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Meghan S. Towers

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PROTECTIONISM, PUNISHMENT AND PARIAHS: SEX OFFENDERS AND RESIDENCE RESTRICTIONS

Meghan Silē Towers[*]

INTRODUCTION

At the highest levels of government, the U.S. Congress recently approved the Adam Walsh[1] Child Protection and Safety Act of 2006,[2] which unifies the sex offender registration system nationally and provides funding for states and local governments to create and research electronic monitoring programs targeting sex offenders.[3] Meanwhile, at a more local level, states, towns and municipalities have begun to pass strict laws regarding the disclosure of registered sex offenders and their residences. Sex

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[*] Brooklyn Law School Class of 2007; A.B. Lafayette College, 2004. The author wishes to thank her parents, Cathy and Dan Towers; grandparents, Tom and Dorothy Fielding; brother, Ryan Towers and sister Danielle Towers for their love, laughter and guidance. She would also like to thank Lee Jacobs, for holding the second ring; Dori Milner, for nights on the couch and sugar packets; Andy Grey, for always providing a beverage; Robert Ontell, Hail to the Victors; Jessica Gary, for her help; and Paul, for warnings of lurking danger. In addition, she would like to extend a special thanks to the entire staff of the JLP for their brazen bluebooking.

[1] Adam Walsh was 6 years old when he was abducted and murdered. He was the son of John and Revé Walsh, who later created "America's Most Wanted" and the National Center for Missing and Exploited Children in response to their son's tragic death. *Reid Praises Adam Walsh Child Protection and Safety Act*, U.S. NEWSWIRE July 20, 2006.

[2] Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. (2006) (enacted).

[3] *Id.*

offenders, 96% of whom are men,[4] who have been tried, convicted and punished in accordance with the criminal justice system, are restricted by these local and federal laws. But after their time is served and their debt to society is paid, there will be increasingly no redemption, no clean slate, but rather a growing list of rules and prohibitions that greatly restricts the lives these individuals can lead following their jail time. While most people consider it a small price to pay for the safety of America's children, a handful of individuals and groups[5] have begun to question these laws as representing a system of ex post facto punishment that makes pariahs out of sex offenders.

Congressional acts named after brutally murdered little girls, like Megan's Law,[6] provide for a strict system of registering and monitoring convicted sex offenders. The effectiveness and fairness of these laws have been examined by the judiciary and the public—with almost universal acceptance and support.[7] However, the public has recently thought these restrictions insufficient. As high profile cases of abduction, sexual torture and murder flood America's television screens, local politicians are trying new ways to keep children safe from sexual predators.[8] Towns in Iowa,[9] Oklahoma, and twelve other states[10]

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[4] Lawrence Greenfeld, *An Analysis of Data on Rape and Sexual Assault: Sex Offenses and Offenders*, 21 DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS (1997).

[5] The American Civil Liberties Union is one group that has consistently challenged residency restrictions on behalf of many "John Does."

[6] Megan's Law, HR 2137, 104th Cong. (1996) (enacted).

[7] *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (holding that current dangerousness of a convicted sex offender irrelevant to whether they should be included in the state's registry) *and* Gunderson v. Hvaas, 2002 U.S. Dist. LEXIS 21783 (2002) (upholding that a sex offender who pled to a lesser sentence still had to register with state because circumstance of offense similar to those of higher offenses and since statute was regulatory right of presumed innocence did not apply).

[8] Manuel Roig-Franzia, *Miami Beach Mayor Seeks to Exclude Sex Offenders*, WASHINGTON POST, April 25, 2005, at A03 (discussing the death of Jessica Lunsford and Sarah Lunde and the effect these deaths had on the media, public and subsequently politics).

[9] Julie Hilden, *Are the Pedophile-Free Zones Constitutional? The Issues*

are initiating legislation that limits access of certain areas to registered sex offenders. Specifically, registered sex offenders are prevented from living or working near schools, playgrounds and other locations frequented by children.[11] This intersection of property rights and civil sanctions, public fear and private shame brings an important discussion to the public forum: when does prevention cross the line into punishment and how does local government reconcile the freedom of movement and rights of property with residence restrictions that look similar to restrictive zoning?

This note looks at these new zoning regulations through the lens of property and practicality. First this note will examine the framework provided by *The City of Philadelphia v. New Jersey,*[12] regarding a state isolating itself from common problems, and apply the same analysis to a comparable problem of statewide sex offender residency restrictions like those in Iowa. Next this note will take the framework regarding exclusionary zoning laws as set forth in the landmark property case *Southern Burlington County NAACP v. Township of Mount Laurel*[13] and apply it to modern residence restrictions regarding registered sex offenders. By employing these principals to residency restrictions this note will seek to create a method for understanding how individual property rights and common responsibility interact with local fears and public concerns. It will also reveal how the current form of residency restrictions have an unfair effect of pushing the burden of treating and

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they May Raise, FINDLAW, Aug. 30, 2005, http://writ.news.findlaw.com/hilden/20050830.html (examining residence restrictions in Iowa and revealing possible constitutional challenges).

[10] In Doe v. Miller, 405 F.3d 700, 714 (2005) the court identifies twelve other states that have residency restrictions for sex offenders, including: Alabama, Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Ohio, Oklahoma, Oregon and Tennessee.

[11] *See* DEVON B. ADAMS, SUMMARY OF STATE SEX OFFENDER REGISTRY DISSEMINATION PROCEDURES, (Bureau of Justice Statistics 1999).

[12] The City of Phila. v. New Jersey, 437 U.S. 617 (1978).

[13] Southern Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 67 N.J. 151 (1975) [hereinafter Mt. Laurel].

monitoring convicted sex offenders onto towns and municipalities with smaller populations, smaller budgets and fewer resources. In the end, this system will only compound the problem of dealing with sex offenders. Finally, this note will examine the criticism of residence restrictions and address possible alternative solutions, such as housing arrangements, additional monitoring, education and individualized attention.

I. SEX OFFENDER LAWS

There are various laws[14] throughout the United States designed to help law enforcement officials and communities fight sex offenders and other child predators.[15] This note specifically focuses on residency restrictions imposed on convicted sex offenders following their parole from prison, though registries will also be discussed. Residency restrictions are relatively new restraints and part of a larger system that restricts and controls paroled sex offenders. These restrictions placed on sex offenders

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[14] One such measure is the AMBER Alert System. AMBER stands for America's Missing: Broadcast Emergency Response, and it is named after Amber Hagerman, a 9-year old who was kidnapped and brutally murdered while riding her bicycle in Arlington, Texas. Following her death, in 1996 local police and Dallas-Fort Worth broadcasters developed an early warning system. The system requires that after there has been a kidnapping that meets certain specific criteria all local radio and TV broadcasters as well as state transportation officials are notified. These various groups issue alerts interrupting regular broadcasting and reaching anyone listening to a radio, watching TV or traveling on roadways. This system spread throughout the nation. Now all 50 states have AMBER Alert Systems and the Department of Justice is currently working to create a seamless national system. U.S. Department of Justice, *AMBER Alert: History and Frequently Asked Questions*, http://www.amberalert.gov/about/faqs.htm (last visited Nov. 13, 2006).

[15] For the context of this note the term "sex offenders" refers to adults who have committed sexual crimes against children. At times there will be distinctions drawn between child molesters, or sex offenders whose sexual crime with children did not include intercourse, and statutory rapists, whose sexual crime with children included intercourse. PATRICK A. LANGAN, ERICA L. SCHMITT AND MATTHEW R. DUROSE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 4 (Bureau of Justice Statistics 2003).

are often coupled with other requirements, most notably registry requirements.[16]

A. Registries

Registry requirements are the most common form of control exercised over paroled sex offenders. All fifty states have sex offender registration acts ("SORAs") that require sex offenders to register with the state, and often require notification of the offender's status to neighbors and local law enforcement.[17] Sex offender registries are kept by local police and contain the names, addresses and criminal histories of sex offenders residing within a given area.[18] Disclosure laws require that schools and other interested parties be informed of sex offenders living nearby.[19] Many have the information available online, along with pictures and maps of neighborhoods pinpointing the residences of sex offenders.[20] In addition, many sites also include a disclaimer requiring that a user acknowledges that the information on the site might include mistakes and that its use is for legitimate purposes.[21]

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[16] The same states that have residence restrictions also have registry requirements. *Compare*, Adams, *supra* note 11 and Doe v. Miller, 405 F.3d 700 (2005).

[17] Jane A. Small, *Who are the people in your neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U.L. REV. 1451, 1451 (Nov. 1999) (examining current SORAs and their related problems).

[18] *See* Adams, *supra* note 11.

[19] *Id.*

[20] For example, the Kentucky State Registration website includes pictures of offenders. http://www.kentuckystatepolice.org/sor.htm#search. The California State Registration website includes a searchable map according to city, county, zip code or school that will pinpoint where a sex offender lives within a certain radius. http://meganslaw.ca.gov (click "Continue"; then check the "I have read the disclaimer and agree to these terms and conditions" box; then click "Continue").

