5-14-128(a) (2006).

78. See *infra* Table 1. It would be possible for a person to be classified as a sex offender for registration purposes but not subject to residence or employment restrictions—like in Arkansas and Louisiana. ARK. CODE ANN. § 5-14-128(a); LA. REV. STAT. ANN. § 14:91.1(A)(2) (2006). While

classified as sexually violent predators.⁷⁹ Arizona, California, Florida, Oregon, and Texas have residence restrictions only as part of probation or parole or some other form of supervised release.⁸⁰ Indiana has enacted a more broadly applicable restriction, but the previous law regarding parolees remains in effect.⁸¹

Washington and Nebraska are unique in that there is no overarching state mandate for residence and employment restrictions with the actual decision on restrictions left up to the local communities. The state does provide some guidance and limitations as to how far the communities can go.⁸² Washington imposed a residence restriction on sex offenders as a condition of community custody.⁸³ The offender could not reside within 880 feet from the facilities or grounds of a public or private school.⁸⁴ In 2006, Washington established a committee to develop statewide standards for cities and towns to use when determining whether to impose residency restrictions on sex offenders.⁸⁵ Nebraska defers to and provides guidance for local communities that enact residency restrictions.⁸⁶ State legislation signed into law on April 13, 2006, allows cities to prohibit a high-risk sex offender whose victim was 18 years of age or younger from living within 500 feet of a school or child care facility.⁸⁷

States that do not have a formal statewide restriction may have local ordinances that vary in degree from town to town.⁸⁸ Logistically, communities, if left to their own devices, often take harsher stances against sex offenders to ensure that there is little or no available housing since the effect of not having such prohibitions will be felt in a smaller

this is a variation in classification it can have the same effect if all the enumerated offenses that subject one to registration are also the same that apply to the residence and employment restrictions—like in Alabama where all those that have to register are subject to the residence requirements. ALA. CODE §§ 15-20-26(a), 15-20-21(1) (Westlaw through 2006 Reg. Sess.).

79. LA. REV. STAT. ANN. § 14:91.1(A).

80. See ARIZ. REV. STAT. § 41-1604.07(F) (LexisNexis 2006), CAL. PENAL CODE § 3003(g) (West, Westlaw through Ch. 910 of 2006 Reg. Sess.), FLA. STAT. § 947.1405(7)(a)(2) (2006); OR. REV. STAT. § 144.642(1)(a) (2006); TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2006).

81. IND. CODE ANN. § 11-13-3-4(g)(2)(B) (West 2006).

82. See S.B. 6325, 59th 2d Reg. Sess. (Wash. 2005).

83. WASH. REV. CODE § 9.94A.712(6)(a)(ii) (2006).

84. WASH. REV. CODE § 9.94A.030(8) (2006). This provision expired July 1, 2006. *Id.*

85. See S.B. 6325.

86. See, e.g., Legis. B. 1199, 99th Leg., 2nd Reg. Sess. (Neb. 2005).

87. See *id.* §§ 27-29.

88. See, e.g., Pamela A. MacLean, *Suit Tests Power of Sex Offender Bans, Six Cities Want to Copy Law; They Wait For Result*, 28 NAT'L L.J. 6, Oct. 3, 2005, at col. 2; Associated Press, *Cuero Wants to Require Sex Offenders to Post Yard Signs*, KLTV, Jan. 6, 2006, available at <http://kltv.com/global/story.asp?s=4247289&ClientType=Printable>.

community. In such cases where only local ordinances exist, notice can be a problem.⁸⁹

B. Employment

Along with residence restrictions, several states and local communities have also enacted employment restrictions intended to keep sex offenders away from schools, daycare facilities, playgrounds, public swimming pools, video arcades, recreation centers, or public athletic fields and the like.⁹⁰ Similar to the residence restrictions, this is employment zoning. Not only are sex offenders prohibited from working at these locations, but they are also prohibited from working near these locations.⁹¹ Because most sex offenses against children are committed by individuals who have a prior relationship with their victims, there is a rational basis for keeping child offenders out of relationship-building type jobs such as a teacher or counselor at a school.⁹² But when the law places a barrier around schools and playgrounds that blocks off large sections of the community, the impact of this restriction for employment purposes is enormous and unnecessary.

Jobs that require workers to work at new locations on a regular basis such as plumbers, electricians, and construction are now off-limits to convicted sex offenders because of the risk of inadvertently entering the restricted zones. Downtown areas will be off-limits to prior offenders who are attorneys or accountants or who hold other white-collar jobs. With just one daycare facility located on one floor of a high-rise building, an entire city block could be off-limits. For all practical purposes, sex offenders will be relegated to agricultural work on the outskirts of the community. If that is not feasible, then unemployment is the natural consequence of these restrictions.

As a matter of public policy, it is strange to prefer idleness over work. While unemployment is not the stated objective of these restrictions, it is often the result. Being productive is a key component

89. WOI-TV, *Sex Offender's Wife Worries About Family Future*, Nov. 23, 2005, available at <http://www.woi-tv.com/Global/story.asp?S=4056859&nav=1LFX>. "The Story County attorney says his county first started drawing up maps about a month ago. Since then, they've changed it about twenty times. As of Monday, their map still isn't finalized. That leaves sex offenders who know they need to move, not knowing where they can go." *Id.*

90. See *infra* Table 3.

91. See *infra* Table 3.

92. CTR. FOR SEX OFFENDER MGMT, U.S. DEP'T OF JUSTICE, MYTHS AND FACTS ABOUT SEX OFFENDERS (2000).

to successful rehabilitation and in preventing recidivism.⁹³ Employment plays a significant role in an individual's feeling of self-worth.⁹⁴ Taking away a person's ability to work attacks that person's dignity. With no documented proof that working in proximity to children increases sex crimes, it is odd that courts have done nothing to stop governments from interfering with the essential right to earn a living. Unencumbered without a home or a job, a convicted sex offender is more at risk to re-offend.⁹⁵ After all, what else has he got to do?

C. *Not Banishment?*

The impetus for these not-in-my-backyard ordinances and laws is the perceived need to keep children away from sex offenders. After all, would any person, if given the choice, want a sex offender living next door? Once one community sets up such a law driving the sex offenders out of its community, it forces the neighboring community to act in kind to avoid becoming a haven for sex offenders.⁹⁶ When a community or state adopts a 1,000-foot rule or greater, that community is effectively removing that individual from its community by its strategic zoning. By looking at a map with the 1,000-foot radius drawn around every school, few areas remain where sex offenders may live.⁹⁷ When daycare facilities, including residential homes that serve as day care facilities are added in, the possible living area is even smaller. For states like Georgia, which also add in places where children might congregate, all school bus stops, and churches, then the map is completely covered.⁹⁸

Banishment, not protection, is the desired goal of these laws.⁹⁹ Georgia House Majority leader Jerry Keen, the chief sponsor of 2006 Georgia House Bill 1059, stated,

We want those people running away from Georgia. Given the toughest laws here, we think a lot of people could move to another state. If it becomes too onerous and too inconvenient, they just may want to live

93. CTR. FOR SEX OFFENDER MGMT, U.S. DEP'T OF JUSTICE, TIME TO WORK: MANAGING THE EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION (2002).

94. *Id.*

95. *Id.*

96. See Mike Carlson, *Not In My City*, ORLANDO WEEKLY, Aug. 25, 2005, available at <http://www.orlandoweekly.com/util/printready.asp?id=8250>.

97. See *infra* app. 1.

98. GA. CODE ANN § 42-1-15 (2006).

99. Jason Garcia, *Legislator Seeks Statewide Predator Law*, SUN-SENTINEL, Sept. 15, 2005, at 12B (quoting Rep. Susan Goldstein who introduced a bill in the Florida legislature to increase the residence restrictions from 1000 feet to 2500 and whose ultimate goal was to "get these people out of our neighborhoods and hopefully out of our state").

somewhere else. And I don't care where, as long as it's not Georgia.¹⁰⁰

The effect of this law in Georgia would be to send sex offenders scrambling to find housing and employment, regardless of how long they have lived in their current residence. That is the intent. Rep. Keen echoed his sentiments in the house chambers when he said,

If someone did something now to my grandchildren, I think you and I would have the same reaction to that. Those are the people we're targeting. Those are the people we are trying to get off the streets of this state, and those are the people that we are going to send a message to that if you have a propensity to that crime perhaps you need to move to another state.¹⁰¹

If the law stands, Rep. Keen would get his wish. In Forsyth County, Georgia, 64 of 68 registered sex offenders would have to move—most likely out of the county.¹⁰² But the situation is even worse in neighboring counties. For instance, in DeKalb County, Georgia, a suburb of Atlanta, 466 of the 466 registered sex offenders would have to move.¹⁰³ Pushed out of the urban areas, those affected are forced into the country or out of the state.

