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COMMENT

NEVER GOING HOME: DOES IT MAKE US SAFER? DOES IT MAKE SENSE?

SEX OFFENDERS, RESIDENCY RESTRICTIONS, AND REFORMING RISK MANAGEMENT LAW

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One of the most hotly debated issues in criminal law today is how to manage the perceived risk of sex offenders loose in the community. Beyond mandatory registration and community notification, over a dozen states, including Illinois, have enacted residency restrictions that forbid sex offenders from living within a certain distance of schools, parks, day care centers, or even "places where children normally congregate." This Comment scrutinizes these laws to see if they make sense, and more importantly, if they make us safer. The answer to both questions appears to be no. After detailing the statistical, political, and constitutional problems that render these restrictions ineffective and unconstitutional, I shift my attention to envisioning a better system of risk management. I end by critically examining best practice methods of states across the country that more effectively allocate finite resources to identify and control high risk offenders to prevent them from harming again, while allowing the vast

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majority of offenders who are low risk to better re-integrate into and become productive members of society.

I. INTRODUCTION: MEET PATRICK LEROY

Patrick Leroy is thirty-seven, and has lived almost all of his life with his mother in East St. Louis, Illinois,¹ one of the state's—and nation's—poorest communities. In 1987, when Leroy was eighteen, he was convicted of an unspecified sexual offense,² for which he served six years in prison.³ As a result of this conviction, Leroy is now considered a sex offender, mandating that he annually register his address with, and pay a registration fee to, the local authorities for the rest of his life, or be sentenced to up to three years in prison for noncompliance.⁴ Since being released over a dozen years ago, he has lived in his mother's house and committed no further sexual offenses.⁵

In July 2000, Illinois passed a sex offender residency restriction law.⁶ The law forbade anyone convicted of a sex offense from living within five hundred feet of playgrounds, schools, or day care centers.⁷ The ban applied prospectively and retrospectively, exempting only those who owned a house within the five hundred foot buffer at the law's inception from having to move.⁸ Violation of the residency restriction law in Illinois is a felony, punishable by one to three years in prison.⁹ Leroy's mother's house, where Leroy had lived all of his non-incarcerated life, is located within five hundred feet of Miles Davis Elementary School.¹⁰

¹ *People v. Leroy*, 828 N.E.2d 769, 785, 788 (Ill. App. Ct. 2005) (Kuehn, J., dissenting), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005).

² The exact offense has not been noted in the court proceedings. *Id.* at 784 (Kuehn, J., dissenting). The Illinois sex offender database has recently updated Leroy's entry, now listing his crime as "Criminal Sexual Assault/Force" with a "victim over the age of 18." Welcome to the Illinois Sex Offender Registration Information Website provided by the Illinois State Police, <http://www.isp.state.il.us/sor/> (enter "Leroy" under "Last Name" in "Offender Search.") (last visited Oct. 25, 2006) [hereinafter *Leroy Database Entry*]. This new information begs the question why Leroy is even in the registry at all, if his victim was not a minor (and he himself was only eighteen when the incident occurred).

³ *Leroy*, 828 N.E.2d at 788 (Kuehn, J., dissenting).

⁴ *See* 730 ILL. COMP. STAT. 5/5-8-1(a-6) (2005); *id.* 150/2, 3, 7, 8 & 10; *Leroy*, 828 N.E.2d at 775.

⁵ *Leroy*, 828 N.E.2d at 785, 793 (Kuehn, J., dissenting).

⁶ *Id.* at 784-85 (Kuehn, J., dissenting).

⁷ 720 ILL. COMP. STAT. 5/11-9.3(b-5) & 9.4(b-5).

⁸ *Id.* Thus the sex offenders who had been renting a now-noncompliant residence would have to move.

⁹ *Id.* 5/11-9.3d & 9.4e; 730 ILL. COMP. STAT. 5/5-8-1(a-6).

¹⁰ *Leroy*, 828 N.E.2d at 785 (Kuehn, J., dissenting).

Leroy was charged in August 2002 with violating the residency restriction statute.¹¹ In the ensuing trial and appeal, Leroy argued that these new restrictions violated his substantive and procedural due process rights, his right to equal protection, his right against self-incrimination, prohibitions against ex post facto laws, and prohibitions against cruel and unusual punishment.¹² The Fifth District of the Illinois Appellate Court rejected all these considerations;¹³ the Illinois Supreme Court denied his appeal;¹⁴ and now Patrick Leroy cannot live in his mother's house.¹⁵

The three-member panel's decision was not unanimous, as Judge Kuehn dissented vigorously to the "expulsion" of Patrick Leroy.¹⁶ Judge Kuehn, in detailing the constitutional infirmities of the residency restriction law,¹⁷ noted that the law's enforcement would result in a lifetime ban against Leroy returning to his longtime home, where he had lived without incident for thirteen years since release from prison.¹⁸

Patrick Leroy's story is not unique. He is just one of many former sex offenders now caught in an escalating movement to publicly identify and stringently control sex offenders in order to prevent the next graphic sex crime against children. Sex offenders are vilified and feared; their crimes considered our "society's worst nightmare."¹⁹ But while legislators gain notoriety in this "race to the bottom"²⁰ for passing laws banning sex offenders from living near day care centers, schools, parks, libraries, pools, and recreations trails, larger questions loom: Have these laws made our children safer? More to the point, do these sex offender restrictions make sense? If these "Scarlet Letter"²¹ laws are not effective, what system would ensure better sex offender risk management without wasting scarce public

¹¹ *Id.* at 775.

¹² *Id.*

¹³ *Id.* at 774-84.

¹⁴ *People v. Leroy*, 839 N.E.2d 1032 (Ill. 2005).

¹⁵ *Leroy*, 828 N.E.2d at 785 (Kuehn, J., dissenting).

¹⁶ *See id.* (Kuehn, J., dissenting).

¹⁷ *Id.* at 785-93 (Kuehn, J., dissenting).

¹⁸ *Id.* at 785 (Kuehn, J., dissenting).

¹⁹ Jennifer McKinney, Comment, *Washington State's Return to Indeterminate Sentencing for Sex Offenses: Correcting Past Sentencing Mistakes and Preventing Future Harm*, 26 SEATTLE U. L. REV. 309, 319 (2002).

²⁰ Recent Legislation—Criminal Law, *Sex Offender Notification Statute—Alabama Strengthens Restrictions on Sex Offenders*, 119 HARV. L. REV. 939, 946 (2006) [hereinafter *Alabama Strengthens Restrictions*].

²¹ Dwight Merriam, *The 2005 ZiPLERs: The Eleventh Annual Zoning and Planning Law Report Land Use Decision Awards*, ZONING & PLAN. L. REPT., Feb. 2006, at 5 (awarding the State of Iowa a dubious "Scarlet Letter Award" for its broad residency restrictions, which had the effect of banning sex offenders from living in many of the state's communities).

funds policing and onerously burdening those low-risk offenders like Leroy, who have lived without trouble down the street from schools, parks, and nurseries for many years?

To answer these questions, the Comment is divided into three main parts, considering residency restrictions as a microcosm of the larger problem of effective and constitutional sex offender risk management. Section II traces the recent development of sex offender laws and the resulting pariah-like status of sex offenders in contemporary America.²² Sections III and IV specifically focus on residency restrictions, first scrutinizing their scientific, economic, and political problems before analyzing the *ex post facto* constitutional infirmities with the laws.²³ The conclusion from Sections III and IV is that uniformly applied residency restrictions will probably fail judicial scrutiny, and in any case are ineffective in preventing sex offender recidivism.²⁴

The Comment's last part takes up the policy question of what states should implement in lieu of ineffective and unconstitutional uniformly-applied residential restrictions. Section V examines best practices for managing sex offender risk that have been implemented across the country, considering how each one works and its particular benefits and problems.²⁵ Finally, Section VI proposes a synthesized method of managing sex offenders, which achieves the paramount goal of protecting children by targeting the minority of offenders who are high risk while relaxing restrictions on the vast majority of offenders who studies have shown do not re-offend.²⁶ This synthesized risk management strategy better allocates scarce public resources, allays public fear, and withstands constitutional scrutiny.²⁷

II. BACKGROUND

This section examines the political and social conditions that have led to the residency restrictions that forced Patrick Leroy to leave his mother's home. In turn, this section considers the political and legislative response to sex offenders, the mechanics of residency restrictions, the public's perception of sex offenders, and the judicial treatment of sex offenders.

²² See discussion *infra* Section II.

²³ See discussion *infra* Sections III & IV.

²⁴ See *id.*

²⁵ See discussion *infra* Section V.

²⁶ See discussion *infra* Section VI.

²⁷ See *id.*

A. THE POLITICAL RESPONSE TO SEX OFFENDERS

Strict laws that specifically target sex offenders are a recent innovation. After several well-publicized brutal sexual assaults and murders of children by previously convicted sex offenders living inconspicuously near their victims, states began to pass “Megan’s Laws” in 1990.²⁸ The laws are named after Megan Kanka, a seven-year-old girl from New Jersey who was victimized and then killed by a neighbor who community residents did not know was a twice-convicted sex offender.²⁹

Megan’s Laws, also known as sex offender registration acts (SORAs), require offenders to register promptly when they are released from prison, and also mandate that sex offenders convicted in the past now register themselves with their local police department.³⁰ The goal is to put a face on sex offenders, so they can no longer prey as strangers on the most vulnerable members of society.³¹ The laws, although state-created, became essentially mandatory when Congress passed legislation conditioning 10% of all federal law enforcement funding to the state on the state having an acceptable sex offender registration law.³²

Despite sex offenders being the only class of convicted felons generally forced to register and have their names and pictures posted on websites accessible to the general public,³³ legislators and local officials have since sought even harsher measures. The mayor of Albuquerque proposed posting sex offenders’ photos and descriptions at the zoo and other places where children congregate because he believed that an offender had “‘Danger: Will re-offend’ virtually stamped on his forehead.”³⁴ When

²⁸ *Alabama Strengthens Restrictions*, *supra* note 20, at 939.

²⁹ *See* *Smith v. Doe*, 538 U.S. 84, 89 (2003); Humma Rasul, *Review of Selected 1998 California Legislation: Crimes in Numbers: California Updates its Version of Megan’s Law and Steps Further to Protect Our Children from Sex Offenders Living Together in Group Homes*, 30 MCGEORGE L. REV. 528, 529 (1999); Leslie Henderson, Comment, *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 UMKC L. REV. 797, 816 (2004).

³⁰ *See, e.g., Smith*, 538 U.S. at 90.

³¹ Rasul, *supra* note 29, at 529.

³² *Smith*, 538 U.S. at 89-90; Rasul, *supra* note 29, at 529.

³³ *See, e.g.,* Welcome to the Illinois Sex Offender Registration Information Website provided by the Illinois State Police, <http://www.isp.state.il.us/sor/> (last visited Oct. 26, 2006).

³⁴ Michael Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 719-20 (2005). The mayor then prodded the city council to pass tougher registration restrictions than those of the state’s, including requiring sex offenders to give a DNA sample and dental implants when registering in the city. *See* *Am. Civil Liberties Union v. Albuquerque*, 137 P.3d 1215, 1219, 1225-26 (N.M. Ct. App. 2006).

asked about the constitutional rights of the offenders that were possibly being violated by this proposed law, the mayor replied that the “offender surrendered his rights when he committed his first attack,” and so “his rights should not be taken into consideration when formulating a sex offender policy.”³⁵ For Halloween 2005, state officials in South Carolina, county officials in Cook County, Illinois, and city officials in Rochester, New York, all placed prohibitions on sex offenders having any contact with Halloween festivities.³⁶ The increasingly onerous restrictions have led one commentator to conclude: “Politicians, even in honest attempts to protect the public good, sometimes go too far without considering unintended consequences.”³⁷

B. RESIDENCY RESTRICTIONS

Thirteen states, including Illinois, have passed laws in the last five years banning sex offenders from living within a certain distance of schools, parks, day care centers, and “places where children normally congregate.”³⁸ Residency restrictions are justified as a means of “taking

These restrictions were in the end mostly rejected as constitutionally infirm. *See id.* at 1220, 1223.

³⁵ Duster, *supra* note 34, at 720.

³⁶ In South Carolina and Rochester, case workers were on duty that night to make random checks to ensure no sex offenders left their house. Clif LeBlanc, *Child Sex Offenders Restricted Monday; Some Say Effort Won't Help Children*, THE STATE (Columbia, S.C.), Oct. 28, 2005; *Halloween Banned for Sex Offenders*, RNEWS, Oct. 29, 2005, <http://www.rnews.com/print.cfm?id=31579>. In Illinois, a new law banned sex offenders from handing out Halloween candy or being Santa Claus during the Christmas season. Charles Thomas, *Police Have Eye on Sex Offenders for Halloween; Law Bans RSOs from Giving Out Candy*, ABCLOCAL/WLS-TV, Oct. 31, 2005, <http://abclocal.go.com/wls/story?section=local&id=3591021>. The county sheriffs went and checked on all 1300 convicted sex offenders living in the county, leaving a hanger on the sex offender's door to “serve as a Halloween night alert for parents.” *Id.* The penalty for a sex offender found giving away candy would be a felony punishable by up to three years in prison. *Id.*

³⁷ Merriam, *supra* note 21, at 5.

³⁸ ALA. CODE § 15-20-26 (2005) (convicted sex offenders cannot live or work within two thousand feet of school or child care facility); ARK. CODE ANN. § 5-14-128 (2005) (high risk sex offenders cannot live within two thousand feet of school or day care center); CAL. PENAL CODE § 3003 (Deering 2005) (parolees cannot live within thirty-five miles of victim or witnesses; certain offenders cannot live within one quarter mile of primary school); FLA. STAT. ANN. § 947.1405(7)(a)(2) (West 2005) (sex offenders whose victims were minors cannot live within one thousand feet of a school, day care center, park, playground, or location where children normally congregate); GA. CODE ANN. § 42-1-13 (2005) (registered sex offenders cannot live within one thousand feet of child care facility, school, or area where minors congregate); 720 ILL. COMP. STAT. 5/11-9.3(b-5) & 9.4(b-5) (2005) (child sex offenders cannot live within five hundred feet of school, park, or day care center); IOWA CODE § 692a.2a (2005) (convicted sex offenders of minor cannot live within two thousand

away a portion of the opportunity” for sex offenders to re-offend.³⁹ In terms of width of the prohibited zone, they range from a five hundred foot restriction in Illinois⁴⁰ to two thousand feet in Alabama and Iowa.⁴¹ Oregon has adopted a “general prohibition” against sex offenders living “near where children reside.”⁴² In terms of prohibited locations, most states’ restrictions encompass school and child care facilities, and sometimes parks and the current location of the particular offender’s victim.⁴³ Georgia’s law also includes a vague proscription against living within one thousand feet of any area “where minors congregate.”⁴⁴ These residency restriction laws, like previous sex offender laws, have been generally applied not just prospectively to offenders being sentenced in the future and currently imprisoned or on parole, but also retrospectively to anyone previously convicted of a “sex offense.”⁴⁵

feet of a school or child care facility); KY. REV. STAT. ANN. § 17.495 (2005) (registered offenders on supervised release cannot live within one thousand feet of school or child care facility); LA. REV. STAT. ANN. § 14:91.1 (2005) (sexually violent persons cannot live within one thousand feet of schools without school superintendent’s permission); OHIO REV. CODE ANN. § 2950.031 (Lexis 2005) (sex offenders cannot live within one thousand feet of school); OKLA. STAT. 57 § 590 (2005) (prohibits sex offenders from residing within two thousand feet of schools or educational institutions); OR. REV. STAT. §§ 144.642, 144.644 (2005) (general prohibition against sex offenders living “near” where children reside); TENN. CODE ANN. § 40-39-211 (2005) (sex offenders cannot live within one thousand feet of school, child care facility, or victim). Alabama has recently toughened their sex offender restrictions, including a ban on a sex offender working within five hundred feet of a restricted use or loitering within five hundred feet of a “business or facility having a principal purpose of caring for, educating, or entertaining minors.” *Alabama Strengthens Restrictions*, *supra* note 20, at 941 (quoting 2005 Ala. Act. No. 2005-301).

