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## No Contact Parole Restrictions: Unconstitutional and Counterproductive

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“NO CONTACT” PAROLE RESTRICTIONS:  
UNCONSTITUTIONAL AND COUNTERPRODUCTIVE

*Sharon Brett\**

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## INTRODUCTION

Over the last fifteen years, state legislatures have enacted numerous tough-on-crime statutes that mandate restrictive parole conditions for convicted sex offenders returning to the community. Often, new legislation in this area comes as a knee-jerk response to high-profile cases of paroled offenders who go on to re-offend in particularly gruesome ways. For example, in 1994, repeat sex offender Jesse K. Timmendequas kidnapped, raped, and murdered his seven-year-old neighbor, Megan Kanka.<sup>1</sup> But Megan was not Jesse Timmendequas' first victim. Unbeknownst to the Kanka family, Jesse Timmendequas was a two-time convicted child molester who had a history of preying on young children.<sup>2</sup> The community was devastated. A media firestorm ensued. By the time Jesse Timmendequas made it to trial, local tabloids and newspapers had already branded him "The Monster."<sup>3</sup>

Almost everyone has heard of Megan's story, or one similar to it, because those are the stories that make the news. The focus of popular media and lawmakers on the particularly appalling cases,<sup>4</sup> such as Megan's case, has shaped the way we as a society have come to think about sex offenders more broadly. Because of the particularly gruesome cases, many individuals consider *all* sex offenders to be aggressive, predatory, and violently dangerous people who should not be allowed in public.<sup>5</sup>

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1. William Glaberson, *Man at Heart of Megan's Law Convicted of Her Grisly Murder*, N.Y. TIMES, May 31, 1997, <http://www.nytimes.com/1997/05/31/nyregion/man-at-heart-of-megan-s-law-convicted-of-her-grisly-murder.html> [hereinafter Glaberson, *Man at Heart*].
  2. *Id.*; see also William Glaberson, *Killer in 'Megan' Case Is Sentenced to Death*, N.Y. TIMES, Jun. 21, 1997, <http://www.nytimes.com/1997/06/21/nyregion/killer-in-megan-case-is-sentenced-to-death.html> [hereinafter Glaberson, *Killer in 'Megan' Case*].
  3. David Kocieniewski, *Death Penalty Is Affirmed in Megan's Case*, N.Y. TIMES, Aug. 12, 1999, <http://www.nytimes.com/1999/08/12/nyregion/death-penalty-is-affirmed-in-megan-case.html>.
  4. See generally Tim Bynum et al., *Recidivism of Sex Offenders*, CTR. FOR SEX OFFENDER MGMT. 1 (May 2001), <http://www.csom.org/pubs/recidsexof.pdf> ("In many instances, policies and procedures for the management of sex offenders have been driven by public outcry over highly publicized sex offenses. However, criminal justice practitioners must avoid reactionary responses that are based on public fear of this population. Instead, they must strive to make management decisions that are based on the careful assessment of the likelihood of recidivism.").
  5. See, e.g., Robb London, *Strategy on Sex Crimes is Prison, Then Prison*, N.Y. TIMES, Feb. 8, 1991, <http://www.nytimes.com/1991/02/08/news/strategy-on-sex-crimes-is-prison-then-prison.html>; Gerry Shih, *Sex Offender Allow to Live Near School*, N.Y. TIMES, Mar. 6, 2010, <http://www.nytimes.com/2010/03/07/us/07sfoffender.html>; *Sex Offender Registration Laws Pit Victims' Rights Against Civil Rights*, N.Y. TIMES,

Although what Jesse Timmendequas did was abhorrent, the legislation enacted in the wake of his crime went far beyond making sure we know the pedophiles or pedophile-murderers living in our neighborhoods. Megan’s name now lends itself to a host of state laws requiring the state to notify neighbors when a sex offender moves into the neighborhood.<sup>6</sup> The term “sex offender” is intentionally broad, covering everyone from voyeurs and exhibitionists to rapists and child molesters. Yet, Megan’s Laws treat them the same way, ignoring some crucial questions: Are all sex offenders alike? Are they all monsters?