The real impetus of these bills is not on protecting children, but on punishing former sex offenders once again.¹⁰⁴ In response to criticism of the residence restrictions in Kentucky, Kenton County Sheriff Chuck Korzenborn stated, "I don't care how inconvenient we make it for these guys. . . . Don't commit the crime and you won't have to do the time."¹⁰⁵ These zoning laws are so onerous to comply with that it is just a matter

100. Complaint, *supra* note 9, ¶ 56.

101. See Statement by Representative Keen to Representative Roger Bruce during House Debate on H.B. 1059, Feb. 2, 2006, House Internet Broadcasts, available at http://www.georgia.gov/00/article/0,2086,4802_6107103_47120020,00.html. See also *Georgia's New Sex Offender Law Nixed*, GWINNETT DAILY ONLINE, July 3, 2006, available at <http://www.gwinnettdailyonline.com/GDP/archive/article19EE2C8F45E54F0C972E0BAE97E39C86.asp> (quoting Representative Keen's remarks that the law would be an "inconvenience," but urging that "most folks would agree this is a good thing").

102. Doug Nurse, *Registered Sex Offenders*, ATLANTA J. CONST., July 6, 2006, at 1JH, available at 2006 WLNR 11637530.

103. *Id.* Other metro Atlanta counties would have similar totals: Cherokee County 90 of 95; Clayton County 190 of 220; Cobb County 204 of 208; Henry County 100 of 108; and Rockdale 29 of 29. *Id.*

104. Joyce Blay, *Police Waiting for Maps to Enforce Residency Law: Jackson, Lakewood Officials have Targeted Convicted Sex Offenders*, TRI-TOWN NEWS, Sept. 22, 2005, available at http://tritown.gmnews.com/news/2005/0922/Front_page/032.html.

105. William Croyle, *Sex Offenders Put on Notice: Move if You're near a School*, CINCINNATI ENQUIRER, June 25, 2006, at 1A.

of time before innocent people are locked up. Take the situation in the New Jersey townships of Jackson and Lakewood, where, four months after adopting sex offender residency ordinances, the townships still had not produced maps showing the “pedophile-free zones.”¹⁰⁶ “There will be a map generated, not so someone can say, ‘Oh, that’s not where I can live,’” said a Jackson police captain.¹⁰⁷ “It’s not a question of them knowing, but so we can know. If we want to charge them with the ordinance, *we* need the map.”¹⁰⁸

If the real purpose was protection, then states that have adopted these programs would offer proof that this community purging actually does protect the community and its children. In fact, the states that have actually given thoughtful consideration to this proposal before voting on it have found that there is no correlation between residency and employment locale and recidivism. Both Colorado and Minnesota did extensive research on the issue and found that, if anything, this forced exile only exacerbates the problem it purports to solve.¹⁰⁹

This forced migration of a select group of former criminals is unprecedented. There were forced migrations of Indian Tribes in the 1830s¹¹⁰ and of Japanese-Americans in the 1940s.¹¹¹ There have been times when suspect groups of people, such as foreign agents, Communists, and aliens were subject to monitoring and regulation.¹¹² It is rare for a law to force one class of individuals away from the general

106. Blay, *supra* note 104.

107. *Id.*

108. *Id.* (emphasis added).

109. See SEX OFFENDER MGMT BD., COLORADO DEP’T OF PUBLIC SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATIONS OF SEX OFFENDERS IN THE COMMUNITY (2004) (finding no correlation between where sex offenders lived in comparison to where other criminals lived therefore, a residence restriction would not be a productive method to control recidivism) *available at* http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf; MINNESOTA DEP’T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES (2003) (finding that the residence restrictions would force the state to provide housing for those displaced by such an act and that the cost of creating new housing would be too high along with a belief that residential restrictions would not enhance community safety) *available at* [http://www.corr.state.mn.us/publications/legislative-reports/pdf/2004/Lv1%203%20SEX%20OFFENDERS%20report%202003%20\(revised%202-04\).pdf](http://www.corr.state.mn.us/publications/legislative-reports/pdf/2004/Lv1%203%20SEX%20OFFENDERS%20report%202003%20(revised%202-04).pdf).

110. Pursuant to the Indian Removal Act. See About North Georgia, The Trail of Tears, <http://ngeorgia.com/history/nghisttt.html> (last visited March 8, 2007).

111. Act of March 21, 1942, ch. 191, 56 Stat. 173 (providing a penalty for violation of Executive Order 9066, which authorized the Secretary of War to prescribe military areas). See also *Korematsu v. United States*, 323 U.S. 214 (1944).

112. Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 815 n.183 (1996).

population as if they were contagious.¹¹³ It is outrageous for any court to mischaracterize laws that require citizens living in a law-abiding manner to quit their jobs and uproot their families, taking them out of their chosen communities and forcing them into underdeveloped areas by not calling it what it is—banishment.

V. PENALTIES FOR BEING IN THE ZONE

Violations of the residence or employment restrictions are much more than just a slap on the wrist. For most states the first violation is a felony.¹¹⁴ In Alabama and Georgia, it is a severe felony with up to 30 years for one violation.¹¹⁵ In many cases a violation of this prohibition is punished with greater severity than the crime that made the person a sexual offender to begin with.¹¹⁶

Interestingly, for the most part there is no mens rea required to violate these restrictions.¹¹⁷ A sexual offender may be strictly liable for complying with these prohibitions.¹¹⁸ The basic problem with this is the fact that the prohibited areas are growing constantly. An individual may live or work outside a protected zone only to have a daycare facility pop up near the sex offender. In such a case, the sex offender would have little recourse and no knowledge of such an event.

What is really going on is that these regulations are a way to punish sex offenders twice for one criminal act. Feeling unsatisfied and impotent, states and local communities set legal traps for the convicted sex offenders to fall into so that they can incarcerate them again. It is just a matter of time before a sex offender who tries to remain in a community will violate these specially crafted restrictions.

VI. UNINTENDED CONSEQUENCES

There are unintended consequences of the residence and employment restrictions that may actually exacerbate the problem that

113. In an effort to curb prostitution, Richmond, Virginia, city officials want to make parts of the city off limits to particular individuals unless they lived, worked, or worshipped in the area. Jim Nolan, *Zones Would Bar Prostitutes*, RICHMOND TIMES-DISPATCH, Sept. 11, 2006, at B-1.

114. See *infra* Table 2. (listing Alabama, Arkansas, Georgia, Illinois, Indiana, Missouri, and Tennessee as the states where the first violation of a restriction is a felony).

115. See *infra* Table 2 (listing that in Alabama, punishment ranges from 1 to 10 years imprisonment; in Georgia, from 10 to 30 years imprisonment).

116. See *infra* Table 2.

117. See *infra* Table 2.

118. Offenders are strictly liable in Iowa, Delaware, Florida, Kentucky, Louisiana, Michigan, Missouri, Ohio, and South Dakota. See *infra* Table 2.

the laws were intended to correct. Because these laws are often passed without much consideration as to the results of implementation, there have been many negatives consequences. The shortsightedness of these laws is that, in their zeal to protect, they give sex offenders little hope of redemption.

We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. . . . We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime.¹¹⁹

Coupled with the fact that these restrictions will not work, the negatives far exceed the positives. That is why the Iowa County Attorney's Association has publicly called for the overturning of Iowa's 2,000 foot residence restriction.¹²⁰

By pushing sex offenders away from society, these laws can isolate sex offenders from their friends, co-workers, and other support systems. Without support, the sex offender is left to fend off any deviant urges on his or her own. Without employment, a sex offender will face idle time, which is a factor in favor of recidivism.¹²¹ Social science research indicates that "[d]uring the past 20 years, research on recidivism of the general criminal population identified a history of unstable employment as one of the factors that consistently is associated with criminal behavior."¹²² As Kathleen Colebank, a supervisor for Kentucky's sex offender treatment program states, "With many of the people we treat, isolation played a role in them committing the offense, and we risk replicating that."¹²³

In areas where residence restrictions exist, there are limited choices for housing for those classified as sex offenders. As a result, the likelihood exists that sex offenders will be concentrated in certain areas of town or certain areas just outside of town, if they can find any reasonable housing at all.¹²⁴ The market value of a neighborhood full of

119. *Morrissey v. Brewer*, 443 F.2d 942, 953 (8th Cir. 1971) (en banc) (Lay, J., dissenting).

120. IOWA COUNTY ATTORNEYS ASS'N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA, Feb. 14, 2006, available at <http://www.iowacaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Feb%2014%2006%20for%20website.pdf>.

121. CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, *supra* note 93, at 1-2.

122. *Id.* (citing Paul Gendreau, et al., *A Meta-Analysis of the Predictors of Adult Criminal Recidivism: What Works*, 34 *CRIMINOLOGY* 575 (1996)).

123. Croyle, *supra* note 105.

124. *See, e.g.*, Map of Webster City, Iowa, *infra* app. 1.

registered sex offenders would most likely be depressed, much like an area of town deemed to be a “high crime area.”¹²⁵ Communities would then react against any concentration of sex offenders. For example, the small town of Ely, Iowa, a town without a single school or daycare center, passed local ordinances banning sex offenders from living near the city park, playground, or library, which effectively eliminated all residential areas in the town.¹²⁶ “We felt a little vulnerable,” said an Ely resident.¹²⁷ “For a lot of towns like ours, we can become the only place available for sex offenders.”¹²⁸ Fear, then, is the driving force.