³⁹ Henderson, *supra* note 29, at 799 (quoting Staff and Wire Reports, *Court Hears Sex Offender Challenge*, IOWA CITY PRESS, Apr. 1 2004, at A). See discussion *supra* Section III.A on why this justification has no statistical or scientific basis.

⁴⁰ 720 ILL. COMP. STAT. 5/11-9.3(b-5) & 9.4(b-5) (child sex offenders cannot live within five hundred feet of school, park, or day care center).

⁴¹ ALA. CODE § 15-20-26 (convicted sex offenders cannot live or work within two thousand feet of school or child care facility); IOWA CODE § 692a.2a (convicted sex offender of minor cannot live within two thousand feet of a school or child care facility).

⁴² OR. REV. STAT. §§ 144.642, 144.644 (general prohibition against sex offenders living near where children reside).

⁴³ See, e.g., 720 ILL. COMP. STAT. 5/11-9.3(b-5) & 9.4(b-5) (child sex offenders cannot live within five hundred feet of school, park, or day care center); TENN. CODE ANN. § 40-39-211 (sex offenders cannot live within one thousand feet of school, child care facility, or victim).

⁴⁴ GA. CODE ANN. § 42-1-13 (2005) (registered sex offenders cannot live within one thousand feet of child care facility, school, or area where minors congregate).

⁴⁵ Courts and observers have criticized as overinclusive the list of criminal convictions which have been deemed “sex offenses” for purposes of sex offender registration and now residency restriction statutes. See *Doe v. Miller*, 405 F.3d 700, 726 (8th Cir. 2005), *cert.*

Smaller units of government have also enacted residency restrictions. Cities and counties across the country have passed residency restrictions.⁴⁶ The restrictions include extensive bans, such as 2500 feet around anywhere children congregate in Miami Beach, Florida,⁴⁷ and expanding the list of restricted areas to also include public pools, libraries, and multi-use recreation trails in several Iowa counties and communities.⁴⁸ In addition, quasi-governmental units like common interest communities have added covenants banning sex offenders altogether from their communities.⁴⁹

The laws grandfathered some offenders living within the restricted areas, but not all. Illinois, for example, exempted those sex offenders who owned houses within restricted zones from moving when the law came into being, but did not exempt longtime renters or those, like Leroy, who lived with a relative who actually owned the home.⁵⁰ Also, a convicted sex offender who had been renting a house which was not in a restricted zone when the law was enacted would be in violation of the law if at any point in the future one of the restricted uses, like a day care facility or a playground,

denied, 126 S. Ct. 757 (2005); *People v. Leroy*, 828 N.E.2d 769, 792 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005); Stephen Young & Bryan Brickner, *This Man Is Not a Sexual Predator*, CHI. READER, Oct. 21, 2005, § 1, at 1 (reporting on an Illinois man who murdered a teenager during a gang-related robbery when he was twenty-one, and who is now being forced to register as a child molester since he murdered an adolescent).

⁴⁶ Megan McCurdy, Case Note, *Doe v. Miller*, 38 URB. LAW. 360, 361 (2006) (discussing an Iowa county and city that were expanding residency restrictions in the wake of the Eighth Circuit's *Doe v. Miller* decision upholding the restrictions' constitutionality); Kyle Alspach, *Council votes to ban sex offenders*, SENTINEL-ENTERPRISE (Fitchburg, Mass.), June 21, 2006, at A1, A2 (discussing restrictions in Massachusetts communities); Greg Bluestein, *New Ga. law limits places sex offenders can live*, BOSTON GLOBE, June 24, 2006, at A3 (discussing residency restrictions in Bibb County, Georgia, and Miami Beach, Florida); Maria Cramer, *Fitchburg joins effort to restrict sex offenders*, BOSTON GLOBE, June 22, 2006, at B1, B7 (discussing residency restrictions in Revere and Fitchburg, Massachusetts); Pamela MacLean, *Suit Tests Power of Sex Offender Bans; Six Cities Want to Copy Law; They Wait for Result*, NAT'L L.J., Oct. 3, 2005, at 6 (discussing new residency restrictions in Issaquah, Washington and elsewhere).

⁴⁷ Bluestein, *supra* note 46, at A3.

⁴⁸ McCurdy, *supra* note 46, at 361.

⁴⁹ See Brett Jackson Coppage, Student Article, *Balancing Community Interests and Offender Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood*, 38 URB. LAW. 309, 309-10 (2006) (describing the adoption of these covenants as "spreading like wildfire"). The one court faced with a challenge of such a covenant upheld its restriction in *Mulligan v. Panther Valley Property Owners Ass'n*. See *Mulligan v. Panther Valley Prop. Owners Ass'n*, 766 A.2d 1186 (N.J. Super Ct. App. Div. 2001); Lior Jacob Strahilevitz, *Information Asymmetries and the Right to Exclude*, 104 MICH. L. REV. 1835, 1844-45 (2006); Coppage, *supra*, at 315-16.

⁵⁰ 720 ILL. COMP. STAT. 5/11-9.3(b-5) & 9.4(b-5) (2005).

were to be built within the proscribed five hundred feet of his rented property.⁵¹

C. PUBLIC PERCEPTION AND RESPONSE TO SEX OFFENDERS

Sex offender restrictions have met with resounding public support. It is not a stretch to say that child sex offenders are the bogeymen of our day.⁵² A recent Gallup poll found that 66% of people surveyed were “very concerned” about sex offenders, whereas only 52% were as concerned about violent crime, and just 36% worried as much about terrorism.⁵³ Sex offenders invite fear because of their sordid and well-publicized crimes against children,⁵⁴ and because many believe (incorrectly)⁵⁵ that sex offenders re-offend at a much higher rate than other criminals.⁵⁶ Celebrities from Oprah Winfrey to Bill O’Reilly have advocated for harsher punishment and more stringent surveillance of convicted offenders.⁵⁷ Syndicated columnist Ann Landers, whose advice columns appear in one thousand newspapers across the country, recently concluded, “The only molesters who can be considered permanently cured are those who have been surgically castrated.”⁵⁸

Communities across the country have treated released sex offenders like pariahs.⁵⁹ In the fall of 2005, Cook County began a movement to

⁵¹ See *id.* A federal court in Georgia presented with this challenge to the law dismissed it as merely hypothetical. See *Doe v. Baker*, No. Civ. A. 1:05-CV-2265, 2006 WL 905368, at *5 n.4 (N.D. Ga. Apr. 5, 2006).

⁵² See, e.g., Luis Rosell, *Sex Offenders: Pariahs of the 21st Century?*, 32 WM. MITCHELL L. REV. 419 (2005) (reviewing JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS (2005)).

⁵³ *The Greatest Fear*, THE ECONOMIST, Aug. 26, 2006, at 25.

⁵⁴ See *Alabama Strengthens Restrictions*, *supra* note 20, at 939, 943; McKinney, *supra* note 19, at 309, 318-19.

⁵⁵ See *infra* Section III.A, which details the strong statistical evidence gathered by social scientists and government statisticians that sex offenders re-offend at much lower rates than do other criminals.

⁵⁶ See, e.g., Henderson, *supra* note 29, at 802 n.34.

⁵⁷ In the fall of 2005, Oprah began offering \$100,000 rewards for the apprehension of fugitive sex offenders, pictures of whom she would display on her show and on her website. Oprah’s Child Predator Watch List, http://www.oprah.com/presents/2005/predator/predator_main.jhtml (last visited Nov. 10, 2006). Bill O’Reilly shamed the State of Alabama into “getting tough” on sex offenders when he deemed Alabama to be among the states that “don’t seem to care about this issue at all,” prompting the state legislature to pass stricter residency restrictions and sentencing measures. See *Alabama Strengthens Restrictions*, *supra* note 20, at 942.

⁵⁸ Eileen Fry-Bowers, Note and Comment, *Controversy and Consequence in California: Choosing Between Children and the Constitution*, 25 WHITTIER L. REV. 889, 910 (2004).

⁵⁹ See, e.g., Mark Hayward, *Registered sex offenders in the community: From prisoners*

ensure that no bus stops were placed near sex offenders' homes, in order to prevent offenders from preying on unsuspecting children as they waited for the school bus.⁶⁰ In the first year of this initiative, school systems shifted the bus stops, but already one resident argued that instead, the sex offenders should be forced to move: "They should get rid of the sex offenders. Kids shouldn't have to go through that."⁶¹ A sex offender in California who completed the state sex offender treatment program and then underwent voluntary castration while in prison was still turned down by at least 120 rehabilitation facilities upon release, and neighbors refused to allow him to move in with his father in the State of Washington.⁶² As a result, he now lives in a trailer on the grounds of a California prison.⁶³

Sex offenders also risk bodily harm for being on the list. In April 2006, a Canadian man accessed Maine's online registry, and used the personal information available on it to locate and kill two offenders before killing himself.⁶⁴ In response, Maine only briefly shut down the "popular" website.⁶⁵ As one state representative put it, "[Just] because two people that were on the website were horribly killed doesn't take away the need for that website."⁶⁶

No convicted sex offenders hold major political office. Indeed, in New Hampshire in the fall of 2005, a heated controversy arose whether a state elected official should resign because he had employed a convicted sex offender who had been cited on several occasions for failure to register.⁶⁷ At one point, the Republican councilman faced calls from the

to pariahs, UNION LEADER (Manchester, N.H.), Jun. 4, 2006, at A1.

⁶⁰ *School Bus Stops Located Next to Sex Offenders' Homes; Most Schools Act Quickly to Move Bus Stops*, NBC5/WMAQ-TV, Oct. 7, 2005, <http://www.nbc5.com/news/5072660/detail.html>.

⁶¹ *Id.* Georgia authorities have since done just that, using their state's residency restrictions around "where children congregate" to conclude that sex offenders cannot live within one thousand feet of any school bus stop in the state. See Bluestein, *supra* note 46, at A3. These bus stops can and do change every year. See *id.*

⁶² Fry-Bowers, *supra* note 58, at 914.

⁶³ *Id.*

⁶⁴ John Ellement & Suzanne Smalley, *Sex crime disclosure questioned*, BOSTON GLOBE, Apr. 18, 2006, at A1.

⁶⁵ *Id.*

⁶⁶ *Id.* The article also mentioned a New Hampshire man charged with attempting to murder two men he found in that state's registry, and a Washington man recently sentenced to forty-four years for killing two men he located in that state's online registry. *Id.*

⁶⁷ John DiStaso, *Granite Status: Governor Wants Answers on Sex Offender Getting State Jobs*, UNION LEADER (Manchester, N.H.), Oct. 6, 2005, at A2; Tom Fahey, *Resign, Burton Told Again*, UNION LEADER (Manchester, N.H.), Oct. 6, 2005, at A1. The official, Raymond Burton, is on the Executive Council, an elected body that serves within the executive branch of the New Hampshire state government advising the governor.

entire New Hampshire Congressional delegation, who were all Republicans, as well as the state's Democratic governor to resign.⁶⁸

Thus, the public both hates and fears sex offenders, resulting in approval of ever increasingly harsh penalties for these political pariahs.⁶⁹ Indeed, no state which has passed a residency restriction statute has repealed it, and Alabama has recently enhanced its law with more restrictions on where sex offenders can live, work, and even loiter.⁷⁰

D. JUDICIAL RESPONSE

Courts from across the nation have generally approved of unusually harsh punishments meted out to sex offenders. Judges have conditioned the release of offenders on them placing signs on their front lawns identifying themselves to all passersby as sex offenders.⁷¹ A federal district court judge in Arizona was twice overruled by the Ninth Circuit for imposing rigorous probation restrictions on a man facing marijuana charges who had been convicted fifteen years earlier of sexual contact with a teenage female.⁷² A twelve-year-old boy in Illinois was permanently banished (along with his family) from his community, and made to register as a sex offender for the rest of his life, a shockingly harsh sentence handed out by a juvenile court and upheld by the state's supreme court.⁷³

⁶⁸ Burton did not end up resigning, although in the end, this may have had as much to do with the notorious New Hampshire resistance, especially among those from the poor North Country, to having others tell one what to do. See Paula Tracy, *GOP Fundraiser Becomes Burton 'Love Boat' Cruise*, UNION LEADER (Manchester, N.H.), Sept. 30, 2005, at A5; DiStaso, *supra* note 67, at A1.

⁶⁹ *Alabama Strengthens Restrictions*, *supra* note 20, at 939, 943.

⁷⁰ *Id.* at 939, 942.

⁷¹ Rosell, *supra* note 52, at 424.

⁷² *United States v. T.M.*, 330 F.3d 1235, 1237-39 (9th Cir. 2003). The man pled guilty to a marijuana charge in 1996 but was sentenced to a rigorous probation, including no internet access, no contact with children, and no possession of a camera when the sentencing judge found out the defendant had a dropped child molestation charge from 1961 and had been convicted of sexual contact with a teenage female in 1981. *Id.* The Ninth Circuit remanded the case, noting that "[s]upervised release conditions predicated on twenty-year-old incidents, without more, do not promote the goals of public protection and deterrence." *Id.* at 1240. At this point, the district court, instead of relaxing the probation requirements as directed by the Ninth Circuit, added *another* condition: that the probationer could not drive a car because he had driven the teenager during the 1981 incident. *United States v. T.M.*, 118 F. App'x 286, 287-88 (9th Cir. 2004). The Ninth Circuit then reversed the district court's second terms of probation, including a harshly written directive that the district court must follow its instructions this time. *Id.* at 289.

⁷³ *In re J.W., a Minor*, 787 N.E.2d 747, 750-53, 757-66 (Ill. 2003). Although allowing that what the minor did, forcing five-year-old boys to perform sexual acts on him and dogs, was particularly shocking, Chief Judge McMorrow still noted in her special concurrence, "I

When addressing challenges to the constitutionality of sex offender laws, both federal and state courts have generally deferred to legislative findings, upholding first the SORAs⁷⁴ and later residency restriction laws.⁷⁵ But this judicial trend of upholding all uniformly applied restrictions of sex offenders may not last forever, as already Justice Kuehn and others have vigorously dissented over the constitutionality of residency restrictions.⁷⁶ The next two sections of this Comment will examine residency restrictions in more detail, concluding that the restrictions are neither constitutional nor effective in preventing sex offender recidivism.

