University of St. Thomas Law Journal

Volume 3
Issue 3 *Spring 2006*

Article 11

2006

Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws

David A. Singleton

Bluebook Citation

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 (2006).

ARTICLE

SEX OFFENDER RESIDENCY STATUTES AND THE CULTURE OF FEAR: THE CASE FOR MORE MEANINGFUL RATIONAL BASIS REVIEW OF FEAR-DRIVEN PUBLIC SAFETY LAWS

DAVID A. SINGLETON*

> [T]hey will come for your kid over the Internet; they will come in a truck; they will come in a pickup in the dark of night; they will come in the Hollywood Mall in Florida. . . . There are sickos out there. You have to keep your children [very] close to you. . . .
>
> —Geraldo Rivera[1]

> We had better learn to doubt our inflated fears before they destroy us. Valid fears have their place; they cue us to danger. False and [overdrawn] fears only cause hardship.
>
> —Barry Glassner[2]

INTRODUCTION

Seventeen states and an increasing number of municipalities have passed laws prohibiting people convicted of sex offenses[3] from residing

* Adjunct Professor of Law, Salmon Chase College of Law, Northern Kentucky University; Lecturer of Law, University of Cincinnati College of Law; Executive Director, Ohio Justice & Policy Center; A.B., Duke University; J.D., Harvard Law School. I am very appreciative of the time, insights, and assistance provided by the following individuals: Mark Loudon-Brown, Andrea Yang, Stephen JohnsonGrove, Andrew Amend, Jennifer Walters, Sehar Siddiqi and Sheila Donaldson Johnson. I would not have been able to complete this Article without the support of my wife, Verna Williams. This Article is dedicated to the memory of my mother and father.

1. *The Geraldo Rivera Show*, "Lured Away: How to Get Your Child Back; Panelists Discuss Their Horrifying Experiences of Losing Children Through Abductions and Murders; Tips Are Offered on Keeping Children Safe," (Jose Pretlow Dec. 4, 1997) (TV broadcast) (statement of Geraldo Rivera).

2. Barry Glassner, *The Culture of Fear: Why Americans Are Afraid of the Wrong Things* (Basic Books 1999).

3. "Sex offenders," the label commonly used to refer to these individuals, is one this author would prefer not to use. It implies that individuals so labeled inevitably will re-offend. However, contrary to what most people believe, most people who commit sex offenses do not recidivate

near places where children congregate, such as schools, parks, day cares, and playgrounds.[4] These laws reflect the public's growing fear of sex offenders and outrage at the crimes they commit.[5]

But do sex offender residency statutes actually protect children, or do they undermine community safety? Are these laws common sense, appropriate responses to a serious threat posed to the nation's children, or are they fear-driven reactions to high-profile media coverage of child abduction and sexual assault cases? Moreover, suppose these restrictions are not based on any evidence that they are effective in preventing or reducing child sexual abuse, but are instead hot-blooded legislative responses to public outcry generated from extensive media coverage of child abduction cases. Under such circumstances, should a court, faced with an equal protection challenge to the law, apply a toothless, highly deferential rational basis analysis? Or, should the court conduct a more meaningful review—with bite?

This Article argues that sex offender residency restrictions are driven primarily by fear and dislike of sex offenders, not reasoned analysis of what is necessary to protect children. Accordingly, courts, when considering equal protection challenges to such laws, should eschew highly deferential rational basis review for a more rigorous standard.

Part I analyzes the media's role in shaping and distorting public perception of crime and safety issues in the United States.

Part II discusses the development and proliferation of sex offender residency restrictions as a response to high-profile media coverage of child abduction cases. Part II also examines whether residency restrictions are effective in reducing child sexual abuse and concludes that these laws are likely ineffective and potentially counterproductive.

Part III argues that courts, applying rational basis review, should more closely scrutinize sex offender residency restrictions because such laws are motivated primarily by fear and dislike of sex offenders rather than reasoned analysis of what is necessary and appropriate to protect children from sexual abuse. Part III discusses *United States Department of Agriculture v. Moreno*,[6] *City of Cleburne v. Cleburne Living Center*,[7] and *Romer v. Evans*[8]—three cases in which the United States Supreme Court held that classifications driven by fear and dislike of politically unpopular groups are irrational under the rational basis standard. Although *Moreno*, *Cleburne*,

---

sexually. This will be discussed *infra* Part II. Although the author would prefer to avoid use of the term "sex offender," this Article will nonetheless use it for the sake of convenience.

4. These laws are discussed in more detail, *infra*.

5. Wendy Koch, *States Get Tougher with Sex Offenders*, USA Today (May 23, 2006) (available at http://www.usatoday.com/news/nation/2006-05-23-sex-offenders_x.htm) ("Public fear of sex offenders is spurring a wave of tougher laws this year, both in Congress and statehouses nationwide.").

6. 413 U.S. 528 (1973).

7. 473 U.S. 432 (1985).

8. 517 U.S. 620 (1996).

and *Romer* provide a conceptual basis for closer scrutiny of fear and prejudice-based classifications, those cases, in and of themselves, do not provide a sufficient framework for analyzing the type of statute at issue here. Unlike the classifications at issue in those cases, which the Court found to be solely motivated by fear or a desire to harm a politically unpopular group, sex offender residency statutes are ostensibly motivated by a legitimate and important governmental purpose: the protection of children from sexual abuse. This public safety rationale, however, should not shield sex offender residency statutes from meaningful scrutiny of whether the means chosen by the legislature—prohibiting sex offenders from living within a certain distance of places where children are likely to congregate—further the stated goal of protecting children from sexual abuse. Part III argues that because sex offender residency statutes are largely the result of media-generated fear and dislike of sex offenders, courts should look behind the stated public-safety goals to examine more closely the question of whether these statutes actually protect children.

Part IV proposes a framework for courts to use in determining whether a law, with an ostensibly permissible goal, is nonetheless impermissibly fear-based and therefore irrational.

Part V applies this new framework from Part IV to a hypothetical equal protection challenge to Ohio's sex offender residency law.

I. CRIME, THE MEDIA, AND THE CULTURE OF FEAR

A. *News Reporting of Crime*

Americans are preoccupied with fear, particularly fear of crime.[9] News coverage of crime is at least partially responsible for this fear.[10] Violent crime dominates news reporting in the United States.[11] Crime is often the most prominently featured subject in the local news and in some markets accounts for more than 75 percent of local coverage.[12] Crime is also widely covered in national news outlets.[13] For example, although the national crime rate fell 20 percent from 1990 to 1998, network television coverage of crime increased 83 percent.[14] Moreover, network news coverage of

9. *See e.g.* Glassner, *supra* n. 2; *Bowling for Columbine* (Michael Moore 2002) (motion picture); Marc Siegel, *False Alarm: The Truth About the Epidemic of Fear* (John Wiley & Sons, Inc. 2005).

10. *See* David L. Altheide, *Creating Fear: News and the Construction of Crisis* 22 (Aldine De Gruyter 2002).

11. Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News* 8, http://www.buildingblocksforyouth.org/media/media.pdf (2001).

12. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 Am. J. Pol. Sci. 560, 560 (2000).

13. Dorfman & Schiraldi, *supra* n. 11, at 8; Ctr. for Media & Pub. Affairs, *1998 Year in Review: T.V.'s Leading News Topics, Reporters, and Political Jokes*, 13 Media Monitor 1, 2 (1999).

14. Dorfman & Schiraldi, *supra* n. 11, at 10.

homicides increased 473 percent during that period, despite a 32.9 percent decrease in the homicide rate.[15]

Although researchers may disagree about the cause and effect relationship between media coverage of crime and public perception of crime,[16] there is evidence that the former influences the latter. For example, 80 percent of respondents in a 1997 *Los Angeles Times* poll stated that the media's coverage of violent crime increased their fear of becoming victims, with 52 percent stating that they felt "much more fearful" of being victimized as a result of news coverage of crime.[17] Moreover, three-quarters of the public form their opinions about crime based on news reports—more than three times the number of people who form their opinions based on personal experience.[18]

Crime reporting has become an increasingly popular method for budget-pressed news agencies to boost ratings.[19] As one author has observed, "[t]he media profit from fear mongering through sensationalized headlines. Nothing gets viewers to tune in to a news program like fear: fear of war, fear of disease, fear of death, fear of harm coming to loved ones."[20]

Not all crime, however, is deemed newsworthy by the media. Among the factors that influence the likelihood that the media will cover a particular crime are the existence of multiple victims or offenders, the presence of a white victim, the unusualness of the crime, and the occurrence of the crime in an affluent community.[21] In short, the more peculiar or unusual the crime, the more likely the media will cover it.[22]

The media's coverage of crime often creates a misleading picture of a nation far more dangerous and violent than it is in actuality.[23] Public perception is skewed as a result of two phenomena: the "vividness" and the "availability" biases described by social psychologist John Ruscio.[24] According to Ruscio, "[s]tories featuring mundane, commonplace events don't stand a chance of making it onto the six o'clock news. The stories that do make it through this painstaking selection process are then crafted into ac-

15. *Id.*

16. Altheide, *supra* n. 10, at 24 (describing the disagreement and citing to conflicting studies).

17. Greg Braxton, *Ratings vs. Crime Rates*, L.A. Times B1 (June 4, 1997).

18. Dorfman & Schiraldi, *supra* n. 11, at 4.

19. Nicholas A. Valentino, *Crime News and the Priming of Racial Attitudes During Evaluations of the President*, 63 Pub. Op. Q. 293, 297 (1999).