Residence restrictions leave many offenders homeless.¹²⁹ The coverage area is so large, especially in 2,000-foot areas, that there is limited housing available.¹³⁰ In states or communities where multiple difficult-to-identify triggers exist, such as daycare facilities, school bus stops or places where children congregate, even a smaller prohibited area severely limits reasonable housing. Much of the permissible property is located in high-rent districts or in rural areas where housing is limited.¹³¹

The homeless problem creates an enforcement problem. Although offenders are required to provide a valid address when they register, it is not uncommon for an offender to have to move to comply with the residence law. Subsequent reporting is poor.¹³² In Iowa, for example, the number of missing sex offenders has more than doubled since the residence restrictions went into effect in September 2005.¹³³ Keeping up with the migration of sex offenders will be a full-time job for law enforcement.¹³⁴ Most do not have the money or the manpower to devote so much time to herding people out of town. Other states are losing track of their registered sex offenders, as well. Sex offenders simply do not bother to register anymore because it will only lead to an immediate arrest. In North Carolina, sex offenders are now missing in record

125. See, e.g., MINNESOTA DEP'T OF CORRECTIONS, *supra* note 109, at 11.

126. Todd Dvorak, *Iowa Towns Rush to Bar Sex Offenders*, BOSTON GLOBE, November 12, 2005, available at http://www.boston.com/news/nation/articles/2005/11/12/iowa_towns_rush_to_bar_sex_offenders/.

127. *Id.*

128. *Id.*

129. See, e.g., Rood, *supra* note 6.

130. See, e.g., MINNESOTA DEP'T OF CORRECTIONS, *supra* note 109, at 11.

131. *Id.*

132. Rood, *supra* note 6.

133. *Id.*

134. See Stephen Gurr, *Forsyth Sheriff Paxton Testifies in Federal Hearing*, FORSYTH COUNTY NEWS, July 12, 2006 (quoting Charlene Giles, an investigator for the Houston County (Georgia) Sheriff's Office, “It's going to be a never-ending job, never-ending”).

numbers.¹³⁵

Another unintended consequence would be the desire to create illegitimate sanctuaries. Local communities would actively increase the number of protected areas by increasing the number of public parks or lowering standards for residential daycare facilities. In some states, it is fairly easy to have one's home considered a child-care facility, which would entitle it to the protection zone. In Iowa, for instance, as the number of day care facilities increases, it becomes more and more difficult to know what locations are off-limits.¹³⁶ While there is nothing inherently wrong with having a surplus of daycare facilities, the classification of many would be disingenuous. Similarly, in states that include school bus stops as a prohibited area, there would be impetus for communities to artificially designate areas to zone off more of the community.¹³⁷

Another enforcement problem is created by treating all sex offenders the same regardless of the nature of their offense. By treating all sex offenders the same, the number of individuals classified as a sex offender becomes too large to effectively manage. The number of sex offenders will grow at a pace much faster than the authorities can handle. Special units will need to be created that focus on the monitoring of sex offenders. State and local governments, already strapped for funds, are not equipped to handle all the work required by these restrictive ordinances.

These restrictions displace not only individuals, but also their families.¹³⁸ The impact of relocating is not just felt by the offender because the whole family unit must move. A family may have to find new friends, attend new schools, and find new places to worship. Some

135. Fred Kelly & Franco Ordoñez, *Gaps in Sex-Offender Tracking*, CHARLOTTE OBSERVER, Jun. 11, 2006, 1A ("Authorities have lost track of at least 22 convicted sex offenders in Mecklenburg County and hundreds more across the Carolinas.").

136. According to the Iowa Department of Human Resources between 2002 and 2003, the first year of the residence restrictions, there were 1,921 new listings on the list of 7,172 facilities statewide. *Doe v. Miller*, 298 F. Supp. 2d 844, 849 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005). *See also* WOI-TV, *supra* note 89.

137. Press Release, Southern Center for Human Rights, Enforcement of Bus Stop Rule Halted in Bulloch County (Aug. 15, 2006) (stating that the consent order agreed to after Bulloch County Georgia school boards designated 1,700 school bus stops in Bulloch county), *available at* http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/PressReleases/press_lawsuitHB1059_BullochConsent.htm.

138. *Georgia School Districts Embroiled in Enforcement of Sex Offender Law*, National School Boards Association, Legal Clips, Aug. 2006, *available at* http://www.nsba.org/site/doc_cosa.asp?TRACKID=&VID=50&CID=482&DID=38984 [hereinafter *Georgia School Districts*] (40 families will be displaced once the Columbia County, Georgia, establishes where bus stops are officially located).

families are faced with a difficult decision; because of the reduction in the quality of life in staying together, some may choose to remain without the offending family member.

Finally, by establishing these residence and employment restrictions, a community is merely passing its perceived problem on to the next town.¹³⁹ One by one, communities are adopting laws—not to handle a perceived current problem with local sex offenders—but as a defense mechanism to prevent displaced offenders from other areas from settling in their community.¹⁴⁰ In Orange Beach Alabama, residents not satisfied with the Alabama's 2000 foot restriction passed an ordinance that increases the prohibited zones to four miles.¹⁴¹ As community after community forbids offenders from residing in their midst, sex offenders are left to wander the earth in search of acceptance.

VII. CONSTITUTIONALITY OF THESE RESTRICTIONS

With the U.S. Supreme Court's denial of certiorari in *Doe v. Miller*, the Court currently tacitly permits residence and employment restrictions.¹⁴² The key aspect in determining the constitutionality of these restrictions lies in whether the Court views these restrictions as civil or criminal. The Court in *Smith v. Doe* upheld the sex offender registrations as civil and regulatory because they did not prohibit the sex offender from doing anything; rather, the regulations merely required sex offenders to do something that is not uncommon.¹⁴³ Under the Alaska statutory scheme, sex offenders just had to register themselves, much like any other person would register a motor vehicle.¹⁴⁴ If a vehicle is moved from one jurisdiction to another, the owner is required to update that registration. Having to register as a sex offender does not prevent a sex offender from moving.¹⁴⁵ Surprisingly, most courts that have had an opportunity to weigh in on this issue have upheld residence and employment restrictions as constitutional.¹⁴⁶ The U.S. Supreme

139. See, e.g., Carlson, *supra* note 96.

140. *Id.*

141. Ryan Dezember, *City Tightens Sex Abuser Restrictions*, MOBILE REG., Sept. 8, 2005, at 3.

142. *Doe v. Miller*, 126 S.Ct. 757 (2005), *denying cert. to* 405 F.3d 700 (8th Cir. 2005).

143. *Smith v. Doe*, 538 U.S. 84, 96, 106 (2003) (holding Alaska's Sex Offender Registration Act was not unconstitutional and not violative of the ex post facto clause).

144. *Id.* at 96.

145. Sex offenders often cannot move without first obtaining permission from both the local law enforcement and the proposed new law enforcement. See, e.g., FLA. STAT. § 775.21(6)(i-j) (2006).

146. See, e.g., *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005); *Denson v. Georgia*, 600 S.E.2d 645 (Ga. Ct. App. 2004) (holding residence restrictions were not unconstitutional ex post facto law as

Court has not fully examined the constitutionality of residence and employment restrictions but does suggest that there are limits to the restrictions placed on sex offenders who have served their time.¹⁴⁷

A. *Ex Post Facto* Laws

In general, *ex post facto* laws are laws passed after a particular event has occurred to make the previous activity illegal.¹⁴⁸ A prohibition against *ex post facto* laws is found in the United States Constitution¹⁴⁹ and serves as a foundational principle for our ordered scheme of liberty.¹⁵⁰ The United States Constitution also prohibits states from enacting such laws.¹⁵¹ *Ex post facto* laws are often considered void.¹⁵²

In its first *Ex Post Facto* Clause case, the Supreme Court described four ways a legislature could run afoul of it.¹⁵³ Justice Chase wrote:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.¹⁵⁴

“[B]ut the restriction not to pass any *ex post facto* law, was to secure the person of the subject from injury, or punishment, in consequence of such law.”¹⁵⁵

For a law to be *ex post facto*, it must also “disadvantage the

applied to plaintiff); *Illinois v. Leroy*, 828 N.E.2d 769 (Ill. App. 5th Dist. 2005) (holding residence restriction not unconstitutional); *Iowa v. Seering*, 701 N.W.2d 655 (Iowa 2005).

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

148. *See, e.g., id.* at 92; *Lynce v. Mathis*, 519 U.S. 433, 439-40 (1997); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-25 (1905); *In re Medley*, 134 U.S. 160, 171 (1890); *Calder v. Bull*, 3 U.S. 386, 390, (1798). *See also* Logan, *supra* note 5.

149. U.S. CONST. art. I, § 9, cl. 3.

150. *See Carmell v. Texas*, 529 U.S. 513 (2000).

151. U.S. CONST. art. I, § 10, cl. 1.

152. *See generally* 16A C.J.S. *Constitutional Law* § 584 (2006).

153. *Calder*, 3 U.S. at 390.

154. *Id.* at 390-91.