III. FOUR NON-CONSTITUTIONAL CONCERNS WITH RESIDENCY RESTRICTIONS

There are four principal concerns with residency restrictions, apart from their constitutional frailties: that the laws are based on two flawed premises; that they become a heavy tax burden on the government; and that they provoke two real estate crises, first in the already undesirable communities where sex offenders often end up living, and second, for the low-income sex offenders themselves. Section III takes up each of these critical concerns in turn.

recognize a certain tension between a lifetime reporting requirement and the philosophical underpinnings of our juvenile justice system,” in which crimes committed as a juvenile are supposed to not create adult criminal liability. *Id.* at 766 (McMorrow, C.J., specially concurring). See also Judge Kilbride’s dissent in part expressing his concern that the juvenile court, which has relaxed constitutional protections for the defendant, could hand out such a harsh adult criminal sentence. *Id.* at 770 (Kilbride, J., concurring in part and dissenting in part).

⁷⁴ See, e.g., *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (upholding Connecticut’s SORA), *Smith v. Doe*, 538 U.S. 84 (2003) (upholding Alaska’s SORA); *People v. Malchow*, 739 N.E.2d 433 (Ill. 2000) (upholding Illinois’s SORA).

⁷⁵ See, e.g., *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005) (upholding Iowa’s residency restriction law); *Lee v. State*, 895 So. 2d 1038 (Ala. 2004) (upholding Alabama’s residency restriction law); *Mann v. State*, 603 S.E.2d 283 (Ga. 2004) (upholding Georgia’s residency restriction law); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005) (upholding Illinois’s residency restriction law); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005) (upholding Iowa’s residency restriction law).

⁷⁶ See, e.g., *Miller*, 405 F.3d at 723-26 (Melloy, J., concurring in part and dissenting in part); *Leroy*, 828 N.E.2d at 784-93 (Kuehn, J., dissenting); *Seering*, 701 N.W.2d at 671-72 (Wiggins, J., specially concurring in part and dissenting in part).

A. TWO FLAWED SCIENTIFIC ASSUMPTIONS ABOUT RESIDENCY RESTRICTIONS

Residency restrictions are justified by two flawed scientific and factual premises: that sex offenders target unknown children in their neighborhood to commit many of their offenses and that sex offenders re-offend at a much higher rate than other felons.⁷⁷ The Georgia legislator who sponsored the state's residency restriction justified the measure for both reasons, claiming that sex offenders are "virtually impossible to rehabilitate and these crimes are so difficult to detect and control, [that] those persons who are convicted of sexual offenses against children . . . are apt to be repeat offenders."⁷⁸ Both of these claims are false.

First, the image of the stranger sex offender harming neighborhood children is far from reality. Studies have shown that it is not strangers, but "[r]elatives, friends, baby-sitters, persons in positions of authority over [a] child, or persons who supervise children [who] are more likely than strangers to commit a sexual assault."⁷⁹ Indeed, one study found 80% of abused girls and 60% of abused boys are harmed by people that they know, either a friend or a family member.⁸⁰ Another study concluded that strangers commit no more than 10% of all child molestation cases.⁸¹ A 2003 Department of Justice survey confirmed this, indicating that among the incarcerated child sex offenders in state prisons in 1997, only 7% were in prison for crimes where the victim was a stranger to the assailant.⁸² The implication, then, is that laws should focus on preventing sex offenders from harming children whom they know, and not fixate on preventing the rare attacks by strangers.⁸³ Unfortunately, "[l]egislators [instead] tailor sex

⁷⁷ See, e.g., *Miller*, 405 F.3d at 707-08, 714-16; John La Fond & Bruce Winick, *Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*, 34 SETON HALL L. REV. 1173, 1180-81 (2004); Samantha Imber, *Crimes and Offenses, Sexual Offenses: Prohibit Sexual Predators from Residing Within Proximity of Schools or Areas Where Minors Congregate*, 20 GA. ST. U. L. REV. 100, 101 (2003).

⁷⁸ Imber, *supra* note 77, at 101 (footnote omitted).

⁷⁹ Duster, *supra* note 34, at 717.

⁸⁰ *Id.*; see also *The Greatest Fear*, *supra* note 53, at 25.

⁸¹ Rosell, *supra* note 52, at 420.

⁸² PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* 36 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

⁸³ An article on common interest communities' residency restrictions of sex offenders reached a similar conclusion:

What's particularly revealing about the proliferation of sex offender residency restrictions is the relationship between homeowners associations' restrictions on sex offenders and those same associations' lack of restrictions on potential purchasers who have committed even more serious crimes (such as murder) or crimes more likely to target proximate strangers (such as burglary

offender bills to the local or national high-profile crimes that rouse public outrage and horror . . . [even though] the vast majority of sexual abuse is committed by acquaintances or family members of the victims, not sexual predators lurking in the bushes.”⁸⁴ Some experts even contend residency restrictions do more harm than good, as they lull the public into a false sense of security from stranger sex offenders when the vast majority of predators meet their victims through jobs, volunteering, or social networks.⁸⁵

Furthermore, studies have not shown a correlation between a sex offender’s “residence[s] distance from a school or child care facility, and an increased likelihood of recidivism.”⁸⁶ A California newspaper conducted a review of nearly five hundred released sex offenders who lived legally near schools and day care facilities.⁸⁷ The newspaper found that only one of the five hundred was arrested during the one year period, and that was for committing a parole violation and not another sexual assault.⁸⁸ Rather, psychologists conclude that if a sex offender wants to re-offend, he will do it; and “it doesn’t really matter how close the school is.”⁸⁹ Similarly, a Minnesota Department of Corrections study determined that the only two recidivist acts of child sexual assault committed in parks on unknown victims occurred several miles away from the offenders’ homes, leading the department to conclude that a five hundred foot or even one mile restriction would not likely prevent the rare offender who wanted to harm again.⁹⁰

The second spurious claim made about sex offenders is that they re-offend at an “astronomically”⁹¹ higher rate than do other criminals, justifying the harsh restrictions placed uniquely on them among all felons.⁹²

and automobile theft).

Strahilevitz, *supra* note 49, at 1890.

⁸⁴ *Alabama Strengthens Restrictions*, *supra* note 20, at 943.

⁸⁵ Bluestein, *supra* note 46, at A3.

⁸⁶ Duster, *supra* note 34, at 752.

⁸⁷ Henderson, *supra* note 29, at 811.

⁸⁸ *Id.* at 811 & n.92.

⁸⁹ Duster, *supra* note 34, at 753.

⁹⁰ *Id.*

⁹¹ Henderson, *supra* note 29, at 802 n.34 (quoting an Indiana state legislator candidate saying, “[w]ith the recidivism rate astronomically high for sex offenders, I prefer to embrace the ‘better safe than sorry’ approach”).

⁹² *See, e.g.,* Smith v. Doe, 538 U.S. 84, 103 (2003) (“The risk of recidivism by sex offenders is ‘frightening and high.’” (quoting McKune v. Lile, 536 U.S. 24, 34 (2002))); Doe v. Miller, 405 F.3d 700, 707-08, 714-16 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005); People v. Huddleston, 816 N.E.2d 322, 339-40 (Ill. 2004); McKinney, *supra* note 19, at 318 (stating that sex offenders should be treated differently because they have a “high recidivism

However, extensive private studies refute this claim. In 1998, a massive study of 29,000 sex offenders found recidivism rates of 12.7% for child molesters over five years.⁹³ Admittedly, at least one survey found a higher total, with a 1991 study finding child molesters had a recidivism rate of 31% for sexual crimes and 43% for any violent act.⁹⁴ But a meta-analysis of studies of sex offender recidivism rate concluded that the studies' aggregate recidivism rate for sex offenses was 10-15% within five years and 40% within fifteen to twenty years.⁹⁵

Government statistics have also concluded that sex offenders re-offend at a far lower rate than do other offenders. In 2003, the Department of Justice (DOJ) published a comprehensive study of sex offenders released from prison in 1994.⁹⁶ Of those sex offenders and rapists released from prison in 1994, only 14% were recidivists at that point.⁹⁷ Of those child molesters released in 1994, only 3% were rearrested within three years for a sexual offense against a child, and 14% were rearrested within three years for any violent offense.⁹⁸ All told, 39% of released sex offenders were rearrested within three years, but half of those arrests were for "public order offenses" like parole violations or traffic infractions.⁹⁹

These recidivism rates were markedly lower than those of other felons; as "compared with other ex-cons, sex offenders were paragons of virtue."¹⁰⁰ The DOJ's internal study concluded that 68% of prisoners released in 1994 were rearrested for any offense (including minor ones) within three years, with 68-74% of property criminals and 50-67% of drug offenders rearrested.¹⁰¹ A British study of adult men released from prison in 2002 produced even more striking results, as 85% of those convicted of theft

rate").

⁹³ LeRoy Kondo, *The Tangled Web—Complexities, Fallacies and Misconceptions Regarding the Decision to Release Treated Sexual Offenders from Civil Commitment to Society*, 23 N. ILL. U. L. REV. 195, 199 (2002).

⁹⁴ *Id.* at 200-01. It is unclear for how long that study tracked the group of sex offenders.

⁹⁵ *Id.* at 202.

⁹⁶ LANGAN, SCHMITT & DUROSE, *supra* note 82.

⁹⁷ *Id.* at 11.

⁹⁸ *Id.* at 1, 35.

⁹⁹ *Id.* at 35 (data showing that 39% of released sex offenders were rearrested within three years, with 20% rearrested for public order offenses).

¹⁰⁰ *The end of innocence*, ECONOMIST, Jan. 21, 2006, at 53.

¹⁰¹ U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE U.S.: RECIDIVISM (2002), available at <http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm>; see also Fry-Bowers, *supra* note 58, at 909. The DOJ has not submitted a twenty-year study of recidivism rates for other criminals to compare with those it compiled for sex offenders.

from vehicles were rearrested for any offense within two years, and only 17% of child sex offenders were rearrested for any offense.¹⁰²

Altogether, although sex offenders do pose some risk as a group, less than half are likely to ever re-offend, even over a two-decade span, and government studies have found that less than one in twenty will harm a child again in the three years after the offender is first released from prison. Even the New Hampshire legislator who chaired the state legislature's Committee on Criminal Justice and Public Safety conceded that only one in thirty sex offenders are predators about whom society should be concerned.¹⁰³ Further, any claims that sex offenders have a higher recidivism rate over any period as compared to other felons appear unfounded.¹⁰⁴ Only 39% of sex offenders were arrested for another crime within three years,¹⁰⁵ compared to other felons, whose arrest rate for all crimes approached 70%.¹⁰⁶ Some critics have responded by arguing that stated sex offender recidivism rates are artificially low because sex crimes are underreported, especially within families,¹⁰⁷ but the level of underreporting would have to be quite high for sex crimes to make up the current gap between sex offenders and other criminals. Furthermore, underreporting of sex crimes committed within families would not support residency restrictions, which are premised on keeping stranger sex offenders away from unsuspecting children. While these lower recidivism rates do not support the conclusion that sex offenders should not be supervised at all, they do call into question any court¹⁰⁸ or expert¹⁰⁹ who

¹⁰² *The end of innocence*, *supra* note 100, at 53.

¹⁰³ Mark Hayward, *Who's more dangerous?*, UNION LEADER (Manchester, N.H.), June 5, 2006, at A1.

¹⁰⁴ See Karol Lucken & Jessica Latina, *Sex Offender Civil Commitment Laws: Medicalizing Deviant Sexual Behavior*, 3 BARRY L. REV. 15 (2002). Lucken and Latina, scholars skeptical of the harsh new sex offender laws, gave an example of the recidivism rate fallacy. A State of Washington study concluded that sex offenders have an abnormally high rate of recidivism, even though the state's own data on recidivism found a 48% rate among sex offenders, but a rate of 52% for rapists, 48% for murders and 66% for robbers. *Id.* at 28. This led Lucken and Latina to conclude: "Clearly, this is an illusory benchmark because if the justification for commitment is based upon a high rate of recidivism, statistics clearly favor targeting robbers under such specialized legislation. No such approach has been taken." *Id.* at 28.

¹⁰⁵ LANGAN, SCHMITT & DUROSE, *supra* note 82, at 35.

¹⁰⁶ REENTRY TRENDS IN THE U.S.: RECIDIVISM, *supra* note 101.

¹⁰⁷ La Fond & Winick, *supra* note 77, at 1180-81; see discussion *infra* notes 315-316 and accompanying text (analyzing the methodology and possible motives behind these underreporting claims).

¹⁰⁸ See, e.g., *Doe v. Miller*, 405 F.3d 700, 707-08, 714-16 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005).

¹⁰⁹ See, e.g., La Fond & Winick *supra* note 77, at 1180-81 (The authors acknowledge

rationalizes residency restriction laws because sex offenders re-offend at higher rates than other criminals.

B. THE PUBLIC FISCAL BURDEN OF RESIDENCY RESTRICTIONS

The second concern is the fiscal burden that residency restrictions place on state and local governments. Wisconsin considered enacting a residency restriction law, but concluded it would have cost at least \$17 million to create sufficient housing for displaced sex offenders in rural areas outside restricted zones.¹¹⁰ Illinois's shorter five hundred foot restriction will cause less problems than Iowa's two thousand foot restriction, where studies have shown that entire communities are off limits to sex offenders.¹¹¹ However, the possibility remains even in Illinois that a displaced offender could present a compelling case that in an area near where he once lived, there is no possible alternative housing, and thus the state should have to provide it. The state would then be required to build public sex offender housing, an unenviable political task. The potential for embarrassment and public ire alone should give legislators pause when considering these laws.

C. THE REAL ESTATE CRISIS FOR LOW-INCOME COMMUNITIES

Residency restriction laws have led to two real estate crises. The first crisis has developed in the areas in which sex offenders can legally live because there are no prohibited facilities nearby. On the private sector side, real estate developers are concerned that once the public learns which areas are open to sex offenders, the housing values in those still-unrestricted areas will plummet.¹¹² A study of home values in Montgomery County, Ohio confirmed this fear, finding that those homes located in close proximity to the residence of a known sex offender decreased in value by up to 17%.¹¹³

Residents of those neighborhoods open to sex offenders end up bearing the true cost of residency restrictions as their neighborhoods

that the studies show the recidivism rates are "relatively low," but then contend that research has "serious limitations" because sex crimes are underreported, and sex offenders will plead out to lesser, non-sex-related charges); McKinney, *supra* note 19, at 318 (stating that sex offenders should be treated differently because they have a "high recidivism rate" and "mental abnormality" that means they are different from other criminals).

¹¹⁰ Duster, *supra* note 34, at 719.