In reality, the majority of sex crimes are not the sort of violent rapes that are highlighted in news stories.<sup>7</sup> Furthermore, the categorical treatment of sex offenders—despite significant differences in their crimes—has led to impulsive and overreaching new restrictions once they are paroled.

Parole restrictions for sex offenders take a variety of forms. In addition to the Megan’s Laws discussed above, which are technically “collateral consequences”<sup>8</sup> and can last for indeterminate and varying amounts of time, some states also prohibit sex offenders from living, working, or coming within certain distances of schools, parks, daycares, and other places where children congregate, for the duration of their parole.<sup>9</sup> Some states also require paroled sex offenders to wear Global Positioning System (GPS) tracking devices so the state may monitor the

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Feb. 20, 1993, <http://www.nytimes.com/1993/02/20/us/sex-offender-registration-laws-pit-victims-rights-against-civil-rights.html>.

6. Glaberson, *Killer in ‘Megan’ Case*, *supra* note 2.

7. See Wendy Coch, *Despite High-Profile Cases, Sex-Offense Crimes Decline*, U.S.A. TODAY, Aug. 24, 2005, [http://www.usatoday.com/news/nation/2005-08-24-sex-crimes-cover\\_x.htm](http://www.usatoday.com/news/nation/2005-08-24-sex-crimes-cover_x.htm) (“The headline-grabbing cases tend to be anomalies, because kids are rarely abused by strangers, and even less often killed.”).

8. Individuals who are convicted of crimes face two different types of consequences: direct and collateral. Direct consequences include the term of imprisonment and/or probation/supervisory release that may be imposed as a sentence by the court. Collateral consequences, on the other hand, stem from the “fact of conviction rather than the sentence of the court.” Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 678 (2008). Collateral consequences vary from state to state, but can include involuntary civil commitment, sex offender registry requirements, and other limitations on employment or housing based solely on the fact that the offender was convicted of a sex offense. *Id.*

9. Caleb Durling, *Never Going Home: Does it Make Us Safer? Does it Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 321–325 (2006); Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 42–43 (2008).

offender's location.<sup>10</sup> Other jurisdictions allow for civil commitment of sex offenders following their release from prison as a collateral consequence of an offender's conviction for a sexually-based crime.<sup>11</sup> Some victims' rights advocates even suggest chemical castration as a means of eliminating *any* future sexual arousal in convicted sex offenders, deviant or otherwise.<sup>12</sup>

States continue to look for new ways to control this population once they are released from prison. The most alarming of these new techniques are "no contact" restrictions, which prevent paroled sex offenders from having any interaction with persons under the age of seventeen, including their own children.<sup>13</sup> These "no contact" conditions represent a drastic new step towards more restrictive parole that cannot be justified on public safety grounds.<sup>14</sup> "No contact" parole restrictions test the constitutional limits of society's willingness to continue punishing sex offenders long after their release from confinement.

Some sex offenders may need close monitoring and restrictions on their parole before fully reintegrating into society. However, recidivism studies regarding sex offenders are highly contested and overall do not suggest any clear results. Some studies suggest that most sexual offenders do not recidivate over time.<sup>15</sup> Other research demonstrates that sex offenders are no more likely to recidivate than other criminal offenders.<sup>16</sup> So why should we categorically prohibit these individuals from reuniting with their families upon release from prison? The answer is that we should not, so long as there are alternatives to "no contact" restrictions that would still keep children safe.<sup>17</sup>

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10. Wright, *supra* note 9, at 36.

11. Wright, *supra* note 9, at 40.

12. Wright, *supra* note 11, at 46–47.

13. *See infra* Part III.