155. *Id.* at 390.

offender affected by it.”¹⁵⁶ There is no requirement that it hinder any particular right. In fact, “[it] need not impair a ‘vested right’ Even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Ex Post Facto Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.”¹⁵⁷ For example, a change in state law that altered how “good time credit” was calculated for inmates was an ex post facto violation even though there is no constitutional right to “good time credit.”¹⁵⁸

Determining if a statute violates the Ex Post Facto Clause hinges on the purpose of the law.¹⁵⁹ If the legislature meant to impose punishment, then the statute violates the Ex Post Facto Clause if it punishes previous activity.¹⁶⁰ If the intention was to establish “civil proceedings” by enacting a regulatory scheme that is civil and non-punitive, then the court must look at the effect of the law.¹⁶¹

The first step in the analysis is to ascertain the legislative intent.¹⁶² Courts give the legislature the benefit of the doubt in determining intent, especially if there is an explicitly stated intent within the statute.¹⁶³ A high standard of proof is required to overcome even a superficial statement of intent.¹⁶⁴ The U.S. Supreme Court reaffirmed in *Smith*, “only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty.”¹⁶⁵ Various courts have taken great pains to find a civil intent. For instance, the placement and naming of an act is given more weight if it claims to be civil and is found in the civil code.¹⁶⁶ The lack of any identification or its placement in the criminal code is often treated as having little probative value.¹⁶⁷ Regardless of the label or placement of a restriction, the inquiry does not end at this point.

In examining the legislative intent, it is important to see the lengths

156. *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citing *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)).

157. *Id.* at 29-31.

158. *See id.*

159. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

160. *Id.*; *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the statute’s intent is to punish, then the Ex Post Facto Clause will be violated if the now unlawful act occurred prior to the adoption of the law. *See Smith*, 538 U.S. at 92.

161. *Smith*, 538 U.S. at 92; *Hendricks*, 521 U.S. at 361.

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

163. *Id.*

164. *Id.*

165. *Id.* *See also* *United States v. Ward*, 448 U.S. 242, 248-49 (1980).

166. *Ward*, 448 U.S. at 249.

167. *Smith*, 538 U.S. at 94-95.

the legislature went in analyzing the alleged problem. The courts must be sensitive to the fact that there may not be legitimate debate and discussion on sex offender restrictions because of the lack of real representation by the effected class: convicted sex offenders.¹⁶⁸ The few states that have taken the time to see if residence or employment restrictions would actually work did not enact such provisions.¹⁶⁹ Most legislative bodies act in haste with one goal in mind: removing sex offenders from the community.¹⁷⁰ The Supreme Court has said that the “failure to consider, or to use, ‘alternative and less harsh methods’ to achieve a non-punitive objective can help to show that legislature’s ‘purpose was to punish.’”¹⁷¹

Next a court must look at the practical effects of the restrictions and decide if these restrictions are regulatory or punitive.¹⁷² A hardship placed on an individual is not enough to make a restriction punitive. For instance, just because a restriction might cause the community to distrust a sex offender, it will not be punitive unless it encourages an act of retribution against the sex offender.¹⁷³ As a result, sex offender registrations are not considered punitive,¹⁷⁴ nor is civil commitment for sexually violent predators.¹⁷⁵

The Court in *Kennedy v. Mendoza-Martinez* set forth seven factors to assist in determining if a statute’s restrictions constitute actual punishment.¹⁷⁶ These factors are not exhaustive but are helpful.¹⁷⁷ The court will balance the factors, which at times contradict each other. They include: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment: retribution

168. There is a disenfranchisement issue that should provide courts with a reason to view skeptically any facial designation of civil as opposed to criminal.

169. Colorado and Minnesota both passed on the issue after extensive studies. *See supra* note 109 and accompanying text.

170. *See, e.g., Georgia School Districts*, *supra* note 138 (quoting school superintendent Tommy Price, who stated, “Our board didn’t give a lot of thought one way or the other . . . We saw no reason why we shouldn’t formally approve them.”).

171. *Kansas v. Hendricks*, 521 U.S. 346, 388 (1997) (Breyer, J., dissenting) (citing *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

172. *See Hawker v. People of New York*, 170 U.S. 189, 196 (1898). A court will look at the substance of the law and not at its form in determining whether it is *ex post facto*. *Id.*

173. *See Patterson v. State*, 985 P.2d 1007, 1013 (Alaska Ct. App. 1999), *overruled on other grounds by Doe v. Dept. of Pub. Safety*, 92 P.3d 398 (Alaska 2004).

174. *Smith v. Doe*, 538 U.S. 84, 105-06 (2003).

175. *Hendricks*, 521 U.S. at 369.

176. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

177. *Smith*, 538 U.S. at 97.

and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned.¹⁷⁸

The civil/criminal analysis under *Mendoza-Martinez* tends to be result oriented. Because there is no true test or measuring stick to distinguish the two, courts seem to weigh the factors according to the preferred outcome. How else could the court construe confinement for those considered dangerous to be civil and not criminal, preventive and not punitive, when the result of the restraints are exactly the same?¹⁷⁹ As residence and employment restrictions proliferate, courts should eventually reach the point at which these restrictions are considered punitive and not regulatory.¹⁸⁰

There are several important factual differences that distinguish residence and employment restrictions from the two previous sanctions which were deemed regulatory: sex offender registration and civil commitment. Residence and employment restrictions place an affirmative burden on several fundamental liberty interests—where to live, work, raise a family, and even travel. The freedom to live a law-abiding life in the manner of one's own choosing should not be terminated by a criminal conviction. More importantly, it should not be a result of conviction. Unlike registration requirements, these restrictions are a new and unexpected restraint on sex offenders' lives.¹⁸¹ The ramification of not being able to live and work where you choose is not a product of the crime; it is a product of the legislation.

Residence and employment restrictions are not like registration requirements because residence and employment restrictions actually impose a physical restraint on the sex offender. The Court in *Smith v. Doe* found that Alaska's registration law was not punitive because "the Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative

178. *Kennedy*, 372 U.S. at 168-69.

179. See Michael Louis Corrado, *Sex Offenders, Unlawful Combatants and Preventive Detention*, 84 N.C. L. REV. 77 (2005); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L. J. 1 (2005); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003).

180. See, e.g., *Doe v. Miller*, 298 F. Supp. 2d 844, 849 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

181. *Smith*, 538 U.S. at 101. "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.*

disability of restraint.”¹⁸² The Court even goes on to say that “the Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.”¹⁸³ Thus, the *Smith* Court implies that a residence or employment restriction might be improper.

The *Smith* Court does note that particular employment prohibitions can be legitimate civil sanctions.¹⁸⁴ For example, the Court has authorized the forbidding participation in the banking industry,¹⁸⁵ working as a union official¹⁸⁶ or revocation of a medical license.¹⁸⁷ But these restrictions are case specific and are related to the underlying deviant behavior that resulted in such a sanction. Restrictions that prohibit working within a certain distance of a school or church have no particular correlation to the previous employment of the sex offender or the relationship, if any, of the employment to the criminal offense.

These restrictions are an inverted detention. In prison, offenders are confined to a small space while society continues around it. Under these residence and employment schemes, the walls are built around society and the offender is forced to live confined outside them.¹⁸⁸ Essentially, towns become gated communities with severe punishments for trespassers. The issue boils down to the greater of two motives. Do these invisible walls protect society, punish the offender, or both? If the objective is to incapacitate the sex offenders so that they cannot re-offend, then that is a form of punishment.¹⁸⁹

Unlike civil commitment, which provides some effort at rehabilitation through counseling and psychological treatment, residence and employment restrictions confer no benefit on the sex offender.¹⁹⁰

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

183. *Id.*

184. *Id.*

185. *See Hudson v. United States*, 522 U.S. 93 (1997).

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

187. *See Hawker v. People of New York*, 170 U.S. 189 (1898).

188. *See Wayne A. Logan, A Study in “Actuarial Justice”: Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 595-96 (2000) (“To a significant extent, the laws serve ‘a kind of waste management function,’ a massive corrections experiment taking place beyond prison walls.”).

189. 4 WILLIAM BLACKSTONE, COMMENTARIES *11-*12 (stating an objective of criminal law is to “depriv[e] the party injuring of the power to do future mischief.”). *See also United States v. Brown*, 381 U.S. 437, 458 (“Punishment serves several purposes: retribution, rehabilitation, deterrent – and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”). *See also HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION* 3-6 (1968).

190. *Allen v. Illinois*, 478 U.S. 364, 369 (1986). *See also Kansas v. Hendricks*, 521 U.S. 346, 381 (1997) (Breyer, J., dissenting). Justice Breyer, in his dissent, suggests that withholding or delaying treatment until the end or near the end of the prison sentence, so that further detention is

These restrictions are for the protection of the public by removing these “dangerous” individuals. There is no evidence that these restrictions will cure a sex offender of his or her deviant actions. In his dissent in *Hendricks*, Justice Breyer states, “The *Allen* Court’s focus upon treatment, as a kind of touchstone helping to distinguish civil from punitive purposes, is not surprising, for one would expect a non-punitive statutory scheme to confine, not simply in order to protect, but also in order to cure.”¹⁹¹ There needs to be some benefit to all interested parties: the state and the convicted offender. Protecting society alone is not enough, especially since there is no proof that these restrictions will protect society.