¹¹¹ See Miller, 405 F.3d at 706; *id.* at 724 (Melloy, J., concurring in part and dissenting in part). That was even before Iowa counties and communities added pools, libraries, parks, and recreation trails to the list, further limiting the housing opportunities available to sex offenders. See McCurdy, *supra* note 46, at 361.

¹¹² Duster, *supra* note 34, at 773.

¹¹³ Henderson, *supra* note 29, at 839.

become the dumping ground for society's pariahs. Already in Illinois, sex offenders are massing in the 60628 zip code on the Far South Side of Chicago.¹¹⁴ This poor, primarily black area now houses more than one tenth of the state's paroled offenders, who often live in boarding houses that are willing to accommodate them in large numbers.¹¹⁵ The ACLU thus concluded, "while 'herding former offenders into penal colonies may help get politicians re-elected, . . . it is a poor use of law enforcement dollars. The unfortunate families who happen to live in the few areas where these former offenders can live aren't too thrilled about it either.'"¹¹⁶

D. THE REAL ESTATE CRISIS FOR POOR SEX OFFENDERS

Low-income sex offenders face a severe housing problem when they are released from prison because residency restrictions can dramatically limit where an offender can live. Since schools, day care centers, and parks are most often built in the center or main residential areas of cities and towns, residency restrictions prevent offenders from living in the areas closest to jobs and public transit.¹¹⁷ In rural areas with small, compact towns, a residency restriction can mean that an entire town is off limits, leaving only distant farmhouses as possible options where a sex offender can live.¹¹⁸ For example, an Iowa sex offender was found living with his family of three in a car on an abandoned farm property because residences in the small farm towns were either off limits or too expensive.¹¹⁹

Whenever an area does become the newest dumping ground for offenders, the reaction among those living there has been to push sex offenders out. In Chicago, the local alderman for the Far South Side neighborhood that currently houses a tenth of the state's paroled sex

¹¹⁴ *Residents Worry Sex Offenders Concentrated on South Side: Aldermen Promise to Spread Out Housing for Offenders*, NBC5/WMAQ-TV, Jan. 31, 2005, <http://www.nbc5.com/news/4148816/detail.html> [hereinafter *Concentrated on the South Side*].

¹¹⁵ *Id.*

¹¹⁶ Duster, *supra* note 34, at 772 (quoting Press Release, American Civil Liberties Union, ACLU of Iowa Files First Ever Class-Action Lawsuit Challenging Sex Offender "Banishment" (June 25, 2003), available at <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=13074&c=15>).

¹¹⁷ *See id.* at 715.

¹¹⁸ *See Doe v. Miller*, 405 F.3d 700, 706 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005); *id.* at 724 (Melloy, J., dissenting in part and concurring in part); Duster, *supra* note 34, at 715; Bluestein, *supra* note 46, at A3 (discussing a Georgia class action suit contending that the state's residency restrictions drove sex offenders from the city and suburbs to trailers in rural areas).

¹¹⁹ *State v. Seering*, 701 N.W.2d 655, 660 (Iowa 2005). The court noted Seering was then ejected from the farm property. *Id.* at 660.

offenders lobbied the city to pass an ordinance preventing multiple sex offenders from living in the same building, effectively ending the boarding house practice in place now.¹²⁰ Federal law already bans sex offenders from living in federal public housing, and a court in the State of Washington allowed a private low-income landlord to expel a sex offender tenant even though the offender had both disclosed his conviction from the beginning and been a compliant tenant for six years.¹²¹ Further, since the Archdiocesan Housing Authority had the district court's ruling confirmed on appeal, the evicted tenant had to reimburse the authority for its attorney's fees.¹²² The court conceded, "[W]e recognize that the Housing Authority's rule is harsh as applied to Demmings, and regret that he must suffer adverse consequences. Indeed, the rule is harsh as to all sex offenders, who increasingly struggle to find housing upon their release. The rule is, however, reasonable."¹²³

These "reasonable" residency restrictions most harshly affect low-income offenders, who return to society ostracized and without resources, such as a car, after spending several years in prison.¹²⁴ As these isolated offenders live far from work opportunities and without the means to get there, scholars have concluded that they become even more marginalized and less integrated into society.¹²⁵ New Hampshire's chief parole and probation officer concluded that sex offenders readjust to society better when they have access to "employment, family support, social interaction, church attendance and meetings with recovery groups, such as Alcoholics Anonymous."¹²⁶ As a result, the residency restrictions meant to protect the community may instead lead to banished sex offenders coming to believe "their essential identity is as a sex offender," which then "stimulate[s] re-offense."¹²⁷

Thus the residency restrictions suffer from several practical problems that call into question their basis, efficacy, and fairness. Their scientific premise is spurious and only leads to overinclusive and ineffective

¹²⁰ *Concentrated on the South Side*, *supra* note 114.

¹²¹ See *Archdiocesan Hous. Auth. v. Demmings*, No. 46157-51, 2001 WL 1229809, at *2 (Wash. Ct. App., Oct 15, 2001).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Duster, *supra* note 34, at 715. One article detailed how difficult it is even for educated and formerly well-paid individuals who are convicted sex offenders to find work after release from prison. Mark Hayward, *Jobs hard to find, tougher to keep*, UNION LEADER (Manchester, N.H.), June 4, 2006, at A10.

¹²⁵ Duster, *supra* note 34, at 715.

¹²⁶ Hayward, *supra* note 59, at A1.

¹²⁷ Henderson, *supra* note 29, at 804-05.

restrictions that will do nothing to stop the small fraction of sex offenders who will harm unknown children again. Instead, the residency restrictions limit the opportunities available to all sex offenders, many of whom are quite poor, as they attempt to reintegrate into society. Further, residency restrictions could become costly and politically unpopular if a state were forced to provide or even build banished sex offender housing. Lastly, those areas outside of the prohibited zones where sex offenders can live are shouldering the burden for the rest of society, and soon enough these communities too will act to avoid the stigma and plummeting housing values that follow sex offenders.

IV. CONSTITUTIONAL CHALLENGES TO RESIDENCY RESTRICTION LAWS

The United States Supreme Court has not yet taken a case that considers the constitutionality of residency restrictions, having recently denied certiorari on the Eighth Circuit decision *Doe v. Miller*.¹²⁸ The Court has held SORAs constitutional in the 2003 decision of *Smith v. Doe*.¹²⁹ However, the majority in *Smith* included dicta that sex offenders could use to distinguish residency restrictions from SORAs¹³⁰ and then successfully challenge residency restrictions as unconstitutional for violating the ex post facto prohibition in the Constitution.¹³¹ Section IV, after summarizing *Smith*, will analyze residency restrictions under the five factors of the *Mendoza-Martinez* ex post facto test,¹³² applying the facts and arguments of the principal cases to date that have challenged residency restrictions in state¹³³ and federal court.¹³⁴

Besides *People v. Leroy* in the Illinois state courts, offenders in Arkansas, Ohio, Iowa, Georgia, and Alabama have all challenged the constitutionality of residency restrictions. The Eighth Circuit recently upheld Arkansas's residency restriction for offenders assessed as high-

¹²⁸ See *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), cert. denied, 126 S. Ct. 757 (2005).

¹²⁹ 538 U.S. 84 (2003).

¹³⁰ See *id.* at 100.

¹³¹ U.S. CONST. art. 1, § 10, cl. 1.

¹³² *United States v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

¹³³ See, e.g., *Lee v. State*, 895 So. 2d 1038 (Ala. 2004); *Mann v. State*, 603 S.E.2d 283 (Ga. 2004); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. Ct. 2005), appeal denied, 839 N.E.2d 1032 (Ill. 2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005).

¹³⁴ See, e.g., *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), cert. denied, 126 S. Ct. 757 (2005); *Doe v. Baker*, No. Civ. A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006); *Coston v. Petro*, 398 F. Supp. 2d 878 (N.D. Ohio 2005); *Doe v. Miller*, 298 F. Supp. 2d 844 (S.D. Iowa 2004), rev'd, 405 F.3d 700 (8th Cir. 2005), cert. denied, 126 S. Ct. 757 (2005).

risk.¹³⁵ Federal district courts in Ohio¹³⁶ and Georgia¹³⁷ have also recently upheld those states' residency restrictions. There are two cases from Iowa challenging that state's residency restrictions: *State v. Seering*, an Iowa Supreme Court case upholding the state's residency restriction over two dissenting votes;¹³⁸ and *Doe v. Miller*, an Eighth Circuit opinion upholding the Iowa residency restriction by a two-to-one vote and reversing the district court judge who had ruled in favor of the plaintiff class of sex offenders.¹³⁹ The supreme courts of Alabama¹⁴⁰ and Georgia¹⁴¹ have both upheld residency restrictions in brief opinions that quickly dismissed the constitutional arguments raised by the offenders.

A. SMITH V. DOE

The most significant Supreme Court case regarding sex offender restrictions is *Smith v. Doe*, which upheld Alaska's SORA provisions.¹⁴² In *Smith*, both respondent sex offenders had been convicted and served their prison sentences long before Alaska passed its SORA, so they argued that the SORA was a punitive provision applied retroactively to them, thus violating the ex post facto prohibition contained in Article 1, Section 10 of the United States Constitution.¹⁴³ The Supreme Court subjected the SORA to the five factors of the ex post facto analysis that it outlined in *United States v. Mendoza-Martinez*,¹⁴⁴ and concluded that the SORA was civil and nonpunitive, and thus did not violate the ex post facto prohibition.¹⁴⁵ In the six-to-three opinion,¹⁴⁶ the Court held that Alaska had the right to require

¹³⁵ *Weems*, 453 F.3d at 1012-13, 1017. See discussion *infra* Section V.A (discussing why Arkansas's law is probably the most effective of the current residency restrictions and stands on the strongest constitutional footing, because it is premised on a showing of high risk on an assessment criteria).

¹³⁶ *Coston*, 398 F. Supp. 2d 878 (Ohio).

¹³⁷ *Baker*, 2006 WL 905368 (Georgia).

¹³⁸ *Seering*, 701 N.W.2d 655.

¹³⁹ *Miller*, 405 F.3d 700; *Miller*, 298 F. Supp. 2d 844.

¹⁴⁰ *Lee v. State*, 895 So. 2d 1038 (Ala. 2004); see also *In re J.L.N. v. State*, 894 So. 2d 751 (Ala. 2004).

¹⁴¹ *Mann v. State*, 603 S.E.2d 283 (Ga. 2004).

¹⁴² *Smith v. Doe*, 538 U.S. 84, 105 (2003). This case was decided in companion with *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), a similar challenge of Connecticut's SORA provisions, but a decision which did not include the same depth of ex post facto analysis as *Smith*.

¹⁴³ *Smith*, 538 U.S. at 91-92.

¹⁴⁴ 372 U.S. 144, 168-69 (1963).

¹⁴⁵ *Smith*, 538 U.S. at 92-105.

¹⁴⁶ Justice Souter concurred in the judgment, upholding the law only because of the legislative presumption of constitutionality, *id.* at 109-10 (Souter, J., concurring in

registration since the offenders posed a substantial risk of re-offending, noting that the Court had previously concluded that sex offenders are “much more likely than other type[s] of offender[s] to be arrested for a new rape or sexual assault.”¹⁴⁷ The Court then rationalized upholding Alaska’s law by stating it was “conjecture” and that there was “no evidence” that the SORA led to “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.”¹⁴⁸

B. EX POST FACTO ANALYSIS

Residency restrictions come under ex post facto scrutiny because they, like all other post-conviction and parole sex offender risk management laws, purport to be civil and not criminal in nature.¹⁴⁹ The ex post facto clause of Article 1, Section 10 of the Constitution prohibits a law from imposing additional punishment for a sentenced crime after the initial sentence has been handed down.¹⁵⁰ If a law does impose an additional punishment on the person, then the law is punitive and an impermissible ex post facto law.¹⁵¹

The Supreme Court has developed a two-step test to determine if a law is civil or punitive.¹⁵² First, a court faced with an ex post facto challenge will examine the stated legislative intent of the statute.¹⁵³ With residency restrictions, all reviewing courts have concluded that the legislative intent was civil, not punitive, citing the legislative record stating that the restrictions are intended to protect society and children from sex offenders, rather than to punish sex offenders.¹⁵⁴

A court will then progress to the second step of examining whether, despite the law’s stated civil intent, the law’s effects are nonetheless so punitive that they negate its stated intent.¹⁵⁵ The Supreme Court, in *United*

judgment), hardly a ringing endorsement of SORAs’ constitutionality and an indication of his willingness to scrutinize other sex offender restrictions in future cases. Justices Stevens, Breyer, and Ginsburg dissented. *Id.* at 110-18 (Stevens, Ginsburg, Breyer, JJ., dissenting).

¹⁴⁷ *Id.* at 103.

¹⁴⁸ *Id.* at 100.

¹⁴⁹ *See, e.g., id.* at 93; *Doe v. Miller*, 405 F.3d 700, 705 (8th Cir. 2005), *cert denied*, 126 S. Ct. 757 (2005); *People v. Leroy*, 828 N.E.2d 769, 779 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005).

¹⁵⁰ U.S. CONST. art. 1, § 10, cl. 1.

¹⁵¹ *Smith*, 538 U.S. at 92.

¹⁵² *Id.*; *United States v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

¹⁵³ *Smith*, 538 U.S. at 92.

¹⁵⁴ *See, e.g., Leroy*, 828 N.E.2d at 775.

¹⁵⁵ *See, e.g., Smith*, 538 U.S. at 92.

States v. Mendoza-Martinez,¹⁵⁶ created a list of seven “guideposts” for a court when considering this question, five of which the *Smith* court concluded were relevant to an analysis of sex offender risk management laws: (1) Is the restriction historically regarded as a punishment? (2) Does the restriction impose an affirmative disability or restraint? (3) Does the restriction promote the traditional aims of punishment (i.e., retribution and deterrence)? (4) Does the restriction have a rational connection to a nonpunitive purpose? (5) Is the restriction excessive with respect to its purpose?¹⁵⁷ The Supreme Court has not stated how to weigh these five factors¹⁵⁸ or whether a law is categorically unconstitutional after failing a certain number of the factors, leaving lower courts able to weigh and discount factors as they see fit.¹⁵⁹

*1. Is the Penalty Historically Considered a Punishment?*¹⁶⁰

The first *Mendoza-Martinez* factor considers whether or not the penalty at issue has been historically considered a punishment.¹⁶¹ The historical punishment similar to residency restrictions is banishment, which American colonists used to eject those who would not comply with a community’s norms or rules.¹⁶² Residency conditions placed on sex offenders and other paroled criminals that have been found to constitute banishment have been ruled unconstitutional.¹⁶³

Courts have resorted to several arguments to avoid answering the question of whether residency restrictions are actually banishment. The

¹⁵⁶ 372 U.S. at 168-69.

¹⁵⁷ *Smith*, 538 U.S. at 97.

¹⁵⁸ *Id.* (describing the factors as “neither exhaustive nor dispositive,” but merely “useful guideposts”).