14. *Id.*

15. Timothy Fortney, Jill Levenson, Yolanda Brannon & Juanita N. Baker, *Myths and Facts About Sexual Offenders: Implications for Treatment and Public Policy*, 2 *SEXUAL OFFENDER TREATMENT*, no. 1, 2007, available at <http://www.sexual-offender-treatment.org/55.html>; Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1, 24 (Nov. 2003), [www.bjs.gov/content/pub/pdf/rsorp94.pdf](http://www.bjs.gov/content/pub/pdf/rsorp94.pdf) (stating that within first three years of their release from prison, only 5.3% of former sex offenders committed a new sex offense).

16. *See infra* Part III (A)(2); Bynum et al., *supra* note 4. For a list of various recidivism studies of sex offenders, pointing out that "data is scarce, complicated, and frequently conflicting," see Bret Hobson, *Note: Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?* 40 *GA. L. REV.* 961, 969 (2006).

17. *See infra* Part V.

The problem of states moving towards more restrictive conditions is a problem of categorical over-inclusion. Highly restrictive parole conditions may be necessary for some offenders (certainly for the Jesse Timmendequas of the world), but they are not necessary for all. This Article aims to expand current sex offender scholarship, focusing on the new "no contact" restrictions and the way in which the application of such restrictions to all sex offenders without individual review is not only unconstitutional, but also poor public policy.

This Article proceeds as follows. Part I addresses current sex offender restrictions and explains the state of the law by providing examples of ways in which legislators have and continue to move towards more restrictive parole for sex offenders. Specifically, Part I addresses the unforeseen consequences of residency restrictions and the extreme solution of civilly committing paroled sex offenders against their will for indeterminate periods of time. Part II presents Michigan as an alarming example of a state that uses "no contact" restrictions in contravention of the Constitution and in counterproductive ways, potentially increasing recidivism in the state. Part III addresses the complex constitutional questions created by the "no contact" conditions that keep paroled offenders away from their children, and why such restrictions are not justifiable on public safety grounds. Finally, Part IV suggests ways in which states can meet their public safety goals without sacrificing parolees' constitutional rights.

#### I. WHERE WE ARE NOW AND HOW WE GOT THERE: EXAMPLES OF THE CURRENT STATE OF SEX OFFENDER RESTRICTIONS

The common public perception is that removing former offenders<sup>18</sup> from any potential interaction with minors—including their own children, whether or not the children were involved in the offense of conviction—is necessary to eliminate such individuals' opportunities to abuse again.<sup>19</sup> Proponents of such aggressive controls for released sex

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18 I will use the term "former offender" to signify individuals who have been convicted of or plead guilty to sex offenses in the past and who have since completed their sentences and have been released from prison or jail.

19. See, e.g., *Exploring Public Awareness and Attitudes About Sex Offender Management: Findings from a National Public Opinion Poll*, CTR. FOR SEX OFFENDER MGMT. 1, 5 (Aug. 2010), <http://www.csom.org/pubs/CSOM-Exploring%20Public%20Awareness.pdf> [hereinafter *Exploring Public Awareness*] (noting that the results of a recent public opinion poll indicated that "72% of respondents [believed] at least half, if not most, convicted sex offenders will commit additional sex crimes in the future" and that

offenders argue that sexual victimization of children can have devastating, long-term consequences for the victim and his or her family, including mental health issues, reproductive difficulties, poor academic performance, and more.<sup>20</sup> Because of these severe consequences for victims, public opinion polls indicate support for state departments of corrections that develop effective prevention measures to stop such abuse before it begins.<sup>21</sup>

This wisdom is misguided and can lead to drastic consequences. The research on recidivism of sex offenders is inconclusive but suggests that sex offenders are no more likely to recidivate than other criminals.<sup>22</sup> Despite this research, legislators continue to rely on society's fear of sex offenses and the consequences of such crimes. This fear often drives the formulation and codification of harsh parole restrictions. This Part will look briefly at why our fears about sex offenders may be unfounded, and where such fear has taken us in restricting the liberty of sex offenders.

