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Where Will They Go - Sex Offender Residency Restrictions as Modern-Day Banishment

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WHERE WILL THEY GO? SEX OFFENDER RESIDENCY RESTRICTIONS AS MODERN-DAY BANISHMENT

Following the occurrence of several high-profile child abductions and murders in the 1980s and 1990s, parents in the United States intensely feared for the safety of their children. In an effort to appease these voters by appearing tough on crime, state and national legislators began to create strict requirements for ex-felons released from prison after being convicted of a sexual offense. First came registration laws so that police were aware of the location of these offenders. Next were online registries providing members of the public with details on where offenders were living and the particulars of their crimes. These were quickly followed by restrictions on where the sex offenders could reside.

Over twenty states have enacted sex offender residency restrictions since their inception in 1995. While the restrictions vary in terms of protected zones and an offender's required distance from those locations, most of the statutes prohibit sex offenders from living within a minimum of five hundred feet of a school or daycare facility. Various courts have upheld the constitutionality of these constraints. Yet, as these laws become increasingly prevalent, more and more jurisdictions on both the state and municipal levels are adopting them—and in stricter forms—in order to avoid becoming dumping grounds for the sex offenders of neighboring jurisdictions. The result is that some of the statutes, by their massive scope, ban offenders from living in entire cities.

As these laws become more widespread, the concern is that, eventually, these convicted criminals might have nowhere left to live. In that sense, though not analogous to the formal definition of the word, these sex offender residency restrictions appear to be a modern-day version of banishment—a form of punishment deemed unconstitutional in many jurisdictions. But can these laws truly be

called banishment? If so, what is the solution to the problem? These are questions this Note seeks to answer.

I. RESIDENCY RESTRICTIONS

A. Background

Sex offender residency restriction laws as they exist today are a response to a series of tragic events that occurred during the 1980s and early 1990s. The abduction and murder of Adam Walsh in 1981, the subsequent abduction and disappearance of Jacob Wetterling in 1989, and the abductions and murders of Polly Klaas in 1993 and Megan Kanka in 1994 led to a flood of media attention on the issue of protecting American children.¹ It was Megan Kanka's murder, however, that directed the focus on sex offenders. Out of all the events mentioned, hers was the only murder committed by a convicted sex offender who lived in her neighborhood.²

In the late 1980s, various states began to create sex offender registries in order to keep tabs on individuals convicted of various sex crimes.³ In 1990, Washington became the first state to supplement its registry by going one step further, creating a community notification law that required law enforcement to notify residents when a convicted sex offender moved into their neighborhood.⁴ Florida and Alabama soon followed suit, passing their own laws in 1996 and 1999, respectively.⁵ Following Megan Kanka's murder, Congress stepped in to create federal law on the matter, passing the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in 1994, which requires states to create registries of convicted sex offenders.⁶ In addition, Congress passed Megan's Law

¹ David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 604–06 (2006).

² *Id.* at 605.

³ Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 121 (2007).

⁴ *Id.*; WASH. REV. CODE ANN. § 4.24.550 (West 2005 & Supp. 2008) (authorizing the release of information about convicted sex offenders and kidnapping offenders through a public web site). See generally Recent Legislation, 108 HARV. L. REV. 787, 787 (1995) (explaining that Washington's 1990 law serves as a model for other sex offender notification initiatives by lawmakers and communities).

⁵ Steven J. Wernick, Note, *In Accordance With a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1157 (2006); see also ALA. CODE § 15-20-26(a) (LexisNexis Supp. 2007); FLA. STAT. ANN. § 947.1405 (West 2001 & Supp. 2008).

⁶ Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071(a) (2000 & Supp. 2005)); Singleton, *supra* note 1, at 605.

in 1996, requiring all states to implement some type of community notification in neighborhoods where sex offenders reside.⁷

In the meantime, states began a race to protect America's children, leading to the appearance of the first sex offender residency restriction statutes in Florida, Delaware, and Michigan in 1995.⁸ The typical residency restriction statute prohibits any sex offender from residing within a certain distance (usually somewhere between 1,000 and 2,500 feet) of places that are determined to be areas where children congregate.⁹ Such areas typically include schools, daycare centers, bus stops, and playgrounds.¹⁰ While a few states have adopted residency restrictions that apply only to sex offenders whose victims were minors, and others use a parole board's risk assessment to determine to whom the restrictions should apply,¹¹ most states' restrictions apply to all sex offenders—a broad category that can encompass everything from public urination and consensual sex among teenagers to aggravated rape and child molestation.¹²

B. Residency Restrictions Today

Today, more than twenty states have passed some type of sex offender residency restriction.¹³ Iowa enacted the strictest restriction that existed at the time in 2002, prohibiting sex offenders whose victims were minors from living within 2,000 feet of a school or registered childcare facility.¹⁴ Although the law was designed to protect the welfare of children in the state and prevent sex offenders from recidivating,¹⁵ the statute had consequences that few realized at

⁷ Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e)(2) (2000 & Supp. 2005)); Singleton, *supra* note 1, at 606.

⁸ Singleton, *supra* note 1, at 607; *see also* DEL. CODE ANN. tit. 11, § 1112(a) (2001) (enacted 1995) (prohibiting sex offenders from living within 500 feet of any school); FLA. STAT. ANN. § 947.1405(7) (enacted 1995) (prohibiting sex offenders whose victims were under age eighteen from living within 1,000 feet of a school, park, playground, public school bus stop, or other place where children regularly congregate); MICH. COMP. LAWS ANN. §§ 28.735(1), 28.733(f) (West 2004 & Supp. 2008) (enacted 1995) (prohibiting sex offenders from living within 1,000 feet of any "school safety zone").

⁹ MARCUS NIETO & DAVID JUNG, CAL. STATE LIBRARY, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 15 (2006), available at <http://www.library.ca.gov/crb/06/08/06-008.pdf>.

¹⁰ *Id.*

¹¹ *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US app. at 139-141 (2007), available at <http://hrw.org/reports/2007/us0907/us0907web.pdf> (listing and describing sex offender residency restrictions by state).

¹² *Id.* at 39-40.

¹³ *Id.* at 100.

¹⁴ Yung, *supra* note 3, at 124; *see also* IOWA CODE ANN. § 692A.2A (West 2003 & Supp. 2008).

¹⁵ Doe v. Miller, 405 F.3d 700, 720 (8th Cir. 2005) ("The Iowa statute [wa]s designed to

the time. The constitutionality of the law was quickly challenged because the result of the 2,000-foot restriction, as found by the United States District Court for the Southern District of Iowa, was to completely ban sex offenders from living in many of Iowa's small towns and cities.¹⁶ The court went on to explain,

[M]aps show that the two thousand foot circles cover virtually the entire city area. The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods. In smaller towns that have a school or child care facility, the entire town is often engulfed by an excluded area. In Johnson County alone, the towns of Lone Tree, North Liberty, Oxford, Shueyville, Solon, Swisher, and Tiffen are wholly restricted to sex offenders under § 692A.2A. Unincorporated areas and towns too small to have a school or child care facility remain available, as does the country, but available housing in these areas is not necessarily readily available.¹⁷

The court added that, although entirely unrestricted areas do exist within the state, these areas are exclusively limited to very small towns without any schools, or to farmland.¹⁸ On the basis of these findings, the court struck down the Iowa restriction, declaring it unconstitutional as a violation of the Ex Post Facto Clause as it was applied to those who committed their crimes prior to the law's enactment.¹⁹ The court also found the restriction unconstitutional, because it violated the Fourteenth Amendment's substantive and procedural due process rights for offenders.²⁰ Despite the district court's extensive findings in the case, the ruling was later overturned by the United States Court of Appeals for the Eighth Circuit.²¹ The Eighth Circuit focused on distinguishing the restriction from the old

reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime").

¹⁶ *Doe v. Miller*, 298 F. Supp. 2d 844, 869 (S.D. Iowa 2004) (finding that although the Iowa law did not "banish" sex offenders from towns on its face, it did so in practical application), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

¹⁷ *Id.* at 851 (internal citations omitted).

¹⁸ *Id.* at 869.

¹⁹ *Id.* at 880.