¹⁵⁹ See, e.g., *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005), *cert denied*, 126 S. Ct. 757 (2005); *Leroy*, 828 N.E.2d at 781.

¹⁶⁰ *Smith*, 538 U.S. at 97.

¹⁶¹ *Id.*

¹⁶² *Leroy*, 828 N.E.2d at 780.

¹⁶³ *State v. Beach*, 147 Cal. App. 3d 612, 620-21 (Cal. Ct. App. 1983) (holding it unconstitutional for a court to include as part of probation conditions that an elderly woman charged with involuntary manslaughter be forced to move from her home of twenty-four years and move to another neighborhood for the five-year duration of the probation). See also *Booth v. State*, where an Alaska appellate court judge twice reversed the sentence given to a sex offender by a district court when the terms of probation would have forbidden the offender from living in the same village as his victim for thirty-six months. No. A-8219, 2002 WL 31307875, at *1-2 (Alaska Ct. App. Oct. 16, 2002). The probation had been ordered since the village was too small and had no police officer to supervise the defendant. *Id.* at *1-2. The appellate court concluded this was unconstitutional banishment, as the defendant had lived there his whole life. *Id.* at *2.

Leroy court noted that the offender could always find somewhere else to live.¹⁶⁴ Several courts have concluded the restrictions did not constitute banishment as in colonial days, since the offender could enter the restricted zone to visit or conduct business, although he could never again stay the night.¹⁶⁵ Other courts avoided the banishment issue procedurally by saying that the sex offender did not allege sufficient facts at trial to show that he was rendered homeless.¹⁶⁶ The Alabama Supreme Court further concluded that there was no evidence that anyone had *ever* been banished from one's home as a result of the state's residency restriction.¹⁶⁷

Instead, quite the opposite is true: the only way residency restrictions would work, in the eyes of the public and legislators, is if the law *did* root out those sex offenders living near schools, parks, and child care facilities and prevent others from moving into the restricted zones.

Observers and dissenting judges who have concluded that residency restrictions constitute banishment offer ample support for their contention. *Miller* provided the strongest empirical proof of actual banishment caused by the restrictions, as the plaintiff sex offenders produced studies showing that several Iowa counties,¹⁶⁸ cities,¹⁶⁹ and small towns were essentially

¹⁶⁴ *Leroy*, 828 N.E.2d at 780.

¹⁶⁵ See *Doe v. Baker*, No. Civ. A. 1:05-CV-2265, 2006 WL 905368, at *3 (N.D. Ga. Apr. 5, 2006); *Coston v. Petro*, 398 F. Supp. 2d 878, 885 (N.D. Ohio 2005); *Mann v. State*, 603 S.E.2d 283, 285-86 & n.7 (Ga. 2004). But see *Baker*, 2006 WL 905368 at *4, which upheld Georgia's one thousand foot restriction in a suburban area as constitutional, but conceded that "[a] more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem if applied retroactively to those convicted prior to its passage."

¹⁶⁶ See, e.g., *Lee v. State*, 895 So. 2d 1038, 1043 (Ala. 2004). Residency restrictions can lead to emotionally and fiscally harsh decisions for affected sex offenders with families. One Georgia sex offender had to purchase an additional residence outside restricted areas, while his wife, daughter, son, and mother-in-law remained in the family residence within the restricted zone. *Baker*, 2006 WL 905368, at *1.

¹⁶⁷ *Id.* at 1043 (holding there is "no evidence . . . indicating that he or any other sex offender was homeless, or that he or any other sex offender has been banished from his home or his community").

¹⁶⁸ In mostly rural Carroll County, Iowa, of the 9019 residential units available, just 2077 (23%) were outside the restricted areas, and of them, 1694 were distant farm houses while only 244 were located in communities too small to have a school or child care facility. *Doe v. Miller*, 405 F.3d 700, 706 n.2 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005). Johnson County, where the University of Iowa is located, was "virtually" completely off-limits to sex offenders as a result of the residency restrictions. *Duster*, *supra* note 34, at 723.

¹⁶⁹ In Des Moines, sex offenders were left with an industrial area and some of the city's newest and wealthiest neighborhoods available for them to live. *Miller*, 405 F.3d at 724 (Melloy, J., dissenting in part and concurring in part). In Bettendorf, sex offenders could live on a golf course or in a few wealthy neighborhoods. *Duster*, *supra* note 34, at 723.

inaccessible.¹⁷⁰ The dissenting Eighth Circuit judge in *Miller* thus concluded that residency restrictions were tantamount to banishment: “The difficulty in finding proper housing prevents offenders from living in many Iowa communities. This effectively results in banishment from virtually all of Iowa’s cities and towns.”¹⁷¹ The dissenting judge in *Leroy* considered Illinois’s residency restriction a “substantial” limitation on where Leroy could live in his hometown of East St. Louis, concluding that “to indefinitely expel a man from his family home, and separate him from family members with whom he has lived his entire life, seems decidedly similar to a method of punishment employed in colonial times.”¹⁷² The two dissenting judges on the Iowa Supreme Court in *Seering* also found that Iowa’s residency restriction law constituted banishment for its detrimental social effect on the released sex offender, as it “imposes an onerous and intrusive obligation on a convicted sex offender, results in community ostracism, and marks the offender as a person who should be shunned by society.”¹⁷³

Lastly, the language of the *Smith* decision affirming the SORAs should not extend to upholding residency restrictions. In *Smith*, the Court decided the SORAs did not constitute banishment because the practice in colonial times involved “face to face shaming” and expulsion, whereas the SORAs resulted in social condemnation through correct information.¹⁷⁴ The Court then approved of the SORAs partly because the measures placed no limit on where a sex offender could live.¹⁷⁵ As Judge Melloy noted in his dissent in *Miller*, the Supreme Court could not use the same reasoning to uphold residency restrictions, for restrictions do involve expulsion and place limits on where an offender can live.¹⁷⁶

Studies of residency restrictions enacted elsewhere confirm this. The Seattle suburb Issaquah, which limited offenders to commercial and industrial zones within the city that were also at least 1000 feet from schools and day care centers, resulted in only 250 to 300 of the city’s 7000 units being legally available to sex offenders, thus rendering 95% of the community’s housing off-limits. See MacLean, *supra* note 46, at 6.

¹⁷⁰ *Miller*, 405 F.3d at 724 (Melloy, J., dissenting in part and concurring in part); Duster, *supra* note 34, at 723.

¹⁷¹ *Miller*, 405 F.3d at 724 (Melloy, J., dissenting in part and concurring in part).

¹⁷² *People v. Leroy*, 828 N.E.2d 769, 787, 789 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005) (Kuehn, J., dissenting).

¹⁷³ *State v. Seering*, 701 N.W.2d 655, 671-72 (Wiggins, J., concurring in part and dissenting in part).

¹⁷⁴ *Smith v. Doe*, 538 U.S. 84, 98 (2003).

¹⁷⁵ *Id.* at 100.

¹⁷⁶ *Miller*, 405 F.3d at 724 (Melloy, J., concurring in part and dissenting in part) (after describing the holding in *Smith*, concluding the Iowa law “fits the description of banishment”); see also Brett Hobson, Note, *Banishing Acts: How Far May States Go to*

2. Does the Restriction Impose an Affirmative Disability or Restraint?¹⁷⁷

The courts that upheld residency restrictions in *Leroy*, *Seering*, and *Miller* conceded that the law violates the second ex post facto guidepost of imposing an affirmative disability or restraint.¹⁷⁸ As noted above, the law would not work *unless* it prevented sex offenders from living in certain places. However, the *Leroy* majority downplayed the importance of this guidepost, terming it insufficient to render residency restrictions punitive.¹⁷⁹

Dissenting judges that have criticized residency restrictions have not brushed off this factor so quickly. First, the factor differentiates SORAs from residency restrictions, since the former do not place a limit on where sex offenders can live and thus work, but the latter's aim is exactly that limitation. This differentiation matters since it indicates the Court's reasoning in *Smith* for upholding the SORAs¹⁸⁰ does not provide a strong basis for also upholding residency restrictions. Indeed, the SORA in *Smith* passed this second factor as well as the previous one examining banishment. On the other hand, the federal district court in *Miller*, which held Iowa's residency restrictions unconstitutional, found that the residency restriction "impose[d] exactly the affirmative restraint that the Supreme Court [in *Smith*] found lacking in Alaska's sex offender registration schemes."¹⁸¹ The dissenter in *Miller*'s Eighth Circuit decision agreed, as he was concerned that residency restrictions went "far beyond" mere registration, becoming the type of law that *Smith* implied would be illegal.¹⁸² Thus, residency restrictions clearly impose an affirmative restraint, although what weight this factor should carry in the overall consideration of ex post facto analysis remains unclear.

3. Does the Restriction Promote the Traditional Aims of Punishment?¹⁸³

If residency restrictions are civil, then they should not promote the traditional aims of punishment—retribution and deterrence.¹⁸⁴ Courts have

Keep Convicted Sex Offenders Away from Children?, 40 GA. L. REV. 961, 990-91 (2006) (criticizing courts for relying on *Smith* to conclude residency restrictions are not punitive in effect since there are "significant differences" in "the magnitude of the burden" between registration requirements and residency restrictions).

¹⁷⁷ *Smith*, 538 U.S. at 97.

¹⁷⁸ See *Miller*, 405 F.3d at 720-21; *People v. Leroy*, 828 N.E.2d 769, 781 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005); *Seering*, 701 N.W.2d at 668.

¹⁷⁹ See *Leroy*, 828 N.E.2d at 781.

¹⁸⁰ *Smith*, 538 U.S. at 100.

¹⁸¹ *Doe v. Miller*, 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005), *cert denied*, 126 S. Ct. 757 (2005).

¹⁸² See *Miller*, 405 F.3d at 725 (Melloy, J., dissenting in part and concurring in part).

¹⁸³ *Smith*, 538 U.S. at 97.

offered two reasons why sex offender management laws in general do not promote retribution and deterrence. First, in *Smith*, the United States Supreme Court concluded that Alaska's SORA was not retributive since the law was reasonably related to sex offenders having unusually high rates of recidivism, although the Court cited to no particular data when making this assertion.¹⁸⁵ Rather, the statistical evidence compiled by private and public sources and summarized in Section III.A show that sex offenders are in fact far less likely to re-offend than other felons and cast doubt on *Smith's* assertions to the contrary.¹⁸⁶ Second, the *Leroy* court accepted that Illinois's residency restrictions might be deterrent, but found the law still acceptable since many government initiatives deter without being considered punishments, and residency restrictions do not "significantly" promote deterrence.¹⁸⁷

Judge Kuehn, dissenting in *Leroy*, considered Illinois's residency restrictions to be deterrent and highly retributive.¹⁸⁸ Judge Kuehn noted the ironic consolation offered by the majority that Leroy could visit his mother at her home, every day if he wished, so long as he did not sleep there at night.¹⁸⁹ As a result of these permissible visits, Leroy could be at his mother's home during the day—when school was in session and he allegedly posed a risk to children—but could not spend the night at the house when the school children would have all returned to their homes. Judge Kuehn concluded this result could only be considered retributive:

Absent a tendency to promote retribution, what legitimate purpose would legislators have in removing Patrick Leroy from his home, given the fact that he has lived there for 10 years without re-offending, despite his close proximity to the hundreds upon hundreds of children who have matriculated to Miles Davis Elementary School during the same time span?¹⁹⁰

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 102.

¹⁸⁶ See discussion *supra* Section III.A (examining recidivism statistics for sexual offenders compared to other felons).

¹⁸⁷ *People v. Leroy*, 828 N.E.2d 769, 781 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005); see also *Doe v. Baker*, No. Civ. A. 1:05-CV-2265, 2006 WL 905368 at *1 (N.D. Ga. Apr. 5, 2006); *Coston v. Petro*, 398 F. Supp. 2d 878, 885 (N.D. Ohio 2005); *Mann v. State*, 603 S.E.2d 283, 285-86 & n.7 (Ga. 2004). In *Mann*, the Georgia Supreme Court rationalized that "the Statute does not prohibit appellant from visiting his parent's property, conducting a business on the property, or even purchasing and leasing the property—it only prohibits his residency on the property," thus leading the court to conclude, "in contrast to these slight considerations, the State's interests underlying the Residency Statute are considerable." 603 S.E.2d at 285-86 & n.7.

¹⁸⁸ *Leroy*, 828 N.E.2d at 791 (Kuehn, J., dissenting).

¹⁸⁹ *Id.* (Kuehn, J., dissenting).

¹⁹⁰ *Id.* (Kuehn, J., dissenting).

Judge Kuehn further criticized the uniform application of these residency restrictions, which fail to consider sex offenders' prior offenses or case histories, leading him to conclude that the law was only meant to punish the offender and not protect the community: "Since this Act treats all offenders alike, without consideration of whether a particular offender is likely to reoffend, its retroactive residency restriction promotes and furthers retribution, a traditional aim of punishment."¹⁹¹

*4. Does the Restriction Have a Rational Connection to a Nonpunitive Purpose?*¹⁹²

Residency restrictions have a rational connection to a nonpunitive purpose, as they are designed to keep children safe from sexual assault by known offenders.¹⁹³ Despite the statistics in Section III.A that show the far lower recidivism rate of child sex offenders compared to other released felons,¹⁹⁴ this nonpunitive purpose still has merit. The question, again, is how much weight should be accorded to this factor as compared to the other four factors, a matter on which the Supreme Court has given no guidance.¹⁹⁵ The Eighth Circuit in *Miller* announced that this guidepost was the "most significant factor" and that it trumped the previous factors which the residency restriction had violated, but cited no authority for this conclusion.¹⁹⁶ Hopefully, a future Supreme Court case will decide the relative weight of these ex post facto factors or more strongly insist on equal consideration of all the factors to halt this judicial fiddling.

*5. Is the Restriction Excessive with Respect to its Purpose?*¹⁹⁷

The fifth factor turns on the empirical issue of how often sex offenders re-offend, and hence the legitimacy of laws restricting the areas in which they can live. The *Smith* Court concluded that sex offenders had a high rate of recidivism, specifically noting a report issued by the DOJ showing that sex offenders could do nothing for twenty years and then harm children

¹⁹¹ *Id.* (Kuehn, J., dissenting).

¹⁹² *Smith v. Doe*, 538 U.S. 84, 97 (2003).

¹⁹³ *Leroy*, 828 N.E.2d at 781-82.

¹⁹⁴ See discussion *supra* Section III.A.

¹⁹⁵ *Smith*, 538 U.S. at 97 (describing the factors as "neither exhaustive nor dispositive," but merely "useful guideposts").

¹⁹⁶ *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005), *cert denied*, 126 S. Ct. 757 (2005) (quoting *Smith*, 538 U.S. at 102). The *Miller* court engaged in a little judicial dishonesty with this claim (or were just guilty of an editing oversight), as the *Smith* court characterized it as *a* most significant factor, rather than *the* most significant factor. Compare *id.* at 721, with *Smith*, 538 U.S. at 102.