Most of the residence and employment zoning restrictions apply only to a special class of individuals: those who have previously committed a sexual offense.¹⁹² The civil commitment contemplated in *Hendricks* involved offenders who had also been adjudged to be dangerous.¹⁹³ The Supreme Court has found that an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate non-punitive governmental objective.¹⁹⁴ What is often missing from sex offender residence and employment restrictions is a finding of dangerousness with the individual offenders. The legislative trend is for residence restrictions to apply to all who are required to register, with no finding of dangerousness.¹⁹⁵ For example, Arkansas and Louisiana apply these restrictions only on those found to be sexually violent predators.¹⁹⁶ This overbroad classification does not take into account the life situation of its victims and creates unjustified havoc. For example, an 80-year-old Lexington, Kentucky, resident “living in . . . a nursing home, where he is treated for dementia and heart ailments,” will have to move to the nearest nursing home facility that satisfies Kentucky’s new harsher residence restrictions—two hours

required, is a scheme that looks punitive. *Id.*

191. *Hendricks*, 521 U.S. at 382 (Breyer, J., dissenting).

192. *Id.* at 380 (citing *Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781 (1994) (finding that a tax on marijuana [is] “conditioned on the commission of a crime . . . is ‘significant of [its] penal and prohibitory intent’”)).

193. *Id.* at 363 (majority opinion).

194. *Id.*

195. Six (Michigan, Idaho, Indiana, Mississippi, South Dakota, and Kentucky) of the Seven (Virginia) states that created new post-sentence residence restrictions in 2006 were registration driven. Three (Georgia, Oklahoma, Tennessee) of the four (Missouri) additional states that amended their previous laws to increase the restrictions in 2006 were also registration driven. See Table 1.

196. See ARK. CODE ANN. § 5-14-128(a) (2006); LA. REV. STAT. ANN. § 14:91.1(A)(2) (2006).

away.¹⁹⁷ These restrictions treat all sex offenders the same regardless if the offense was a misdemeanor or felony, a first or subsequent offense, a predatory act or temporary lapse in judgment. The desire of these restrictions is to keep the handful of truly deviant predators away from children, but its application is overbearing and punitive on the vast majority of sex offenders.

Finally, violation of a true regulatory scheme results in a fine or injunction but certainly does not carry a possible thirty-year prison term.¹⁹⁸ Thirty years is a significant criminal sanction available for only the most heinous crimes. With these laws in effect, those classified as sex offenders live their lives in fear that they may inadvertently, and with no malicious intent, violate these laws and basically throw away the rest of their lives.¹⁹⁹ These restrictions are significant restraints equal to and perhaps even greater than the punishment received for the underlying offense.²⁰⁰ There is a severe impact on those who have served their time but languish under the status of being a sex offender. Individuals who have paid their debt are now required to pay more. Subsequent punishments are clear violations of the Ex Post Facto Clause.

B. Other Constitutional Claims

There is no more fundamental American right than the right to own property and earn a livelihood.²⁰¹ That right is guaranteed by the Fifth and Fourteenth Amendments, which require due process before these interests can be taken away. The tension is between a state's alleged exercise of its police power in the interest of the general welfare and the process by which individuals lose their individual liberty. A state's police power does not give it unlimited power over individual liberty.

197. Andrew Wolfson, *Sex Offenders Fight Residence Rules*, LOUISVILLE COURIER-J., Sept. 21, 2006.

198. *Cf.* GA. CODE ANN. § 42-1-15(d) (2006).

199. *See infra* Table 2 (listing mental element requirements for each state).

200. *See infra* Table 2 (listing punishments for first and subsequent violations).

201. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id.

As Justice Harlan stated, “the police power cannot be put forward as an excuse for oppressive and unjust legislation.”²⁰² When a state is exercising its police power there must be a balance between the public and private interests involved in order for the regulations to be reasonable.²⁰³

Sex offender residence and employment restrictions may violate other constitutional provisions, but analysis of those claims is typically hindered by the predicate determination that the restrictions are civil in nature. For instance, if a court finds the proceedings and actions civil in nature, then the Fifth Amendment right against self-incrimination does not attach.²⁰⁴ Similarly, if the court refuses to call sanctions punishment, then the constitutional scrutiny is greatly diminished.²⁰⁵

A finding that a law is civil in nature effectively thwarts most constitutional claims. Likewise, a determination that the restrictions are actually punishment will result in multiple constitutional violations. Regardless of the number of constitutional deficiencies, a court need only find one constitutional violation to make an act unconstitutional.

Other constitutional claims are available, but will not be discussed in this article. They include the following: violation of substantive due process rights under the 14th Amendment by restricting the right to own a home in location of one’s own choosing,²⁰⁶ violation of the right to work²⁰⁷ and the right to travel;²⁰⁸ violation of the Equal Protection Clause of the 14th Amendment by treating sex offenders differently than all other citizens;²⁰⁹ violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment;²¹⁰ violation of the Double Jeopardy

202. *Lochner v. New York*, 198 U.S. 45, 66 (1905) (dissenting opinion, Justice Harlan), *overruled by Day-Bright Lighting Inc. v. Missouri*, 342 U.S. 45 (1952).

203. *Dept. of Transp. v. Longo*, 510 A.2d 832, 834 (Pa. 1986).

204. *See Allen v. Illinois*, 478 U.S. 364, 374-75 (1986).

205. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) (finding that deportation is not punishment and therefore not contrary to the Ex Post Facto Clause).

206. *See Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974). Zoning ordinances that have the effect of restricting the number of unrelated persons who may live together in a residential zone are not violative of Fourteenth Amendment equal protection. So long as the zoning ordinance bears a rational relationship to a permissible state objective, it is constitutional. *Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977) (holding that a housing ordinance limiting occupancy of a dwelling unit to a narrow definition of “family” violated Due Process).

207. *See e.g. Wilson v. Loew’s Inc.*, 355 U.S. 597, 599 (1958). There is a “fundamental right to work.” *Id.*

208. *See United States v. Guest*, 383 U.S. 745, 757 (1966). *See also Saenz v. Roe*, 526 U.S. 489, 498 (1999).

209. *See e.g. League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594 (2006) (treating people differently for no lawful purpose violates equal protection).

210. These restrictions are often disproportionate to the crime in degree and scope as to make

Clause,²¹¹ and violation of the Fifth Amendment right against self-incrimination.²¹²

VIII. THE COURT DOES HAVE ITS BREAKING POINT

Even though most of the previous case law has sanctified sex offender residence and employment restrictions, there does seem to be a point where the U.S. Supreme Court will say enough is enough. In his dissent in *Hendricks*, Justice Kennedy warns that activities such as civil commitment for sex offenders would cross the line if “[it] were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil commitment is justified, our precedents would not suffice to validate it.”²¹³ Perhaps it will start with a willingness to take down a statute that is imprecise in its understanding and application, such as in Georgia.²¹⁴ In July 2006, the addition of school bus stops to the list of places a sex offender cannot live or work within 1,000 feet was deemed too imprecise because there was no formal declaration of a school bus stop.²¹⁵ Or perhaps the Court will conclude that the classification of sex offenders is too large to precisely indicate future dangerousness. As legislative bodies continue to push sex offenders out by adding prohibited places or enlarging the zones around

them unconstitutional. A person convicted of a misdemeanor expects to receive a punishment that last less than a year. Likewise a person convicted of a felony expects that the maximum amount of time his liberty would be restricted would be the statutorily established sentencing limits. It was never contemplated that a misdemeanor conviction would, some ten years after the final disposition, create a new debilitating restraint on his or her liberty. It is cruel and unusual punishment for a strict liability crime to carry a severe sanction such as a prison sentence of 10 or more years. It is fundamentally unfair to imprison someone for a technical violation when there is no evil intent. Scholars have noted a shift in public opinion regarding strict liability crimes. See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 380 (2003); Carol. S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Divide*, 85 GEO. L. 775 (1997). Yet that is precisely what the residence and employment restrictions do.

211. A new restraint on liberty after being released from prison should be considered a second punishment for the same criminal action. See *e.g.* *Hudson v. United States*, 522 U.S. 93, 101-02 (1997).

212. Every state has some form of registration for sex offenders. Variations exist on the frequency and the amount of information required depending on the state and the level/classification of the offender. All registrations require that the offender provide a current residence. It is possible that in the process of following the law and registering as a sex offender, that an individual may be unknowingly incriminating himself if the address listed is within a prohibited area.

213. *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring).

214. See, *e.g.* Jill Young Miller, *Sex Offender Law Muddled*, ATLANTA J.-CONSTITUTION, July 26, 2006, at A1, A9.

215. *Id.*

the prohibited places and as the punitive intent of these laws becomes even more evident, reason will win out over passion.

IX. A BETTER SOLUTION

Merely keeping convicted sex offenders away from particular areas does nothing to keep them away from children or any other potential victims. A key aspect of most sex offenses is that the assailant and the victim often have a relationship with each other before the violation occurs. The stranger danger for sex crimes is actually very low. Whatever danger is posed, it is probably best handled by educating children how to act.²¹⁶ And if there is a desire to separate children from child sexual offenders, then laws that hinder relationship-building, such as prohibiting a child sex offender from working at a daycare or school, would be narrowly tailored, less restrictive and more effective.

A better solution to the problem would be to discontinue the practice of exiling the convicted sex offenders from the general population once they have paid their debt to society. If society is so certain that sex offenders have not paid enough, then perhaps the incarceration time should increase. At a minimum, some sort of rehabilitation and treatment should be used throughout the confinement period so that society could better trust that the person leaving the penitentiary is changed from the one who entered. Preventing offenders from being able to reasonably assimilate themselves in the general population does not serve any legitimate purpose other than making politicians feel like they are tough on crime.