²⁰ *Id.*

²¹ *Doe v. Miller*, 405 F.3d 700, 723 (8th Cir. 2005) (holding that the Iowa legislature's decisions regarding restrictions on sex offenders were "reasonably related" to its regulatory purpose and that it was not successfully demonstrated that the restrictions amounted to retroactive punishment).

common law punishment of banishment²² and, in doing so, found the restriction to be non-punitive and therefore a constitutional regulatory law.²³

Other states have since followed Iowa's example, enacting even stricter laws. California citizens passed Proposition 83 in 2006, which prohibits all registered sex offenders from living within 2,000 feet of any school or park.²⁴ Georgia also passed its residency restriction in 2006, prohibiting all registered sex offenders from living within 1,000 feet of a school, childcare facility, church, school bus stop, or other place where minors congregate.²⁵ These restrictions have far-reaching effects, making it impossible for some offenders to find a place to live. One convict in Augusta, Georgia, was left with only two possible places to live once the restriction went into effect—both were hotels.²⁶ The only job he could find upon release was at a fast food restaurant; he could not afford a hotel bill for long and was ultimately left homeless.²⁷ His problems did not stop there; one lawyer found that there is only one homeless shelter in the entire state of Georgia willing to accept sex offenders.²⁸ Unfortunately, Georgia has also made it a policy to arrest any offenders who are homeless, arguing that these individuals are violating their responsibility to register under the state and federal laws since “you have to have an address.”²⁹ The statute is written so that a second violation of the registration laws means an automatic lifetime prison sentence for the violator.³⁰

These restrictions, when applied, severely limit an offender's ability to find housing upon release from prison because communities that have enacted such statutes, particularly communities with larger safety zones, have effectively blocked offenders from living in most urban areas.³¹ A good example of the real-world effects of these restrictions can be seen on the following maps of the City of Minneapolis. As one can see, even a 1,500-foot safety zone around schools and parks leaves an offender with very little housing options

²² *Id.* at 719–20.

²³ *Id.* at 723.

²⁴ Jennifer Warren, *Judge Blocks Part of Sex Offender Law*, L.A. TIMES, Nov. 8, 2006, at A32.

²⁵ GA. CODE ANN. § 42-1-15 (1997 & Supp. 2007).

²⁶ Shaila Dewan, *Homelessness Could Mean Life in Prison for Offender*, N.Y. TIMES, Aug. 3, 2007, at A13.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (quoting Sgt. Ray Hardin of the Richmond County Sheriff's Office in Atlanta).

³⁰ *Id.*

³¹ Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 352 (2007).

within the city. With minor exceptions, all of the areas left available are non-residential areas of the city, meaning there would be little to no housing options for offenders in those areas.³² This becomes a greater issue when you consider that landlords—even those in the unrestricted areas—have begun to evict discovered sex offenders.³³ As a result of these stark effects, the Minnesota Department of Corrections recommended that the state not adopt a statewide residency restriction,³⁴ and the state followed that recommendation. The end result of these expansive residency restrictions is that offenders will either live in a rural area of the state, leave the state entirely, or face the reality that they may be sent back to jail for violations of the strict registration or residency restriction statutes.

In addition to these broad residency restrictions, Georgia³⁵ and other states, such as Alabama,³⁶ Idaho,³⁷ Illinois,³⁸ Louisiana,³⁹ Michigan,⁴⁰ and South Dakota,⁴¹ have restrictions barring sex offenders from loitering within a certain distance of places where children typically gather. Some states also have restrictions barring offenders from working within certain distances of schools or daycare

³² See MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES 10 (2003, rev. 2004), available at [http://www.corr.state.mn.us/publications/legislativereports/pdf/2004/Lvl3SEXOFFENDERSreport2003\(revised2-04\).pdf](http://www.corr.state.mn.us/publications/legislativereports/pdf/2004/Lvl3SEXOFFENDERSreport2003(revised2-04).pdf).

³³ Ryan Hawkins, Note, *Human Zoning: The Constitutionality of Sex-Offender Residency Restrictions as Applied to Post-Conviction Offenders*, 5 PIERCE L. REV. 331, 339 (2007) (pointing out that three of the plaintiffs in *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), had rental applications rejected or were evicted once the landlords discovered their criminal records).

³⁴ MINN. DEP'T OF CORR., *supra* note 32, at 11.

³⁵ GA. CODE ANN. § 42-1-15 (1997 & Supp. 2007) (prohibiting sex offenders from residing or loitering within 1,000 feet of a school, child care facility, church, school bus stop, or other place where minors congregate).

³⁶ ALA. CODE § 15-20-26(f) (LexisNexis Supp. 2007) (prohibiting sex offenders from loitering within 500 feet of “a school, child care facility, playground, park, athletic field or facility, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors” and defining “loiter” under this subdivision as to be in a place without having any legitimate purpose or to remain in a place for longer than your legitimate purpose requires).

³⁷ IDAHO CODE ANN. § 18-8329 (Supp. 2008) (prohibiting registered sex offenders from residing or loitering within 500 feet of a school with students under eighteen years of age).

³⁸ 720 ILL. COMP. STAT. ANN. 5/11-9.3(b), (b-5) (West 2002 & Supp. 2008) (prohibiting child sex offenders from residing or loitering within 500 feet of a school).

³⁹ LA. REV. STAT. ANN. § 14:91.1 (2004 & Supp. 2008); LA. REV. STAT. ANN. § 15:538 (2005 & Supp. 2008) (prohibiting sex offenders whose offense involved a minor from stepping foot within 1,000 feet of a school, daycare facility, playground, public or private youth center, public swimming pool, or free standing video arcade facility).

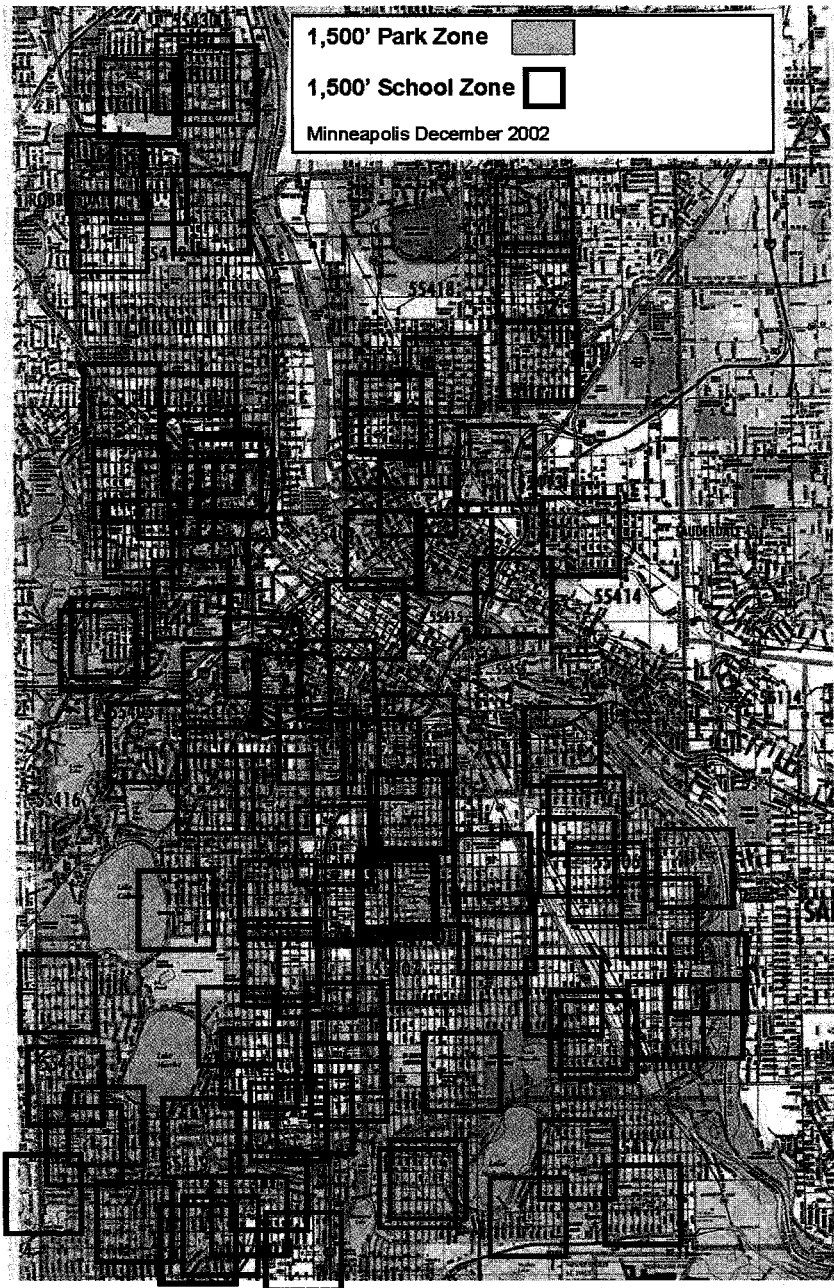
⁴⁰ MICH. COMP. LAWS §§ 28.733, 28.734, 28.735 (Supp. 2008) (applying a penalty to sex offenders residing or loitering within 1,000 feet of school property).