¹⁹⁷ *Smith*, 538 U.S. at 97.

again.¹⁹⁸ The Court cited to the report to justify a registration system to keep track of dormant but still potentially dangerous offenders.¹⁹⁹ In *Miller*, the Eighth Circuit endorsed the testimony of a state expert who testified that there were “very high rates of re-offense” by sex offenders who target children, and rejected the testimony of the plaintiffs’ expert of the who testified that sex offenders had an average recidivism rate of 20-25%.²⁰⁰ Section III.A detailed the statistics produced by the DOJ and academics which refute these courts’ beliefs in sex offenders’ abnormally high recidivism rates.²⁰¹ Nevertheless, courts have deferred to legislative judgment, noting that it is not the job of the courts to determine if sex offender management laws are drafted in the best possible way, so long as the laws are a reasonable way of achieving the ends of preventing sex offender recidivism.²⁰²

Judges critical of sex offender management laws have expressed great concern with the overinclusivity of these restrictions. Justice Souter, concurring only in the judgment in *Smith*, questioned whether “the fact that the [SORA] uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on.”²⁰³ Justice Ginsburg, dissenting in *Smith*, criticized the overinclusivity of Alaska’s SORA law as “[excessive] in relation to its nonpunitive purpose.” She pointed out the inconsistency of the alleged purpose of the Act—to prevent recidivism—with one of the respondents’ situation, as the Alaska courts had twice noted his successful rehabilitation and had even granted him custody of a child of the same age and gender as his previous victim.²⁰⁴ Justice Ginsburg noted this incongruity in warning about the potentially punitive effect of overinclusive sex offender registration laws.²⁰⁵ Put another way by one scholar:

¹⁹⁸ *Id.* at 103-04 (quoting R. Prentky, R. Knight & A. Lee, U.S. Dep’t of Justice, Nat’l Inst. of Justice, Child Sexual Molestation: Research Issues 14 (1997)).

¹⁹⁹ *Id.* (quoting PRENTKY, KNIGHT & LEE, *supra* note 198, at 14).

²⁰⁰ *Miller*, 405 F.3d at 707, 722.

²⁰¹ See discussion *supra* Section III.A.

²⁰² See, e.g., *Smith*, 538 U.S. at 103, 105; *People v. Leroy*, 828 N.E.2d 769, 782 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005).

²⁰³ *Smith*, 538 U.S. at 109 (Souter, J., concurring in judgment)

²⁰⁴ *Id.* at 117-18 (Ginsburg, J., dissenting).

²⁰⁵ *Id.* (Ginsburg, J., dissenting) (“Notwithstanding this strong evidence of rehabilitation [being granted custody and being released from jail early], the Alaska Act requires Doe to report personal information to the State four times per year, and permits the State publicly to label him a ‘Registered Sex Offender’ for the rest of this life.”).

By allowing these individuals to return to the community following their punishment, whether or not they are subject to probation or parole, [the state] has tacitly agreed they are safe enough. Infringement on their right to establish a home and maintain familial relationships results in significant restrictions on their ability to reintegrate into society and shocks one's sense of fair play.²⁰⁶

Since residency restrictions apply for life, they evince a belief that sex offenders will never be rehabilitated, leading the dissenting judge in *Seering* to conclude that it "exceeds the non-punitive purpose of the statute."²⁰⁷

C. CONCLUSIONS ON RESIDENCY RESTRICTIONS

For the reasons stated above, serious questions remain regarding the efficacy, basis, and constitutionality of residency restriction laws for convicted sex offenders. Constitutionally, the residency restrictions violate as many as four of the five applicable guideposts in the ex post facto analysis, and as a scholar reiterated after analyzing the Iowa residency restrictions, "there is no place in our Constitution for such an exception to the prohibition of ex post facto laws."²⁰⁸ Courts have thus far upheld residency restrictions by downplaying the guideposts which the restrictions clearly violate and emphasizing their rational relation to a nonpunitive purpose, but a law's constitutionality should not depend on judicial sleight of hand. Further, the reasoning in the United States Supreme Court's *Smith* decision which upheld the SORAs' constitutionality does not convincingly extend to upholding residency restrictions, as these latter measures constitute banishment and impose real limitations on where sex offenders can live and, by extension, work, rather than simply providing information to the public as the former laws do.²⁰⁹

Examining the law from scientific, social, and political viewpoints, residency restrictions are no less troubling. The rationale of needing enhanced policing measures because sex offenders have a higher rate of recidivism than other felons is specious; in the first three years after release, only 3% of sex offenders will harm children again whereas nearly 70% of other violent criminals will be rearrested.²¹⁰ While one can argue quite persuasively that any further sexual offenses against children are unacceptable, the claims of sex offenders' higher recidivism rates are undermined by the overwhelming amount of research conducted on the

²⁰⁶ Fry-Bowers, *supra* note 58, at 922.

²⁰⁷ *State v. Seering*, 701 N.W.2d 655, 672 (Iowa 2005) (Wiggins, J., concurring in part and dissenting in part).

²⁰⁸ Duster, *supra* note 34, at 735; *see also* Hobson, *supra* note 176, at 991-92.

²⁰⁹ *See Smith*, 538 U.S. at 98-100.

²¹⁰ *See* discussion *supra* notes 97-101 and accompanying text.

topic that indicates otherwise. Second, residency restrictions may not deter those rare offenders who do wish to harm children whom they don't know, as even a one mile restriction would not have stopped those few offenders in Minnesota who traveled several miles to parks to harm unknown children.²¹¹ Lastly, the costs on both society and on offenders are enormous. Offenders are overwhelmingly poor and lack the resources after prison to become productive members of society, especially when they are forced to live far from jobs and urban areas as social outcasts.

In the short term, these laws will likely continue to be upheld, especially by state court judges facing re-election pressures.²¹² That said, grave constitutional questions exist with uniformly-applied residency restrictions, and dissenting judges are increasingly voicing cogent concerns about these restrictions. A well-researched case, documenting on a large scale that the residency restrictions prevented or essentially prevented sex offenders from finding available housing, would force a court to either strike down the residency restriction or clearly contradict the Court's reasoning in *Smith v. Doe* for upholding SORAs.

V. BEST PRACTICE METHODS FOR MANAGING SEX OFFENDER RISK IN THE COMMUNITY

Recognizing that residency restrictions are an inappropriate answer for sex offender risk management, policymakers concerned with protecting their community must consider new and different strategies. As befits our federalist system, states are trying many different methods to prevent sex offender recidivism, reforming not only the post-prison restrictions on sex offenders, but also the type of courts that handle these cases and the sentencing structure for sex offenders. This final section will consider four methods that aim to manage sex offenders: (1) use of risk assessment criteria to match post-prison restrictions to prior acts and future risk, (2) indeterminate sentencing, (3) civil commitments, and (4) sex offender

²¹¹ Duster, *supra* note 34, at 753.

²¹² See *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring) (saying that elected judges "cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects"). Justice O'Connor continued by citing to a law review article quoting former California Supreme Court Judge Otto Kaus that a judge claiming to be oblivious of the election consequences when making a controversial decision is akin to "ignoring a crocodile in your bathtub." *Id.* at 789 (quoting Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994)); see also MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 248 (3d ed. 2004) ("There is substantial reason to believe that elective judges are influenced in controversial cases by the threat of being voted out of office.").

reentry courts. Section V examines how each of these methods works in practice before weighing their benefits and concerns. Section VI proposes a comprehensive risk management system using a mix of methods that best focuses a state's finite resources on those sex offenders who are identified to pose the greatest risk, while allowing the many low-risk offenders who are highly unlikely to re-offend to reintegrate into society with only minimal restrictions placed on them.

A. BETTER-TAILORED RESTRICTIONS THROUGH RISK ASSESSMENT CRITERIA

States should implement well-founded risk assessment criteria to categorize sex offenders based on future risk and prior bad acts, and then tailor restrictive measures accordingly. As discussed in Section III.A, studies show that sex offenders do not re-offend at a higher rate than other criminals; in fact, quite the opposite is true, as even the longest twenty-year study shows that fewer than half of sex offenders will re-offend.²¹³ Legislators would thus better protect the community by creating assessment criteria to identify the sex offenders that pose the greatest risk of re-offending. Prosecutors could then reasonably seek, and judges could reasonably impose, longer prison sentences and more controlling post-prison restrictions on those high-risk offenders.

Several states now use criteria for assessing the risk of sex offender recidivism. Nebraska's assessment criteria, known as an instrument, determines both the registration and level of custody requirements placed on a sex offender upon release from prison,²¹⁴ although it could easily be modified to include determinations of residency restriction level or any other risk management measure.²¹⁵ State authorities created the instrument in consultation with Mario Scalora, a professor of law and psychology at the University of Nebraska, who tracked 1,300 sex offenders to determine which factors most closely related to recidivism when the offender was released into the community.²¹⁶

²¹³ See discussion *supra* Section III.A and accompanying text, concerning actual recidivism statistics for sexual offenders as compared to other felons.

²¹⁴ NEB. REV. STAT. § 29-4013 (2005); see *Slansky v. Neb. State Patrol*, 685 N.W.2d 335 (Neb. 2004).

²¹⁵ Arkansas has done just that, as the state's residency restrictions are applied only to those sex offenders demonstrating a high risk level on that state's assessment criteria. See ARK. CODE ANN. § 5-14-128 (2005); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1012-13 (8th Cir. 2006).

²¹⁶ *Slansky*, 685 N.W.2d at 342-43. The study had an error rate of 12%. *Id.* at 348.

Nebraska's instrument focuses on the offender's past acts and his psychiatric state upon release.²¹⁷ The offender is then assessed to be at a risk level of either one (low), two (medium), or three (high).²¹⁸ The instrument weighs the following factors in determining the offender's risk level:

- Whether the conduct of the sex offender was characterized by repetitive and compulsive behavior;
- Whether the sex offender committed the sexual offense against a child;
- Whether the sexual offense involved the use of a weapon, violence, or infliction of serious bodily harm;
- The number, date, and nature of prior offenses;
- Whether psychological or psychiatric profiles indicate a risk of recidivism;
- The sex offender's response to treatment;
- Any recent threats by the sex offender against a person, or expressions of intent to commit additional crimes; and
- Behavior of the sex offender while confined.²¹⁹

The presence of either of two additional factors automatically result in an offender being assessed a level one (low) ranking: proof of advanced age or debilitating illness.²²⁰ On the other hand, the presence of any one of four other indicators results in an automatic level three (high) determination of the sex offender's risk: "(1) Torture or mutilation of the victim or the infliction of death, (2) abduction and forcible transportation of the victim to another location, (3) threats to reoffend sexually or violently, and (4) recent clinical assessment of dangerousness."²²¹

The assessor then considers which conditions on release would minimize the sex offender's risk of recidivism: probation, parole, counseling, therapy, or treatment.²²² For those offenders released into the public, the assessment level affects who in the public is alerted to the offender's status and presence in the community.²²³ If an offender is determined to be level one, only law enforcement officials are notified of

²¹⁷ *Id.* at 342.

²¹⁸ *Id.* at 341.

²¹⁹ *Id.* at 342.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 341.

his location.²²⁴ If level two, then nearby schools, daycare centers, and religious and youth organizations are also notified of the offender's identity.²²⁵ If level three, all members of the public who might encounter the individual are notified.²²⁶

Risk assessment criteria have several advantages. First, assessment criteria can ensure a better allocation of state resources. The state can imprison or harshly restrict the high risk offenders, while enabling low and moderate risk sex offenders to live in the community with appropriate restrictions and undergo mandatory outpatient treatment. The latter option is significantly cheaper than incarceration.²²⁷

Second, risk assessment criteria allow courts to impose future restrictions in proportion to an offender's prior acts. Judges²²⁸ and scholars²²⁹ critical of the uniformly-applied residency restrictions have urged this type of nuanced, individually tailored approach. In *Leroy*, Judge Kuehn criticized the disconnect between risk and punishment caused by uniformly-applied residency restrictions:

[A] man branded a child sex offender for having had consensual sex with a 17-year-old girl could safely reside in close proximity to toddlers gathered at a daycare center but present a problem living across the street from a high school. On the other hand, a pedophile grandfather, branded a child sex offender for fondling his young grandchildren and their friends, presents a potential problem living across the street from a daycare center but could safely reside in close proximity to a high school.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* New Jersey uses a similar three-tier system, in which only police know of low-risk offenders, schools are alerted about medium-risk offenders, and the police notify anyone in the "public that [is] likely to come in contact with" with high-risk offenders. See Debra H. Goldstein & Stephanie Goldstein, *Sex Offender Registration & Notification: The Constitution vs. Public Safety*, 60 ALA. LAW. 112, 118 (1999).

²²⁷ Outpatient treatment costs from \$5,000 to \$15,000 a year, whereas incarceration costs at least \$22,000 without treatment. Fry-Bowers, *supra* note 58, at 925 n.264.

²²⁸ *Doe v. Miller*, 405 F.3d 700, 725 (8th Cir. 2005) (Melloy, J., concurring in part and dissenting in part), *cert denied*, 126 S. Ct. 757 (2005); *People v. Leroy*, 828 N.E.2d 769, 790-91 (Ill. App. Ct. 2005) (Kuehn, J., dissenting), *appeal denied*, 839 N.E.2d 1032 (Ill. 2005); see also *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017-18 (8th Cir. 2006) (acknowledging these criticisms raised by the dissenting judge in *Miller* and *Seering*).

²²⁹ See, e.g., *Alabama Strengthens Restrictions*, *supra* note 20, at 939 ("Like many of these laws, Alabama's poorly tailored [enhanced residency restriction law] fails to address the vast majority of sex crimes committed against children, and its chances of preventing the crimes it does target are small."); Henderson, *supra* note 29, at 813-14 ("If an offender's only victims are historically teenagers or adults, imposing a residential restriction regarding primary school zones is futile and ineffective.").

[Instead,] this Act treats all offenders alike, without consideration of whether a particular offender is likely to reoffend²³⁰

Judge Kuehn noted at the beginning of his dissent that the record did not even detail exactly what crime Leroy had committed as an eighteen-year old, and “[w]ithout a better understanding of the nature of his offense, particularly his choice of victim, we cannot assess Leroy’s likelihood for recidivism.”²³¹ Information now posted on Leroy’s Illinois Sex Offender Database entry indicates he was convicted of a criminal sexual assault in which the victim was *over* eighteen (when he himself was only eighteen), which further raises questions of why Leroy should be banished from living near an elementary school.²³²

Dissenting in *Miller*, Judge Melloy similarly concluded that the uniform application of residency restrictions made no sense without a determination of ongoing individual risk.²³³ One of the plaintiffs, John Doe II, was convicted of having consensual sex with a fifteen-year-old when he was twenty years old, a crime that would not seem to indicate he was a threat to toddlers in day care centers.²³⁴ Another plaintiff, John Doe VII, was convicted of statutory rape in Kansas, an act not even criminalized in Iowa, but he nonetheless had to register and live outside the two thousand foot prohibited zone.²³⁵

Some courts have expressly rejected the notion that a sex offender’s prior acts should guide the severity of his punishment, believing that this would result in offenders merely receiving lighter sentences.²³⁶ But that would not necessarily be the case. In *Seering*, Iowa officials enforced a two thousand foot residency restriction from schools and day care centers against the convicted offender while still allowing him to *live with* the victim of his “lascivious conduct”: his teenaged daughter.²³⁷ If the Iowa courts had employed a risk assessment criteria and tailored the sentence accordingly, it is likely that they would have imposed restrictions on Seering that were designed to protect his teenaged daughter and other

²³⁰ *Leroy*, 828 N.E.2d at 791 (Kuehn, J., dissenting).