[21] Websites that list Sex Offenders often contain cautions that the information found on the site cannot be used for criminal persecutions, such as harassment, and that such a use of the information is subject to

The push for this form of surveillance came on the heels of the high profile murder of Megan Kanka.[22] Megan lived in a reportedly quiet neighborhood in Hamilton Township, New Jersey.[23] On July 29, 1994 she was lured into the house of a neighbor with the promise of a puppy.[24] The neighbor was Jesse Timmendequas, a man previously convicted twice of sexual crimes against children.[25] Timmendequas lived with two other convicted sex offenders across the street from Megan's home.[26] After luring Megan into the house, Timmendequas raped her and then killed her by strangling her with a belt to ensure her silence.[27] Timmendequas eventually confessed to the murder and led a search party to the field where Megan's body was found.[28] Timmendequas was sentenced to death and is as of the date of this publication awaiting execution.[29]

The story of Megan Kanka was highly publicized and the New Jersey legislature, galvanized by public outcry, passed legislation that required sex offenders to register with local police upon parole.[30] The registry laws also require disclosure of the name and address of the sex offender to neighbors, local schools and other places frequented by children.[31] If a sex offender moves, then he or she must notify the police.[32]

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prosecution.

[22] Bureau of Justice Assistance, Background on the Act and Its Amendments, http://www.ojp.usdoj.gov/BJA/what/2a2jwactbackground.html (last visited Nov. 17, 2005).

[23] Seamus McGraw, *Suffer the Children: The Story of Megan's Law*, Court TV, http://www.crimelibrary.com/serial_killers/predators/kanka/1.html (last visited Dec. 11, 2006).

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] McGraw, *supra* note 23.

[29] *Id*.

[30] Division of Criminal Justice, New Jersey Office of the Attorney General, *Megan's Law*, http://www.state.nj.us/lps/dcj/megan/ (last visited Sept. 25, 2005).

[31] *Id*.

[32] There have been many problems with the sex offender registries.

Following New Jersey's lead, other states ratified sex offender registry laws.[33] On a national level, in 1996 President Clinton signed an updated version of the Jacob Wetterling Crimes Against Children Act.[34] This act had a provision popularly referred to as Megan's Law,[35] which required every state to develop some sort of procedure for notifying the public when a sex offender is released into their community.[36] The procedures differ from state to state,[37] but common elements include the release of personal information such as names, addresses, criminal history and even photographs to neighbors, schools and any party that expresses interest in the information.[38] For example,[39] in Alabama if an offender qualifies for notification, a flyer with his or her photograph is mailed to all residents living within a specified distance.[40] In Rhode Island, all schools, day care facilities and other related

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Cases of mistaken identity have caused innocent people to be treated like criminals. Also, in some states the definition of a "sex offender" is not limited to people that have committed violent sexual crimes with children but includes other groups that pose no danger to society. Men convicted of consensual sodomy with women or other men are considered sex offenders. As are women convicted of prostitution and any one convicted of statutory rape. These offenders are lumped in with violent offenders—those guilty of child molestation, rape and other sexual violence. *See generally*, National Institute of Corrections, Fifty State Survey on Sex Offender Registry (2006), http://www.nicic.org/Library/021768.

[33] For example, New York signed their own version of Megan's Law in July 1995. New York State Sex Offender Registry, http://criminaljustice.state.ny.us/nsor/ (last visited Nov. 16, 2005).

[34] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Title 17, 108 Stat. 2038, as amended, 42 U.S.C. § 14071.

[35] Pub.L. 104-145, May 17, 1996, 110 Stat. 1345.

[36] *Id*.

[37] For a comprehensive list of state sex offender registries see ADAMS, *supra* note 11. This report also lists how each state registry can be accessed and what information is available to the general public. *Id*.

[38] Small, *supra* note 17, at 1461.

[39] For a complete listing of the notification procedures of each state see ADAMS, *supra* note 11.

[40] *Id*. at 3.

institutions are notified.[41] Parents of children attending such places are also notified.[42] Although these registries remain immensely popular, as this note argues, there are also some problems associated with them.

Sex Offender Registry Acts or SORAs are often criticized as overbroad—snaring anyone convicted of a sexual crime.[43] They also raise concerns over such potential problems as improper notification, vigilantism, false sense of security and ex post facto or double jeopardy issues.[44] SORAs have been challenged, usually under the Due Process guarantee of the Fourteenth Amendment.[45] Some state courts have found that SORAs implicate a Due Process interest, but very few have found a liberty or property interest involved.[46]

B. Constitutionality of Registration Laws

Federally, the constitutionality of SORAs have been addressed recently by the Supreme Court in *Smith v. Doe*.[47] *Smith* challenged the Alaska Sex Offender Registration Act, which required sex offenders incarcerated in Alaska to register with the Department of Corrections within thirty days of their release.[48] Depending on the level of offense, a convicted sex offender would have to ratify the information annually or

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[41] *Id.* at 7.

[42] *Id.*

[43] *See supra* note 32 for a further discussion.

[44] Small, *supra* note 17, at 1465-470.

[45] *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (discussing that current dangerousness of a convicted sex offender is irrelevant to whether they should be included in the state's registry) and Gunderson v. Hvaas, 2002 U.S. Dist. LEXIS 21783 (2002) (holding that a sex offender who pled to a lesser sentence still had to register with state because circumstance of offense similar to those of higher offenses and since the statute was regulatory right of presumed innocence did not apply).

[46] Given that current laws affect where sex offenders can live and also their property rights—a Fourteenth Amendment challenge may be stronger now that zoning laws have come into play.

[47] Smith v. Doe, 538 U.S. 84 (2003).

[48] *Id.* at 90-91.

quarterly for a specified number of years.[49] The state would also publish certain information about the registrant, such as address, date and place of conviction and sentence etc., on the internet.[50]

In its analysis of the constitutionality of this Act, the Court first examined whether "the legislature meant the statute to establish civil proceedings."[51] If the Court found legislative intent to impose punishment then the law would be deemed invalid under the Ex Post Facto Clause.[52] However, if the Court found legislative intent to "enact a regulatory scheme that is civil and non-punitive"[53] then the Court would look to determine whether the scheme is so punitive in either purpose or effect "as to negate the State's intention to deem it civil."[54] If the law passed these tests then it is deemed constitutional.[55]

In *Smith* the Supreme Court concluded that Alaska's Sex Offender Registration Act was non-punitive; therefore, asking sex offenders to register did not violate the Ex Post Facto Clause of the Constitution.[56] The Court found the Act was within the interests of the state to protect the health and safety of its citizens.[57] Based on the language of the statute and the legislative record, the Court found that facially the statute was designed to protect the public.[58] The Court noted that when a state uses its power to protect the health and safety of its citizens, there is a presumption that the legislative intent was to

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[49] *Id*. at 90.

[50] *Id*. at 91.

[51] *Id*. at 92.

[52] *Id*. The Ex Post Facto Clause is found in the United States Constitution Article I, § 9, Clause 3, and forbids the enactment of ex post facto laws, which are laws that apply retroactively and may criminalize an action that was legal when it was committed. BLACK'S LAW DICTIONARY 264-65 (8th Ed. 2004).

[53] Smith v. Doe, 538 U.S. 84, 92 (2003).

[54] *Id*.

[55] *Id*.

[56] *Id*. at 105-106.

[57] *Id*.

[58] Smith v. Doe, 538 U.S. 84, 93 (2003).

exercise the state's regulatory power.[59] This logic, therefore, defeated the argument that the state intended to impose punishment with the registration requirement.[60]

Next, the Court examined Alaska's implementation of the Registration Act. Again the Court ruled that the scheme was non-punitive since the Act had "contemplated distinctly civil procedures"[61] for its administration.[62] The Court then examined the effects the Act had on the paroled sex offenders. The Court analyzed the registry requirements by examining:

> whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.[63]

The court then examined each of these issues to determine if the Act was non-punitive.

If a state chooses to punish then it might adopt a traditional form of punishment so that the public will recognize it as such.[64] Comparing the registration requirements with colonial shaming, the Court stated that the aim of such punishments was typically to impose permanent stigmas on the offenders which effectively ostracized the guilty.[65] The court also noted that "the most serious offenders were banished,[66] after which they could neither

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[59] *Id*.

[60] *Id*.

[61] One example was allowing the managerial aspects of the regime to be handled by the same body that dealt with civil matters. *Id*. at 96.

[62] *Id*. at 96.

[63] Smith v. Doe, 538 U.S. 84, 97 (2003).

[64] *Id*.

[65] *Id*. at 98.