### *A. Inconclusive Research*

Implicit in such post-incarceration restrictions of former sex offenders is the view that the propensity to re-offend is high. Although the public image of a sex offender may be uniform, a wide range of crimes may make one a "sex offender."<sup>23</sup> This is what makes restrictive parole conditions—especially "no contact" parole conditions—particularly troublesome. First, these conditions are applied not only to those who committed sex offenses against children, but also to those who committed sex offenses against adults and to those who committed a non-sexual

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many respondents believed residency restrictions and registration requirements are effective ways of preventing recidivism).

20. See, e.g., Elizabeth A. Schilling, Robert H. Aseltine, Jr. & Susan Gore, *Adverse Childhood Experiences and Mental Health in Young Adults: A Longitudinal Study*, 7 BMC PUB. HEALTH 30 (2007) (arguing that there is a "very strong association between childhood adversity and depressive symptoms, antisocial behavior, and drug use during the early transition to adulthood"); Maria Trent, Gretchen Clum & Kathleen M. Roch, *Sexual Victimization and Reproductive Health Outcomes in Urban Youth*, 7 ACAD. PEDIATRICS 313 (July 2007) (demonstrating that urban youth with history of sexual victimization are "more likely than those without victimization histories to have a pregnancy or STI [sexually transmitted infection] before young adulthood").

21. See generally *Exploring Public Awareness*, *supra* note 19, at 4–5.

22. See generally Bynum et al., *supra* note 4.

23. See Bynum et al., *supra* note 4, at 2 ("Sex offenders are a highly heterogeneous mixture of individuals who have committed violent sexual assaults on strangers, offenders who have had inappropriate sexual contact with family members, individuals who have molested children, and those who have engaged in a wide range of other inappropriate and criminal sexual behaviors.").

crime against a child (e.g., involuntary manslaughter via drunk driving that results in the death of a child passenger). Not all individuals who committed sexual crimes are the sort of sexually aggressive, predatory people society typically envisions as "sex offenders."<sup>24</sup> Many are individuals who were engaged in relationships that were consensual to the couple, but illegal to the state—for example, "Romeo and Juliet" offenders who were in relationships with their "victims" when their "victims" happened to be months shy of the age of consent.<sup>25</sup> Others committed one-time crimes of opportunity, and after treatment in confinement, are unlikely to threaten the safety of others.<sup>26</sup>

Recidivism rates for sex offenders are similarly heterogeneous.<sup>27</sup> Although many sex crimes go unreported due to victims' feelings of fear, humiliation, and guilt,<sup>28</sup> recidivism studies of sex offenders do not indicate that sex offenders are any more likely to re-offend than other types of criminal offenders.<sup>29</sup> Methodologies used to predict who will re-offend are also far from perfect.<sup>30</sup> The psychopathology of pedophilia and sexually violent tendencies is incredibly complex.<sup>31</sup> As a result, some

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24. See generally Bynum et al., *supra* note 4, at 2.

25. Many states have statutory rape laws that criminalize sexual activity between a legal adult and a person under the age of consent. These laws vary from state to state. In some cases, activity charged as statutory rape is non-consensual and even predatory. Other cases involve high school couples where only one partner is over the age of consent. A couple's activity may be consensual, but is nonetheless criminalized by the state. Once convicted, the adult partner is considered a sex offender. See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (2009).

26. See generally Bynum et al., *supra* note 4.

27. Bynum et al., *supra* note 4, at 6 ("There is wide variation in results [in recidivism rates], in both the amount of measured recidivism and the factors associated with these outcomes.").

28. Bynum et al., *supra* note 4, at 3 (noting that factors leading to low reporting levels "are compounded by the shame and guilt experienced by sexual assault victims, and, for many, a desire to put a tragic experience behind them").