20. Benjamin Radford, *Media Myth Makers: How Journalists, Activists, and Advertisers Mislead Us* 66 (Prometheus Books 2003).

21. Dorfman & Schiraldi, *supra* n. 11, at 8; Steven Chermak, *Predicting Crime Story Salience: The Effects of Crime, Victim, and Defendant Characteristics*, 26 J. Crim. Just. 61, 62 (1998).

22. John Ruscio, *Risky Business: Vividness, Availability, and the Media Paradox*, 24 Skeptical Inquirer 22, 25 (Mar./Apr. 2000) ("Events must be somewhat unusual in order to be considered newsworthy.").

23. Dorfman & Schiraldi, *supra* n. 11, at 7.

24. Ruscio, *supra* n. 22, at 23.

counts emphasizing their concrete, personal and emotional context."[25] This is the "vividness" bias factor. The other phenomenon is the "availability" bias.[26] According to Ruscio, "our judgments of frequency and probability are heavily influenced by the ease with which we can imagine or recall instances of an event."[27] Thus, because we do not carefully evaluate "all the logically possible events weighted by their actual frequency of occurrence, the simple presence of one memory and absence of another can short-circuit a fully rational evaluation."[28]

Perhaps it is not surprising that Americans believe the country has become increasingly dangerous. As Dorfman and Schiraldi observe, "to the uninitiated news consumer, those unaware that reporters and editors make a series of choices about what goes into the newspaper or TV broadcast, the regular diet of unusual over time seems usual."[29]

But does obsessive fear of crime make us any safer? *The Culture of Fear* author Barry Glassner writes: "One of the paradoxes of a culture of fear is that serious problems remain widely ignored even though they give rise to precisely the dangers that the populace most abhors."[30]

B. News Coverage of Child Abduction Cases

Media coverage of child abduction cases has grown significantly during the past two decades. The following examples illustrate this trend.

On July 27, 1981, six-year-old Adam Walsh was abducted from a mall in Hollywood, Florida.[31] Walsh and his mother entered a Sears store where Walsh began playing with a video game while his mother shopped. When his mother returned, Walsh had vanished. After two hours of frantic but fruitless searching for Walsh, the police were called. Two weeks later, Walsh's severed head was found 120 miles from where he was kidnapped. Ottis Toole, a serial killer, confessed to the crime on two occasions but subsequently recanted. He died in prison without ever being charged for Walsh's death. A Westlaw search generated two articles about the Walsh case during the first year after the crime occurred.[32] A LexisNexis search revealed thirteen articles during that same time period.[33]

---

25. *Id.* at 23.
26. *Id.*
27. *Id.*
28. *Id.* at 24.
29. Dorfman & Schiraldi, *supra* n. 11, at 31.
30. Glassner, *supra* n. 2, at xviii.
31. Courtroom TV Network, *Child Abduction: Adam and Polly,* http://www.crimelibrary.com/criminal_mind/psychology/child_abduction/9.html (accessed Sept. 15, 2006) [hereinafter *Adam and Polly*]. The additional facts of the Walsh case, as reported herein, were obtained from the aforementioned source.
32. The Westlaw search was conducted in the USNEWS database using the following search terms: "Adam Walsh" & DA(AFT 7/27/1981 & BEF 7/27/1982).
33. The LexisNexis search was conducted in the News, All (English, Full Text) database using the following search terms: "Adam Walsh" and date(geq (7/27/1981) and leq(7/27/1982)).

On October 22, 1989, eleven-year-old Jacob Wetterling was abducted near his home in St. Joseph, Minnesota.[34] Wetterling, his brother and a friend had just returned from a local convenience store. On the way home, a gun-wielding masked man confronted the boys. The man grabbed Wetterling and led him into the woods. Wetterling was never seen again and his body was never recovered. The identity of his attacker is unknown. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act as part of the Federal Violent Crime Control and Law Enforcement Act of 1994.[35] The Jacob Wetterling Act requires states to implement a sex offender and crimes-against-children registry.[36] A Westlaw search generated 375 articles about the Wetterling case during the first year after the crime occurred.[37] A LexisNexis search revealed sixty-three articles during that same time period.[38]

On October 1, 1993, twelve-year-old Polly Klaas was kidnapped from her home at knifepoint during a slumber party.[39] Thousands of local residents joined what would become one of the largest manhunts in United States history. Unfortunately, Klaas was found murdered. The man who abducted and killed her, Richard Allen Davis, was sentenced to death. A Westlaw search generated 2,751 articles during the first year after the crime occurred.[40] A LexisNexis search revealed 1,504 articles during that same time period.[41]

Seven-year-old Megan Kanka was abducted from her home on July 29, 1994.[42] Two days later she was found murdered by a convicted sex offender who lived nearby. In 1994, New Jersey passed the first "Megan's Law" in the country, which required community notification of the presence of cer-

---

34. Jacob Wetterling Foundation, *Jacob Wetterling Story,* http://www.jwfjfw.org/ReadArticle.asp?articleID=34 (accessed Sept. 16, 2006). The additional facts of the Wetterling case, as reported herein, were obtained from the aforementioned source.

35. Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994); codified at 42 U.S.C. § 14071(a) (2006).

36. *Id.*

37. The Westlaw search was conducted in the USNEWS database using the following search terms: "Jacob Wetterling" & DA(AFT 10/22/1989 & BEF 10/22/1990).

38. The LexisNexis search was conducted in the News, All (English, Full Text) database using the following search terms: "Jacob Wetterling" and date(geq (10/22/1989) and leq (10/22/1990)).

39. *Adam and Polly, supra* n. 31, at http://www.crimelibrary.com/criminal_mind/psychology/child_abduction/9.html. The additional facts of the Klaas case, as reported herein, were obtained from the aforementioned source.

40. The Westlaw search was conducted in the USNEWS database using the following search terms: "Polly Klaas" & DA(AFT 10/1/1993 & BEF 10/1/1994).

41. The LexisNexis search was conducted in the News, All (English, Full Text) database using the following search terms: "Polly Klaas" and date(geq (9/10/1/1993) and leq (9/10/1/1994)).

42. Wikipedia: The Free Encyclopedia, *Megan Kanka,* http://en.wikidpedia.org/wiki/Megan_Kanka (accessed Sept. 16, 2006). The additional facts of the Kanka case, as reported herein, were obtained from the aforementioned source.

tain sex offenders in the community.[43] In 1996, the federal Megan's Law was passed.[44] The federal provision requires all fifty states to implement some form of community notification of sex offenders.[45] A Westlaw search generated 630 articles during the first year after the crime occurred.[46] A LexisNexis search revealed 332 articles during the same time period.[47]

On February 1, 2004, eleven-year-old Carlie Brucia took a shortcut through the parking lot of a carwash on her way home.[48] She never made it. A video camera captured a man, Joseph Smith, approaching her and leading her away. Brucia's body was found less than a week later. A Westlaw search generated 3,318 articles about the Brucia case during the first year after the crime occurred.[49] A LexisNexis search revealed 1,163 articles during the same time period.[50]

Jessica Lunsford, a nine-year-old Florida girl, was abducted from her home on February 23, 2005, and murdered a short time thereafter by a convicted sex offender, John Couey.[51] Lunsford was buried alive with a stuffed animal. A Westlaw search generated 6,510 articles about the Lunsford case during the first year after the crime occurred.[52] A LexisNexis search revealed 2,563 articles during the same time period.[53]

The coverage of these cases follows certain trends. First, coverage has grown exponentially since Adam Walsh's murder. The LexisNexis database contained only thirteen articles about the Walsh case during the first year after his disappearance, compared to the more than 2,500 articles that appeared in LexisNexis for the first year after the Jessica Lunsford murder.

---

43. N.J. Stat. Ann. § 2C:7-2 (2006).

44. Pub. L. No. 104-145, § 2(d), 110 Stat. 1345, 1345 (1996); codified at 42 U.S.C. § 14071(e)(2) (2006).

45. *Id.*

46. The Westlaw search was conducted in the USNEWS database using the following search terms: "Megan Kanka" & DA(AFT 7/29/1994 & BEF 7/29/1995).

47. The LexisNexis search was conducted in the News, All (English, Full Text) database using the following search terms: "Megan Kanka" and date(geq(7/29/1994) and leq(7/29/1995)).

48. Charles Montaldo, *About.com, Carlie Brucia: A Child Is Abducted on Videotape*, http://crime.about.com/od/current/a/carliebrucia.htm (accessed Sept. 12, 2006). The additional facts of the Brucia case, as reported herein, were obtained from the aforementioned source.

49. The Westlaw search was conducted in the USNEWS database using the following search terms: "Carlie Brucia" & DA(AFT 2/1/2004 & BEF 2/1/2005).

50. The LexisNexis search was conducted in the News, All (English, Full Text) database using the following search terms: "Carlie Brucia" and date(geq(2/1/2004) and leq(2/1/2005)).