[66] In Doe v. Miller, 405 F.3d 700, 719-20 (2005), which will be discussed in detail in Part III. B., one of the arguments used against residency restrictions is that they are similar to the colonial punishment of banishment, which the Court here acknowledges as historically one of the worst punishments. *Smith,* 538 U.S. 84, 98 (2003).

return to their original community, nor reputation tarnished, be admitted easily into a new one."[67] In comparison, the Court ruled that the stigma from registry restrictions resulted from the "dissemination of accurate information about a criminal record, most of which is already public."[68] The Court further noted that widespread public access to registry information was necessary to promote the goals of the scheme, namely those of public protection.[69] Therefore, the Court held that registry requirements do not parallel what historically has been thought of as punishment nor did they promote the traditional aims of punishment.[70]

In *Smith,* the Court then examined whether the registration requirements imposed an affirmative disability or restraint on the offenders.[71] There was no physical restraint imposed by the Act, and the Court observed that offenders would not be completely unemployable nor would they be unable to find places to live, stating that the Act caused no "substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords."[72] After determining that there was no affirmative disability or restraint imposed, the Court quickly dealt with the Act's rational connection to a non-putative purpose.[73] The Court held that the risk of recidivism posed by sex offenders[74] combined with the non-excessive

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[67] *Smith,* 538 U.S. 84, 98 (2003).

[68] *Id*.

[69] *Id*. at 99.

[70] *See id*. at 98-99.

[71] Smith v. Doe, 538 U.S. 84, 98-99 (2003).

[72] *Id*. at 100.

[73] *Id*. at 102-03.

[74] According to the court's reading of U.S. Department of Justice reports, "when convicted sex offenders reenter society they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id*. at 102. However, as will be discussed in Section III.D, of this note recidivist rates among criminals arrested for non-sexual crimes were much higher. Therefore, while sex offenders may be the most likely to commit another rape, they do not have the highest recidivist rate among

duration of the reporting requirements resulted in the fact that the Act was reasonable in light of the nonpunitive objective.[75] In the end, the Court held the Act constitutional.[76]

While *Smith v. Doe* established that statewide Sex Offender Registries were constitutional, some of the framework discussed by the Court supports the idea that residence restrictions might be impermissible or at least subject to scrutiny.[77] Specifically, the finding that registries result in no additional housing disadvantages for sex offenders,[78] do not "ostracize" them,[79] and are dissimilar from "banishment"[80] is in sharp contrast with the realities of the newest limits imposed on sex offenders: residence restrictions.

C. Residence Restrictions

Residence restrictions are statutory laws that control where sex offenders can live under the terms of their parole.[81] The most common form of these restrictions limits sex offenders from residing within specified distances from schools, day care centers, playgrounds, parks and other places where children congregate.[82]

Residence restrictions have become popular in recent years. Several states have enacted strict rules regarding where

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convicts as is often reported.

[75] *Id*. at 103-06.

[76] *Id*. at 106.

[77] This note will apply the framework from *Smith v. Doe* to residence restrictions later in the note, after residence restrictions have been discussed and explained. *See* Section C.3, *supra*.

[78] Smith v. Doe, 538 U.S. 84, 101 (2003).

[79] *Id*. at 99.

[80] *Id*. at 98.

[81] Jill S. Levenson and Leo P. Cotter, *The Impact of Sex Offender Resident Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 168, 175 (2005).

[82] *See* Doe v. Miller, 405 F.3d 700, 715 n.14 (2005).

convicted sex offenders may reside.[83] The rules are diverse and vary greatly from state to state. For example, in Arkansas a registered sex offender cannot live within 2,000 feet of elementary or secondary schools and daycare facilities.[84] In California, convicted sex offenders may not reside within any single family dwelling with another sex offender unless they are related by blood, marriage or adoption.[85] In Illinois, the residence restriction states that a *child* sex offender may not "knowingly reside within 500 feet of a playground or facility providing programs or services exclusively directed toward persons under eighteen years of age."[86] The Illinois restriction also includes a section that forbids approaching, contacting or communicating with children by registered sex offenders in parks or other areas frequented by children.[87] Similar residence restrictions have been adopted in some form by many states, including large states such as New York and California.[88]

In addition to state residence restrictions, some municipalities and other smaller geopolitical areas have also enacted strict laws limiting where sex offenders can reside. For example, the mayor of Miami Beach garnered considerable attention for pushing legislation that creates a buffer zone around places where children regularly congregate and the homes of sex offenders.[89] This zone stretches for 2,500 feet around such areas and makes it almost impossible for sex offenders to live within Miami Beach.[90] While Florida[91] already has statewide residence

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[83] *See* Devon B. Adams, Summary of State Sex Offender Registry Dissemination Procedures, (Bureau of Justice Statistics 1999).

[84] A.C.A. § 5-14-128 (2005).

[85] Ann. Cal. Penal Code § 3003.5 (2005).

[86] 720 ILCS 5/11-9.4 (2005).

[87] *Id*.

[88] Other states include: Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, Oregon and Tennessee. Doe v. Miller, 405 F.3d 700, 715 (2005).

[89] Manuel Roig-Franzia, *Miami Beach Mayer Seeks to Exclude Sex Offenders: Wider Buffer Covers Nearly Entire City*, WASHINGTON POST, Apr. 25, 2005, at A3.

[90] *Id*.

restrictions for sex offenders, some municipalities are discovering that the public fear of sex offenders warrants stricter limitations.

1. Municipal Residency Restriction—Hamilton Township, NJ

Hamilton Township was the home of Megan Kanka and the birthplace of the movement in the 1990s to register sex offenders.[92] Now Hamilton Township is at the forefront of another trend—residency restrictions. On May 17, 2005 the Township Council of Hamilton Township voted unanimously in favor of Ordinance 05-017, which extended residence restrictions for sex offenders to 2,500 feet from a school, playground, childcare center or park.[93] Hamilton Township still enacted one of the most restrictive requirements in the United States, even though New Jersey already had a residency restriction in place.[94] However, this more restrictive rule makes Hamilton Township the fortified castle in the already restrictive fort that is New Jersey.

2. State Residency Restriction—Iowa

In 2002 the Iowa State legislature passed a residency restriction that applied to convicted sex offenders who had been involved in certain offenses with a minor.[95] The residence restriction required that such offenders live outside of 2000 feet of a school or a registered child care facility.[96] At the time of its

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[91] *See* FLA. STAT. § 948.30 (2005).

[92] Bureau of Justice Assistance, *Background on the Act and Its Amendments*, http://www.ojp.usdoj.gov/BJA/what/2a2jwactbackground.html (last visited Nov. 17, 2005).

[93] Township of Hamilton, Meeting Minutes—Township Council (May 17, 2005) *available at,* http://www.hamiltonnj.com/index.htm?/announcements/council_agendas_minutes.htm [hereinafter *Hamilton Township Meeting Minutes].*

[94] *See* Adams, *supra* note 11.

[95] Doe v. Miller, 405 F.3d 700, 704 (8th Cir. 2005).

[96] *Id*.

passage, this state-wide restriction was one of the harshest and resulted in a great deal of controversy.[97]

3. Smith v. Doe *as applied to Residence Restrictions*

Smith[98] examined a challenge to Alaska's Sex Offender Registry law. Since *Smith* is the only recent Supreme Court case dealing with the regulation of paroled sex offenders, it is a valid framework for contemplating how the Supreme Court would handle a similar challenge to residence restrictions. Some of the arguments that the Court considered in *Smith* are also applicable to analyzing a challenge to residence restrictions. While others do not have the same effect when applied to residence restrictions.

Since residence restrictions limit where sex offenders may reside based on proximity to schools, parks, playgrounds and other sites as previously discussed, such restrictions do exactly what the Court implied was improper.[99] For example, Iowa's residence limitations resulted in restricted areas that encompassed the majority of available housing in cities and in small towns because the presence of a single school or child care center could cause the entire town to be off limits to sex offenders.[100] Calling this a housing disadvantage, as this note argues, is an understatement. As such, residence restrictions, unlike registries similar to the Alaskan registry as examined in *Doe v. Smith*, do impose additional housing disadvantages for sex offenders, and therefore, would defeat one argument of the Supreme Court in favor of registries.

In addition, in *Smith,* the Court pointed out that since the

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[97] http://www.iowastatedaily.com/media/storage/paper818/news/2006/01/25/Opinion/Editorial.Residency.Restrictions.Create.More.Problems.Than.They.Solve1503545.shtml?norewrite200611141402&sourcedomain=www.iowastatedaily.com

[98] *Smith* was discussed *supra*, Section I.B.

[99] Previously, in *Smith*, the Court held that since registry requirements do not limit where sex offenders can live or restrict their movement they are within a state's police powers. *See supra* Section I.B.