Instead of simply hoping that incarceration for any length of time will rehabilitate a sex offender or setting up arbitrary barriers that debilitate any hope of assimilation, a more prudent approach would be to provide some comprehensive counseling during incarceration, so that when sex offenders are released, we can be more hopeful that they will not re-offend. Alternatively, sex offenders could spend the last portion of their sentence in a sex offender halfway house, where they could receive the counseling and assistance needed to rejoin society and overcome any deviant urges.²¹⁷ It is presumptively unfair to punish

216. A greater danger for children may come from internet chat-room stalkers. Some of NBC Dateline's most popular shows involve catching child predators. Residence and Employment restrictions would not solve this problem at all. In fact, by keeping some sex offenders unemployed, the restrictions may give chat-room stalkers more time to chat.

217. For example in Minneapolis, Minnesota, Alpha Human Services offers an Adult Residential Program specifically designed for repeat sexual offenders. See Alpha Human Services, www.alphaservices.org, for more information.

someone for the status crime of being a sex offender, rather than for the underlying crime. Giving first-time offenders probation with little or no jail time—but then sentencing them to a felony when they fail to move from a house they have lived in for the past 10 years without incident—does not cure any problem. It is merely a means by which sex offenders can be punished a second time for their crime without running afoul of any double jeopardy claims.

If it can be proven that a particular amount of time is necessary to rehabilitate, then that amount of time should be the minimum time required to be spent by all noteworthy sex offenders. Releasing individuals before they are competent to control their anti-social desires and creating a massive system to monitor and track them until the inevitable day occurs when they re-offend is not in society's best interest. Once people serve their full sentences, their debt to society is paid. They now owe society nothing for their past actions—only the promise to live debt-free henceforth. If the current punishment is not sufficient, then it must be increased so that society will receive its payment upfront, not after the fact. Residence and employment restrictions re-punish those who do not deserve additional punishment. That practice is contrary to our ordered scheme of liberty and must cease. The time has come for the courts to protect the interests of this helpless group and end this practice.

There is no arguing the fact that sex crimes are terrible. But so are many different crimes. Everyone makes mistakes.²¹⁸ It seems that for this broad spectrum of crimes there is a one-strike-and-you're-out policy. With recidivism so low and the likelihood of repentance high, it is a shame that people like Lori Sue Collins are treated as lepers.²¹⁹ The good in her is ignored as she is cast out, away from society, and forced into a nomadic existence by a twenty-first century lynch mob. If there is no redemption possible for sex offenders, then why not act accordingly and lock them up forever or execute them? If not, no matter how much we hate the sin, we have to reach out to the sinner. We must offer sex offenders real hope, because without hope, they will act without conscience; then everyone loses.

218. "For all have sinned and fall short of the Glory of God." Romans 3:23.

219. See Complaint, *supra* note 9, ¶¶ 38-45.

TABLE 1 – SEX OFFENDER RESIDENCE PROHIBITED ZONES

State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Alabama	Persons convicted of a “criminal sex offense” ²²⁰	Within 2,000 feet of any school or child care facility ²²¹	Life ²²²	No
Arkansas	Persons required to register as a sex offender AND who are assigned risk level 3 (high) or 4 (SVP) ²²³	Within 2,000 feet of any elementary or secondary school or daycare facility ²²⁴	15 years to life ²²⁵	Yes ²²⁶
Delaware	Persons convicted of certain sex offenses involving a child under 16 ²²⁷	Within 500 feet of the property of any school ²²⁸	Life ²²⁹	No

220. ALA. CODE §§ 15-20-26(a), 15-20-21(1) (Westlaw through 2006 Reg. Sess.).

221. § 15-20-26(a).

222. ALA. CODE § 15-20-33(a) (Westlaw through 2006 Reg. Sess.).

223. ARK. CODE ANN. § 5-14-128(a) (2006).

224. *Id.*

225. ARK. CODE ANN. § 12-12-919(a),(b)(1) (2006).

226. ARK. CODE ANN. §§ 12-12-917(h), 919(b)(1), 922(b)(1)(a) (2006). A sex offender may request an administrative review challenging the level 3 or 4 risk assignment, request a risk reassessment every five years, and petition a court for release from registration requirements after 15 years. By lowering the risk classification to level 1 or 2, or obtaining release from registration requirements, a sex offender will no longer be subject to the residence restriction.

227. DEL. CODE ANN. tit. 11, § 1112(b)(4) (2006).

228. § 1112(a)(1) (2006).

229. *Id.* The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely. *Id.*

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State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Florida	Persons convicted of certain sex offenses involving a child under 16 ²³⁰	Within 1,000 feet of any school, day care center, park, or playground ²³¹	Life ²³²	No
Georgia	Persons required to register as a sex offender ²³³	Within 1,000 feet of any child care facility, church, school, or area where minors congregate ²³⁴	10 years to life ²³⁵	Yes ²³⁶
Idaho	Persons required to register as a sex offender ²³⁷	Within 500 feet of the property on which a school is located ²³⁸	10 years to life ²³⁹	Yes ²⁴⁰

230. FLA. STAT. § 794.065(1) (2006).

231. *Id.*

232. *Id.* The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely. *Id.*

233. GA. CODE ANN. § 42-1-15(a) (2006).

234. *Id.* Georgia's sex offender residency prohibition was amended in 2006 to 1) make it a crime to loiter within the prohibited zone, 2) include "churches" among the restricted areas, and 3) add school bus stops and public/community swimming pools to the definition of "area where minors congregate." See H.B. 1059, 148th Gen. Assem., Reg. Sess. (Ga. 2006), available at http://www.legis.state.ga.us/legis/2005_06/versions/hb1059_HB_1059_AP_11.htm.

235. GA. CODE ANN. § 42-1-12(g) (2006).

236. *Id.* Effective July 1, 2006, sexual offenders may petition a court for release from registration requirements after 10 years. *Id.* If successful, the offender will no longer be subject to the residence restriction. *Id.*

237. IDAHO CODE ANN. § 18-8329(1) (2006).

238. § 18-8329(1)(d).

239. § 18-8310(1).

240. *Id.* Sex offenders who are not required to register for life may petition a court for release from registration requirements after 10 years, and, if successful, will no longer be subject to the residence restriction. *Id.*

State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Illinois	Persons convicted of a child sex offense, or certified as a sexually dangerous person whose victim was under 18 ²⁴¹	Within 500 feet of any school that persons under the age of 18 attend ²⁴²	Life ²⁴³	No ²⁴⁴
Indiana	Persons required to register as a sex offender who are 1) sexually violent predators, or 2) have been convicted of certain offenses involving a minor ²⁴⁵	Within 1,000 feet of school property, a youth program center, or public park ²⁴⁶	10 years to life ²⁴⁷	Yes ²⁴⁸

241. 720 ILL. COMP. STAT. 5/11-9.3(b-5), (c)(1) (2006).

242. *Id.* § 5/11-9.3(b-5).

243. *Id.* The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely. *Id.*

244. A “sexually dangerous person” may appeal the designation. 725 ILL. COMP. STAT. 205/9 (2006). But, even if successful, the offender will remain subject to the residence prohibition if his/her underlying conviction is a qualifying child sex offense.

245. IND. CODE ANN. § 35-42-4-11(a) (West 2006).

246. § 35-42-4-11(c).

247. IND. CODE ANN. § 11-8-8-19 (West 2006).

248. *Id.* The duty to register, and consequently the residence restriction, terminates after 10 years for certain offenders. A sexually violent predator may petition a court to have the SVP status removed 10 years after the initial classification. IND. CODE ANN. § 35-38-1-7.5(g) (West 2006).

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State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Iowa	Persons who have committed a criminal, aggravated, sexually violent, or other offense involving a minor ²⁴⁹	Within 2,000 feet of a elementary or secondary school or child care facility ²⁵⁰	Life ²⁵¹	No
Kentucky	Persons required to register as a sex offender ²⁵²	Within 1,000 feet of a school, preschool, public playground, or day care facility ²⁵³	20 years to life ²⁵⁴	Yes ²⁵⁵
Louisiana	Sexually violent predators ²⁵⁶	Within 1,000 feet of any elementary or secondary school, day care, playground, youth center, public swimming pool, or free standing video arcade ²⁵⁷	Life ²⁵⁸	No ²⁵⁹

249. IOWA CODE ANN. § 692A.2A(1), (2) (West 2006).

250. § 692A.2A(2).