²³¹ *Id.* at 791 (Kuehn, J., dissenting).

²³² Leroy Database Entry, *supra* note 2.

²³³ *Miller*, 405 F.3d at 726 (Melloy, J., concurring in part and dissenting in part).

²³⁴ *See id.*

²³⁵ *Id.*

²³⁶ *See e.g.*, *State v. Strickland*, 609 S.E.2d 253, 255-56 (N.C. Ct. App. 2005) (upholding the probation standard that denied a convicted sex offender from gaining custody of his five-year-old son, even though his conviction was for having sex with his thirteen-year-old sister-in-law).

²³⁷ *State v. Seering*, 701 N.W.2d 655, 659 (Iowa 2005).

teenaged females, rather than imposing broad and seemingly unrelated restrictions on Seering's proximity to day care centers.

Some of the system's critics focus on how the risk assessment instrument is devised.²³⁸ If the criteria too heavily weigh "static risk factors" that never change, like prior offenses and deviant sexual preferences, inmates could permanently have no chance of lessening heavy restrictions despite successfully demonstrating progress or completing rehabilitation.²³⁹ Instead, critics believe the criteria must also consider "dynamic risk factors," like "sexual deviancy and peer group associations, difficulties with intimacy, the presence of deviant sexual fantasies, and cognitive distortions regarding sexual offenses," that could be positively affected by rehabilitation.²⁴⁰ Kondo is also concerned that experts have proven no more accurate on average than laymen at predicting exactly which offenders will commit future sex crimes.²⁴¹ Other critics contend that problems with underreporting of all sex crimes lead to an underestimation of offenders' dangerousness.²⁴²

Another concern is manipulation of the criteria to skew the results. California, for example, has a multi-tiered system of risk evaluation, yet assesses 82% of sex offenders as high risk,²⁴³ raising suspicions that the tiered system has become a vehicle to hand out harsher sentences to most offenders. Thus, procedural safeguards would need to be imposed, including a periodic review of the assessments to ensure a reasonable distribution of offenders across the risk tiers. Indeed, the potential for prosecutorial abuse is a recurring problem with these proposed methods,²⁴⁴ and periodic independent monitoring will be needed for all.

The use of risk assessment criteria to determine appropriate sentences for convicted sex offenders, while not foolproof, would nonetheless be a considerable improvement over the current method of meting out uniform

²³⁸ Kondo, *supra* note 93, at 202.

²³⁹ *Id.*

²⁴⁰ *Id.* at 202, 211-12 (footnotes omitted).

²⁴¹ *Id.* at 203; *see also* Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 144-45 (2005) (pointing out that the main criticism in the past of sentencing tied to risk assessment was an inaccurate assessment instrument, and now a larger body of research has led to better methods that can produce accurate profiles with a probability of recidivism ranging from 1% to 80% risk over three years, so that concern should be mollified).

²⁴² *See* La Fond & Winick, *supra* note 77, at 1181 ("It is, therefore, very possible that sex offenders *may* be more dangerous as a group than official records and recidivism research indicate. If sex offenders *are* more dangerous, current methods of predicting sexual recidivism may grossly under-predict sexual dangerousness.").

²⁴³ Fry-Bowers, *supra* note 58, at 897.

²⁴⁴ *See* discussion *infra* notes 284-291 and accompanying text.

punishment to all. That said, assessment criteria would be a large step forward in managing the risk of sex offenders. Such a system would alleviate *ex post facto* concerns and mollify the critics who contend that with the current residency restriction laws, “sex offenders are subject to the residency restriction regardless of whether they pose a danger to the population.”²⁴⁵ In addition, the use of risk assessment criteria and tailored restrictions would allow states to better allocate their finite resources to incarcerate and control high-risk offenders while letting the lowest risk offenders return to society with appropriate minimal supervision. Narrowly tailored residency restrictions, based on the circumstances of each individual sex offender, would also be more likely to withstand judicial scrutiny than those that are applied to all. For example, the Eighth Circuit correctly concluded that the Arkansas residency restrictions predicated on a finding of high risk on the assessment criteria seems more likely to withstand judicial scrutiny than restrictions that indiscriminately apply to all sex offenders:

In considering whether the Arkansas residency restriction is nonetheless so punitive in effect as to negate the legislature’s intent to create a civil, non-punitive regulatory scheme, we believe that Arkansas law is on even stronger constitutional footing than the Iowa statute. Unlike the Iowa law, the Arkansas statutory plan calls for a particularized risk assessment of sex offenders, which increases the likelihood that the residency restriction is not excessive in relation to the rational purpose of minimizing the risk of sex crimes against minors. This fine-tuning of the restriction addresses the principal concern of the dissenting judges who believed the Iowa statute violated the *Ex Post Facto* Clause.²⁴⁶

B. INDETERMINATE SENTENCING

Several states, including Washington and Colorado, have enacted indeterminate, also known as open-ended, sentencing as a way to impose longer prison sentences and more restrictive controls on high-risk sex offenders who have served their full sentences and are to be released back into the community.²⁴⁷ Washington lawmakers passed the Sex Offender

²⁴⁵ *Doe v. Miller*, 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004), *rev’d*, 405 F.3d 700 (8th Cir. 2005), *cert denied*, 126 S. Ct. 757 (2005).

²⁴⁶ *Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1017 (8th Cir. 2006) (citing *Doe v. Miller*, 405 F.3d 700, 725-26 (8th Cir. 2005), *cert denied*, 126 S. Ct. 757 (2005) (Melloy, J., concurring in part and dissenting in part); *State v. Seering*, 701 N.W.2d 655, 672 (Iowa 2005) (Wiggins, J., concurring in part and dissenting in part)).

²⁴⁷ See McKinney, *supra* note 19, at 310 (discussing Washington’s law); COLO. DEP’T OF CORR. ET AL., LIFETIME SUPERVISION OF SEX OFFENDERS—ANNUAL REPORT (2005), available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/Annual%20Report%202005.pdf; see also discussion *infra* Section V.D (describing Colorado’s sex offender reentry courts that control offenders once they have been granted conditional release).

Management Act (SOMA) to correct the state's lack of supervision for these high-risk offenders.²⁴⁸ Under SOMA, convicted offenders are given a minimum and maximum sentence length.²⁴⁹ No less than ninety days before the minimum sentence is set to end, there is a hearing before the Indeterminate Sentencing Review Board (ISRB), which uses risk assessment criteria to predict the offender's probability of recidivism.²⁵⁰ The presumption is toward releasing the offender, unless the state can show by a preponderance of the evidence that the offender is more likely than not to commit another sex offense after being released.²⁵¹ If the ISRB finds the offender to be more likely than not to re-offend, then the prisoner is sentenced to another minimum term of no longer than two years.²⁵² This review process repeats until the sex offender either wins release at the board's hearing or completes the maximum term of his sentence.²⁵³ Upon release, the offender is placed on conditional parole, and the state can return the offender to prison if he does not comply with the conditions of parole.²⁵⁴

SOMA's advocates point to several advantages. First, indeterminate sentencing is an openly criminal measure and does not masquerade as a civil prevention,²⁵⁵ the legislative sleight of hand under which residency restrictions are classified.²⁵⁶ Second, the State has to make a "continuing [showing] of dangerousness [for a] justification for continued incarceration."²⁵⁷ Therefore, the State must implement a risk management assessment criteria²⁵⁸ and allow those offenders of no or low risk of recidivism to complete only their minimum sentence, concentrating state resources on preventing further harm by high-risk offenders. Next, the structure could provide incentive to incarcerated offenders to make a concerted effort to reform to improve their chances of gaining release at

²⁴⁸ See McKinney, *supra* note 19, at 311-12.

²⁴⁹ *Id.* at 323.

²⁵⁰ *Id.* at 324.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* It is unclear from McKinney's article whether or not this conditional parole would also be in effect in the instance that the offender had served the maximum sentences. See *id.* That is to say, could the offender be sent back to prison if he already had completed his full term and is noncompliant while on probation?

²⁵⁵ See *id.* at 331-33 ("[T]he system on its face is clearly punitive."); Rosell, *supra* note 52, at 429-30.

²⁵⁶ See discussion *supra* Section IV.B. A civil commitment regime also suffers from the same problem as residency restrictions of being purportedly civil but in practice appearing to be a criminal system. See discussion *infra* Section V.C.

²⁵⁷ McKinney, *supra* note 19, at 332.

²⁵⁸ Slobogin, *supra* note 241, at 144-45.

their subsequent hearing and then receiving fewer restrictions upon their parole. Conditional sentencing also enables state officials to include more restrictions on offenders upon release, enabling more control by officials over high-risk offenders.²⁵⁹

Lastly, in Washington, this method benefits the offenders upon release from prison in two ways. First, the state is required to place the offender in the least restrictive setting possible considering the offender's determined risk level.²⁶⁰ Second, a provision preempts local land use codes when offenders are placed back in the community.²⁶¹ This latter provision is vital, as Washington already had to scale back its civil commitment program due to the high cost of lawsuits by municipalities protesting offender outpatient placement in their community.²⁶²

States' implementation of SOMA has revealed some problems. First, in Washington, the offenders do not receive any treatment while in prison.²⁶³ Defenders of the system support this decision as cost effective,²⁶⁴ but it could lead to an endless cycle of lost hearings by imprisoned offenders who cannot improve without the treatment that the system does not provide. As a result, the indeterminate system then becomes a sentence to maximum term in almost every case. Some legal scholars also wonder if this is just the sentencing trend swinging back from strict guideline sentencing toward ones of indeterminate length.²⁶⁵ Legislators scrapped indeterminate sentencing during the "Law and Order" movement in the 1970s, as critics felt lenient judges used indeterminate sentences to let criminals off too lightly.²⁶⁶ However, the solution reached at the time,

²⁵⁹ McKinney, *supra* note 19, at 333.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 324-25. State empowerment to place offenders in community outpatient facilities cannot be overstated, as this Comment has already mentioned the sex offender in California who, even after undergoing castration, was refused any outpatient placement and lives in a trailer on the grounds of a prison, *see supra* notes 62-63 and accompanying text, as well as a Chicago alderman agitating to push sex offenders out of the zip code where one-tenth of Illinois's paroled offenders have been forced to live. *See discussion supra* Section III.D.

²⁶² *See* McKinney, *supra* note 19, at 314-15; Sarah Spierling, Note and Comment, *Lock Them Up and Throw Away the Key: How Washington's Violent Sexual Predator Law will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL'Y 879, 922-25 (2001).

²⁶³ McKinney, *supra* note 19, at 314.

²⁶⁴ *Id.*

²⁶⁵ *See* Marguerite Driessen & W. Cole Durham, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVth International Congress of Comparative Law: Section V: Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 623-24 (2002).

²⁶⁶ *Id.*

“tough” determinate sentences, caused today’s prison overcrowding problems, which ironically now result in offenders being released at the earliest possible moment to relieve that overcrowding.²⁶⁷ One wonders, then, if indeterminate sentencing will do any better at fixing this structural flaw in our penal system.

The results in Colorado of indeterminate sentencing have shown several other problems with the system’s implementation. First, though the state has set up a system of supervised release and indeterminate sentences, the release portion has virtually never been used. This has happened partly because, due to cuts to the program’s counseling budget, imprisoned offenders are not receiving the counseling that the law requires them to complete before being eligible for supervised release.²⁶⁸ As a result (although conceding that the program was only implemented in late 1998), 793 offenders have been sentenced under the program, but only 2 of 182 eligible prisoners have been granted parole and sent to community corrections.²⁶⁹ An additional 5 out of 14 who met the criteria for release to community corrections are in a transitional community.²⁷⁰ Thus, as seen before with assessment criteria, reviewing officials are judging nearly every offender as high risk when statistics strongly refute this belief.²⁷¹ The result is two-fold: a system on paper that has not really been tested by the realities of managing actual offenders; and a continued refusal by parole boards to believe that any offenders are actually low-risk and can be released back into the community.

In conclusion, the systematic review process of imprisoned sex offenders in indeterminate sentencing should better differentiate those high-risk offenders who require long-term incarceration from lower risk offenders who need only serve the minimum time. Furthermore, SOMA’s use of risk assessment criteria and tailored restrictions will result in more effective control over the sex offenders who are released into the community.

C. CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

Often referred to as sexually violent predator (SVP) laws or sex offender civil commitment laws (SOCCLs),²⁷² civil commitment regimes

²⁶⁷ *Id.* at 624.

²⁶⁸ See COLO. DEP’T OF CORR. ET AL., *supra* note 247, at 28.

²⁶⁹ *Id.* at 3, 7.

²⁷⁰ *Id.* at 7.

²⁷¹ See discussion *supra* Sections III.A and V.A.

²⁷² Lucken & Latina, *supra* note 104, at 15.

are already in place in many states,²⁷³ including Illinois,²⁷⁴ and have been ruled constitutional on several occasions.²⁷⁵

Procedurally, a civil commitment regime is somewhat akin to an indeterminate sentencing hearing process. After completing his prison sentence, a sex offender is tested for mental illness.²⁷⁶ If the offender is diagnosed to be suffering from a treatable mental illness,²⁷⁷ then the offender can be sent to civil but involuntary treatment.²⁷⁸ Once committed, the offender undergoes mandatory therapy, which may require the offender to admit to his past deviant acts and discuss his motivations for committing them.²⁷⁹ If the offender is found to have been treated for his mental disability, then he is immediately released.²⁸⁰ The committed offender must have at least an annual review of his status, and is able to petition for a review at any time.²⁸¹ However, the defendant does not have an absolute right to be present when the review board decides on his status since the commitment is civil.²⁸²

Supporters see civil commitments as a valuable component of a preventive justice system, complementing the indeterminate sentencing regime discussed in Section V.B.²⁸³ Critics of civil commitments contend the system suffers from several key flaws. First, prosecutors have taken advantage of the regime's potential to hold offenders indefinitely and sought commitment for offenders deemed high risk, regardless of whether the offender actually suffers from the requisite mental illness.²⁸⁴ "SOCCLs have a sustained popularity among the public and policy makers. This support exists largely because SOCCLs are not really about treatment. Instead, they are about the incapacitation of society's most heinous

²⁷³ Slobogin, *supra* note 241, at 124 n.14. Seventeen states had such laws at the beginning of 2005. *Id.*

²⁷⁴ 725 ILL. COMP. STAT. 207/1-90 (2005).

²⁷⁵ See *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986).