[100] Doe v. Miller, 405 F.3d at 706.

registries were not similar to colonial punishment, then it was unlikely that the registries were punitive.[101] However, residence restrictions effectively ostracize the guilty and also ban offenders from living in certain areas. If there are very few areas in cities and larger towns where sex offenders can live, then the result of residence restrictions will be to herd registered offenders together into these permissible areas. Eventually, extrapolating on the effect of residence restrictions, entire neighborhoods might become populated largely by registered sex offenders, creating modern day penal enclaves in cities and towns across America.[102] Forcing sex offenders to live together might have the additional adverse effect of preventing their reintegration into society and instigating further instances of abuse.[103] Thus, it appears residence restrictions have the effect of ostracizing and banning offenders. Once again they are more punitive in effect than registries and defeat yet another prong of *Smith* that allowed the Supreme Court to find such restrictions constitutional.

Using the framework of the leading Supreme Court case that addresses sex offender parole requirements similar to residence restrictions reveals that residence restrictions raise concerns of constitutionality that registries do not. A challenge of residence restrictions as a punitive measure in violation of the Ex Post Facto Clause of the Constitution might be successful.[104] In addition, there are cases from a purely public policy prospective that raise additional concerns of the validity of residence restrictions.[105]

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[101] Smith v. Doe, 538 U.S. 84, 99 (2003).

[102] *Cf*. Lisa Henderson, Comment, *Sex Offenders: You are Now Free To Move About the Country*, 73 UMKC L. Rev. 797, 804 (2005).

[103] *Id*. at 802.

[104] *See infra* Section III.B for the discussion concerning Doe v. Miller. In *Miller*, the Eighth circuit dismissed these arguments. However, there are a variety of possible challenges to the Court's reasoning.

[105] *See infra* Section V.

II. RESIDENCY RESTRICTIONS AND PROTECTIONISM

Sex offender residence restrictions have protectionist tendencies. This section seeks to compare residence restrictions to past state efforts to isolate themselves from a problem that crosses state lines. First, a prior decision of the Supreme Court dealing with state protectionism will be examined. Then the framework provided by the Supreme Court will be used to address protectionism in regards to Iowa residence restrictions.

A. City of Philadelphia v. New Jersey

In early 1974, New Jersey enacted a statutory provision that prohibited the importation of most "solid or liquid waste which originated or was collected outside of the territorial limits of the State."[106] Cities in other states that had arrangements with private landfill operators in New Jersey challenged this law.[107] While the trial court declared the law unconstitutional because it interfered with interstate commerce, the New Jersey Supreme Court held that the statute was a legitimate exercise in the protection of vital health and environmental concerns that posed no great burden upon interstate commerce and was, therefore, permissible.[108] The U.S. Supreme Court dismissed the relevance of the purported environmental protection the law was supposed to provide.[109] Then the Court held that discriminating against articles of commerce[110] coming from outside the state was impermissible under the Commerce Cause unless there was another way to distinguish the articles besides their place of origin.[111] The Court ruled with the understanding that small burdens on interstate commerce would be tolerated provided that

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[106] City of Philadelphia v. New Jersey, 437 U.S. 617, 618 (1978).

[107] *Id.* at 619.

[108] *Id.* at 620.

[109] *Id.*

[110] The Supreme Court adopted the view of the New Jersey Supreme Court that the movement of waste constituted commerce for the purpose of an analysis of constitutionality under the Commerce Clause. *Id.* at 621.

[111] City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1975).

a state legislature had the goal and effect of protecting the health and safety of that state's citizens.[112] In addition, the Court also stated: "What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[113] The Court went on to scold New Jersey for attempting to "saddle those outside the State with the entire burden"[114] associated with reducing waste in New Jersey.[115]

Sex offender residency restrictions facially appear to have very little in common with New Jersey waste restrictions, but important analogies can be drawn. In both situations states are faced with an undesirable. No one wants sex offenders living next door, just as no one wants to live next to a landfill. Yet both of these unwanted problems exist in this country, in all states and in all communities. The question then becomes whether it is permissible for one state to isolate itself from a problem common to many by erecting effective barriers—in this case residence restrictions—that severely limit where sex offenders may live within a state.

B. Doe v. Miller

In *Doe v. Miller,*[116] the U.S. Court of Appeals for the Eighth Circuit examined the constitutionality of Iowa Code § 692A.2A, which prohibited a person convicted of sex offenses against minors from residing within 2,000 feet of a school or registered child care facility.[117] The district court held that this law was constitutional because it fell within the state's power to protect the health and safety of the citizens of Iowa, and that on its face, the residency restrictions were not unconstitutional.[118] The U.S.

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[112] *Id*. at 623-24.
[113] *Id*. at 628.
[114] *Id*. at 629.
[115] *Id*.
[116] Doe v. Miller, 405 F.3d 700, 700 (8th Cir. 2005).
[117] *Id*. at 705 (citing Iowa Code § 692.2A (2002)).
[118] *Id*. at 704.

Court of Appeals for the Eighth Circuit reversed.[119]

On appeal, the Eighth Circuit first addressed the reasoning of the lower court in finding Iowa Code § 692A.2A unconstitutional.[120] The circuit court dismissed the lower court's conclusion that the residence restrictions encompassed such a large majority of the land in cities and larger towns that the only available housing left for sex offenders was in small enclaves in the cities or in rural areas where available housing was "not necessarily readily available."[121] The circuit court pointed out that "while the residency restriction may have exacerbated a housing problem for the plaintiffs, not all their difficulty was caused by the statute."[122] The court found that housing problems occurred for many of the plaintiffs not because of the residence restriction, but because of their own money troubles or status as convicted felons; factors that would remain even if the statute were repealed.[123]

The Court then turned to the Fourteenth Amendment Due Process challenge to § 692A.2A.[124] First, the court dismissed the challenge based on procedural due process, pointing out that the statute was not vague and that the legislature could draw classifications amongst felons provided that the "substantive rule" does not conflict with provisions of the constitution.[125]

Substantive due process was the next challenge to § 692A.2A.[126] The plaintiffs claimed that the statute infringed on their "right to privacy and choice in family matters, the right to travel and 'the fundamental right to live where you want.'"[127] To support this the plaintiffs applied the reasoning from *Moore v. City of East Cleveland*, which dealt with zoning restrictions

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[119] *Id*. at 705.
[120] *Id*.
[121] *Id*. at 706.
[122] Doe v. Miller, 405 F.3d 700, 706 (8th Cir. 2005).
[123] *Id*. at 706.
[124] *Id*. at 708.
[125] *Id*. at 708-10.
[126] *Id*. at 709.
[127] *Id*.

that attempted to reach into the home and limit the type of relatives that could live together in order to qualify as a "single-family home."[128] The Eighth Circuit dismissed this comparison, pointing out that the law did not restrict who may live with sex offenders, but merely restricted where the residence they co-habited could be located.[129] Therefore, the court did not find infringement on matters relating to marriage and the family that would require strict scrutiny under the Fourteenth Amendment.[130]

The court also rejected the argument that the residence restriction infringed on the right to travel.[131] "The Iowa statute imposes no obstacle to a sex offender's entry into Iowa, and it does not erect an actual barrier to interstate movement."[132] The court declined to examine whether there was a fundamental right to intrastate travel.[133] The court also declined to find that "the right to live where you want" was a fundamental right so deeply entrenched in the history and tradition of the United States that to deny its protection would sacrifice liberty and justice.[134]

After dismissing these arguments, the Eighth Circuit was then required to review the statute to determine if it "rationally advanced some legitimate governmental purpose."[135] Because "precise statistical data is unavailable and human behavior is necessarily unpredictable"[136] the court stated that the authority of the Iowa legislature in erecting measures to protect the health and safety of its citizens was broad.[137] Citing *Conn. Dept't of*

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[128] 431 U.S. 494 (1977) (holding that a zoning ordinance that defined family in such a way as to prohibit a grandmother from living with her two grandsons in an area zoned for "single family residences" was unconstitutional).

[129] Doe v. Miller, 405 F.3d 700, 710 (8th Cir. 2005).

[130] *Id.* at 711.

[131] *Id.* at 712.

[132] *Id.* (internal quotations and citations omitted).

[133] *Id.* at 713.

[134] Doe v. Miller, 405 F.3d 700, 714 (8th Cir. 2005).

[135] *Id.* at 715 (internal quotations and citations omitted).