251. *Id.* The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

252. KY. REV. STAT. ANN. § 17.545(1) (West 2006).

253. *Id.*

254. KY. REV. STAT. ANN. § 17.520(2)(a), (3) (West 2006).

255. *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the residence restriction, after 20 years. *Id.*

256. LA. REV. STAT. ANN. § 14:91.1(A)(2) (2006).

257. *Id.*

258. *Id.* The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely. *Id.*

259. *See* LA. REV. STAT. ANN. § 15:542.1 (2006) (containing no provision for reconsideration of the SVP classification after the sentencing court makes the initial determination). Section 2 of Acts 1999, No. 594 repealed paragraph (B)(4) of this section which allowed the defendant to petition the sentencing court annually for review of the SVP designation. *Id.*

State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Michigan	Persons required to register as a sex offender ²⁶⁰	Within 1,000 feet of school property ²⁶¹	10 years to life ²⁶²	Yes ²⁶³
Mississippi	Persons required to register as a sex offender ²⁶⁴	Within 1,500 feet of any elementary or secondary school or child care facility ²⁶⁵	10 years to life ²⁶⁶	Yes ²⁶⁷
Missouri	Persons convicted of certain sex offenses ²⁶⁸	Within 1,000 feet of any school or childcare facility ²⁶⁹	Life ²⁷⁰	No
Ohio	Persons convicted of a sexually oriented offense or child-victim oriented offense ²⁷¹	Within 1,000 feet of any school premises ²⁷²	Life ²⁷³	No

260. MICH. COMP. LAWS § 28.735(1) (2006).

261. MICH. COMP. LAWS §§ 28.735(1), 733(f) (2006).

262. MICH. COMP. LAWS § 28.725(6), (7) (2006).

263. *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the residence restriction, after 10 to 25 years. *Id.*

264. MISS. CODE ANN. § 45-33-25(4)(a) (2006).

265. *Id.*

266. MISS. CODE ANN. § 45-33-47(2)(a) (2006).

267. *Id.* Sex offenders who are not required to register for life may petition a court for release from registration requirements after 10 years, and, if successful, will no longer be subject to the residence restriction. *Id.*

268. MO. ANN. STAT. § 566.147(1) (West 2006).

269. *Id.*

270. The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely. *See id.*

271. OHIO REV. CODE ANN. § 2950.031(A) (West 2006).

272. *Id.*

273. *Id.* The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely. *Id.*

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State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Oklahoma	Persons registered as a sex offender ²⁷⁴	Within 2,000 feet of any school, educational institution, park, playground, or childcare facility ²⁷⁵	10 years to life ²⁷⁶	Yes ²⁷⁷
South Dakota	Persons required to register as a sex offender ²⁷⁸	Within 500 feet of any school, public park, playground, or public pool ²⁷⁹	10 years to life ²⁸⁰	Yes ²⁸¹
Tennessee	Persons required to register as a sex offender whose victim was a minor ²⁸²	Within 1,000 feet of any school, day care/child care facility, public park, playground, recreation center, or athletic field ²⁸³	10 years to life ²⁸⁴	Yes ²⁸⁵

274. OKLA. STAT. ANN. tit. 57, § 590 (West 2006).

275. *Id.*

276. OKLA. STAT. ANN. tit. 57, §§ 583(C), 584(J) (West 2006).

277. *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the residence restriction, after 10 years. *Id.*

278. S.D. CODIFIED LAWS § 22-24B-23 (2006).

279. S.D. CODIFIED LAWS §§ 22-24B-23, 22-24B-22(1) (2006).

280. S.D. CODIFIED LAWS §§ 22-24B-27 (2006).

281. *Id.* A sex offender may petition a court 10 years after conviction for release from the residency restriction. *Id.*

282. TENN. CODE ANN. § 40-39-211(a) (2006).

283. *Id.*

284. TENN. CODE ANN. § 40-39-207(a), (f)(1) (2006).

285. § 40-39-207(c). Sex offenders who are not required to register for life may petition the Tennessee Bureau of Investigation for release from registration requirements after 10 years, and, if successful, will no longer be subject to the residence restriction.

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State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Virginia	Adults convicted of certain sex offenses where the offender is more than 3 years older than the victim ²⁸⁶	Within 500 feet of the premises of a child day center, or primary, secondary, or high school ²⁸⁷	Life ²⁸⁸	No

286. VA. CODE ANN. § 18.2-370.3(A) (2006).

287. *Id.*

288. *Id.* The offender “shall be forever prohibited from residing” within the prohibited zone.
Id.

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TABLE 2 – PENALTIES FOR RESIDING WITHIN PROHIBITED ZONE

State	Felony/Misdemeanor	Punishment - 1st Violation	Punishment - 2nd or Subsequent Violations	Mental Element
Alabama	Class C felony ²⁸⁹	Imprisonment, 1 to 10 years ²⁹⁰	Same	Knowingly ²⁹¹
Arkansas	Class D felony ²⁹²	Imprisonment, up to 6 years ²⁹³	Same	Knowingly ²⁹⁴
Delaware	Class G felony ²⁹⁵	Imprisonment, up to 2 years ²⁹⁶	Same	Strict Liability ²⁹⁷
Florida	First degree misdemeanor or third degree felony depending on the degree of punishment for the qualifying sex offense ²⁹⁸	Misdemeanor, imprisonment up to 1 year; felony, imprisonment up to 5 years ²⁹⁹	Same	Strict Liability ³⁰⁰
Georgia ³⁰¹	Felony	Imprisonment, 10 to 30 years	Same	Knowingly

289. ALA. CODE § 15-20-26(h) (Westlaw through 2006 Reg. Sess.).

290. ALA. CODE § 13A-5-6(a)(3) (Westlaw through 2006 Reg. Sess.).

291. § 15-20-26(h).

292. ARK. CODE ANN. § 5-14-128(d) (2006).

293. ARK. CODE ANN. § 5-4-401(a)(5) (2006).

294. § 5-14-128(d).

295. DEL. CODE ANN. tit. 11, § 1112(a)(1) (2006).

296. DEL. CODE ANN. tit. 11, § 4205(b)(7) (2006).

297. The statute contains no culpability requirement, so strict liability is inferred. *See* tit. 11, § 1112(a)(1).

298. FLA. STAT. § 794.065(1) (2006).

299. FLA. STAT. § 775.082(3)(d), (4)(a) (2006).

300. The statute contains no culpability requirement, so strict liability is inferred. *See* § 794.065.

301. GA. CODE ANN. § 42-1-15(d) (2006).

State	Felony/Misdemeanor	Punishment - 1st Violation	Punishment - 2nd or Subsequent Violations	Mental Element
Idaho	Misdemeanor ³⁰²	Imprisonment, up to 6 months, fine up to \$1,000, or both ³⁰³	Same	Strict Liability ³⁰⁴
Illinois	Class 4 felony ³⁰⁵	Imprisonment, 1 to 3 years ³⁰⁶	Same	Knowingly ³⁰⁷
Indiana	Class D felony ³⁰⁸	Imprisonment, 6 months to 3 years, and fine not more than \$10,000 ³⁰⁹	Same	Knowingly, intentionally ³¹⁰
Iowa	Aggravated misdemeanor ³¹¹	Imprisonment, up to 2 years, and fine of \$500 to \$5,000 ³¹²	Same	Strict Liability ³¹³
Kentucky	First violation is a Class A misdemeanor. Second or subsequent violation is a Class D felony. ³¹⁴	Imprisonment, up to 1 year ³¹⁵	Imprisonment, 1 to 5 years ³¹⁶	Strict Liability ³¹⁷

302. IDAHO CODE ANN. § 18-8329(1) (2006).

303. IDAHO CODE ANN. § 18-113(1) (2006).

304. The statute contains no culpability requirement, so strict liability is inferred. *See* § 18-8329(1)(d).

305. 720 ILL. COMP. STAT. 5/11-9.3(d) (2006).

306. 730 ILL. COMP. STAT. 5/5-8-1(a)(7) (2006).

307. § 5/11-9.3(b-5).

308. IND. CODE ANN. § 35-42-4-11 (West 2006).

309. IND. CODE ANN. § 35-50-2-7(a) (West 2006).

310. § 35-42-4-11.

311. IOWA CODE ANN. § 692A.2A(3) (West 2006).

312. IOWA CODE ANN. § 903.1(2) (West 2006).

313. The statute contains no culpability requirement, so strict liability is inferred. *See* IOWA CODE ANN. § 692A.2A(2).

314. KY. REV. STAT. ANN. § 17.545(3) (West 2006).

315. KY. REV. STAT. ANN. § 532.090(1) (West 2006).

State	Felony/Misdemeanor	Punishment - 1st Violation	Punishment - 2nd or Subsequent Violations	Mental Element
Louisiana ³¹⁸	Misdemeanor	Imprisonment, up to 6 months, fine not to exceed \$1,000, or both	Same	Strict Liability ³¹⁹
Michigan ³²⁰	First violation is a misdemeanor. Second or subsequent violation is a felony.	Imprisonment up to 1 year, \$1,000 fine, or both	Imprisonment up to 2 years, \$2,000 fine, or both	Strict Liability ³²¹
Mississippi ³²²	Felony	Imprisonment up to 5 years, fine up to \$5,000, or both	Same	Strict Liability ³²³
Missouri	First violation is a class D felony. Second or subsequent violation is a class B felony. ³²⁴	Imprisonment, up to 4 years ³²⁵	Imprisonment, 5 to 15 years ³²⁶	Strict Liability ³²⁷

316. KY. REV. STAT. ANN. § 532.060(2)(d) (West 2006).

317. The statute contains no culpability requirement, so strict liability is inferred. *See* KY. § 17.545(1).

318. LA. REV. STAT. ANN. § 14:91.1(E) (2006).

319. The statute contains no culpability requirement, so strict liability is inferred. *See id.* § 14:91.1(A)(2).

320. MICH. COMP. LAWS § 28.735(2)(a), (b) (2006).

321. The statute contains no culpability requirement, so strict liability is inferred. *See* MICH. COMP. LAWS § 28.735(1) (2006).