⁴¹ S.D. CODIFIED LAWS §§ 22-24B-22, 22-24B-24, 22-24B-28 (2006) (prohibiting sex offenders from residing or loitering within 500 feet of a school, public park, playground, or public pool).

facilities.⁴² These statutes, coupled with the residency restrictions, leave most offenders with little or no reason to travel into a state's urban cities. But even those offenders with reason to travel into these areas are likely to avoid them since a lack of notice is not a defense to violations of the laws.⁴³

⁴² See, e.g., GA. CODE ANN. § 42-1-15 (1997 & Supp. 2007) (prohibiting sex offenders from working within 1,000 feet of a school, child care facility, church, school bus stop, or other place where minors congregate); MICH. COMP. LAWS §§ 28.733, 28.734, 28.735 (Supp. 2008) (applying a penalty to sex offenders working within a student safety zone).

⁴³ See Yung, *supra* note 3, at 142–43 (noting the difficulties that sex offenders encounter when living in urban areas).



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⁴⁴ MINN. DEP'T OF CORR., *supra* note 32, at 20 app. C-2.



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⁴⁵ MINN. DEP'T OF CORR., *supra* note 32, at 21 app. C-3.

Municipalities have started to enact residency restrictions of their own—particularly cities in states that have not yet adopted a statewide residency restriction. New Jersey remains without a statewide residency restriction, but over 110 towns have passed residency restrictions,⁴⁶ most of which impose a 2,500-foot safety zone around “schools, parks, playgrounds, and day-care centers.”⁴⁷ Jersey City’s restriction prohibits any registered sex offender over the age of eighteen from living within 2,500 feet of any school, daycare center, day camp, city, county or state park, playground, commercial recreation facility (such as theaters, bowling alleys, sports fields, or exercise or sport facilities), convenience store, or public library.⁴⁸ Even if proximity to a school is the lone consideration, the only areas of the city that remain available are railroad tracks, a cemetery, and a mall with only a small amount of housing. Once the remainder of the restrictions are accounted for, even those minimal options disappear.⁴⁹

Communities in states that already enforce residency restrictions, such as Florida, have also passed their own ordinances on the matter, enforcing safety zones larger than those provided for by state law.⁵⁰ A Miami Beach ordinance requires that sex offenders whose victims were under the age of sixteen live at least 2,500 feet away from any school.⁵¹ This ordinance created a housing shortage for sex offenders that has left at least five such offenders seeking shelter under the Julia Tuttle Causeway.⁵² And they are not alone. According to the Florida Department of Corrections, such laws have left many sex offenders homeless throughout the state.⁵³

These state and local sex offender residency restrictions have proliferated across the country since they were first introduced. When the Iowa restriction was passed, neighboring states began to propose similar restrictions in an effort to avoid becoming dumping grounds for Iowa sex offenders who might leave the state in search of more readily available housing and jobs.⁵⁴ Indeed, states that would like to

⁴⁶ Yung, *supra* note 3, at 126.

⁴⁷ Matthew R. Petracca, Note, *Banished! – New Jersey’s Municipalities’ Unconstitutional Trend of Banishing Sex Offenders*, 31 SETON HALL LEGIS. J. 253, 259 (2006).

⁴⁸ Elizabeth Weill-Greenberg, *Sex Offenders? Not in My Backyard!*, CITY BELT (Hudson County, N.J.), Jan. 23, 2007, http://citybelt.typepad.com/citybelt/2007/01/sex_offenders_n.html.

⁴⁹ *Id.*

⁵⁰ See Wernick, *supra* note 5, at 1163–64; Yung, *supra* note 3, at 125–26.

⁵¹ Wernick, *supra* note 5, at 1164.

⁵² The Julia Tuttle Causeway is a portion of the interstate connecting Miami to Miami Beach. John Zarrella & Patrick Oppmann, *Florida Housing Sex Offenders Under Bridge*, CNN, Apr. 6, 2007, <http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/index.html>.

⁵³ *Id.*

⁵⁴ Peter D. Edgerton, Comment, *Banishment and the Right to Live Where You Want*, 74 U. CHI. L. REV. 1023, 1054 (2007) (citing Monica Davey, *Iowa’s Residency Rules Drive Sex*

avoid becoming a safe haven for sex offenders are left with little choice but to implement residency restrictions of their own—the stricter, the better—to avoid an influx of convicts into their jurisdictions.⁵⁵ In addition, Congress has been passing laws to nationalize the treatment of sex offenders. Congress required all states to register their sex offenders in 1994 and required states to implement community notification laws in 1996.⁵⁶ Most recently, in 2006, Congress passed the Adam Walsh Act, which creates a national sex offender registry, makes failure to register a federal crime, expands the amount of information that offenders must provide when they register, increases the categories of offenders required to register, and lengthens the period during which they are required to remain registered.⁵⁷ Congress made the receipt of certain federal funds conditional on a state implementing the regulations outlined by the Act, further compelling states to implement the newer, stricter registration requirements.⁵⁸ If this trend continues, it will only be a matter of time before Congress passes a national residency restriction statute, especially considering the constant desire of politicians to appear tough on crime.

II. BANISHMENT

A. History

While the use of banishment as punishment dates back as far as 2285 B.C.,⁵⁹ banishment became connected with America when England began sending convicts abroad to both America and Australia in the eighteenth century.⁶⁰ Ireland and Scotland also participated in this form of banishment, termed “transportation.”⁶¹

Offenders Underground, N.Y. TIMES, Mar. 16, 2006, at A1).

⁵⁵ Yung, *supra* note 3, at 148–49.

⁵⁶ See *supra* notes 6–7 and accompanying text.

⁵⁷ See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 42 U.S.C.); HUMAN RIGHTS WATCH, *supra* note 11, at 37–38; OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION: PROPOSED GUIDELINES 4–5 (2007), available at http://www.ojp.gov/smart/pdfs/proposed_somaguidelines.pdf.

⁵⁸ See OFFICE OF THE ATT’Y GEN., *supra* note 57, at 6 (pointing out that Section 125 of the Act stipulates a mandatory 10 percent reduction in federal justice assistance funding for states that refuse to or cannot implement the law to a substantial degree).

⁵⁹ Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 459 (1998) (citing THE OLDEST CODE OF LAWS IN THE WORLD: THE CODE OF LAWS PROMULGATED BY HAMMURABI, KING OF BABYLON, B.C. 2285–2242 at 31 (C.H.W Johns Trans., 1911)).

⁶⁰ See *id.* at 461–62.

⁶¹ *Id.* at 462.

Though this mode of punishment was outlawed in England in the mid-nineteenth century,⁶² its use continued in the United States. Beginning with colonial America, the government banished persons who violated laws or otherwise behaved in an inappropriate manner.⁶³

B. Banishment Today

Despite its prior use in the United States, many states now explicitly forbid the use of banishment. At least fifteen states currently outlaw the use of banishment in their constitutions.⁶⁴ In addition to those that explicitly outlaw the practice, most state and federal courts have found banishment illegal.⁶⁵ However, at least five states permit the use of banishment, to varying degrees.⁶⁶ Georgia has upheld 158 of 159 county banishments—which banish offenders from

⁶² *Id.* at 462–63.

⁶³ Matthew D. Borrelli, Note, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 471 (2003).

⁶⁴ Snider, *supra* note 59, at 465; *see, e.g.*, ALA. CONST. art. I, § 30 (“[N]o citizen shall be exiled.”); ARK. CONST. art. II, § 21 (“[N]or shall any person, under any circumstances, be exiled from the State.”); GA. CONST. art. I, § 1, para. 21 (“Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime.”); ILL. CONST. art. I, § 11 (“No person shall be transported out of the State for an offense committed within the State.”); KAN. CONST. § 12 (“No conviction within the state shall work a forfeiture of estate.”); MD. CONST. art. XXIV (“[N]o man ought to be . . . outlawed, or exiled . . . but by the judgment of his peers, or by the Law of the land.”); MASS. CONST. pt. 1, art. XII (“[N]o subject shall be . . . exiled . . . but by the judgment of his peers, or the law of the land.”); NEB. CONST. art. I, § 15 (“[N]o conviction shall work . . . forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the state.”); N.H. CONST. pt. 1, art. XV (“No subject shall be . . . exiled . . . but by the judgment of his peers, or the law of the land”); N.C. CONST. art. I, § 19 (“No person shall be . . . outlawed, or exiled . . . but by the law of the land.”); OHIO CONST. art. I, § 12 (“No person shall be transported out of the state, for any offense committed within the same”); OKLA. CONST. art. II, § 29 (“No person shall be transported out of the State for any offense committed within the State . . . without his consent, except by due process of law”); TENN. CONST. art. I, § 8 (“[N]o man shall be . . . outlawed, or exiled . . . but by the judgment of his peers or the law of the land.”); TEX. CONST. art. I, § 20 (“No citizen shall be outlawed. No person shall be transported out of the State for any offense committed within the same.”); W. VA. CONST. art. III, § 5 (“No person shall be transported out of, or forced to leave the State for any offence committed within the same”).