[136] *Id.*

[137] *Id.*

Publ. Safety v. Doe,[138] the court held that it is rational to believe that sex offenders present dangers to society and that the danger of convicted sex offenders committing new sexual crimes upon their reentry into society is high.[139] Because of these dangers the court felt that the restriction advanced a legitimate government purpose and that the legislature of a state is the proper decision-maker in determining the appropriate distance.[140]

The court then rejected a challenge based on the constitutional right against self-incrimination found in the Fifth and Fourteenth Amendments[141] and turned to the issue of whether these residence restrictions constituted an attempt at ex post facto punishment.[142] Since the Iowa General Assembly did not intend to create a law of criminal punishment,[143] the court had to inquire as to whether the purpose or effect of the law was so punitive that it violated the Ex Post Facto Clause.[144] Because the court believed that the purpose of the law was not punitive,[145] the judges then turned to the question of whether the effect of the law was punitive.[146]

Like the Supreme Court in *Smith*,[147] the plaintiffs in *Miller* pointed to the similarities between residence restrictions and banishment in an attempt to prove punitive effect.[148] However,

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[138] Conn. Dep't of Pub. Safety, 538 U.S. at 1 (2003) (dealing with a constitutional challenge to website that registered sex offenders' whereabouts and level of dangerousness pursuant to Connecticut's version of Megan's Law).

[139] *Miller*, 405 F.3d at 715.

[140] *Id.*

[141] The petitioners argued that requiring sex offenders to register forced them to provide information that incriminated themselves in violation of the Fifth and Fourteenth Amendments. Doe v. Miller, 405 F.3d 700, 716 (8th Cir. 2005).

[142] *Id.* at 718.

[143] *Id.*

[144] *See id.* at 719

[145] *Id.*

[146] *Id.*

[147] Smith v. Doe, 538 U.S. 84, 98 (2003).

[148] *See* Doe v. Miller, 405 F.3d 700, 719 (8th Cir. 2005).

the Eighth Circuit did not find this argument compelling for two reasons. First, the residence restriction only affected where offenders may reside but did not "expel" them from the community.[149] Since offenders could still access every area of Iowa "for employment, to conduct commercial transactions, or for any purpose other then establishing a residence"[150] the comparison to banishment failed.[151] Second, the court pointed out the "novelty" of residence restrictions, indicating that it could not be similar to a traditional means of punishment because it was a new idea.[152]

Turning to the issue of whether the law promoted traditional punishment aims of deterrence and retribution, the Eighth Circuit found that the law intended to deter and that it was not overly retributive.[153] In addition, the law did not impose an affirmative disability or restraint.[154] The judges compared the civil commitment of the mentally ill to residence restrictions[155] and pointed out that in the first case courts have consistently held that such confinement "does not necessarily impose punishment because it bears a reasonable relationship to a 'legitimate nonpunitive objective.'"[156] Finally, the court examined whether Iowa Code § 692A.2A had a rational

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[149] *Id.*

[150] *Id.*

[151] Of course, if the goal of residence restrictions is to keep convicted sex offenders away from potential victims then this argument is nonsensical. True, sex offenders are prevented from living next to schools, but as the Court points out with this argument, which does not deny them access to these areas for almost any other purpose. *Id.* at 712.

[152] *Id.* at 720.

[153] *Id.*

[154] Doe v. Miller, 405 F.3d 700, 720 (8th Cir. 2005).

[155] Interestingly enough, some states attempt to keep sexual offenders confined to mental hospitals following their release from prison, citing that sexual offenders have mental instability and should be confined for the good of society. For an interesting discussion of current state efforts to confine sexual offenders to mental hospitals using current laws directed at the dangerously mental ill see *Pushing the Envelope*, THE NEW YORK TIMES, Dec. 7, 2005.

[156] Doe v. Miller, 405 F.3d 700, 720 (8th Cir. 2005).

connection to a non-punitive purpose.[157] Again, the court felt that the law fit the purpose of protecting the public health and safety and was not so overbroad as to become punitive.[158] In the end the Eighth Circuit upheld Iowa Code § 692A.2A and reversed the lower court decision that had found this residence restriction unconstitutional.

C. Miller In Light of Philadelphia

The Eighth Circuit failed to consider in *Miller* the repercussions that Iowa's residence restriction might have on neighboring states. The Iowa Code § 692A.2A is not nearly as restrictive as the statutory provision struck down in *Philadelphia* nor does it obviously affect interstate commerce, but a few parallels still exist.

First, in both cases states attempt to deal with a problem by restricting its ability to exist within the state. In *Philadelphia,* this meant barring waste from entering into New Jersey's borders. *Miller's* goal was to bar sex offenders from residing within certain zones. In both cases the legislatures are attempting to prevent their states from being the receptacle of a distasteful problem.[159]

As the court pointed out in *Philadelphia*, it is unfair for one state to place the burden of dealing with a difficult problem onto those outside of the state.[160] Again, while Iowa is not ejecting all sex offenders from within its borders nor preventing others from moving into the state, it is now more difficult for sex offenders

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[157] *Id*. at 721.

[158] *Id*. at 722.

[159] Since the decision of the Eighth Circuit more states have added restrictive sex offender residence requirements. In 2006 Georgia passed a 1,000 feet restriction that not only included schools, playgrounds and parks but also bus stops and churches. In describing the purpose of the law Rep. Jerry Keen stated, "We don't want these type of people [sex offenders] staying in our state." Greg Bluestein, *Sex Offender Challenges Ga. Residency Restrictions*, WASHINGTON POST, June 16, 2006. Such an attitude clearly portrays isolationist tendencies by a lawmaker.

[160] City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1973).

to live in Iowa than in other states without residency restrictions.[161] Since each state has the burden of monitoring the sex offenders that live within its borders, the effect of state-wide residence restrictions might put a greater burden on states that do not have such restrictions.

Also, sex offenders who desire to move to Iowa might be deterred by the presence of residence restrictions. This could have an inadvertent effect on interstate commerce and also interstate real estate transactions. While sex offenders may not represent a large percentage of the population this type of residency restriction might have some effect on interstate commerce.[162]

III. RESIDENCE RESTRICTIONS AND EXCLUSIONARY ZONING

In examining the form and the general effect of residence restrictions, one comparison with property law becomes apparent: exclusionary zoning. Exclusionary zoning, for the purposes of this note, refers to the efforts of groups within localities to use the zoning code to achieve specific social goals. Exclusionary zoning is defined as "land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the zoning municipality."[163]

A. Southern Burlington County NAACP v. Township of Mount Laurel

In 1975, the Supreme Court of New Jersey decided the *Southern Burlington County NAACP v. Township of Mount Laurel*.[164] Various parties brought suit against the Township on

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[161] For example, Time Magazine reported that an anonymous sex offender planned to uproot from Mason City, Iowa and move to a neighboring state such as Nebraska or South Dakota. Anita Hamilton, *Banning the Bad Guys*, TIME, Sept. 5, 2005, at 72.

[162] Such a study is beyond the resources of the author, but is worth contemplating.

[163] 83 AM. JUR. 2D *Zoning and Planning* § 74 (2005).

[164] *Mt. Laurel*, 67 N.J. 151 (1975).

the grounds that the land use regulations passed by the municipality had the discriminatory effect of excluding low and moderate income families from the area.[165]

Mount Laurel's problems can be traced to Philadelphia's rapid expansion and the growing number of highways running through New Jersey.[166] As more and more people moved into this suburb of Philadelphia the number and extent of local zoning ordinances also grew.[167] The township tried to limit its growth to a certain type.[168] For example, 29.2% of the land in the township was zoned for industry.[169] However, only certain types of industry were permitted—including light manufacturing, farms and offices.[170] Another 1.2% of the total land in the township was zoned for retail business.[171] The remaining land was divided into four residential zones, all of which only permitted single-family, detached housing with one house per lot.[172] Within Mt. Laurel there was no area allotted for attached townhouses, apartments (outside of those permitted on farms) or mobile homes.[173] The court noted that these general ordinance requirements "realistically allow only homes within the financial reach of persons of at least middle income."[174] The result of this exclusionary zoning was to push low and middle-income families out of Mt. Laurel.[175]

Mt. Laurel was, at the time of this case, involved in the then new idea of "planned unit development" (PUD).[176] Instead of housing requirements defined by local legislation, PUD allows for the town to make a contract with real estate developers,

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[165] *Id*. at 157.
[166] *Id*. at 162.
[167] *Id*. at 161-62.
[168] *Id*.
[169] *Mt. Laurel*, 67 N.J. 151, 162 (1975).
[170] *Id*.
[171] *Id*. at 163.
[172] *Id*.
[173] *Id*.
[174] *Id*. at 164.
[175] *See Mt. Laurel*, 67 N.J. 151 (1975).
[176] *Id*. at 166.

which uses broad guidelines for building housing.[177] While the developers in this case had included attached townhouses and a variety of apartments, they would not have been available to people of low to moderate-income.[178] Once again the township had arranged for housing that would not accommodate people of below middle-income.[179]

While the court accepted the argument that the ordinances were not created with a discriminatory purpose, it nonetheless found that the zoning regulations had the effect of excluding low and moderate income families.[180] The court called such patterns of land use regulations "selfish and parochial,"[181] and stated that such laws build walls around towns to keep out "those people or entities not adding favorably"[182] to the desires of the local community.[183]

When examining whether such one-sided land use regulations were legal under the New Jersey constitution the court asked whether municipalities could validly use zoning to make it impossible to provide low and middle income housing and therefore prevent people from these economic categories from living within the municipality.[184] Since zoning laws are encompassed within New Jersey's police power the court asked whether these land use regulations promoted public health, safety, morals or the general welfare.[185] The court also stated that "a zoning enactment which is contrary to the general welfare is invalid."[186]

In deciding whether the land use regulations promoted the general welfare the court emphasized that "when regulation does have a substantial external impact the welfare of the state's

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[177] *Id.*
[178] *Id.* at 167.
[179] *Id.*
[180] *Mt. Laurel*, 67 N.J. 151, 170 (1975).
[181] *Id.* at 171.
[182] *Id.*
[183] *Cf. id.*
[184] *Id.* at 173.
[185] *Id.* at 175.
[186] *Mt. Laurel*, 67 N.J. 151, 175 (1975).

citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served."[187] The court went on to explain that the municipal regulations were designed to create a favorable tax base and ultimately found that these zoning regulations were not permissible because "municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate."[188] Since housing is one of the "basic human needs,"[189] the requirement for adequate housing for all of Mount Laurel's citizens outweighed the community's desire for a favorable tax base.