51. Susan Candiotti & Paul Courson, *CNN.com Law Center, Sheriff: Evidence Points to Sex Abuse*, http://www.cnn.com/2005/LAW/03/20/lunsford.case/index.html (last updated Mar. 21, 2005).

52. The Westlaw search was conducted in the USNEWS database using the following search terms: "Jessica Lunsford" & DA(AFT 2/23/2005 & BEF 2/23/2006).

53. The LexisNexis search was conducted in the News, All (English, Full Text) database using the following search terms: "Jessica Lunsford" and date(geq(2/23//2005) and leq(2/23/2006)).

Second, each of these cases involved white victims,[54] who, as discussed above, are generally deemed more worthy of coverage than victims of color.[55] Third, all but two of these cases involved abductions from the victim's home. Again, this factor increases the unusualness of the incident, which heightens the media's interest in the story.[56]

II. SEX OFFENDER RESIDENCY RESTRICTIONS

A. *Development and Proliferation*

Currently, seventeen states restrict where sex offenders can live. The first seven of these laws were passed in the 1990s, beginning with Florida,[57] Delaware[58] and Michigan[59] in 1995. In 1998, legislatures in Alabama,[60] California,[61] and Illinois[62] enacted residency restrictions. Indiana followed suit in 1999.[63]

From 2000 to 2004, ten states passed sex offender residency restrictions, beginning with Kentucky[64] in 2000, followed by Oregon[65] and Loui-

54. *See Adam and Polly*, *supra* n. 31 (see picture of Adam Walsh at the top of page); *Jacob Wetterling Story*, *supra* n. 34 (see picture of Jacob Wetterling to the left of the text); *Adam and Polly*, *supra* n. 31 (see picture of Polly in the second photo from the top); *Megan Kanka*, *supra* n. 42 (see picture of Megan to the right of the text); *Carlie Brucia: A Child Is Abducted on Videotape*, *supra* n. 48 (see picture of Carlie Brucia to the right of the text); Candiotti & Courson, *supra* n. 51 (see picture of Jessica Lunsford in the bottom of three images in the Video box).

55. *Romer*, 517 U.S. 620.

56. Radford, *supra* n. 20, at 8; Sharmak, *supra* n. 21, at 62; Ruscio, *supra* n. 22, at 25.

57. Fla. Stat. § 947.1405(7) (2006) (enacted 1995). Florida's law prohibits offenders, convicted of sexually assaulting children, from living within 1,000 feet of a school, day care center, park, playground or other place where children regularly congregate.

58. 11 Del. Code Ann. tit. 11, § 1112(a) (2006) (enacted 1995). Delaware's law prohibits sex offenders from living within 500 feet of school property.

59. Mich. Comp. Laws § 28.735[1], 28.733(f) (2006) (enacted 1995). Michigan's law prohibits sex offenders from living within "student safety zones," defined as "1,000 feet or less from school property."

60. Ala. Code § 15-20-26 (2006). Alabama's law, as originally enacted, prohibited sex offenders from residing within 1,000 feet of schools and child care facilities. It was amended in 2000 to increase the buffer zone to 2,000 feet.

61. Cal. Penal Code Ann. § 3003 (West 2006). California's provision bars sex offenders on parole from living within one-quarter mile of schools.

62. 720 Ill. Comp. Stat. Ann. 5/11-9.3 (b-5) (2006). Illinois' law prohibits "child sex offenders" from residing within 500 feet of school premises.

63. Ind. Code Ann. § 11-13-3-4(g)(2)(B) (2006). The law, as originally enacted, prohibited sex offenders on parole from residing within 1,000 feet of school property unless the offender obtained written permission from the parole board. The Indiana law was recently amended to add public parks and youth program centers as places sex offenders are barred from living near. 2006 Ind. Acts 12. The amendment became effective on July 1, 2006.

64. Ky. Rev. Stat. Ann. § 17.495 (West 2005). This law, as originally enacted, prohibited sex offenders from living within 1,000 feet of schools and day care centers. The law was recently amended to include publicly owned playgrounds and extend all restrictions to force an offender from their residence if any of the facilities in the statute moves within 1,000 feet of the offender.

65. Or. Rev. Stat. Ann. § 144.642 (2006). Oregon's law requires the parole authorities to adopt residence requirements prohibiting certain paroled sex offenders from residing "near locations where children are the primary occupants."

siana[66] in 2001, and Iowa[67] in 2002. In 2003, legislatures in Georgia,[68] Arkansas,[69] Ohio,[70] and Oklahoma[71] passed residency restrictions. Similar laws in Tennessee[72] and Missouri[73] became effective in 2004. Mississippi passed new residency restrictions in 2006.[74] Moreover, as this Article goes to press, sex offender residency bills are pending in eleven states: Arizona,[75] Colorado,[76] Indiana,[77] Kansas,[78] Maryland,[79] Massachusetts,[80]

66. La. Rev. Stat. Ann. § 14:91.1 (2006). As originally enacted, the statute prohibited sexually violent predators from living within 1,000 feet of schools, 2004 La. Acts 178. In 2004, the Louisiana legislature amended the statute by adding day care centers, playgrounds, public and private youth centers, swimming pools and free standing video arcades to the list of places sex offenders were barred from living near.

67. Iowa Code § 692A.2A (2006).

68. Ga. Code Ann. § 42-1-15 (2006). The law as originally enacted prohibits registered sex offenders from living within 1,000 feet of child care facilities, schools and other areas where children congregate, including public and private park and recreation facilities, playgrounds, and neighborhood centers. 2006 Ga. Laws 571. On July 1, 2006, an amendment to the Georgia law forbid sex offenders from living within 1,000 feet of school bus stops.

69. Ark. Code Ann. § 5-14-128 (2006) Arkansas' law bars certain sex offenders from residing within 2,000 feet of schools and day cares.

70. Ohio Rev. Code Ann. § 2950.031 (West 2006). Ohio's law prohibits sex offenders from residing within 1,000 feet of schools.

71. Okla. Stat. tit. 57, § 590 (2006). Oklahoma's law prohibits sex offenders from living within 2,000 feet of any public or private school site or educational institution.

72. Tenn. Code Ann. § 40-39-211 (2006). Tennessee's law prohibits sex offenders, whose victims were minors, from living within 1,000 feet of schools and licensed day care facilities.

73. Mo. Rev. Stat. § 566.147 (2006). Missouri's law bars certain sex offenders from residing within 1,000 feet of schools and child care facilities.

74. Miss. Code Ann. § 45-33-25 (2006). Mississippi's law prohibits sex offenders from living within 1,500 feet of schools or day cares.

75. Ariz. H. 2380, 47th Leg., 2d Reg. Sess. (Jan. 25, 2006) (would prohibit sexually violent offenders on community supervision from residing within 440 feet of school property).

76. Colo. H. 1089, 65th Gen. Assembly, 2d Reg. Sess. (Jan. 13, 2006) (would prohibit sexually violent predators from residing within 1,500 feet of a school, day care center or playground).

77. Ind. Sen. 12, 114th Gen. Assembly, 2d Reg. Sess. (Jan. 10, 2006) (would prohibit sex offenders on parole from residing within 1,000 feet of school property, unless the offender obtains a waiver from the parole board).

78. Kan. Sen. 506, 81st Leg., 2006 Reg. Sess. (Mar. 22, 2006) (would prohibit sex offenders from residing within 2,000 feet of licensed child care facilities, registered family day care homes or the real property of any school).

79. Md. H. 942, 421st Gen. Assembly, 2006 Reg. Sess. (Feb. 9, 2006) (would prohibit sex offenders required to register for life from residing within one mile of an elementary or secondary school or a park where children regularly congregate).

80. Mass. H. 889, 184th Gen. Ct., 2005 Reg. Sess. (Jan. 5, 2005) (would prohibit sex offenders from residing within one mile of schools).

Nebraska,[81] New Jersey,[82] New York,[83] South Carolina,[84] and Rhode Island.[85]

Furthermore, since 2005, numerous municipalities across the country have proposed or passed residency restrictions prohibiting sex offenders from residing near schools and other places where children are likely to congregate.[86]

As the enactment dates of these statutes illustrate, sex offender residency restrictions are likely a response to high-profile media coverage of child abduction cases. It is probably no accident that passage of the first sex offender residency restrictions in 1995 followed on the heels of the Klaas and Kanka murders in 1993 and 1994, respectively. Prior to the Klaas

---

81. Neb. Leg. Res. 867, 99th Leg., 2d Reg. Sess. (Jan. 5, 2006) (would prohibit high-risk sex offenders from residing within 1,000 feet of schools and child care facilities).

82. N.J. Assembly 639, 212th Leg. (Jan. 10, 2006) (would prohibit sex offenders with minor victims from residing within 500 feet of a school, playground or child care center).

83. N.Y. Assembly 9428, 229th Annual Leg. Sess. (Jan. 11, 2006) (would prohibit sex offenders from living within 1,000 feet of schools).

84. S.C. H. 4323, Gen. Assembly, 116th Sess. (Jan. 10, 2006) (would prohibit sex offenders with minor victims from residing within 1,000 feet of schools, day care centers, children's recreational facilities, parks, playgrounds, and bus stops).

85. R.I. H. 7621, 2005-2006 Leg. Sess. (Feb. 16, 2006) (would prohibit child predators from residing within 500 feet of day cares, schools, public parks, playgrounds, libraries, and public family housing).