⁶⁵ Snider, *supra* note 59, at 466.

⁶⁶ Borrelli, *supra* note 63, at 478; *see also* Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (holding conditions of probation valid so long as condition reasonably relates to rehabilitation); State v. Collett, 208 S.E.2d 472, 472–73 (Ga. 1974) (holding banishment beyond the borders of the state unconstitutional but upholding banishment from a seven-county area as a condition of parole); Cobb v. State, 437 So. 2d 1218, 1220–21 (Miss. 1983) (finding that there was no violation of constitutional provision when probation was not unreasonable or arbitrary and did not violate public policy or judicial authority); State v. James, 978 P.2d 415, 416–18 (Or. Ct. App. 1999) (finding that an exclusion proceeding is not a “criminal proceeding” for purposes of determining double jeopardy issue); State v. Jacobs, 692 P.2d 1387, 1389 (Or. Ct. App. 1984) (finding condition of probation to be excessive under state statute without reaching state constitutional issue); State v. Nienhardt, 537 N.W.2d 123, 125–26 (Wis. Ct. App. 1995) (stating, without deciding, that probation conditions may impinge on constitutional rights if such conditions are not overly broad and are reasonably related to the person’s rehabilitation).

all but one county in the state—even though the two counties to which prosecutors typically seek to banish offenders are Ware County (“a remote, sparsely populated area in southern central Georgia”⁶⁷) and Echols County (where “[t]here are no restaurants, hotels or banks, and only four thousand residents in the county”⁶⁸). This form of banishment has effectively led to banishment from the state, since the options for housing and work in those counties are minimal.⁶⁹ Despite the fact that interstate banishment is forbidden by the Georgia Constitution, the courts in Georgia have found this type of banishment within the state acceptable.⁷⁰ Mississippi, Florida, Wisconsin, and Oregon also allow banishment, but restrict its use only to situations where it is reasonable and in the interest of the defendant’s rehabilitation.⁷¹ Additionally, the State of Washington permits banishment in accordance with tribal customs.⁷² Aside from these examples, some state courts have allowed banishment as a condition of pardon or parole, but nearly every court reviewing banishment as a condition of probation or suspension of sentence has found the practice unacceptable.⁷³

C. What is Banishment?

Despite the long history of banishment as punishment, there remains little scholarship on the subject. One explanation, offered by Garth Snider, is that banishment is most often used as a condition of probation or parole. Very few defendants challenge the conditions, and, even when challenges arise, most courts defer to the discretion of the trial judge.⁷⁴ As a result of this lack of academic review, there is little material defining banishment as it is used today, and, in fact, there seems to be no single definition upon which courts universally rely. Justice Brewer, dissenting in *United States v. Ju Toy*,⁷⁵ cited the Black’s Law Dictionary definition of banishment: “punishment

⁶⁷ Snider, *supra* note 59, at 455.

⁶⁸ Jason S. Alloy, Note, “158-County Banishment” in *Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1099 (2002).

⁶⁹ See *id.* at 1103.

⁷⁰ Edgerton, *supra* note 54, at 1038–39; see also, e.g., *Collett*, 208 S.E.2d at 474 (upholding banishment from a seven-county area as a condition of parole); *Sanders v. State*, 577 S.E.2d 94, 96 (Ga. Ct. App. 2003) (authorizing banishment as a “reasonable condition of probation or suspension of sentence”).

⁷¹ *Borrelli*, *supra* note 63, at 479.

⁷² See *State v. Roberts*, 894 P.2d 1340, 1341 (Wash. Ct. App. 1995); Edgerton, *supra* note 54, at 1038.

⁷³ Snider, *supra* note 59, at 466.

⁷⁴ *Id.* at 456.

⁷⁵ 198 U.S. 253 (1905).

inflicted on criminals, by compelling them to quit a city, place, or country, for a specified period of time, or for life.”⁷⁶ He went on to cite another dictionary, defining banishment as “[a] punishment by forced exile, either for years or for life, inflicted principally upon political offenders, “transportation” being the word used to express a similar punishment of ordinary criminals.”⁷⁷ Some say that banishment is a person’s exile from a city, country, or state for some length of time, during which the person is prohibited from returning.⁷⁸ It has even been explained simply as being “expelled from . . . the community.”⁷⁹ Others, however, insist that when the word banishment is used, it is referring to an exile from a large geographic area, such as a state or country.⁸⁰ Still others claim that banishment is more than merely having a restriction placed on where you can go. For instance, the Iowa Supreme Court in *State v. Seering*⁸¹ stated that “true banishment goes beyond the mere restriction of ‘one’s freedom to go or remain where others have the right to be: it often works a destruction on one’s social, cultural, and political existence.”⁸² Likewise, other courts have claimed that banishment was a punishment for “[t]he most serious offenders . . . after which they could neither return to their original community, nor, reputation tarnished, be admitted easily into a new one.”⁸³ Needless to say, there does not seem to be any single definition of banishment that is utilized by courts today, and, thus, there remains no clear legal standard for banishment.⁸⁴

III. RESIDENCY RESTRICTIONS AS BANISHMENT

Although courts have not yet adopted a unified definition of what it means to be “banished,” all the definitions courts have used seem to have common characteristics. Each provides for: (1) “the expulsion in fact of a person from a community,” (2) banishment “to a

⁷⁶ *Id.* at 269–70 (Brewer, J., dissenting) (quoting BLACK’S LAW DICTIONARY).

⁷⁷ *Id.* at 270 (quoting RAPALJE & LAWRENCE’S LAW DICTIONARY 109 (vol. 1)).

⁷⁸ Borrelli, *supra* note 63, at 469.

⁷⁹ Smith v. Doe, 538 U.S. 84, 98 (2003).

⁸⁰ Delgado v. Carmichael, 332 U.S. 388, 391 (1947) (stating that deportation is the equivalent of banishment); *State v. Collett*, 208 S.E.2d 472, 473 (Ga. 1974) (stating that legislators only intended for the constitutional prohibition on banishment to refer to banishment from the state); BLACK’S LAW DICTIONARY 154, 614 (8th ed. 2004).

⁸¹ 701 N.W.2d 655 (Iowa 2005).

⁸² *Id.* at 667–68 (quoting *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 897 (2d Cir. 1996)).

⁸³ *Smith*, 538 U.S. at 98 (citing T. BLOMBERG & K. LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 30–31 (2000)).

⁸⁴ Yung, *supra* note 3, at 133 (noting that the Supreme Court has still not defined the parameters of “banishment”).

non-institutional setting,” and (3) “sever[ing] ties to a community.”⁸⁵ Applying these factors, it seems clear that sex offender residency restrictions fall into the “banishment” classification. While not all residency restrictions bar sex offenders from entire neighborhoods, those with larger safety zones certainly encourage, if not compel, sex offenders to move out of entire cities. Even restrictions with smaller safety zones can still be described as expelling a person from a community, because a particular neighborhood within a city could be considered a community. In addition, none of the residency restrictions indicate that the sex offender should end up in a prison, mental facility, or other institutional setting. The sex offender is free to reside and, in certain states, work and loiter wherever he likes, so long as it is not within the specified distance of a protected property. Finally, all of these laws clearly intend to sever a sex offender’s ties to the community.

The de facto effect of these residency restrictions is that many sex offenders have been forced to move out of communities to which they have been tied their entire lives.⁸⁶ They cannot live or even stay overnight with their family members⁸⁷ and, in some cases, can no longer work at businesses they themselves own.⁸⁸ In many cases, these restrictions have resulted in sex offenders leaving the state where they have lived their entire lives to move to a state where there are not such harsh restrictions on them—namely states without any residency restrictions.⁸⁹ Not only do these laws work to sever community ties, but, at least in part, this is their intended effect. When the first draft of the Georgia restriction was unveiled, the Georgia House Majority Leader stated that it was his intent to make it “so onerous, costly, [and] inconvenient (for sex offenders) that they leave Georgia. I don’t care where [they live] as long as it’s not here.”⁹⁰

The Supreme Court has yet to address the constitutionality of sex offender residency restrictions,⁹¹ but the highest court to do so, the United States Court of Appeals for the Eighth Circuit, has expressly rejected a claim that these laws serve to exile sex offenders from communities. In *Doe v. Miller*,⁹² the court said,

⁸⁵ *Id.* at 134.

⁸⁶ HUMAN RIGHTS WATCH, *supra* note 11, at 102–06.

⁸⁷ *Id.*

⁸⁸ *Mann v. Ga. Dep’t of Corr.*, 653 S.E.2d 740 (Ga. 2007).

⁸⁹ HUMAN RIGHTS WATCH, *supra* note 11, at 106.