Essential to the court's reasoning was the determination that land use regulations could not be allowed to "foreclose the opportunity of the classes of people mentioned for low and moderate income housing"[190] especially considering that the municipality must shoulder a "fair share of the present and prospective regional need [for low and middle income housing]."[191] The court emphasizes that "every municipality . . . must bear its fair share of the regional burden" of providing low and middle income housing.[192] The interests of citizens throughout the region and state were taken into consideration, and in light of those interests, the court found Mount Laurel's zoning regulations impermissible.

B. Property Analogies

Examining the facts in *Mt. Laurel* reveals several similarities between those exclusionary zoning regulations and residence restrictions for sex offenders. First, in both cases local municipalities sought to use a form of zoning, an element of property law, to exclude an unwanted group. In both situations the effect of these laws is to push the unwanted group outside of

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[187] *Id.*
[188] *Id.* at 188.
[189] *Id.* at 178.
[190] *Id.* at 174.
[191] *Id.*
[192] *Mt. Laurel*, 67 N.J. 151, 189 (1975).

the borders of the town. While in the abstract this seems feasible, the New Jersey Supreme Court in *Mt. Laurel* pointed out that this only shifted the burden to the rest of the state.[193] The same effect can be seen in the case of residence restrictions for sex offenders. "While states attempt to force sex offenders to live elsewhere with the intent of making their communities safer, inevitably the new community where the offenders will be living is forced to deal with those problems, which it may be ill-equipped to do."[194] The sweeping-the-problem-under-the-carpet approach to sex offenders might be very attractive to each community in the short term. The end result is not to fix the problem but only to allow it to fester elsewhere.

IV. CRITICISMS OF RESIDENCY RESTRICTIONS

While this note focuses on the similarities between residence restrictions and exclusionary zoning, it is important to briefly address the criticisms leveled at residence restrictions. Residence restrictions are designed to address "stranger danger."[195] This term refers to the idea that sex offenders prey on children that they do not know.[196] In reality, this is a highly inaccurate myth. In fact, amongst juvenile female victims only 7.5% were assaulted by a stranger, while 58.7% were assaulted by an acquaintance and 33.9% were assaulted by a family member.[197] Juvenile male victims were even less likely to be assaulted by a stranger where only 5% of young male victims were assaulted by strangers, while 59.2% were assaulted by acquaintances and 35.8% were assaulted by family members.[198] This data contradicts the common fear that a stranger will be the one to

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[193] *Id*. at 164.

[194] Michael J. Duster, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 714 (2005).

[195] Levenson & Cotter, *supra* note 81, at 175.

[196] *Id*.

[197] HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENt: VICTIM, INCIDENT AND OFFENDER CHARACTERISTICS, 10 (National Center for Juvenile Justice 2000).

[198] *Id*.

assault a child. In fact, based on the statistics, the people surrounding children daily are the ones potentially posing the greatest danger.[199] Residence restrictions are useless to prevent acquaintances or family members from assaulting children. They also do not stop strangers from assaulting children since they do not prevent registered sex offenders from entering a restricted zone, just from living within one.[200]

Residence restrictions also prevent sex offenders from living near areas where children congregate but do not prevent an offender from living next door to minors.[201] Nor do the laws account for the fact that sex offenders are more likely to travel outside of their neighborhood to avoid recognition if they attempt to re-offend.[202] For example, in a recent study, one offender stated: "You don't want me to live near a school where the kids are when I'm at work. The way it is now, when I get home from work, they are home too—right next door."[203] The statistics and studies regarding juvenile sexual assault do not appear to support the current form of residence restrictions.

V. PUSHING THE PARIAH ASIDE & OTHER CONSIDERATIONS

The attractiveness of residence restrictions can be obvious. First, from a legislative view, restrictions allow elected officials to quickly respond to their constituents' concerns. Taking a stand against sex offenders and for America's children is a politically popular move.[204] In addition, residence restrictions are inexpensive, especially in comparison to further incarceration, treatment programs, and other forms of monitoring. The primary cost of the restriction is born by the sex offender himself, not by the tax payers of any community.

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[199] *Id.*

[200] *See supra* Part I.C.

[201] An exhaustive look into the statute of each state that had residency restrictions as of Nov. 17, 2005 revealed no provision that prohibited sex offenders from moving next door to a minor.

[202] Levenson & Lotter, *supra* note 81, at 174.

[203] *Id.* at 175.

[204] *Cf.* Henderson, *supra* note 102, at 801.

Finally, residence restrictions are easy to implement. Again, the primary responsibility falls on the offender himself as a condition of his parole.[205] Since all fifty states have registry requirements,[206] it will be clear to parole officers and other law enforcement officials when a registered offender is violating the residence restriction.[207]

A. Efficiency Argument

Courts often consider the assignment of risk, especially when faced with a dangerous situation or condition. Courts will consider what party is best suited to prevent the contemplated danger and ask which party should be assigned the risk, in addition to which party can most effectively prevent the risk from occurring. From a purely economic standpoint, it is usually the creator of a product that is best suited to prevent the danger because they are most knowledgeable and it is generally most convenient for them to do so. In the case of sex offenders, it is clear that they are in the best position to prevent further molestation, but the issue then becomes who is in the best position to watch over these offenders. Is it larger municipalities with larger police forces and more funding but also with higher populations of children? Or is it smaller municipalities in more rural areas? This note argues that the best party to assume this risk is the larger municipalities, and that pushing sex offenders aside, outside of larger towns through residence restrictions will eventually overwhelm the more rural areas to which sex offenders move.[208]

The Minnesota legislature rejected statewide residence restrictions partly for this reason: "proximity restrictions will have the effect of restricting [offenders] to less populated areas,

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[205] *See* Small, *supra* note 17.

[206] *Id*. at 1451.

[207] Statutes requiring registration include provisions that provide consequences for sex offenders that fail to register. *See infra* note 21 for a further discussion.

[208] *C.f*. Duster, *supra* note 194, at 174.

with fewer supervising agents and fewer services for offenders (i.e., employment, education, and treatment)."[209] As *Mt. Laurel Township* and *Philadelphia* point out, there are some problems that are common to an entire region and even to the entire nation.[210] To isolate one's community from this problem might seem attractive and certainly helps resolve fears of the "not in my backyard" philosophy. However, it is a selfish and ultimately futile solution.

B. Effect on Property

One effect of residence restrictions on real property is to decrease the pool of potential homebuyers available to people wanting to sell their property that is located inside a restricted zone.[211] In addition, residence restrictions act as a type of zoning and affect how homeowners are able to use their property. For example, if a homeowner wanted to form a half-way house within a restricted area they could not. Restrictions on property diminish the transferability of land and thus residence restrictions negatively affect innocent property owners.[212]

Also at issue is who will be responsible for ensuring restrictions are met. The burden could be placed on those selling property. Additional title insurance might be required to cover the sale of property to a buyer who is unable to assume residency due to a past conviction of a sex crime. Then comes the issue of whether sellers would be guilty of fraud if they know that their home is within a restricted zone but do not

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[209] Minn. Dep't of Corr., Level Three Sex Offenders Residential Placement Issues: 2003 Report to the Legislature 11 (2003).

[210] *See* Philadelphia v. New Jersey, 437 U.S. 617, 628; Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 172-74 (the problems addressed in these cases are not related to sex offenders).

[211] As of Oct. 3, 2005 there were nearly 500,000 registered sex offenders. *See* Robert F. Worth, *Exiling Sex Offenders from Town*, N.Y. TIMES, Oct. 3, 2005, at B1.