86. *See e.g.* City of Miami Beach, Fla., *Miami Beach City Commission Unanimously Approves Local Sex Offender Ordinance*, http://www.miamibeachfl.gov/newcity/cityhall/mayor_dermer/Press%20Release%20-20Sex%20Offender%20Ordinance.pdf (June 8, 2005) (press release announcing passage of Miami Beach, Florida ordinance prohibiting sex offenders from residing within 2,500 feet of schools, parks, and other areas where children congregate); Don Ruane, *Cape Zones Out Sex Criminals*, News-Press (Ft. Myers, Fla.) 1A (Jan. 31, 2006) (reporting Cape Coral, Florida ordinance prohibiting sex offenders from living within 2,500 feet of a school, day care center, park or playground); Pervaiz Shallwani, *Dublin Adopts Sex Offender Limits*, Morning Call (Allentown, Pa.) B1 (Feb. 14, 2006) (reporting passage of ordinance in Dublin, Pennsylvania prohibiting sex offenders from living within 2,500 feet of schools, child care centers, public parks and recreation facilities); Liz Neely, *Cities Restrict Sex Offenders*, San Diego Union-Trib. B1 (Mar. 19, 2006); Toni Becker, *Richland Discusses Sex Offender Restrictions*, Free Press (Boyertown, Pa.) (Mar. 1, 2006) (discussing proposed ordinance in Richland, Pennsylvania; reporting ordinance passed in Lower Makefield Township restricting sex offenders, whose crimes were committed against minors, from living within 2,500 feet of schools, parks, playgrounds, child care facilities, community centers, and other places where children congregate); Kathy Baratta, *Sex Offender Ordered to Move*, News Transcr. (Freehold, N.J.) (Mar. 22, 2006) (reporting challenge to Manalapan, New Jersey ordinance adopted in August 2005 which bans sex offenders from living within 2,500 feet of schools, libraries, and other places where children are likely to gather); Carnie Young, *City to Mull Sex Offender Crackdown*, Gwinnett Daily Post (Gwinnett County, Ga.) (Mar. 26, 2006) (reporting proposed ordinance in Snellville City, Georgia prohibiting sex offenders from living within 2,500 feet of schools, day cares, parks and playgrounds); Michele Besso, *Newark Weighs Sex Offender Legislation*, News J. (Wilmington, Del.) A1 (Mar. 25, 2006) (discussing proposed Newark, Delaware ordinance prohibiting sex offenders from residing within 2,500 feet of parks, playgrounds, and day care centers; reporting similar ordinance passed by the town of Bridgeville, Delaware); KFDX 3, *New Sex Offender Ordinance Proposed*, http://www.kfdx.com/news/default.asp?mode=shownews&id=11494 (Apr. 3, 2006) (reporting proposed ban on registered sex offenders living within 1,000 feet of a public park, a school, a youth center or certain child care facilities).

murder, national coverage of such crimes was comparatively slight. Beginning with the Klaas case, however, media coverage of such crimes exploded. The increased attention to child abduction cases and the public outcry generated thereby likely led to passage of the first restrictions in 1995. Regardless of the reasons for the first restrictions, there can be little doubt that the highly publicized murders of Brucia and Lunsford in 2005 played a significant role in the spate of new sex offender residency restrictions proposed and enacted in 2005 and 2006.

The following subsections will examine the justifications for sex offender residency statutes and will discuss whether such restrictions are effective or potentially counterproductive.

B. Rationales for Residency Restrictions

There are two primary rationales for sex offender residency restrictions: (1) preventing children from being abducted at or near school grounds by sex offenders, and (2) reducing opportunities for sex offenders who live near schools to "groom" children for purposes of sexual abuse. A third reason often cited—more as a means of creating a sense of urgency for legislative action to protect children—is the purportedly high recidivism rate for sex offenders. Each of these rationales will be discussed below in turn.

1. Preventing child abductions by strangers

Based on high-profile coverage of certain child abduction cases, many people believe that sex offender residency restrictions are necessary to prevent these crimes from recurring. Take, for example, the statement of the Iowa lawmaker who sponsored that state's residency restriction: "We hear about all the child abductions. We didn't want [sex offenders] living across from schools and child-care centers, looking out the windows at all the kids across the street."[87] Although media coverage suggests that child abductions are commonplace, these crimes—tragic as they are—are rare.

Every year, approximately 100 children are abducted by strangers and killed in the United States.[88] Moreover, less than one percent of all murders involve sexual assault, and in fact, the prevalence of sexual murders declined by about half between the late 1970s and the mid-1990s.[89]

Additionally, most victims of child sexual assaults know their abuser. A 2000 Department of Justice study found that 93 percent of child sexual

87. Alex Tom, *Abusers' Housing Options Severely Limited*, Des Moines Register 1A (Aug. 26, 2002) (quoting St. Sen. Jerry Behn).

88. National Center for Missing and Exploited Children, *Frequently Asked Questions and Statistics* http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=242 (accessed Sept. 21, 2006).

89. Bureau of Just. Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* 27, http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf (Feb. 1997).

assault victims knew their perpetrator; 34.2 percent were family members and 58.7 percent were acquaintances.[90] Only seven percent of child victims reported that strangers abused them.[91] Thus, rather than representing the norm, crimes like the Kanka and Lunsford abductions are the exceptions.

If preventing abductions of children by strangers is the goal of sex offender residency statutes, it is not likely that these restrictions advance that goal in any meaningful way. Someone who is determined enough to snatch a child from the street—a brazen crime indeed—would likely not be deterred or limited from doing so by a residency restriction. This was essentially the conclusion of the Minnesota Department of Corrections, which, at the request of the Minnesota legislature, released a study in 2003 that examined the likely effectiveness of a proposal to ban sex offenders from residing within 1,500 feet of schools and parks. The study reached the following conclusions:

> Based on the examination of [the highest risk offenders], there were no examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses [observed in the study]. Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact. The two [high risk] offenders [in the study] whose re-offenses took place near parks both drove from their residences to park areas that were several miles away. . . . Based on these cases, it appears that a sex offender attracted to such locations for purposes of committing a crime is more likely to travel to another neighborhood in order to act in secret rather than in a neighborhood where his or her picture is well known.[92]

In 2004, the Colorado Department of Public Safety conducted a similar study. The Colorado researchers concluded: "Placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism."[93]

The Minnesota and Colorado reports are the only studies to examine the effectiveness of sex offender residency statutes. Both reports, however, reached the conclusion that these restrictions are not effective in protecting children from sexual abuse.

---

90. Bureau of Just. Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 10, http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf (July 2000).

91. *Id.*

92. Minn. Dept. of Corrections, *Level Three Sex Offenders Residential Placement Issues: 2003 Report to the Legislature* 9, http://www.doc.state.mn.us/publications/legislativereports/pdf/2004/Lvl%203%20SEX%20OFFENDERS%20report%202003%20(revised%202-04).pdf (Jan. 2003).

93. Colo. Dept. of Pub. Safety, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community* 5, http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf (Mar. 15, 2004).

2. Limiting opportunities for child molesters to groom children

Although sex offender residency restrictions may be driven primarily by fear of child abductions, at least one state has raised another rationale in defense of its statute: reducing the opportunity for sex offenders to groom potential victims.

According to James Orlando, an expert hired by the State of Ohio, residency restrictions reduce sex offenders' access and opportunity to sexually abuse children, a vulnerable population.[94] This is important, according to Orlando, because children are usually sexually assaulted by people they know.[95] Therefore, according to Orlando, prohibiting sex offenders from living near schools limits their opportunities to establish relationships with children whom they can later "groom" for purposes of sexual abuse.[96] Moreover, according to Orlando, prohibiting all sex offenders from living near schools, even those offenders whose offenses did not involve children, is reasonable because "it is not possible to predict which offenders who were previously convicted of an adult offense will cross over to molest children."[97]

The problem with this rationale is that children live in many places throughout a given community, not just near schools. This point was driven home by GIS[98] map data produced in a case involving a Clermont County, Ohio sex offender who was defending himself from eviction pursuant to the state's residency law.[99] The evidence showed that of the twelve sex offenders who, as a result of the residency restriction, relocated within the county to addresses that were more than 1,000 feet from a school, seven moved to residences that were more densely populated with children compared to the previous address (a net increase of 4.10 children per acre), whereas five offenders moved to residences that were less densely populated with children (a net decrease of 1.79 children per acre).[100] Overall, the net effect of the twelve relocations was an increase of 2.97 children per acre.[101] Although one might counter that being near a school provides a larger pool of potential victims, there's nothing to stop determined child molesters from placing themselves in positions where they can have access to large num-

94. Expert Rep. of James A. Orlando at 5–6, *Coston v. Petro,* 398 F. Supp. 2d 878 (S.D. Ohio 2005).

95. *Id.* at 5. See discussion *supra* regarding the percentages of children assaulted by strangers versus people known to the child.

96. *Id.*

97. *Id.*

98. GIS refers to "Geographic Information Systems." GIS is a system of computer hardware, software and geographic data for capturing, managing, analyzing and displaying all forms of geographically referenced information.

99. *State v. Billings*, No. 2005 CVH 1328 (Ct. of Com. Pleas, Clermont County, Ohio Sept. 12, 2006).