⁹⁰ Vicky Eckenrode, *Bill to Focus on Sex Crimes*, AUGUSTA CHRON., Sept. 29, 2005, at B1 (quoting House Majority Leader Jerry Keen).

⁹¹ HUMAN RIGHTS WATCH, *supra* note 11, at 127.

⁹² 405 F.3d 700 (8th Cir. 2005).

While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, [Iowa's statute] restricts only where offenders may reside. It does not "expel" the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence. With respect to many offenders, the statute does not even require a change of residence.⁹³

The court in *Miller* used the factors outlined in *Kennedy v. Mendoza-Martinez*⁹⁴ to determine whether the residency restrictions were punitive and, therefore, unconstitutional on ex post facto grounds.⁹⁵ In doing so, the court focused on the fact that the residency restrictions did not resemble a historical and traditional form of punishment.⁹⁶ The law was not restrictive enough for the court to see the analogy to traditional banishment since it still enabled offenders to pass through cities and towns and merely restricted their place of residence.⁹⁷

However, the restrictions resemble banishment more than the court was willing to admit. As the dissent in *Miller* pointed out, the restrictions fall into several of the definitions that have been given to "banishment."⁹⁸ The plaintiffs in the case "could neither return to their original community nor, reputation tarnished, be admitted easily into a new one,"⁹⁹ especially when the continuing addition of more state and municipal residency restrictions is considered. The plaintiffs and other offenders in states with residency restrictions are prevented from living in entire towns, and, where they are able to live, there are very few housing options because the locations are generally rural or industrial.¹⁰⁰ Even if they do find an apartment in which to live, there is no guarantee they will be given a lease as the stigma of being found

⁹³ *Id.* at 719.

⁹⁴ 372 U.S. 144, 168-9 (1963) (outlining the factors for determining when a law has a punitive effect for ex post facto purposes including (1) whether the law has been regarded in our history and traditions as punishment, (2) whether it promotes the traditional aims of punishment, (3) whether it imposes an affirmative disability or restraint, (4) whether it has a rational connection to a nonpunitive purpose, and (5) whether it is excessive with respect to that purpose).

⁹⁵ *Miller*, 405 F.3d at 718-19.

⁹⁶ *Id.*

⁹⁷ *Id.* at 719.

⁹⁸ *Id.* at 724 (Melloy, J., concurring and dissenting).

⁹⁹ *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 98 (2003)).

¹⁰⁰ *Id.*

on the sex offender registry prompts many landlords to refuse to rent to them.¹⁰¹

Some might argue that the similarities the restrictions bear to banishment are not enough. They may well point to the fact that courts have continually seen banishment as it was traditionally understood: banning an individual completely from a town, city, or state, thereby prohibiting them from even stepping foot in the jurisdiction. To support this argument, they could point not only to the court's decision in *Miller*, but also to other decisions, such as *City of Renton v. Playtime Theatres*.¹⁰² In that case, the Supreme Court held that a municipal ordinance that effectively banned adult movie theatres from the city did not amount to a complete ban.¹⁰³ There, the ordinance prohibited adult movie establishments from "locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."¹⁰⁴ In doing so, the law left only five percent of the land in the city for these theatres to choose from, and that land was either already occupied or was not commercially viable for the theatres.¹⁰⁵ The Supreme Court found that there was no constitutional violation in the ordinance, despite its practical effect of banning adult movie theatres from the city, because the theatres could still "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees."¹⁰⁶

Although residency restrictions do ban sex offenders from living, working, and loitering in certain areas, the laws do not completely ban sex offenders from stepping foot within a city or town in the same way an order of banishment would. However, the larger residency restrictions clearly prohibit sex offenders from residing in many smaller towns and cities.¹⁰⁷ It is also important to recognize that, as the laws proliferate and become more and more restrictive, the offenders will be left with fewer and fewer places to live. In addition, even when the residency restrictions do not completely ban a sex offender from residing within a municipality, they, along with municipal restrictions and work or loitering restrictions, leave offenders with little to no reason to enter entire cities. Aside from the odd shopping trip or a visit to their family and friends,¹⁰⁸ there

¹⁰¹ *Id.* at 706–07 (majority opinion).

¹⁰² 475 U.S. 41 (1986).

¹⁰³ *Id.* at 46.

¹⁰⁴ *Id.* at 43.

¹⁰⁵ *Id.* at 53.

¹⁰⁶ *Id.* at 54.

¹⁰⁷ See *Miller*, 405 F.3d at 724 (Melloy, J., concurring and dissenting) (discussing the effect of heightened residency restrictions on sex offenders in Iowa).

¹⁰⁸ Which, in many cases, would have to be a day visit since most offenders are not

remains no reason for offenders to even set foot within these cities. Even if a town does not have a work restriction, the residency restriction itself acts as a restriction on where they can work, as many offenders may not be able to afford long commutes to work. The end result is that, even though offenders are still free to pass through cities and towns, the likelihood that they would do so is significantly reduced. As a result, courts should realize that what these state and municipal legislators are doing is effectively implementing banishment under a more palatable name. These laws do everything they can to prevent offenders from living within certain cities and states, while still being flexible enough to avoid being considered analogous to traditional banishment. The result is that legislators get the best of both worlds—they rid their jurisdiction of sex offenders while implementing a form of punishment that should be considered punitive and unconstitutional on both state and federal grounds.

Indeed, other courts have found that lesser restrictions may constitute banishment. In *In re Mannino*,¹⁰⁹ a California court found a condition of probation requiring a protestor to stay off college campuses to constitute banishment, which in California was itself an unlawful form of probation.¹¹⁰ The Washington Court of Appeals found a probation condition preventing a convicted murderer from living in the same county as his victim's family for the remainder of his life to constitute an order of banishment.¹¹¹ In addition, some courts considering issues of banishment have analogized the punishment to cases involving lesser geographic restrictions. For example, the Massachusetts Supreme Court found probation conditions prohibiting a convicted prostitute from entering the French Quarter in New Orleans,¹¹² requiring a convicted harasser to stay out of a town,¹¹³ and barring individuals from bars or schools¹¹⁴ similar to a probation condition banishing a convict from the state.¹¹⁵ Thus it seems clear that other courts see restrictions less than banishment

allowed to sleep within a safety zone and must be able to be found at their residence during nighttime hours. *See, e.g.,* HUMAN RIGHTS WATCH, *supra* note 11, at 109.

¹⁰⁹ 92 Cal. Rptr. 880 (Cal. Ct. App. 1971).

¹¹⁰ *Id.* at 887 (citing *People v. Blakeman*, 339 P.2d 202, 202–03 (Cal. Dist. Ct. App. 1959)).

¹¹¹ *State v. Schimelpfenig*, 115 P.3d 338, 339 (Wash. Ct. App. 2005).

¹¹² *Commonwealth v. Pike*, 701 N.E.2d 951, 960 (Mass. 1998) (citing *State v. Morgan*, 389 So. 2d 364, 366 (La. 1980)).

¹¹³ *Id.* (citing *State v. Nienhardt*, 537 N.W.2d 123, 125 (Wis. Ct. App. 1995)).

¹¹⁴ *Id.* (citing *State v. Charlton*, 846 P.2d 341 (N.M. Ct. App. 1992)).

¹¹⁵ *Pike*, 701 N.E.2d 951.

from an entire city, county, or state to constitute, or at least be highly analogous and relevant to, banishment.

Because these residency restrictions are so much like banishment, one must look at how state courts have addressed banishment to see how state and federal courts should evaluate residency restrictions. As previously mentioned, a number of states stipulate in their constitutions that all banishment is unlawful.¹¹⁶ Some states, however, only forbid banishment where there is a lack of due process.¹¹⁷ In addition, a number of states have attempted to maneuver around constitutional provisions disallowing banishment by distinguishing between banishment required as a condition of pardon or parole and banishment voluntarily agreed to as a condition of probation or early release, with varying results.¹¹⁸ When state courts have allowed banishment as a condition of probation or early release, they have applied certain factors to ensure that the probationer's constitutional rights were infringed only to the extent that was practical and necessary. While these factors differ in various states, every state with banishment case law has set certain requirements that the banishment must meet. These factors help determine whether or not sex offender residency restriction provisions would survive the same restrictions placed on the law of banishment.

A. California

In California, a state that also has sex offender residency restrictions, the courts are given great latitude in imposing probation conditions, provided that the conditions are related to rehabilitation and public safety.¹¹⁹ The California Penal Code allows a court to impose any

reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally

¹¹⁶ See sources cited *supra* note 64.

¹¹⁷ Snider, *supra* note 59, at 465.