[212] *See generally*, PROPERTY Chs. 6-11 (Jesse Dukeminier and James E. Kreier eds., 1981).

reveal this information upon the sale. Another consideration is the effect on the recordation system for deeds—each recorded deed might need to be modified to reflect this new land use restriction. These issues are only a few that affect all home owners in states with residence restrictions and that have not been addressed by the legislature, along with residence restrictions against sex offenders.[213]

C. Public Misperception

In May 2005 when Hamilton Township passed its latest residence restriction, the Township Council opened the floor to the public in order to ensure all concerns were addressed.[214] The comments from the townspeople of Hamilton Township[215] reveal some common misconceptions about sex offenders and also expose the failure to appreciate the consequences of registry restrictions.

Hamilton Township's mayor, Glen D. Gilmore stated:

> Tonight we're hoping to enact an ordinance that I believe will add another strand to the safety net that protects our children . . . This ordinance is a common sense ordinance . . . I'm hopeful that tonight Hamilton Township will lead our state in enacting a law that's common sense and enacting a law that says convicted child sex offenders, convicted child sex offenders that have a high rate of re-offense will not be permitted to live within twenty-five hundred feet of a school, playground, a child care center or a park. That is common sense and that is something that I hope tonight will add to our measures to protect those who are too young to protect themselves.[216]

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[213] *See* Henderson, *supra* note 102, at 822-24 (for a good discussion on the repercussions that residence restrictions have on home sales).

[214] *Hamilton Township Meeting Minutes*, *supra* note 93.

[215] Obviously these selected statements do not represent every opinion on this issue.

[216] *Hamilton Township Meeting Minutes, supra* note 93, at 4.

This statement, while passionate and understandable, contains many misconceptions about child molesters. First, it is not a common sense measure that preventing child molesters from *living* near schools and other designated areas will prevent them from molesting those children.[217] In 2005, J.S. Levenson and L.P. Cottor conducted a survey of 135 sex offenders living in Florida in order to study the impact that residence restrictions had on the rehabilitation and reintegration of sex offenders back into society.[218] As Levenson and Cottor's study reveals, sex offenders prefer to offend *away* from their place of residence.[219] In addition, child sex offenders have the lowest comparative rate of recidivism among all convicted felons.[220]

Danielle Ference, a member of Hamilton Township and a participant at the meeting, stated:

> To me, it has nothing to do with Civil Rights. It's got nothing to do with race or religion. It's about a predator, a convicted sexual predator and keeping them away from exactly what they prey our children. I don't know about you, and I don't know what the statistics are, but I do know every time I read the paper (sic) but I know every time I read the paper, and I read about one of these cases, nine times out of ten, it is a repeat sex offender. They may serve their time, but what they take from these children, the lucky ones that live to talk about it, is something that they can never get back. They won't get it back in three to five years. This ban is important to me, maybe more than most . . . These children are our future and I can assure you the effects of something

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[217] J.S. Levenson and L.P Cottor, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168 (2005).

[218] *Id*.

[219] *Id*. (emphasis added).

[220] Patrick A. Langan, Erica L. Schmitt, and Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994*, BUREAU OF JUSTICE STATISTICS (U.S. Dept. of Justice, Office of Justice Programs), Nov. 2003, at 30.

> like this has on a child will stay with them for ever. It changes the way that they think and the way that they live their lives. How they are gonna look at other people and how they are gonna view the world.[221]

Ference's comment reveals a common problem with residence restrictions. The problem is that residence restrictions, while banning sex offenders from certain areas of a municipality, do not bar sex offenders from coming into contact with children.[222] Sex offenders might not be able to live near parks, schools or day care centers, but they certainly can walk by them whenever they so choose. Residence restrictions are defined by restricting residence—they do not restrict movement, of sex offenders or of children.

In addition, the strictest residence restrictions might protect one town at the expense of another. In areas where residence restrictions prevent sex offenders from living within a certain municipality there is still the municipality next door. What many people fail to realize is that they are not banning child molesters from their own town without consequences—they are merely sending these "predators" to the next town over to prey on someone else's child.

Again it is clear from Ference's statement that there are still misconceptions regarding the recidivism of sexual offenders.[223] According to a study by the Department of Justice,[224] based on

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[221] *Hamilton Township Meeting Minutes, supra* note 93, at 5.

[222] *See generally* Roig-Franzia, *supra* note 8. The current sex offender residence restrictions on the books do not prevent registered sex offenders from speaking with or contacting children.

[223] It has been surmised that such misconceptions have driven legislatures to create registration and notification statutes. These misconceptions might also explain the attractiveness of residence restrictions to legislatures pressured by their constituents to "do more" about child molestation. *See* Eileen K. Fry-Bowers, *Controversy and Consequence in California: Choosing between Children and the Constitution*, 25 WHITTIER L. REV. 889, 906 (2004).

[224] The Department of Justice examined arrest records for 9,691 male sex offenders who had been released from prisons in fifteen states. *See*

official arrest records, 5.3% of sex offenders released in 1994 were rearrested for a new sex crime within the first three years following their release.[225] The same study reveals that 2.2% of child molesters and statutory rapists were rearrested within three years for sex crimes against a child.[226] In contrast, recidivism rates among prisoners released in 1994 for non-sexual crimes were much higher; in fact 67.5% of prisoners studied were rearrested for committing a crime three years later.[227]

Meanwhile, only 43% of released sex offenders were rearrested for *any* type of crime three years following their release.[228] Therefore, sex offenders do not have the highest rates of recidivism among released criminals. In fact, the rates of recidivism among sex offenders for committing another sex crime were the lowest among all released prisoners who were then rearrested for committing the same crime for which they were put in jail.[229] For example, 13.4% of released robbers were rearrested for the same category of offense for which they were just in prison.[230]

In addition, the Bureau of Justice surmises that by extrapolating on current data regarding sex crimes within their study "released sex offenders accounted for 13% and released non-sex offenders accounted for 87% of the 3,845 sex crimes committed by all the prisoners released in 1994."[231] This reveals that the most dangerous sex criminals are not in fact registered sex offenders, but rather other parolees who were guilty of crimes but who are not required to register under current

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Patrick A. Langan, Erica L. Schmitt, and Matthew R. Durose, Recidivism of Sex Offenders Released from Prison in 1994 (Bureau of Justice Statistics 2003).

[225] *Id*. at 24.

[226] *Id*. at 31.

[227] *Id*.

[228] *See id*. at 14 (emphasis added)

[229] See *supra* note 224 for a further discussion.

[230] *See* Patrick A. Langan, Erica L. Schmitt, and Matthew R. Durose, Recidivism of Sex Offenders Released from Prison in 1994 (Bureau of Justice Statistics 2003).

[231] *Id*. at 24.

statutes.[232]

VI. WORKABLE ALTERNATIVES

This note has focused mainly on states that have implemented residence restrictions, but workable alternatives exist. Two states who have not implemented residency restrictions, Colorado and Minnesota, can offer insight into practical alternatives.

In March of 2004 the Colorado Department of Public Safety issued a report for the legislature of Colorado studying the effect of sex offender living arrangements on community safety.[233] The Minnesota Department of Corrections issued a similar report in January of 2003.[234] After the results from these reports were disclosed to the state legislatures both bodies decided not to enact residence restrictions. Comparing these two reports reveals several themes and alternatives to sex offender registration including case-by-case treatment of each individual offender and supportive living situations/housing solutions. In addition, such current methods of offender monitoring as registry requirements, neighborhood notification and education are also effective solutions.[235]

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[232] An exception to this general statement is Montana, which is one of a few states that requires registration of violent offenders. Montana requires that violent offenders, or those convicted of specified crimes like assault, arson or homicide, register with local law enforcement along with sex offenders. Montana Department of Justice, Sexual and Violent Offender Registry, http://www.doj.mt.gov/svor/offendertypes.asp (last visited Dec. 7, 2005).

[233] Colo. Dep't of Pub. Safety: Div. of Criminal Justice—Sex Offender Mgmt. Bd., Report on Safety Issues Raised By Living Arrangements For and Location of Sex Offenders in the Community (2004).

[234] Minn. Dep't of Corr., Level Three Sex Offenders Residential Placement Issues: 2003 Report to the Legislature (2003).

[235] For a good discussion of current methods and alternatives of monitoring and treating sex offenders see Henderson, *supra* note 102, at 823-39.

A. Case-By-Case Evaluations

An often cited solution to preventing recidivism among sex offenders is a case-by-case analysis of every sex offender and a tailoring of solutions to fit his or her individual needs.[236] Every sex offender has a unique fingerprint of offense, with different triggers and victim characteristics.[237] An effective solution to one offender's problem might stoke the flames of another's sickness.