²⁷⁶ See, e.g., *M.X.L. v. N.J. Dep't of Human Servs./N.J. Dep't of Corr.*, 876 A.2d 869, 872 (N.J. Super. Ct. App. Div. 2005).

²⁷⁷ *Allen*, 478 U.S. at 366, 369-70.

²⁷⁸ See, e.g., *M.X.L.*, 876 A.2d at 872.

²⁷⁹ *Allen*, 478 U.S. at 366-67; see Eric Janus & Wayne Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 370-72, 377-80 (2003); Lucken & Latina, *supra* note 104, at 25-27, 35-36.

²⁸⁰ See *Allen*, 478 U.S. at 369-70; *M.X.L.*, 876 A.2d at 875-76.

²⁸¹ See *Allen*, 478 U.S. at 369 n.3; *M.X.L.*, 876 A.2d at 875-76.

²⁸² Lucken & Latina, *supra* note 104, at 27-28.

²⁸³ See Slobogin, *supra* note 241, at 128; see also discussion *supra* Section V.B.

²⁸⁴ See Lucken & Latina, *supra* note 104, at 37; Jonathan Saltzman, *Push is on to keep sex criminals locked up*, BOSTON GLOBE, Oct. 25, 2005, at A1.

offenders. Thus, it matters little whether rehabilitation is achieved and proper procedures are followed.”²⁸⁵ Critics note that legislators have different tools available to handle high-risk offenders without mental disabilities, such as increasing sentence lengths or eliminating parole, and civil commitments should not be used for controlling those offenders.²⁸⁶

Courts have compounded prosecutors’ abuse of the system by not carefully scrutinizing commitment requests.²⁸⁷ Scholars found that in the sixteen states with SVP laws, prosecutors win between 75% and nearly 100% of their cases to civilly commit offenders.²⁸⁸ As a result, commitments have become de facto indeterminate sentencing, but without the maximum sentence ceiling provided by SOMA.²⁸⁹ As a result of the prosecutorial abuse and the lack of judicial scrutiny, critics have concluded that civil commitments are not a better reform, but just the favorite program of this generation of prosecutors to lock up problematic sexual offenders,²⁹⁰ leading to a class of permanently incarcerated offenders who have completed their sentences but cannot gain release.²⁹¹

Cost is a second significant concern. Studies have shown that to implement SVP laws costs \$50,000 to \$130,000 per year per offender, with an average cost of about \$100,000.²⁹² This high cost would be a hard sell politically, and could lead to legislators slashing funding for the treatment component but keeping the involuntary commitment system in place.²⁹³ Civil commitments without adequate funding for treatment would result in

²⁸⁵ Lucken & Latina, *supra* note 104, at 37; *see also* Janus & Logan, *supra* note 279, at 320 (writing that SVPs, along with registration schemes, are “the corner-stones of what has been aptly called America’s ‘preventive state,’ which, rather than achieving social control by means of avowedly penal regimes behind prison walls, seeks to ‘identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in a variety of ways’”).

²⁸⁶ Amy Jurgensmeier, Comment, *Promises to Keep: The Continued Denial of Constitutional Rights to Sexually Violent Predators*, 41 WASHBURN L.J. 667, 683 (2001) (summarizing the dilemma as: “If the desired result was to keep sexual predator confined for life to protect the community against the chance that they might re-offend, the legislature could have increased sentences for such crimes or revised sentencing guidelines”).

²⁸⁷ *See* La Fond & Winick, *supra* note 77, at 1176.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Lucken & Latina, *supra* note 104, at 38.

²⁹¹ Janus & Logan, *supra* note 279, at 383.

²⁹² Rosell, *supra* note 52, at 428.

²⁹³ *Cf.* COLO. DEP’T OF CORR. ET AL., *supra* note 247, at 28 (describing how the state’s indeterminate sentencing predicated on mandatory prisoner counseling is already suffering from budget cuts resulting in a shortage of counselors, making it that much harder for sex offenders to have any chance at prevailing at a indeterminate sentencing hearing).

SVP offenders being permanently institutionalized with little chance of rehabilitation and release.

Like many available options, civil commitments are appropriate for some offenders, but certainly not all. For those offenders with treatable mental illnesses who do pose a recidivism risk, the state would be wise to use the civil commitment regime to thoroughly treat the offender before considering release. However, the problem with civil commitments is the temptation for state abuse. If courts become lax in their scrutiny of increasing claims by the state of mental illness among offenders about to be released from prison, while legislators cut funding for therapy available to committed offenders, the result could easily be that civil commitments become a shadow penal system that holds a significant percentage of offenders indefinitely. Indeed, even proponents admit the laws have already been misused, as “SVP laws thus commit some sex offenders who would not reoffend if released or placed in an outpatient program under aggressive supervision.”²⁹⁴ These nagging problems need to be addressed for civil commitments to be a legitimate state tool used to manage a discrete subset of sex offenders.

D. SEX OFFENDER REENTRY COURTS

Sex offender reentry courts follow a recent trend of specialized courts, such as those for drug treatment, domestic violence, and mental health.²⁹⁵ Colorado has implemented sex offender reentry courts to much acclaim.²⁹⁶

The reentry court is at the center of a comprehensive approach to managing sex offenders, handling the offenders’ case from the bail hearing through to conditional release.²⁹⁷ As a specialized court, judges and counsel appearing in this court would receive training on effective sex offender risk management practices.²⁹⁸ The judge plays an active role as the “reentry manager” of the “interagency team” in charge of the offender’s case, supervising the treatment and holding the offender accountable for relapses or lack of effort in treatment.²⁹⁹

²⁹⁴ La Fond & Winick, *supra* note 77, at 1176.

²⁹⁵ *Id.* at 1192-93.

²⁹⁶ See discussion *infra* notes 307-310 and accompanying text.

²⁹⁷ Madeline Carter, Kurt Bumby & Thomas Talbot, *Promoting Offender Accountability and Community Safety Through the Comprehensive Approach to Sex Offender Management*, 34 SETON HALL L. REV. 1273, 1275-76 (2004).

²⁹⁸ *Id.* at 1280-81.

²⁹⁹ Kim English, *The Containment Approach to Managing Sex Offenders*, 34 SETON HALL L. REV. 1255, 1259-60 (2004); La Fond & Winick, *supra* note 77, at 1193-94, 1196.

Polygraph testing plays a large role throughout the reentry court's processes. Bail is granted based on an initial assessment of risk level using actuarial tables and polygraph testing.³⁰⁰ Those offenders determined to be low risk based on actuarial tables and the polygraph results can receive a deferred sentence for which the offender submits to rigorous treatment but is conditionally allowed to return to the community.³⁰¹ The reentry court then controls the offender's release and level of supervision.³⁰² Normally, a gradual release process is used, with the offender gaining privileges and shedding restrictions upon satisfying successive levels of expectations.³⁰³ While the offender is on a deferred sentence, officials can exercise the more intrusive powers available to parole and probation officers, including warrantless searches of the offender's house and person so long as there are reasonable grounds.³⁰⁴

During treatment, the reentry court's supervision of the offender continues to rely heavily on results from mandatory polygraph testing, studying the offender's responses to specific questions about his past acts, and predilections to focus on relapse prevention components.³⁰⁵ If the offender refuses to comply with further polygraph testing or demonstrates high-risk behavior, the court has a wide range of options to tighten control over the offender, which range from increasing surveillance and mandating additional treatment sessions to revoking community release and returning the offender to prison.³⁰⁶

Proponents believe this system offers the best of both worlds, as it is cheaper and more targeted than permanent incarceration for all, but still satisfies the public mandate for strong control over sex offenders.³⁰⁷ Furthermore, sex offenders are incentivized to reform, as they will only gain freedom by taking the treatment seriously and complying with the polygraph testing, with the punishment that a failure to comply will result in

³⁰⁰ La Fond & Winick, *supra* note 77, at 1196.

³⁰¹ *Id.*

³⁰² *Id.* at 1188-89.

³⁰³ *Id.*

³⁰⁴ *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987). In a recent United States Supreme Court decision, the majority held that a probationer, by agreeing to the terms of his conditional freedom, accepted that his "person, property, place of residence, vehicle [and] personal effects [could be searched] at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *United States v. Knights*, 534 U.S. 112, 114 (2001) (citation omitted).

³⁰⁵ Carter, Bumby & Talbot, *supra* note 297, at 1285-88; English, *supra* note 299, at 1266.

³⁰⁶ English, *supra* note 299, at 1266-68 (describing the consequences available for noncompliance as a "powerful incentive").

³⁰⁷ La Fond & Winick, *supra* note 77, at 1186.

fewer privileges and a possible return to prison.³⁰⁸ The system's immediate consequences, including reincarceration, also help to overcome the sex offender's entrenched deviant behavior and fantasies.³⁰⁹ Proponents also contend that using the polygraph while asking offender questions about his prior acts is the best way to solve the alleged underreporting problem with sex offenses, as the offender will be held accountable for, and know his variable sentence depends upon, his truthfulness and willingness to comply with all requests made of him.³¹⁰

Critics are not convinced of the system's viability and legality. First, on a practical level, it would involve a massive financial effort to train judges and lawyers, coordinate interagency teams, and set up a separate court system for handling the offenders.³¹¹ In an environment where many in the public simply want sex offenders locked up forever, devoting large amounts of money to halfway houses, counseling, and specially trained judges and probation officers for sex offender rehabilitation seems politically unrealistic.

Reliance on polygraph testing is another serious concern with the current procedure in Colorado's reentry courts. Proponents claim that polygraphs are 85% correct.³¹² Illinois courts, among others, consider polygraph results too unreliable to be admitted as evidence, as the polygraph "impinges upon the integrity of our judicial system."³¹³ Admittedly, the Supreme Court in *McKune v. Lile* upheld the use of compelled polygraph testing on imprisoned sex offenders as serving a legitimate prison purpose,³¹⁴ but it remains true that courts are skeptical about the reliability and appropriate role of polygraphs in our judicial system.

This unreliability is compounded in the Colorado system by an incentive on the part of the offender to confess to sexual crimes they may

³⁰⁸ *Id.*

³⁰⁹ English, *supra* note 299, at 1263.

³¹⁰ *Id.*; La Fond & Winick, *supra* note 77, at 1204-05.

³¹¹ See also English, *supra* note 299, at 1264 (asserting that probation officers' caseloads would need to be lowered to twenty or twenty-five at the maximum, and the state would need to have twenty-four hour halfway houses open in every jurisdiction).

³¹² La Fond & Winick, *supra* note 77, at 1201-03.

³¹³ *People v. Baynes*, 430 N.E.2d 1070, 1079 (Ill. 1981); see also *People v. Binion*, 832 N.E.2d 875, 884 (Ill. 2005) ("The polygraph is not sufficiently reliable to establish guilt or innocence, yet its quasi-scientific nature could lead a jury to give the evidence undue weight despite its unreliability."); *People v. Jackson*, 781 N.E.2d 278, 281-82 (Ill. 2002); *People v. Bock*, 827 N.E.2d 1089, 1095 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1027 (Ill. 2005) ("Due to the inherent unreliability of [polygraph] examinations, evidence regarding their administration is generally inadmissible in Illinois.").

³¹⁴ See *McKune v. Lile*, 536 U.S. 24, 35-41 (2002).

not have committed. The Colorado practitioners who promote reentry courts believe that sex crimes are massively underreported, with one practitioner claiming the underreporting ratio is one arrest to every thirty actual acts of child rape or molestation, a figure she reached from the results of these compulsory polygraph tests.³¹⁵

There are two responses to this shocking claim. First, this discrepancy is most likely exaggerated—especially when so many studies and meta-analyses have been completed about sex offender recidivism by disinterested scholars and the government, none of which have hinted at any sort of underreporting ratio approaching thirty to one.³¹⁶ Second, this claim calls into question the practitioners' motivations when testing these Colorado sex offenders. If the practitioners involved have an agenda to "find" undocumented sex offenses, one wonders if offenders realize that extravagant "confessions" in which they "tell all" mean a better chance that the prosecutor will declare the offender compliant with the testing, and thus eligible for release and lighter restrictions. This perverse incentive for an offender to lie and fabricate sex offenses never committed exemplifies the problems with basing a system on already unreliable polygraph testing.

In conclusion, reentry courts offer an interesting synthesis of several ideas. They use assessment criteria, flexible sentencing, and a more graduated approach to punishment. However, the costs of funding the parole and monitoring program could be financially burdensome and politically difficult to sustain. Further, a system heavily reliant on polygraph results, evidence found to be unreliable and inadmissible by other states, will not be readily adopted elsewhere. But those limitations should not prevent a state or court from implementing the useful practices in this model that bridge the gap between punishment and treatment

VI. CONCLUSION

The handling of sex offenders is one of the most well-publicized criminal justice issues in our nation today, and states are trying a wide variety of strategies to manage sex offender risk of recidivism. Some strategies, like registration, appear to be here to stay, for better or for worse. Others, such as residency restrictions, have not faced Supreme Court scrutiny and very well may fail based on their retroactive, *ex post facto* application in a uniform manner to all offenders, regardless of demonstrated risk of recidivism and elapsed time since conviction. These flawed

³¹⁵ English, *supra* note 299, at 1266-67.

³¹⁶ See discussion *supra* Section III.A.

strategies should be modified or replaced by a scheme that borrows from the best practices of various states.

First, courts need to be more willing to take the time to tailor the restrictions and punishments imposed on sex offenders to the crimes committed, the probability of the offenders' recidivism, and their likely victims. Risk assessment criteria like Nebraska's would allow courts to factor criminal history and future risk of harm into sentencing and conditional release, ending the practice of uniformly-applied laws and instead efficiently focusing police resources on the highest risk offenders. Further, states should use the risk assessment criteria to grant longer, indeterminate sentences for the minority of sex offenders who pose a high risk of recidivism, while providing treatment for imprisoned offenders to enable those that can improve to do so. For those sex offenders continuing to suffer from serious but treatable mental disabilities, a secure civil commitment regime focused on rehabilitation would be the proper fit. Lastly, a specialized sex offender reentry court would be beneficial in ensuring continuity and expertise throughout this process, which would prevent high-risk offenders from being inadvertently released while better identifying the low-risk offenders who should serve their sentence and then be allowed to reintegrate into society with decreasing restrictions over time.

The remaining problem is how to handle the offenders like Patrick Leroy who have been living in the community for years and now are affected by retroactive laws. States could offer a deal to these offenders whereby they undergo the risk assessment criteria. For those offenders judged a low risk, as presumably most would be since they have lived without incident in the community for years or decades, the state would relax the restrictions on these offenders to registration only. For those found to be higher risk, reincarceration is legally out of the question, but the state could focus its surveillance and treatment resources on these offenders, and would be better able to catch the offenders before they commit their next sex offense.

Federalism has enabled states to implement many different strategies to handle sex offender risk management. It is now time for the best practices of risk management to be recognized and modeled across the nation, concentrating resources and policing on the few high-risk offenders while letting the many low-risk offenders return home. This strategy makes us safer and makes sense.