¹¹⁸ *Id.* at 466; see also Millsaps v. Strauss, 185 S.W.2d 933, 937-38 (Ark. 1945) (holding that neither Arkansas's constitution nor its statutes confer power on judges to banish inmates from the state); Bird v. State, 190 A.2d 804, 807 (Md. 1963) (holding that banishment, imposed as a condition to suspension of a prison sentence, is improper); State *ex rel.* Halverson v. Young, 154 N.W.2d 699, 703 (Minn. 1967) (holding that probation cannot properly be revoked based on a condition of banishment); Ray v. McCoy, 321 S.E.2d 90, 92-93 (W. Va. 1984) (noting that a West Virginia inmate may knowingly waive her constitutional protection against banishment).

¹¹⁹ *In re Mannino*, 92 Cal. Rptr. 880, 882 (Cal. Ct. App. 1971).

and specifically for the reformation and rehabilitation of the probationer.¹²⁰

However, a condition of probation which “relates to conduct which is not in itself criminal, and . . . requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid.”¹²¹ Since the residency restrictions regulate conduct which is not itself criminal—living in proximity to a school—it must be determined in what situations California courts are permitted to regulate non-criminal conduct. According to the Supreme Court of California, probation conditions can regulate conduct that is not itself criminal so long as those restrictions are “reasonably related to the crime of which the defendant was convicted or to future criminality.”¹²² Sentencing courts violate this standard, however, when their determination is arbitrary or capricious or “exceeds the bounds of reason, all of the circumstances being considered.”¹²³ Using this standard, the court in *Mannino* found a probation condition that barred a protestor convicted of assault from being present on any school campus without permission to be overly broad, noting that “banishment itself is a prohibited term of probation.”¹²⁴ The court explained that while his presence on a school campus for the purpose of actively engaging in a protest could lead to future criminal activity, the condition of probation was applied to any and all presence on school campuses.¹²⁵ The court held that this restraint on the probationer’s personal liberties was too great under the circumstances and, therefore, struck down the condition.¹²⁶

If California courts properly applied the above standard to the state residency restriction, it would likely be struck down. The restriction obviously regulates non-criminal conduct and, thus, under standards articulated by the California Supreme Court, can withstand judicial scrutiny only if it is reasonably related to the crime the probationer committed or to that probationer’s future criminality. The California sex offender residency restriction, better known as Proposition 83 or Jessica’s Law, would fail under this analysis because the law restricts

¹²⁰ CAL. PENAL CODE § 1203.1(j) (West 2004) (emphasis added).

¹²¹ *In re Mannino*, 92 Cal. Rptr. at 883 (quoting *People v. Dominguez*, 64 Cal. Rptr. 290, 293 (Cal. Ct. App. 1967)).

¹²² *People v. Lent*, 541 P.2d 545, 548 (Cal. 1975).

¹²³ *People v. Warner*, 574 P.2d 1237, 1239 (Cal. 1978) (quoting *People v. Giminez*, 534 P.2d 65, 67 (Cal. 1975)).

¹²⁴ 92 Cal. Rptr. at 887.

¹²⁵ *Id.*

¹²⁶ *Id.*

all registered sex offenders from living within 2,000 feet of a school or park.¹²⁷ However, not every registered sex offender committed a sexual crime against a child—and it would be difficult to claim that such a restriction is reasonably related to a person’s future criminality unless their crime had, in fact, been against a child. In addition, the restriction applies to all registered sex offenders regardless of their risk of re-offense. Some convicts are forced to register for having consensual sex with a girlfriend or boyfriend who was under the age of consent at the time.¹²⁸ These offenders are unlikely to recommit a sexual crime, since they are well over the age of consent by the time they get out of prison. However, the residency restriction applies to them, regardless of the fact that they are considered to be a low risk for re-offense.

¹²⁷ LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 83: SEX OFFENDERS, SEXUALLY VIOLENT PREDATORS. PUNISHMENT, RESIDENCE RESTRICTIONS AND MONITORING. INITIATIVE STATUTE. (Nov. 6, 2006), http://www.lao.ca.gov/ballot/2006/83_11_2006.pdf (overview of Proposition 83 by the legislature’s nonpartisan fiscal and policy analysis office).

¹²⁸ ALA. CODE §§ 13A-6-63, 13A-11-200 (LexisNexis 2005); ALASKA STAT. §§ 11.41.434, 12.63.010, 12.63.100 (2006); ARIZ. REV. STAT. ANN. § 13-1405 (2001); ARIZ. REV. STAT. ANN. § 13-3821 (2001 & Supp. 2007); ARK. CODE ANN. § 5-14-110 (2006 & Supp. 2007); ARK. CODE ANN. §§ 12-12-903, 12-12-905 (2003 & Supp. 2007); COLO. REV. STAT. §§ 16-22-103, 18-3-402, 18-3-411 (2007); CONN. GEN. STAT. ANN. § 53a-70 (2007); CONN. GEN. STAT. ANN. §§ 54-250, 54-251 (2001 & Supp. 2008); FLA. STAT. ANN. § 775.21 (West 2005 & Supp. 2008); FLA. STAT. ANN. § 794.011 (West 2007); IND. CODE ANN. §§ 11-8-8-5, 11-8-8-7 (West Supp. 2008); IND. CODE ANN. § 35-42-4-9 (West 2004 & Supp. 2008); LA. REV. STAT. ANN. § 14:92(A)(7) (2004); LA. REV. STAT. ANN. §§ 15:541, 15:542 (2005 & Supp. 2008); ME. REV. STAT. ANN. tit. 17-A, § 254 (2006); ME. REV. STAT. ANN. tit. 34-A, §§ 11203, 11222 (Supp. 2007); MD. CODE ANN. CRIM. PROC. §§ 11-704, 11-701 (LexisNexis 2008); MD. CRIM. LAW § 3-304 (LexisNexis 2002 & Supp. 2007); MASS. GEN. LAWS ANN. ch. 6, §§ 178C, 178D (West 2006 & Supp. 2008); MASS. GEN. LAWS ANN. ch. 272, § 35A (West 2000); MICH. COMP. LAWS ANN. §§ 28.722, 28.723, 750.520e (West 2004 & Supp. 2008); MINN. STAT. ANN. § 243.166, Subd. 1b(a)(1)(iii) (2006 & Supp. 2008); MINN. STAT. ANN. § 609.345 (2003 & Supp. 2008); MO. ANN. STAT. § 566.032 (West 2003 & Supp. 2008); MO. ANN. STAT. § 589.400 (West 1999 & Supp. 2008); N.H. REV. STAT. ANN. §§ 632-A:2, 651-B:1, 651-B:2 (LexisNexis 2007); N.J. REV. STAT. § 2C:7-2 (West 2005 & Supp. 2008); N.J. REV. STAT. §§ 2C:14-2, 2C:14-3b (West 2005); N.C. GEN. STAT. §§ 14-27.7A, 14-208.6, 14-208.7 (2007); N.D. CENT. CODE §§ 12.1-20-07, 12.1-32-15 (1997 & Supp. 2007); OKLA. STAT. ANN. tit. 21, § 1123 (West 2002 & Supp. 2008); OKLA. STAT. ANN. tit. 57, § 582 (West 2004 & Supp. 2008); R.I. GEN. LAWS §§ 11-37.1-2, 11-37.1-3 (2002 & Supp. 2007); S.C. CODE ANN. § 16-3-655 (2003 & Supp. 2007); S.C. CODE ANN. § 23-3-430 (2007); S.D. CODIFIED LAWS §§ 22-22-7, 22-24B-2 (2006); S.D. CODIFIED LAWS § 22-24B-1 (2006 & Supp. 2008); TENN. CODE ANN. §§ 39-13-506, 40-39-202, 40-39-203 (2006 & Supp. 2007); TEX. CODE CRIM. PROC. ANN. art. 62.001, 62.002 (Vernon 2006 & Supp. 2008); TEX. PENAL CODE ANN. § 21.11 (Vernon 2003); UTAH CODE ANN. §§ 76-5-401, 76-5-401.2 (2003); UTAH CODE ANN. § 77-27-21.5 (2003 & Supp. 2007); WASH. REV. CODE ANN. §§ 9A.44.096, 9A.44.130 (West 2000 & Supp. 2008); W. VA. CODE ANN. § 15-12-2 (LexisNexis 2004 & Supp. 2008); W. VA. CODE ANN. § 61-8B-9 (LexisNexis 2005 & Supp. 2008); WIS. STAT. ANN. §§ 301.45, 948.02 (West 2005 & Supp. 2007).