In addition to being effective and practical this solution would not have to be prohibitively expensive since before their release from prison most sex offenders must appear before parole boards who then evaluate each individual before release.[238] Adding a comprehensive evaluation of the individual offender and a plan for parole would be a very effective and practical way of ensuring that each offender is treated in a way that will best prevent future offenses. Also, this will allow certain residence restrictions to be put in place for offenders that need this type of surveillance. Simultaneously, there will not be the problems associated with widespread blanket residence restrictions.[239] As the Minnesota Department of Corrections stated, "since blanket proximity restrictions on residential locations of [offenders] do not enhance community safety, the current offender-by-offender restrictions should be retained."[240]

B. Housing Solutions

Studies often cite the isolation of sex offenders as a mistake in the effort to prevent recidivism.[241] "Research regarding dynamic risk has indicated that a lack of positive social support and depressed mood, anger and hostility are all associated with

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[236] *See e.g.,* Levenson & Cotter, *supra* note 81.

[237] *Id*.

[238] Henderson, *supra* note 102, at 833.

[239] *Id*. at 823.

[240] Minn. Dep't of Corr., *supra* note 234, at 11.

[241] Levenson, *supra* note 217, at 175.

recidivism."[242] Colorado pointed out that residence restrictions, by limiting housing options available to sexual offenders "may increase their risk of re-offending by forcing them to live in communities where safe support systems may not exist or in remote areas providing them with high degrees of anonymity."[243]

In fact, the Colorado study found that the offenders with the lowest recidivism rates where those who lived in Shared Living Arrangements with other convicted sex offenders. [244] The report stated that the success of the offenders in these types of arrangements is probably related to the fact that "offenders hold each other accountable for their actions and responsibilities and notify the appropriate authorities when a roommate commits certain behaviors."[245] In addition, the offenders are living with others who share the same temptations and desires to improve, so there is simultaneous support along with monitoring. In addition, these SLAs are not isolated from the rest of the community, so offenders are reintegrated back into society.[246]

C. Offender Monitoring

This note has already examined residence restrictions and their popularity and effectiveness.[247] Registries have already been examined by the Supreme Court and found to be a constitutional expression of the legislative right to protect the health and safety of a state's citizens. Also, all 50 states already have SORAs. SORAs are also an attractive solution because the primary burden is on the offender, as opposed to the

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[242] *Id*.

[243] Colo. Dep't of Pub. Safety, *supra* note 233, at 9.

[244] In general, Shared Living Arrangements (SLAs) are a small group of convicted sex offenders living together in a house. The offenders have the responsibility over the residence, whose location and composition is determined in advance by a provider of treatment and a supervising parole officer. *Id*. at 12-13.

[245] *Id*. at 13.

[246] *See generally*, Colo. Dep't of Pub. Safety, *supra* note 233, at 12-14.

[247] *See* discussion Part I.A.

community. In short, registration requirements have many advantages over residence restrictions, including the fact that they have already been implemented, challenged and altered to fit each state's own experiences.[248]

Electronic monitoring refers to the use of global positioning technology to track convicted sex offenders.[249] Parolees who qualify for these types of programs must wear an electronic, waterproof ankle band that is linked to a global positioning system (GPS) transmitter; if the wearer strays too far from their transmitter, an alert is sent to law enforcement authorities.[250] The GPS transmitters can be stationary or portable. The system can send alerts to law enforcement officials if the sex offenders approach areas like schools or child care facilities.[251] Through the use of global positing technology, sex offenders can be monitored at all times and some states have even sentenced offenders to electronic monitoring for life.[252] According to the experiences of Florida, one of the first and most active proponents of this type of monitoring, offenders under the GPS program are less likely to violate their paroles when compared to others under traditional modes of monitoring.[253] The Jessica Lunsford and Sarah Lunde Act[254] would have provided federal funding to implement these systems.[255] Again, this form of monitoring has the advantage of some proof of effectiveness.

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[248] This can be seen by viewing the different requirements that each state has come up with to deal with the registration of its sex offenders. *See generally* Adams, *supra* note 11.

[249] *Id.* at 10.

[250] Wired News, States Track Sex Offenders by GPS, http://www.wired.com/news/technology/0,1282,68372,00.html?tw=rss.POL (last visited Dec. 8, 2005).

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] Jessica Lunsford and Sarah Lunde Act, H.R. 3407, 109th Cong. (2005).

[255] *Id.*

D. Neighborhood Notification

Informing parents and neighbors of a sex offender residing nearby is another way to prevent future offenses. Public notification of residential locations of [offenders] serves a valuable service and should continue. Community residents with this knowledge are able to determine what level of interaction they feel is acceptable for their family safety. The information raises awareness, dispels rumors and allows a greater knowledge of safety issues.[256]

This method allows individuals to work with law enforcement officials in helping to prevent future offenses by keeping their families out of danger. It also spurns community involvement in the monitoring of sex offenders and could possibly calm parental fears and foster an understanding of the true threat posed by convicted sex offenders.[257]

Concerns that notification might actually encourage community fears and promote vigilantism are already addressed through SORAs, which include provisions designed to punish those who use the information contained in such registries for unlawful purposes.[258]

E. Education

Education of both possible victims and sex offenders, when combined with the above solutions, is one of the most effective ways to prevent future sex offenses.[259] Teaching children to beware of danger and to report inappropriate behavior will help to prevent abuse and will also improve our understanding of exactly how widespread sexual offenses are against children.[260]

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[256] Minn. Dep't of Corr., *supra* note 234, at 11.

[257] *Id*.

[258] *See supra* note 21 for a further discussion.

[259] Congress has made education a priority in its newest efforts to combat sexual crimes. *See generally*, Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. (2006).

[260] Sexual offenses are considered to be one of the crimes that is least likely to be reported to the police. *See* TIMOTHY C. HART & CALLIE

Educating sex offenders about the nature of their offenses and who they hurt is considered to be an effective way of preventing re-offense and an essential tool in rehabilitating sex offenders.[261] By educating both sides, society may begin to address the causes of sexual offenses and prevent further offenses.

CONCLUSION

While on the surface residence restrictions appear to be a low cost and effective way of protecting the nation's children, a deeper look reveals otherwise. Applying the framework, conclusions and even dicta from cases like *Philadelphia,*[262] *Mt. Laurel,*[263] and *Smith*[264] reveal that residence restrictions are far from a simple solution. They raise constitutional issues as well as issues of fairness, not to mention practical concerns on the mobility of real property. After scrutinizing the Eighth Circuit's decision in *Miller*[265] problems become self-evident.

Residence restrictions are based on widespread public misconceptions.[266] Rates of recidivism are often cited improperly, not only by politicians, but by the courts themselves. In addition, there is a general lack of knowledge regarding what causes sex offenders to commit crimes against children. Finally, the criminal mindset of each individual sex offender could differ greatly.[267] What might seem like a good solution to prevent one offender from re-offending would be the completely wrong punishment for another. Residence restrictions can also worsen the problem of monitoring sexual offenders by isolating them from society, aggravating housing problems, decreasing the ability to register and removing them from areas

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RENNISON, REPORTING CRIME TO THE POLICE, 1992-2000 3 (Bureau of Justice Statistics 2003).

[261] *See e.g.* Levenson & Cotter, *supra* note 217.

[262] 437 U.S. 617.

[263] 67 N.J. 151.

[264] 538 U.S. 84.

[265] 405 F.3d 700.

[266] *See infra* Section V.D for a further discussion.

[267] Levenson & Cotter, *supra* note 217, at 175.

where treatment options exist.[268]

In addition to the above practical concerns, residence restrictions do not relate favorably to landmark property decisions and real estate ideals. First, courts have consistently rejected the concept of exclusionary zoning as a form of social management. Second, when municipalities construct residence restrictions for sex offenders they are often banishing such offenders from their towns. This has the result of unequally spreading the burden associated with sex offenders to other municipalities. Third, residence restrictions can be viewed as a type of constraint on the mobility and transferability of real property. Like restrictive covenants this can decrease the marketability of land. Therefore the burden of residence restrictions falls not only on convicted sex offenders but also on people wishing to sell their homes. Other considerations, such as voidability of real estate contracts between convicted sex offenders and sellers of homes, are raised by these statutes and are not addressed by the legislature—leaving vast areas of uncertainty caused by sex offender residence restrictions.

Residence restrictions, while facially attractive, are unduly burdensome to both registered sex offenders and the communities that must eventually receive them. The presence of other methods of managing convicted sex offenders makes residence restrictions look even less attractive. With the prevalence of other less costly, less broad and more effective modes of control residence restrictions are truly unnecessary. There are ways of managing sex offenders without infringing on the mobility of real estate or the ideals of the constitution. Solutions exist, such as education and monitoring to address public fear and disgust towards sex offenders—solutions that can meet the needs of legislatures, law enforcement officials, parents, victims and the offenders themselves.

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[268] *See*, COLO. DEP'T OF PUB. SAFETY: DIV. OF CRIMINAL JUSTICE—SEX OFFENDER MGMT. BD., REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY (2004); MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE (2003).