100. Transcr. of Hearing at 146, *State v. Billings*, No. 2005 CVH 1328 (Ct. of Com. Pleas, Clermont County, Ohio May 30, 2006).

101. *Id.*

bers of children—regardless of whether or not the child molesters live nearby a school.

3. "High" sex offender recidivism rates

Proponents of sex offender residency restrictions often argue that such measures are necessary in light of sex offenders' purportedly high recidivism rates.[102] Some courts have cited to sex offender recidivism as a reason for upholding residency restrictions against constitutional attack.[103] Recent research, however, calls this rationale into question. For example, the Department of Justice found that 5.3 percent of sex offenders were rearrested for a new sex crime within three years after release from prison.[104] Moreover, the Ohio Department of Rehabilitation and Correction reported an 11 percent recidivism rate within ten years of release from incarceration, measured by conviction and return to prison for a new sex offense or a sexually related parole violation, such as possession of pornography.[105] The Ohio study characterized sex-offense recidivism as a "fairly unusual" occurrence.[106] Additionally, Canadian researchers reported a 14 percent sex-offense recidivism rate in a study of 29,000 sex offenders in North America and Europe.[107]

It is true that child molesters have higher recidivism rates than sex offenders who victimize adults. For example, a study completed by Canadian researchers reported over a 20 percent recidivism rate for child molest-

102. *See e.g. Hearing on Theater Continued until Aug. 4*, Courier-Post (Cherry Hill, N.J.) B, 2G (July 9, 2005) ("Sex offenders statistically have a high rate of recidivism and are know[n] to prey on children," quoting Committeeman Barry M. Wright in explaining why Winslow Township, New Jersey passed a law banning sex offenders from living within 2,500 feet of a school, park, playground, library, day care center or church); Sheila McLaughlin, *Sex Offender Told to Move from Loveland*, Cincinnati Enquirer 2C (June 30, 2005) ("In my experience as a prosecutor, sex offenders have a high rate of recidivism, and we don't want to take any chances," quoting Mayor Brad Greenberg explaining Loveland, Ohio's decision to enforce state law prohibiting sex offenders from living within 1,000 feet of schools); John Sanko, *Sex-Offender Bill Eyed; Mom Says Proposed Study Doesn't Go Far Enough*, Rocky Mt. News (Denver, Colo.) 16A (Feb. 28, 2002) (sex offenders have a "high likelihood of recidivism," quoting Colorado State Sen. Mary Ellen Epps in support of a bill requiring a study of the potential threat from sex offenders living near schools and other areas where children congregate; as discussed below, however, the study recommended against enactment of a sex offender residency law and no such provision has been adopted statewide in Colorado to date).

103. *See e.g. Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005).

104. Bureau of Just. Statistics, *Recidivism of Sex Offenders Released From Prison in 1994* 30, http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf (Nov. 2003).

105. Ohio Dept. of Rehab. & Correction, *Ten-Year Recidivism Follow-Up of 1989 Sex Offender Releases* 10-11, 24, http://www.drc.state.oh.us/web/Reports/Ten_Year_Recidivism.pdf (Apr. 2001).

106. *Id.* at 12.

107. *See* R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. Consulting & Clinical Psychol. 348, 351 (1998); R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis* 8 (Pub. Safety & Emerg. Preparedness Canada 2004).

ers.[108] Older studies, however, have reported much higher recidivism rates. A study led by Robert A. Prentky reported a recidivism rate as high as 52 percent.[109] Drawing conclusions about current recidivism rates from the Prentky study is unwarranted though, because Prentky's subjects were sex offenders released from prison during the period 1959-1985, well before treatment became more available and more effective.[110] Additionally, the study's subjects were the "worst of the worst" offenders—individuals who were civilly committed for aggressive or repeat sex offenses.[111] In light of the fact that these offenders were not necessarily representative of sex offenders generally, the authors issued two caveats: (1) "[t]he obvious, marked heterogeneity of sexual offenders precludes automatic generalization of the *rates* reported here to other samples"; and (2) "these findings should *not* be construed as evidence of the inefficacy of treatment," since "the treatment services [available to the subjects of the study] were not provided uniformly or systematically and did not conform to a state-of-the-art model."[112]

Admittedly, ascertaining the true rate of recidivism is impossible. Sex offenses, like other crimes, are underreported. Moreover, measuring recidivism depends upon how one defines it; for example, measuring recidivism by reconviction as opposed to rearrest or reoffense will yield a smaller number.

In any event, however, whether sex offenders recidivate at high, medium or low rates is irrelevant to the question of whether residency statutes are effective in protecting children from sexual abuse. As discussed above, offenders who are motivated to abduct children who are strangers will do so whether or not they live near a school. Additionally, with respect to limiting access and opportunity to potential victims, residency restrictions only serve to shift the potential risk from one part of the community where children are found to another part of the community where children will also likely be. If a danger exists that a sex offender living within 1,000 feet of a school could groom a child who walks to and from the school past the offender's residence, that very same danger would likely exist elsewhere in the community, unless sex offenders are banished to the rural outskirts of town. While banishment might be a more effective and rational means of limiting access and opportunity to offend, it would pose serious constitutional problems.[113]

---

108. Hanson & Bussiere, *supra* n. 107, at 351.

109. Robert A. Prentky, Austin F. S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & Hum. Behav. 635, 644 (1997).

110. *Id.* at 640, 657.

111. *Id.* at 637.

112. *Id.* at 656–57 (emphasis in original).

113. A complete discussion of the constitutional problems of banishment is beyond the scope of this Article. At least two constitutional problems would arise. The first problem is that banish-

In sum, there is no evidence that sex offender residency restrictions are useful in protecting children from sexual abuse. To the contrary, the only studies that exist—the Minnesota and Colorado reports—conclude that these restrictions do not protect children.

C. *The Potential Counterproductivity of Sex Offender Residency Restrictions*

The preceding subsections examined the question of whether sex offender residency restrictions are effective in protecting children and concluded they are not. This subsection argues that residency restrictions are not only ineffective but also potentially counterproductive.

Researchers have found that stability and support increase the likelihood of successful reintegration for former offenders, and that public policies that make reintegration more difficult might undermine public safety.[114] With respect to sex offenders specifically, researchers have found that isolation, unemployment, depression, and instability correlate with increased recidivism.[115] Thus, sex offender residency restrictions may actually increase the risk of a sex offender sexually abusing minors by increasing the offender's instability and stress level.[116]

---

ment would violate the fundamental right to travel. Second, because banishment has historically been considered punishment, this factor would make it more likely that application of the statute to offenders who committed their offenses before the statute's effective date would violate the Ex Post Facto Clause of the United States Constitution.

114. *See e.g.* Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford U. Press 2003).

115. *See* R. Karl Hanson & Andrew Harris, *Dynamic Predictors of Sexual Recidivism*, http://ww2.psepc-sppcc.gc.ca/publications/corrections/199801b_e.pdf (accessed Sept. 8, 2006); R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis*, http://www.mhcp-research.com/200402_e.pdf#search=%22%22Predictors%20of%20Sexual%20Recidivism%3A%20An%20Updated%20Meta-Analysis%22%22 (accessed Sept. 8, 2006); Colo. Dept. of Pub. Safety Div. of Crim. Just. Sex Offender Mgt. Bd., *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community*, http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal.pdf (accessed Sept. 7, 2006); Candace Kruttschnitt, Christopher Uggen & Kelly Shelton, *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 Just. Q. 61 (2000); *see also* Jill Levenson & Leo P. Cotter, *The Impact of Sex Offender Residency Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 Intl. J. of Offender Therapy and Comp. Criminology 168, 172 (2005) (reporting that almost half of the sex offenders surveyed in Florida were prevented from living with supportive family members because of the state's residency restriction); Minn. Dept. of Corrections, *Level Three Sex Offenders Residential Placement Issues: 2003 Report to the Legislature* 9, http://www.doc.state.mn.us/publications/legislativereports/pdf/2004/Lvl%203%20SEX%20OFFENDERS%20report%202003%20(revised%202-04).pdf (Sept. 7, 2006) (recommending against enactment of a 1,500-foot residency restriction because it would "pose . . . problems, such as a high concentration of offenders [in rural areas] with no ties to community; isolation; lack of work, education, and treatment options; and an increase in the distance traveled by agents who supervise offenders").

116. Br. Amicus Curiae of Assoc. for the Treatment of Sexual Abusers at 4–6, *Doe v. Miller*, 405 F.3d 700 (brief filed in support of the petition for writ of certiorari).