B. Michigan

In Michigan, the trial judge is also given considerable discretion in imposing probation conditions that may be relevant to the offense committed and that facilitate or aid the rehabilitation of the offender.¹²⁹ But while the sentencing judge is given wide deference in exercising this discretion, “the exercise of that judgment is not unfettered: the conditions imposed upon the probationer must bear a logical relationship to rehabilitation.”¹³⁰ In *People v. Branson*,¹³¹ the Court of Appeals of Michigan upheld a probation condition barring convicted child abusers from visiting for more than four hours per week or living at a religious camp where they had abused children.¹³² The court indicated that part of the reason it upheld the restriction, however, was that other children lived at the religious camp, and the offenders in the case were not remorseful and took no responsibility for their actions, instead taking the position that they had done nothing wrong.¹³³ Thus, the ruling was focused on the particular circumstances of the case, the offenders involved, and what was reasonable to their individual rehabilitation.

Under this standard, the sex offender residency restrictions in Michigan would also fail. In Michigan, all registered sex offenders are prohibited from living within 1,000 feet of school property.¹³⁴ Not only does such a provision fail to provide for an individualized analysis of an offender’s risks and rehabilitation needs, but it also applies to all sex offenders, whether their crimes were against children or not. Such a restriction cannot possibly be reasonably related to the rehabilitation of an offender whose crimes were not against a minor. Even if an offender’s crimes were against a minor, he or she may have very little risk of re-offending, especially if the crime was something other than sexual assault. In addition, even if the offender were deemed a high risk for re-offense, studies by Colorado and Minnesota have shown that residency restrictions have little or no effect on the chance that a convict will re-offend.¹³⁵ In fact, studies

¹²⁹ See, e.g., *People v. Branson*, 360 N.W.2d 614, 616 (Mich. Ct. App. 1984).

¹³⁰ *Id.* (citing *People v. Higgins*, 177 N.W.2d 716 (Mich. Ct. App. 1970)).

¹³¹ 360 N.W.2d 614 (Mich. Ct. App. 1984).

¹³² *Id.* at 616–17.

¹³³ *Id.* at 616.

¹³⁴ MICH. COMP. LAWS SERV. §§ 28.733, 28.735 (LexisNexis Supp. 2008).

¹³⁵ See COLO. DEP’T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 5 (2004), available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf; MINN. DEP’T OF CORR., *supra* note 32, at 11; MINN. DEP’T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA 2 (2007), available at <http://www.corr.state.mn.us/publications/documents/04-07SexOffenderReport-Proximity.pdf>.

have shown that restricting housing and work options of released offenders only inhibits their reintegration into society—which, in turn, markedly increases the chance of their recidivating.¹³⁶ Indeed, the Superior Court of New Jersey, Appellate Division believes this is the case. That court recently struck down a municipal residency restriction, declaring that the law was directly in conflict with the stated purpose of the State’s sex offender registration law—to “protect society from the risk of re-offense by (convicted sex offenders) and . . . provide for their rehabilitation and reintegration into the community”—and, therefore, was preempted by state law.¹³⁷ Thus, it is possible that these restrictions are, in fact, directly preventing the rehabilitation of released sex offenders. If a court finds that to be the case, the residency restrictions stand no chance under Michigan’s case law as it is applied to orders of banishment.

C. Washington

While Washington’s sex offender residency restriction is far narrower than those of other states, the law of banishment in the state, if applied to those restrictions, would likely still require the state to change its approach. In Washington, the permissibility of an order of banishment is determined by weighing several factors. According to the Court of Appeals of Washington, “a sentencing court should consider the following nonexclusive factors” in determining whether an order of banishment is legal:

- (1) whether the restriction is related to protecting the safety of the victim or witness of the underlying offense;
- (2) whether the restriction is punitive and unrelated to rehabilitation;
- (3) whether the restriction is unduly severe and restrictive because the defendant resides or is employed in the area from which he is banished;
- (4) whether the defendant may petition the court to temporarily lift the restriction if necessary; and
- (5) whether less restrictive means are available to satisfy the State’s compelling interest.¹³⁸

In *State v. Schimelpfenig*,¹³⁹ the court struck down a banishment order preventing a convicted murderer from living within the same county as his victim’s family.¹⁴⁰ The court explained that the

¹³⁶ Yung, *supra* note 3, at 141; COLO. DEP’T OF PUB. SAFETY, *supra* note 135, at 5.

¹³⁷ G.H. v. Township of Galloway, 951 A.2d 221, 225 (N.J. Super. Ct. App. Div. 2008).

¹³⁸ *State v. Schimelpfenig*, 115 P.3d 338, 340–41 (Wash. Ct. App. 2005).

¹³⁹ 115 P.3d 338.

¹⁴⁰ *Id.* at 339.

restriction had to be evaluated with strict scrutiny, since it infringed the offender's constitutional right to travel, and found the order did not pass that test.¹⁴¹ The banishment order was not narrowly tailored to serve the state interest it was meant to protect because no one ever evaluated the offender to determine whether or not he was a risk to the victim's family. In addition, the order prevented the offender, a man with a mental disability, from living with his family in the only home he had ever known—a circumstance that the court determined was sure to prevent his rehabilitation.¹⁴²

The state's sex offender residency restriction would likely be struck down under this analysis as well. Washington's residency restriction prohibits Level II and III (medium- and high-risk) offenders convicted of a serious offense from living within 880 feet of a school.¹⁴³ Obviously the residency restrictions are related to public safety, so the first factor weighs in favor of allowing the residency restrictions. Every other factor, however, weighs in favor of striking down the residency restrictions. First, in many cases, these residency restrictions do banish offenders from areas where they reside. Second, offenders apparently have never been allowed to petition the court for a temporary lift of the restrictions. Also, we have already established that the residency restrictions look enough like banishment, a traditional form of punishment. Therefore, it seems highly likely that they should be classified as punitive as well. In addition, we have already seen how these restrictions can hinder, rather than help, an offender's chance at rehabilitation. And, finally, the restrictions are indiscriminately applied to all offenders who fit the statutory requirement, with no individualized determination of whether the offender is a threat to children or whether depriving them of housing in these areas would hurt their chances of rehabilitation. For this reason, under the court's analysis in *Schimelpfenig*, the restrictions would likely fail to meet the strict scrutiny test that a court would apply.

D. Other States

Similarly, other states' court decisions in banishment cases indicate that their residency restrictions would not survive the same analysis. In Mississippi, "courts have uniformly held that constitutional rights may be abridged by conditions of probation"

¹⁴¹ *Id.* at 339, 341.

¹⁴² *Id.* at 341.

¹⁴³ WASH. REV. CODE § 9.94A.030 (West Supp. 2008); WASH. REV. CODE § 9.94A.8445 (West Supp. 2008).

only where there is “some reasonable relationship to the [offender’s] past or future criminality or to the rehabilitative purpose of probation.”¹⁴⁴ In contradiction of this rule, Mississippi’s sex offender residency restriction prevents all registered sex offenders from living within 1,500 feet of a school or childcare facility, with no determination of the offender’s risk to recidivate or consideration of whether such a restriction would help the offender’s chances of rehabilitation.¹⁴⁵

Alabama has applied a rule quite similar to Mississippi’s to probation conditions restricting an offender’s right to travel, stating, “a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.”¹⁴⁶ Yet Alabama’s sex offender residency restriction applies to all sex offenders, prohibiting them from living or working within 2,000 feet of a school or childcare facility.¹⁴⁷ In addition, other courts have struck down banishment orders under similar rules.¹⁴⁸

Despite these rules of banishment and probation conditions, courts continue to ignore or disregard their relevance in the case of sex offender residency restrictions.

IV. RECOMMENDATIONS

Because sex offender residency restrictions are proliferating at both the state and municipal levels, the country must realize that the laws are not sustainable or practical. One of the primary reasons banishment from a state has been found unconstitutional is because

¹⁴⁴ *Cobb v. State*, 437 So. 2d 1218, 1221 (Miss. 1983) (quoting Brief of Appellant, *Cobb*, 437 So. 2d 1218 (No. 53924)).

¹⁴⁵ MISS. CODE ANN. § 45-33-25(4) (West Supp. 2007).

¹⁴⁶ *Dukes v. State*, 423 So. 2d 329, 331 (Ala. Crim. App. 1982) (quoting *Gilliam v. L.A. Mun. Court*, 159 Cal. Rptr. 74, 77 (1979)).

¹⁴⁷ ALA. CODE § 15-20-26(a) (LexisNexis Supp. 2007).