322. MISS. CODE ANN. § 45-33-33(2) (2006).

323. The statute contains no culpability requirement, so strict liability is inferred. *See* MISS. CODE ANN. § 35-33-25(4)(a) (2006)

324. MO. ANN. STAT. § 566.147(4) (West 2006).

325. MO. ANN. STAT. § 558.011(1) (West 2006).

326. *Id.*

327. The statute contains no culpability requirement, so strict liability is inferred. *See* MO. CODE. ANN. § 566.147(1).

State	Felony/Misdemeanor	Punishment - 1st Violation	Punishment - 2nd or Subsequent Violations	Mental Element
Ohio ³²⁸	A person who violates the prohibition is subject to an action for injunctive relief	Injunction	Injunction	Strict Liability ³²⁹
Oklahoma ³³⁰	Misdemeanor	Fine not to exceed \$3,000	One year in county jail in addition to the fine	Willfully, intentionally
South Dakota	First violation is a class 6 felony; subsequent violations are class 5 felonies ³³¹	Imprisonment for 2 years, or fine of \$4,000, or both ³³²	Imprisonment for 5 years. Optional fine of \$10,000. ³³³	Strict Liability ³³⁴
Tennessee	Class E felony ³³⁵	Imprisonment, 1 to 6 years ³³⁶	Same	Knowingly ³³⁷
Virginia	Class 6 felony ³³⁸	Imprisonment, 1 to 5 years; or, jail up to 12 months and fine up to \$2,500 ³³⁹	Same	Knowingly ³⁴⁰

328. OHIO REV. CODE ANN. § 2950.031(B) (West 2006).

329. The statute contains no culpability requirement, so strict liability is inferred. *See id.* § 2950.031(A).

330. OKLA. STAT. ANN. tit. 57, § 590 (West 2006).

331. S.D. CODIFIED LAWS § 22-24B-23 (2006).

332. S.D. CODIFIED LAWS § 22-6-1(9) (2006).

333. § 22-6-1(8).

334. The statute contains no culpability requirement, so strict liability is inferred. *See* § 22-24B-23.

335. TENN. CODE ANN. § 40-39-211(e) (2006).

336. TENN. CODE ANN. § 40-35-112 (2006).

337. § 40-39-211(a).

338. VA. CODE ANN. § 18.2-370.3(A) (2006).

339. VA. CODE ANN. § 18.2-10(f) (2006).

340. § 18.2-370.3(A).

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TABLE 3 – SEX OFFENDER EMPLOYMENT RESTRICTIONS

State	Employment prohibition applies to:	Where is the offender prohibited from working?	How long is an offender subject to the restriction?	Possibility of release?
Alabama	Persons convicted of a “criminal sex offense” ³⁴¹	Within 2,000 feet of any school or child care facility ³⁴²	Life ³⁴³	No
Alabama	Persons convicted of a criminal sex offense <i>involving a child</i> ³⁴⁴	Within 500 feet of any school, child care facility, park, athletic field or facility, or other business or facility having a principal purpose of caring for, educating, or entertaining minors ³⁴⁵	Life ³⁴⁶	No
Florida	Sexual predators ³⁴⁷	At any business, school, day care center, park, playground, or other place where children regularly congregate ³⁴⁸	30 years to life ³⁴⁹	Yes ³⁵⁰

341. ALA. CODE §§ 15-20-26(a), 15-20-21(1) (Westlaw through 2006 Reg. Sess.).

342. § 15-20-26(a).

343. ALA. CODE § 15-20-33(a) (Westlaw through 2006 Reg. Sess.).

344. §§ 15-20-26(g), 15-20-21(1).

345. §§ 15-20-26(g).

346. § 15-20-33(a).

347. FLA. STAT. § 775.21(10)(b) (2006).

348. *Id.*

349. *Id.* § 775.21(6)(l).

350. *Id.* A sexual predator may petition a court for removal of the sexual predator designation 30 years after release. *Id.*

State	Employment prohibition applies to:	Where is the offender prohibited from working?	How long is an offender subject to the restriction?	Possibility of release?
Georgia	Persons required to register as a sex offender ³⁵¹	Within 1,000 feet of any child care facility, school, or church ³⁵²	10 years to life ³⁵³	Yes ³⁵⁴
Georgia	Sexually dangerous predators ³⁵⁵	Within 1,000 feet of an area where minors congregate ³⁵⁶	Life ³⁵⁷	No
Idaho	Persons required to register as a sex offender ³⁵⁸	At a day care center, group day care facility, or family day care home ³⁵⁹	10 years to life ³⁶⁰	Yes ³⁶¹
Indiana	Sexually violent predators ³⁶²	On school property, at youth program centers, or public parks ³⁶³	10 years to life ³⁶⁴	Yes ³⁶⁵

351. GA. CODE ANN. § 42-1-15(b)(1) (2006).

352. *Id.*

353. GA. CODE ANN. § 42-1-12(g) (2006).

354. *Id.* Effective July 1, 2006, sexual offenders may petition a court for release from registration requirements after 10 years. *Id.* If successful, the offender will no longer be subject to the employment restriction. *Id.*

355. GA. CODE ANN. § 42-1-15(b)(2).

356. *Id.* "Area where minors congregate" includes: public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public/community swimming pools. GA. CODE ANN. § 42-1-12(a)(3).

357. *See* GA. CODE ANN. § 42-1-14 (2006) (containing no provisions for reconsideration of the "sexually dangerous predator" designation after the initial determination is final).

358. IDAHO CODE ANN. § 18-8327(1) (2006).

359. *Id.*

360. IDAHO CODE ANN. § 18-8310(1) (2006).

361. After 10 years, a sex offender may 1) if not required to register for life, petition a court for release from registration requirements, and 2) petition a court for relief from the employment prohibition. IDAHO CODE ANN. §§ 18-8310(1), 18-8328. If successful with either petition, the offender will no longer be subject to the employment restriction. *Id.*

362. IND. CODE ANN. § 35-42-4-10(b) (West 2006) (effective July 1, 2006).

363. *Id.*

364. IND. CODE ANN. § 35-38-1-7.5(g) (West 2006).

365. *Id.* A sexually violent predator may petition a court to have the SVP status removed 10 years after the initial classification. *Id.*

State	Employment prohibition applies to:	Where is the offender prohibited from working?	How long is an offender subject to the restriction?	Possibility of release?
Michigan	Persons required to register as a sex offender ³⁶⁶	Within 1,000 feet of school property ³⁶⁷	10 years to life ³⁶⁸	Yes ³⁶⁹
Michigan	Persons convicted of a "listed [sex] offense" ³⁷⁰	By a school or allowed to work under contract in a school ³⁷¹	N/A	N/A
Oklahoma	Registered sex offenders ³⁷²	To work with or provide services to children or work on school premises ³⁷³	10 years to life ³⁷⁴	Yes ³⁷⁵
Tennessee	Persons required to register as a sex offender whose victim was a minor ³⁷⁶	Within 1,000 feet of any school, day care/child care facility, public park, playground, recreation center, or athletic field ³⁷⁷	10 years to life ³⁷⁸	Yes ³⁷⁹

366. MICH. COMP. LAWS § 28.734(1)(a) (2006).

367. MICH. COMP. LAWS §§ 28.734(1)(a), 28.733(f) (2006).

368. MICH. COMP. LAWS § 28.725(6), (7) (2006).

369. *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the employment restriction, after 10 to 25 years. *Id.*

370. MICH. COMP. LAWS § 380.1230a(10) (2006).

371. *Id.* Interestingly, the statute gives discretion to the school board to approve the hiring of a non-sex felon, but not a sex offender. *Id.*

372. OKLA. STAT. ANN. tit. 57, § 589(A) (West 2006).

373. *Id.*

374. OKLA. STAT. ANN. tit. 57, §§ 583(C), 584(J) (West 2006).

375. *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the employment restriction, after 10 years. *Id.*

376. TENN. CODE ANN. § 40-39-211(a) (2006).

377. *Id.*

378. TENN. CODE ANN. § 40-39-207(a), (f)(1) (2006).

379. TENN. CODE ANN. § 40-39-207(c) (2006). Sex offenders who are not required to register for life may petition the Tennessee Bureau of Investigation for release from registration requirements after 10 years, and, if successful, will no longer be subject to the employment restriction. *Id.*

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State	Employment prohibition applies to:	Where is the offender prohibited from working?	How long is an offender subject to the restriction?	Possibility of release?
Virginia	Adults convicted of certain sex offenses where the offender is more than 3 years older than the victim ³⁸⁰	On public or private elementary or secondary school or child day care center property ³⁸¹	Life ³⁸²	No

380. VA. CODE ANN. § 18.2-370.4(A) (2006).

381. *Id.*

382. *Id.* The offender “shall be forever prohibited from working” in the prohibited area. *Id.*

Appendix 1:

http://www.webstercity.com/departments/police_dept/692a.2a_map.asp