Residency restrictions are also possibly counterproductive for another reason: offenders who have a difficult time finding alternative housing might be driven "underground" (i.e., they would cease registering an address with the sheriff), which would make them much more difficult to track and supervise.[117] This potential has become reality in Iowa, which prohibits sex offenders whose victims were minors from residing within 2,000 feet of schools and day care facilities.[118] In January 2006, the Iowa County Attorneys Association ("ICAA"), a statewide organization that represents local prosecutors, released a statement asking the Iowa legislature to repeal Iowa's law.[119] Believing that the "2,000 foot residency restriction for persons who have been convicted of sex offenses involving minors does not provide the protection that was originally intended,"[120] the ICAA listed fourteen reasons why the legislature should repeal the law.[121] One of these reasons was that "[l]aw enforcement has observed that the residency restriction is causing offenders to become homeless, to change residences without notifying authorities of their new locations, to register false addresses or to simply disappear. If they do not register, law enforcement and the public do not know where they are living."[122] Other reasons included the absence of research showing a "correlation between residency restrictions and reducing sex offenses against children or improving the safety of children"; the fact that "[r]esearch does not support the belief that children are more likely to be victimized by strangers at the covered locations than at other places"; that "[m]any prosecutors have observed that the numerous negative consequences of [Iowa's] lifetime residency restriction has [*sic*] caused a reduction in the number of confessions made by offenders in cases where defendants usually confess"; and that fewer defendants charged with sex offenses are entering plea agreements.[123]

In sum, the available evidence indicates that sex offender residency statutes do not protect children and might increase the danger to the community. The fact that legislatures have passed these laws without evidence of their effectiveness and despite evidence indicating these restrictions are potentially counterproductive suggests that these laws are driven primarily by fear and dislike of sex offenders. The next section will argue that courts, when adjudicating equal protection challenges of sex offender residency

117. Lisa Henderson, Student Author, *Sex Offenders: You are Now Free to Move About the Country. An Analysis of Doe v. Miller's Effects on Sex Offender Residential Restrictions* 73 U. Mo. Kan. City L. Rev. 797, 819 (2005).

118. Iowa Code Ann. § 692A.2A (West 2006).

119. Iowa County Attorneys Assn., *Statement on Sex Offender Residency Restrictions in Iowa*, http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Feb%2014%2006%20for%20website.pdf (accessed Sept. 7, 2006).

120. *Id.*

121. *Id.*

122. *Id.* at ¶ 4.

123. *Id.* at ¶¶ 1–2, 13.

statutes, should eschew highly deferential rational basis review for more rigorous scrutiny given the danger that such laws are infected impermissibly by fear and prejudice.

III. The Case for Closer Scrutiny of Sex Offender Residency Restrictions

Ever since the King's Bench proclaimed in the *Semayne's Case* of 1604 that "the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house,"[124] the home has received heightened protection in Anglo-American courts.[125] Legislatures and courts have made it increasingly clear, however, that the well-known maxim "a man's home is his castle" does not apply to sex offenders who live near schools and other places where children congregate. Convicted sex offenders like Gerry Porter, a Cincinnati resident who lived 983 feet from a school (seventeen feet too close under Ohio law) and who was evicted from the house he and his wife had owned for the past fourteen years,[126] are being forced to move from their homes. These evictions raise many legal issues, including whether residency restrictions violate equal protection.

When analyzing equal protection claims, courts apply different levels of scrutiny to different classifications. Strict scrutiny applies to "suspect" classifications based on race or national origin[127] and to classifications that infringe upon fundamental rights, such as the right to travel,[128] the right to vote,[129] and the right to privacy.[130] Classifications subject to strict scrutiny will only be upheld if the government shows that the classification serves a compelling state interest by the least restrictive means.[131] Statutes analyzed under this standard are rarely upheld.[132] Intermediate scrutiny requires the government to demonstrate that the challenged statute is substantially related to an important governmental interest.[133] To date, courts have applied

124. *Semayne v. Gresham*, 5 Co. Rep. 91a, 93a, 77 Eng. Rep. 194, 198 (K.B. 1604).

125. *See e.g. Jeffries v. Ga. Residential Fin. Auth.*, 503 F. Supp. 610, 619 (N.D. Ga. 1980) (in the context of lease terminations of federally subsidized housing, the court concluded: "The interest at stake here, an individual's interest in remaining in his home, is unquestionably substantial" (citation omitted)).

126. Sharon Coolidge, *Sex Offender Ordered to Move*, The Cincinnati Enquirer 3C (Sept. 29, 2005).

127. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967).

128. *Shapiro v. Thompson*, 394 U.S. 618, 629–630 (1969).

129. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

130. *See Roe v. Wade*, 410 U.S. 113, 152 (1973).

131. *See Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

132. *See e.g. Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803 (2000).

133. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

intermediate scrutiny to discriminatory classifications based on sex or illegitimacy.[134]

The most deferential standard is rational basis review. Under that standard, the party challenging the statute must demonstrate that the classification bears no rational relationship to any legitimate legislative purpose or governmental objective, or that the classification is unreasonable, arbitrary or capricious.[135] This standard, which is highly deferential to legislative judgments,[136] is a very difficult standard for the party challenging the statute to meet and has led many a commentator to conclude that it is a toothless standard.[137] One reason cited for deferring to legislative judgments is that legislatures are better equipped than courts to conduct fact-finding hearings and to weigh the relevant facts necessary for lawmaking.[138] Another view is that judicial review is inherently counter-majoritarian.[139] Under this theory, "statutory law takes its legitimacy from the fact that it represents the will of majority, not from the extent or quality of any articulated reasons."[140]

A. Doe v. Miller*: An Example of Toothless Rational Basis Review of Sex Offender Residency Restrictions*

So far only a handful of courts have reached the merits of challenges to sex offender residency statutes.[141] The leading decision to date is *Doe v. Miller*,[142] the Eighth Circuit Court of Appeals decision upholding the con-

134. *See e.g. Miss. U. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

135. *See Cleburne*, 473 U.S. at 446.

136. *See e.g. Romer*, 517 U.S. at 632 (holding that a statute will not be declared unconstitutional so long as it is rationally related to a legitimate governmental purpose "even if [it] seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous"); *FCC v. Beach Communs., Inc.*, 508 U.S. 307, 313–14 (1993) (describing rational basis review as a "paradigm of judicial restraint").

137. *See e.g.* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (describing rational basis review as "minimal scrutiny in theory and virtually none in fact"); David A. Strauss, *Affirmative Action and the Public Interest*, 1995 Sup. Ct. Rev. 1, 33 n. 89 ("For the most part, rational basis review has been notoriously toothless."); Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. Colo. L. Rev. 73, 86 (1999) ("Usually, courts adopt a highly deferential approach to protective or preventive state legislation, such as civil commitment laws, applying an almost toothless rational basis level of scrutiny.").

138. *See U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

139. Muriel Morisey Spence, *What Congress Knows and Sometimes Doesn't Know*, 30 U. Rich. L. Rev. 653, 662 (1996) (citing Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 209–10 (1971)).

140. *Id.* at 686 (describing two theories of how legislatures make decisions: the will of the majority and public choice theory, in which legislation is viewed as the result of compromises among competing interests).

141. *See e.g. Doe*, 405 F.3d 700; *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *People v. Leroy*, 357 Ill. App. 3d 530 (Ill. App. 5th Dist. 2005); *Lee v. State*, 895 So.2d 1038 (Ala. Crim. App. 2004); *Denson v. State*, 267 Ga. App. 528 (Ga. App. 2004).

142. 405 F.3d 700.

stitutionality of Iowa's sex offender residency restriction which prohibits sex offenders whose offenses were committed against minors from living within 2,000 feet of schools and day cares.[143] In so holding, the Eighth Circuit reversed a district court decision declaring the Iowa statute unconstitutional on numerous grounds.[144]

In *Doe v. Miller*, the Eighth Circuit rejected plaintiff sex offenders' argument that Iowa's sex offender residency statute violated their fundamental rights to travel and privacy.[145] Instead, the Eighth Circuit applied rational basis review. The court noted that "[t]here can be no doubt of a legislature's rationality in believing that 'sex offenders are a serious threat in this Nation,' and that 'when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.'"[146] The court then reasoned that the "only question remaining is whether, in view of a rationally perceived risk, the chosen residency restriction rationally advances the State's interest in protecting children."[147]

The Eighth Circuit then concluded that the legislature's decision to limit where sex offenders reside was rational and one that the legislature was better suited than a court to make: "The legislature is institutionally equipped to weigh the benefits and burdens of various distances, and to reconsider its initial decision in light of experience and data accumulated over time."[148] The court downplayed the significance of the Minnesota study that found no relationship between a sex offender's proximity to a school or park and sexual recidivism. On this point, the court reasoned: "Although the Does introduced one report from the Minnesota Department of Corrections finding 'no evidence in Minnesota that residential proximity of sex offenders to schools or parks affects reoffense,' this solitary case study—which involved only thirteen reoffenders released from prison between 1997 and 1999—does not make irrational the decision of the Iowa General Assembly and the Governor of Iowa to reach a different predictive judgment for Iowa."[149] Thus, the Eighth Circuit simply assumed the effectiveness of Iowa's law. Moreover, although the Eighth Circuit noted that both the state and the plaintiffs' expert agreed that Iowa's statute was po-

143. Iowa Code § 692A.2A.

144. *Doe*, 405 F.3d 700.

145. *Id.* at 710–14. The Eighth Circuit also held that Iowa's sex offender residency restriction did not violate procedural due process, *id.* at 709; did not violate the Fifth Amendment's privilege against self-incrimination, *id.* at 717–18; and did not violate the Ex Post Facto Clause, *id.* at 718–23.

146. *Id.* at 714–15 (quoting *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003)).

147. *Id.* at 715.

148. *Id.* As examples of the ability of legislatures to weigh facts, the Eighth Circuit cited Alabama, which increased its law from 1,000 to 2,000 feet, and Minnesota, which chose not to pass a residency statute after reviewing a study that recommended against it.