¹⁴⁸ *See, e.g., Edison v. State*, 709 P.2d 510, 512 (Alaska Ct. App. 1985) (finding an order of banishment from a village as applied to an individual convicted of driving a snow machine while inebriated to be unlawful because it was not sufficiently related to the offense, was unduly harsh and restrictive, and was not reasonably related to the offender’s rehabilitation); *People v. Beach*, 195 Cal. Rptr. 381, 385–87 (Cal. Ct. App. 1983) (striking down an order of banishment from the community for a woman convicted of shooting a trespasser on her property because the order would have forced the offender out of her home of more than twenty-four years and was more likely to hinder rehabilitation than aid it); *State v. Franklin*, 604 N.W.2d 79, 83–84 (Minn. 2000) (finding an order of banishment from Minneapolis to be unlawful because the offender had significant ties to the city and the order was unrelated to the offender’s crime—trespassing in a building on the fringe of the city); *Johnson v. State*, 672 S.W.2d 621, 623 (Tex. Crim. App. 1984) (striking down an order of banishment from the county for an offender convicted of unauthorized use of an automobile because the order was unrelated to the offender’s rehabilitation and would hinder the offender’s rehabilitation by leaving him broke and unemployed).

such a punishment is a public policy nightmare. As the Supreme Court of Michigan stated in *People v. Baum*,¹⁴⁹

To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy.¹⁵⁰

Despite this general rule, states are, in effect, dumping their convicted sex offenders on other jurisdictions through increasingly harsh residency restrictions, especially when viewed in combination with employment and loitering restrictions. These acts should, in themselves, be considered unconstitutional. After all, the Supreme Court stated in *Missouri ex rel. Gaines v. Canada*¹⁵¹ that equal protection requires each state to furnish their residents with certain services and opportunities within the state's boundaries.¹⁵² As more and more states and municipalities adopt residency restrictions, neighboring jurisdictions are jumping on the bandwagon, seeking to protect themselves from becoming just such a dumping ground. If such laws continue to proliferate, it is easy to imagine that convicted sex offenders will soon have nowhere to go. Such a result is clearly unconstitutional.

Because sex offender residency restrictions are so similar to banishment, and because courts have imposed certain limitations on orders of banishment to protect the constitutional rights of offenders who have had such sentences imposed on them, the rules that apply to orders of banishment should also be applied to sex offender residency restrictions. Rules requiring sex offender residency restrictions to be related to an offender's past and future criminality and rehabilitation can only serve to help the community and further the interest of public safety. There is evidence that these residency restrictions hinder, rather than help, offender rehabilitation by making it more difficult for them to find housing and employment and, therefore,

¹⁴⁹ 231 N.W. 95 (Mich. 1930).

¹⁵⁰ *Id.* at 96.

¹⁵¹ 305 U.S. 307 (1938).

¹⁵² *Id.* at 351.

reintegrate into society upon release from prison.¹⁵³ In addition, the fact that most children who have been sexually abused were abused by people they knew at the time¹⁵⁴ means that, most times, the restrictions will have no effect on the rate of recidivism unless offenders are prohibited from all unsupervised contact with children. It, therefore, becomes necessary to apply the rules of law created for banishment to the sex offender residency restrictions in order to best protect society from further sexual crimes.

The best way to do this is to make individualized assessments of the danger posed by each offender and determine what will be best for each individual offender's rehabilitation. This means that if an offender was convicted of statutory rape for having consensual sex with an underage girlfriend or boyfriend, that situation should be treated differently than that of someone who has multiple convictions of child molestation. We cannot indiscriminately apply these residency restrictions to all sex offenders and expect society to be a safer place, especially when falling under the purview of these laws usually results in being cast out from the society the offender has been a part of—in effect being shamed and exiled from the community. While some might argue that such individualized determinations would be too costly and time-consuming for states to implement, such an argument is misguided.

Some states have already implemented panels of mental health and corrections professionals to assess an offender's risk prior to release from prison.¹⁵⁵ All that is needed is for these professionals to make recommendations as to what would best aid the rehabilitation of a particular offender. Those recommendations could then be reviewed by a sentencing court or parole board and implemented following the offender's release. The use of such a system would limit residency restrictions to those who truly needed them to avoid recidivating. It would leave all other offenders with their residences intact and, hopefully, with improved opportunities to rehabilitate themselves and reintegrate into society. Such a system would also be extremely cost effective. The states that already have such risk assessment boards in place could put them to good use, and those that do not yet have these

¹⁵³ See Yung, *supra* note 3, at 141 (discussing how residency restrictions can create pockets of "sex offender communities" which hinder reintegration into society); see also COLO. DEP'T OF PUB. SAFETY, *supra* note 135, at 5 (stating that residency restrictions would leave sex offenders "extremely limited areas" of residency due to large numbers of schools in scattered locations).

¹⁵⁴ HUMAN RIGHTS WATCH, *supra* note 11, at 24.

¹⁵⁵ See, e.g., MINN. STAT. § 244.052 (2007).

boards could rest assured that the cost of implementing this system is well worth the fundamental liberties it protects.

V. CONCLUSION

While sex offender residency restrictions may give parents the sense that their children are safe, the reality is that the restrictions place severe impediments on former offenders which, practically speaking, amount to a modern-day form of banishment. Some argue that these sex offenders have given up some of their liberty by committing such heinous crimes against society. However, most people fail to realize just how broad and all-encompassing the residency restrictions are for released offenders. Not only do offenders become subject to these restrictions for having consensual sex as teens, but some states require registration for crimes such as public urination and streaking as well.¹⁵⁶ When these facts are considered, it becomes obvious that states are indiscriminately applying these statutes to everyone who falls within an extremely broad category and are failing to take into account the specific risks posed by any given offender. States and cities are not just imposing these restrictive laws against sex offenders, regardless of the risk posed, but states are also enforcing these statutes without regard to their effectiveness or side effects.

While it is widely recognized and reported that these laws can leave offenders homeless,¹⁵⁷ many states have also recognized that the

¹⁵⁶ See HUMAN RIGHTS WATCH, *supra* note 11, at 15, 39 (discussing how some states require registration for non-coercive, non-violent acts having little to do with sexual conduct); see also ARIZ. REV. STAT. § 13-3821 (2001 & Supp. 2007) (requiring registration if the individual has more than one previous conviction for public urination, two indecent exposures to a person under fifteen, or a third indecent exposure to a person over fifteen); CAL. PENAL CODE § 290, 314(1)-(2) (West 2008); CONN. GEN. STAT. ANN. § 53a-186 (West 2007); CONN. GEN. STAT. ANN. §§ 54-250, 54-251 (West 2001 & Supp. 2008) (requiring registration if the victim was under eighteen); GA. CODE ANN. § 16-6-8 (2007); GA. CODE ANN. § 42-1-12 (Supp. 2007) (requiring registration if done in view of a minor); IDAHO CODE ANN. §§ 18-4116, 18-8304, 18-8306 (2004 & Supp. 2008) (requiring registration if convicted of indecent exposure twice within five years); KY. REV. STAT. ANN. §§ 17.500, 17.520 (West 2006 & Supp. 2007); KY. REV. STAT. ANN. §§ 510.148, 510.150 (West 2006); MASS. GEN. LAWS ANN. ch. 6, §§ 178C, 178G (West 2006 & Supp. 2008); MASS. GEN. LAWS ANN. ch. 272, § 16 (West 2000); MICH. COMP. LAWS ANN. § 28.722 (West 2004 & Supp. 2008); MICH. COMP. LAWS ANN. § 28.723 (West 2004); MICH. COMP. LAWS ANN. § 750.167(1)(f) (West 2004) (requiring registration if convicted of indecent or obscene conduct three times); N.H. REV. STAT. ANN. §§ 645:1(II)-(III), 651-B:1, 651-B:2 (LexisNexis 2007) (requiring registration if previously convicted of indecent exposure); OKLA. STAT. ANN. tit. 21, § 1021 (West 2002 & Supp. 2008); OKLA. STAT. ANN. tit. 57, § 582 (West 2004); S.C. CODE ANN. § 23-3-430 (2007); UTAH CODE ANN. §§ 76-9-702.5, 77-27-21.5 (2003 & Supp. 2007); VT. STAT. ANN. tit. 13, §§ 2601, 5401, 5407 (1998 & Supp. 2007).

¹⁵⁷ NIETO & JUNG, *supra* note 9, at 18.

enforcement of these laws does not reduce recidivism rates.¹⁵⁸ In fact, it is well known that residency restrictions—because of their dire consequences—cause some sex offenders to avoid registering.¹⁵⁹ These offenders are then lost to law enforcement officials until they are caught for another crime. In short, not only do these laws severely restrict the liberties of a population that, on average, has lower recidivism rates than those of any other offenders,¹⁶⁰ but they do so in a way that is highly ineffective at keeping children safe. Ultimately, this amounts to banishment and should be considered unconstitutional. If society truly desires such types of restrictions on former sex offenders, there must be a more individualized method of determining who should be subject to the laws and who should not. Without such reform, the country may soon be faced with the very difficult question of where these offenders have left to go.

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¹⁵⁸ COLO. DEP'T OF PUB. SAFETY, *supra* note 135, at 4.

¹⁵⁹ *See id.* at 24 (“Local residency restrictions may drive some of the estimated 500,000 registered sex offenders in the country underground . . .”).

¹⁶⁰ NIETO & JUNG, *supra* note 9, at 2.

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