149. *Id.* at 714.

tentially counterproductive,[150] the court ignored this fact in its rational basis review of the statute.

The absence of any evidence of the effectiveness of Iowa's statute coupled with testimony about its potential counterproductivity should have underscored to the court that the statute was motivated by fear and dislike of sex offenders. The court concluded, however, that there was no basis to believe that Iowa, in passing the residency restriction, acted "merely on negative attitudes toward, fear of, or a bare desire to harm a politically unpopular group."[151]

B. Moreno, Cleburne, *and* Romer

In *Doe v. Miller*, the Eighth Circuit cited *City of Cleburne v. Cleburne Living Center*[152] and *United States Department of Agriculture v. Moreno*.[153] These two cases and a third, *Romer v. Evans*,[154] merit further discussion, for they each provide a conceptual basis for conducting a more rigorous review of sex offender residency restrictions. As will be discussed in more detail below, however, these cases fail to provide a sufficient framework for determining whether sex offender residency restrictions—laws designed to protect the public, specifically children, from serious harm—are rational.

The issue in *Moreno* was whether a federal regulation denying food stamps to groups of individuals who lived together but were unrelated violated equal protection.[155] The plaintiffs in *Moreno* were groups of individuals who satisfied income eligibility requirements for food stamps but who had been denied benefits because the persons in each group were not all related to each other.[156] Applying rational basis review, the Supreme Court held that "[t]he challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the [Food Stamp] Act," which is to provide food assistance to needy individuals.[157] The Court noted that the scant legislative history of the amendment denying benefits to groups of unrelated individuals revealed that the amendment "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[158] Thus, the Court concluded, "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the

150. *Id.* at 707–08.
151. *Id.* at 716 (citing *Cleburne*, 473 U.S. at 448).
152. 473 U.S. 432.
153. 413 U.S. 528.
154. 517 U.S. 620.
155. 413 U.S. at 529.
156. *Id.* at 531.
157. *Id.* at 534.
158. *Id.*

very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[159]

Although the government argued that the classification should nonetheless be sustained because Congress might "rationally have thought (1) that households with one or more unrelated members are more likely than 'fully related households' to contain individuals who abuse the program . . . and (2) that such households are 'relatively unstable,'" thus making it more difficult for the government to detect fraud, the Court dismissed the government's "wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households."[160] Thus, the absence of evidence supporting the government's rationality argument mattered to the Court in concluding that the Food Stamp amendment was irrational.

In *City of Cleburne v. Cleburne Living Center*, the respondent, who sought to open a facility in the petitioner's city for people with mental disabilities, was denied a permit to open the home. The zoning ordinance specifically restricted the home because the occupants were mentally disabled, even though it otherwise complied with zoning requirements.[161] After rejecting the respondent's argument that mental disability was a quasi-suspect classification entitled to intermediate scrutiny, the Court then applied rational basis review and invalidated the ordinance as it applied to the respondent.[162] Noting that the city council, in enforcing the zoning ordinance, was "concerned with the negative attitude of the majority of property owners located within 200 feet of the [proposed] facility" and "the fears of elderly residents of the neighborhood," the Court concluded that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[163]

The city council attempted to justify the application of the ordinance to the respondent by claiming that mentally ill residents of the home might be harassed by students at the junior high school across the street, and by claiming that the council was concerned about the size of the home and the number of people that would occupy it. The Court closely scrutinized these arguments and rejected them both.[164] In rejecting the first argument, the Court noted that "the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears" constitutes an equal protection violation.[165] In dismissing the second argu-

159. *Id.* (emphasis in original).
160. *Id.* at 535–36.
161. 473 U.S. at 435, 437.
162. *Id.* at 446–47, 450.
163. *Id.* at 448.
164. *Id.* at 449–50.
165. *Id.* at 449.

ment, the Court repeated what both the district court and court of appeals had found: "'[if] the potential residents of the [proposed] home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.'"[166]

In *Romer v. Evans*, Colorado voters passed what became known as Amendment 2, which prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect" homosexual persons.[167] Respondents brought suit seeking to enjoin enforcement of Amendment 2.[168] The state's main argument in defense of Amendment 2 was that it placed "gays and lesbians in the same position as all other persons" and simply denied gays and lesbians "special rights."[169] The Colorado Supreme Court sustained the trial court's grant of a preliminary injunction, holding that Amendment 2 was subject to strict scrutiny because it denied gays and lesbians the fundamental right to participate in the political process.[170] The United States Supreme Court affirmed the Colorado Supreme Court's decision but declined to apply strict scrutiny, instead reviewing the case under the rational basis standard.[171] The Supreme Court concluded that Amendment 2 "fails, indeed defies, even this conventional inquiry" because it "impos[es] a broad and undifferentiated disability on a single named group" and because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[172]

The lessons of *Moreno*, *Cleburne*, and *Romer* are two-fold. First, each case held that laws rooted in fear and prejudice fail—and indeed defy—the rational basis test, holdings that are relevant in the context of evaluating the rationality of sex offender residency restrictions, which, this Article contends, are fear-driven. Second, once the Court identified that the classifications at issue in those cases were impermissibly driven by fear and prejudice, the Court refused to defer to the government's arguments advanced in support of the classifications but instead examined the government's contentions skeptically. In this regard, the absence of data corroborating the government's claims of rationality appeared to matter, especially in *Moreno*.[173]

Although *Moreno*, *Cleburne*, and *Romer* provide a conceptual basis for closer scrutiny of fear-based laws, residency restrictions do not fit neatly within the *Moreno*, *Cleburne*, and *Romer* framework. Unlike the classifica-

166. *Id.*
167. 517 U.S. 620, 624.
168. *Id.* at 625.
169. *Id.* at 626.
170. *Id.* at 625 (citing *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993)).
171. *Id.* at 631–32.
172. *Id.* at 632.
173. 413 U.S. at 535 (referencing the government's "wholly unsubstantiated assumptions," which the Court accepted for the sake of argument).

tions at issue in those cases, which were obviously based on fear and prejudice, sex offender residency restrictions are ostensibly motivated by a legitimate and important governmental purpose: the protection of children from sexual abuse. Courts that have upheld sex offender residency restrictions have repeatedly pointed to this important goal in upholding these restrictions against constitutional attack.[174] In effect, this child-protection purpose shields sex-offender residency restrictions from meaningful analysis of whether the means selected by these laws—prohibiting sex offenders from living a certain distance from places where children regularly congregate—actually furthers the purpose of the restrictions: reducing the risk of harm to children.

Thus, although *Moreno*, *Cleburne*, and *Romer* held that fear and prejudice-based laws are irrational, they fail to guide courts in determining whether a law that is ostensibly about public safety is actually motivated by fear and prejudice. The next section will attempt to do so.

IV. Determining the Extent to Which Public Safety Laws Are Motivated Impermissibly by Fear

This Article argues that high-profile media coverage of child abduction cases over the past twenty years has fostered intense fear and dislike of sex offenders. This fear and dislike has sparked a wave of residency restrictions prohibiting sex offenders from living too close to places where children are likely to congregate. These restrictions are not grounded in science, but are instead rooted in fear. There are no studies showing that residency prohibitions protect children and the limited research that does exist concludes precisely the opposite. However, people who commit crimes, particularly violent ones, are generally loathed and feared by the community. Put simply, most people do not like crime. Thus, the mere existence of some fear and dislike of criminals is natural and understandable, and should not necessarily trigger more rigorous scrutiny of public safety laws generally. It is important, therefore, to articulate a framework courts can use to determine whether a law, which ostensibly seeks to protect the community from harm, is nonetheless impermissibly based on fear and prejudice.

This Article proposes a multi-part balancing test for determining whether a "public safety law" is impermissibly driven by fear and prejudice. In making that determination, a court should consider several factors, including, but not limited to: (1) whether the law in question was enacted in response to a particular crime, and if so, the nature and circumstances of that crime, including its unusualness; (2) if commission of the crime served as the impetus for the law, the intensity of the media's cover-

174. *See e.g. Doe*, 405 F.3d at 715–16; *State v. Seering*, 701 N.W.2d 655, 667–68 (Iowa 2005); *People v. Leroy*, 357 Ill. App. 3d 530, 534–35, 540–41, 543 (Ill. App. 5th Dist. 2005); *Lee v. State*, 895 So.2d 1038, 1042, 1044 (Ala. 2004).

age of that crime and similar crimes; (3) if commission of the crime served as the impetus for the law, the amount of time between commission of the crime and the enactment of the law; and (4) whether the legislative record reveals consideration of relevant social science data bearing on the necessity and effectiveness of the law. Each of these factors merits brief discussion.

A. *Whether the Law in Question Was Enacted in Response to a Particular Crime, and if so, the Nature and Circumstances of that Crime, Including its Unusualness*

It is axiomatic that "bad facts make bad law."[175] According to this old saw, heinous crimes often give rise to unduly harsh, ill-conceived and unwise legislation.[176] In determining whether a law is impermissibly fear-based, it is important, therefore, to examine the impetus for the law. If a particular crime serves as the motivation for the challenged law, then it is also important to analyze the nature and circumstances of that crime, including whether it is typical of crimes committed in the community or is instead rather unusual. As Part I of this Article demonstrates, the news media's crime coverage tends to focus on vivid, unusual crimes as a way of attracting viewers.[177] Thus, run-of-the-mill crimes often do not make it on to the evening news. As a result of the "vividness" bias, the focus on the unusual, however, presents a false and misleading picture that skews public perception, and, ultimately, distorts legislative priorities.

Thus, if the impetus for the challenged statute is an unusual crime, there is a heightened danger that the legislature, in enacting the law, is merely responding to community fear and outrage rather than reasoned analysis of what is necessary to protect the community.

B. *If Commission of the Crime Served as the Impetus for the Law, the Intensity of the Media's Coverage of that Crime and Similar Crimes*

If a crime served as the impetus for the challenged law, then it is important to examine the intensity of the news coverage of that crime or similar ones that have received widespread attention. As Ruscio hypothesizes, the more we are inundated with news stories of unusual crimes, the more likely it is that we believe those crimes are commonplace as a result of the "availability" bias.[178] The availability bias, like the vividness bias, distorts public perception, which in turn skews public policy.

175. Mara Lynn Krongard, Student Author, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 Cal. L. Rev. 111, 133 (2002) (discussing slippery slope problem of civilly committing persons with a "mental abnormality").

176. *Id.*

177. Ruscio, *supra* n. 22, at 25.

178. *Id.*

C. *If Commission of the Crime Served as the Impetus for the Law, the Amount of Time between Commission of the Crime and the Enactment of the Law*

The national media frenzy that accompanies certain crimes, like child abductions committed by sex offenders, may result in a swift legislative response. For example, within four months of the Jessica Lunsford murder, Miami Beach, Florida enacted an ordinance prohibiting sex offenders from living within 2,500 feet of schools, parks and other areas where children congregate.[179] Although fast legislative action does not necessarily produce unwise laws, the more quickly a legislature acts with respect to a particular issue, the more likely it is that the legislature is responding to passion rather than thoughtful consideration of the issues. The absence of a so-called "cooling off" period between the time of the crime and enactment of the law should raise a red flag.

D. *Whether the Legislative Record Reveals Consideration of the Relevant Social Science Data, if any, Bearing on the Necessity and Effectiveness of the Law*

Where a legislature acts quickly to pass a new law, or amend an existing one, in response to a notorious crime, but fails to consider social science data bearing on the necessity and effectiveness of the law, there is increased danger that the legislature is merely responding to community fear and outrage rather than engaging in reasoned and dispassionate analysis. Lawmakers' failure to consider relevant data constitutes serious cause for concern.

If upon weighing the above four factors a court determines that there is a substantial danger that the law resulted primarily from fear and outrage rather than thoughtful consideration of the issues, the court should more closely scrutinize the relationship between the means and ends of the statute. For example, once the Supreme Court concluded in *Moreno*, *Cleburne*, and *Romer* that those laws were motivated by fear and prejudice, the Court refused to defer completely to the justifications offered by the government in defense of the law.[180] Thus, if a court concluded that a sex offender residency statute was driven primarily by community fear and outrage, the court would then examine more rigorously the question of whether prohibiting sex offenders from living near schools actually protects children from sexual abuse.

---

179. Charter & Code City Miami (Fla.) §37-7 (2005).

180. *See* discussion *supra* Part III.

V. APPLICATION OF THE PROPOSED FRAMEWORK TO A HYPOTHETICAL OHIO CASE

This Part analyzes a hypothetical equal protection challenge to Ohio's sex offender residency statute.[181]

A. *The Enactment of Ohio's Residency Restriction*

On July 31, 2003, Ohio Senate Bill 5 became effective.[182] Senate Bill 5, which revised Ohio's Megan's Law, included a provision barring sex offenders from residing within 1,000 feet of school premises.[183] Two years earlier, a proposal for a residency restriction was included with House Bill 315, a Megan's Law provision.[184] That proposed restriction would have prohibited sex offenders from living within 500 feet of schools.[185] House Bill 315, however, never became law.[186]

The impetus for Senate Bill 5 was the murder of Wooster, Ohio resident Kristen Jackson, a fourteen-year-old girl who was killed in September 2002 by a convicted sex offender who lived nearby.[187] Jackson was abducted by Joel Yockey as she walked home from the county fair.[188] The crime was particularly savage and gruesome. Yockey decapitated her, cut off her arms, and disposed of her remains in a swamp.[189] Proximity to a school was not a factor in the crime; Yockey lived more than three miles from the nearest school at the time of the murder.[190]

Compared to the coverage of Jessica Lunsford's murder in 2005, media coverage of the Jackson murder was much less. A LexisNexis search generated seventy-nine stories about the Jackson murder.[191]

At the time of the offense, Yockey was not required to register his address with the local sheriff under Ohio's Megan's Law because he was not considered a sexual predator. Senate Bill 5 amended the law by requiring all sex offenders to register their addresses with the sheriff.[192] In addi-

181. Ohio Rev. Code Ann. § 2950.031 (2006).

182. Ohio Sen. 5, 125th Gen. Assembly (July 31, 2003).

183. Ohio Rev. Code Ann. § 2950.031 (2006).

184. Ohio H. 315, 124th Gen. Assembly, Reg. Sess. (2001–2002).

185. *Id.*

186. *Id.*

187. William Hershey, *Taft Signs Law Targeting Sex Offenders; Strengthens Notification Requirements*, Dayton Daily News B1 (Aug. 1, 2003).

188. David Tell, *The Once and Future Offender* ¶ 1, http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=1962&R=ED951FD7D (accessed Sept. 12, 2006).

189. *Id.* at ¶ 20.

190. According to an Accurint search (www.accurint.com), Yockey lived at 1046 Porter Drive in Wooster, Ohio at the time of the offense. A Mapquest search for schools in the area revealed that the closest one was 3.12 miles from Yockey's address.

191. The LexisNexis search was conducted in the News, All (English, Full Text) database using the following search terms: "Kristin Jackson" and "Ohio."

192. Offenders who are adjudicated as sexual predators or as child-victim predators are required to register with the sheriff every ninety days from the date of their initial registration. All

tion to other changes, the amendment also included the residency restriction prohibiting sex offenders from living within 1,000 feet of schools. Senate Bill 5 was introduced on January 23, 2003, and was enacted on July 31, 2003.

There is no indication from Senate Bill 5's legislative history that the legislature studied whether it was necessary to impose a residency restriction for sex offenders, or whether doing so would be effective. Ohio's sex offender residency law received little if any critical analysis.

B. The Hypothetical Challenge

If faced with an equal protection challenge alleging that Ohio's sex offender residency statute was impermissibly fear-based and therefore irrational, a court would first apply the four-factor test discussed in Part IV: (1) whether the law in question was enacted in response to a particular crime, and if so, the nature and circumstances of that crime, including its unusualness; (2) if commission of the crime served as the impetus for the law, the intensity of the media's coverage of that crime and similar crimes; (3) if commission of the crime served as the impetus for the law, the amount of time between commission of the crime and the enactment of the law; and (4) whether the legislative record reveals consideration of relevant social science data bearing on the necessity and effectiveness of the law.

The first factor clearly cuts against the government. The residency restriction was included in a bill whose impetus was the particularly brutal killing of a fourteen-year-old girl. The crime was unusual and vivid. Jackson was abducted by a stranger who brutally decapitated and dismembered her.

The second factor probably cuts against the government. Compared to coverage of the Kanka murder, coverage of the Jackson murder was much less. Whether seventy-nine newspaper articles constitute high-profile coverage depends on the reader's perspective. However, given the vividness of the crime, the seventy-nine newspaper articles likely had a significant impact on the papers' readers.

The third factor slightly favors the government. Though Senate Bill 5 was introduced within five months of the Jackson murder, it was not signed into law until ten months after Jackson's murder. The time between the crime and the passage of the law undercuts the notion that the legislature acted hastily.

However, the fourth factor clearly disfavors the government. The absence of any indication that the legislature studied the necessity and effectiveness of enacting a residency restriction suggests that Ohio's statute was driven more by fear and outrage rather than reasoned analysis.

---

other sexual offenders are required to register with the sheriff on the anniversary of their initial registration. Ohio Rev. Code Ann. § 2950.06 (2006).

Thus, on balance the four factors tip towards a finding that Ohio's sex offender residency statute is fear-based.

CONCLUSION

Sex offender residency restrictions likely fail the test proposed here. These laws are a response to the public's growing outrage and fear of sex offenders created by the frenzied media coverage of child abduction cases. These restrictions are not based on evidence of their effectiveness. To the contrary, they are potentially counterproductive. Lastly, these restrictions impose an enormous burden on offenders, many of whom have long ago been punished for their crimes.

Moreno, *Cleburne*, and *Romer*, however, hold that laws obviously based on fear and prejudice are irrational and therefore entitled to no deference from the courts. This Article has attempted to articulate a framework for determining when a public safety law, such as a sex offender residency restriction, is rooted in fear despite its ostensible community safety purpose.

One might argue that closer scrutiny of laws that neither burden fundamental rights nor create suspect or quasi-suspect classifications violates separation of powers by intruding on the prerogative of legislatures to make laws. However, when legislatures pander to the electorate and pass laws driven by community fear and outrage, lawmakers should forfeit their right to object to judicial second-guessing of their motives.