29. See generally Bynum et al., *supra* note 4.

30. Nora V. Demleitner, *Risk Assessment: Promises and Pitfalls*, 16 FED. SENT'G REP. 161, 164 (2004) (noting that the methodologies for labeling offenders a "future threat . . . remain fallible").

31. Lisa J. Cohen & Igor Galynker, *Psychopathology and Personality Traits of Pedophiles: Issues for Diagnosis and Treatment*, 6 PSYCHIATRIC TIMES 25 (2009), available at <http://www.psychiatrictimes.com/display/article/10168/1420331>. Cohen and Galynker note that although there are some standard criteria to look for when diagnosing pedophilia under the Diagnostic Statistical Manual, there are two problems that may make diagnosis and analysis difficult:

For one, convicted or arrested sex offenders might differ considerably from pedophilic individuals who have not acted on their urges or who have acted on them but have not been caught. Second, not everyone who sexually



offenders remain a risk to their families long after their term of incarceration is complete, particularly in cases where the offender's own child was the victim of the offense.

Despite the differences in risk factors and the inconclusive results of recidivism studies, the criminal justice system increasingly treats all sex offenders alike, without any regard for the individual danger a particular offender may pose. Such undifferentiated treatment has serious procedural and substantive due process implications, as these restrictions impose on individuals' abilities to communicate with their families, find affordable and sustainable housing, and otherwise lead productive and meaningful lives outside of prison.<sup>32</sup>

### B. *Where We Are Now*

In the last twenty years, restrictions on paroled sex offenders have changed significantly. Federal legislation in the early 1990s required former sex offenders to register their home addresses with the state, marking the beginning of an increase in legislative efforts to separate sex offenders from the rest of society.<sup>33</sup> The overwhelming majority of states enacted registration requirements for sex offenders, many in response to the fact that Congress passed legislation that made ten percent of federal law enforcement funding for the state contingent on the state having an acceptable sex offender registration law.<sup>34</sup>

In addition to registration requirements, many states have gone a step further, limiting the locations in which such offenders may live

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molests a child is actually a pedophile; that is, such a person may not have a persistent sexual attraction to prepubescent children.

*Id.* at 25. See also Thomas A. Widiger & Lee Anna Clark, *Toward DSM-V and the Classification of Psychopathology*, 126 *PSYCHOL. BULL.* 946, 949–50 (2001) (arguing that the DSM does not provide adequate guidance for determining when sexual fantasies regarding children or acting out such fantasies constitutes a mental disorder, thereby complicating diagnosis and treatment).

32. Kurt Bumby et al., *Managing the Challenges of Sex Offender Reentry*, *CTR. FOR SEX OFFENDER MGMT.* 1, 1 (Feb. 2007), [http://www.csom.org/pubs/reentry\\_brief.pdf](http://www.csom.org/pubs/reentry_brief.pdf) [hereinafter Bumby et al., *Managing the Challenges*] (noting challenges to reentry faced by paroled sex offenders caused by “the proliferation of legislation that specifically targets the sex offender population”).
33. See Durling, *supra* note 9, at 321 (“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.”).
34. See Durling, *supra* note 9, at 321.

once they are released.<sup>35</sup> For instance, The Julia Tuttle Causeway (“Causeway”) in Miami-Dade County, Florida, is a section of I-195, a well-traveled interstate that runs through southern Florida and connects the mainland to parts of Miami Beach. From 2006 to 2010, it was also home for the vast majority of sex offenders living in the County, none of whom could find more suitable or permanent housing within Miami proper.<sup>36</sup> A shantytown developed under the Causeway as a result of a new series of state and local statutes prohibiting convicted sex offenders from living within 1,000 feet of a school zone, park, or playground, as well as other sites where children are often present.<sup>37</sup> Miami-Dade County’s local legislation took the state’s requirements one step further, preventing sex offenders from living within certain distances of school bus stops, among other locations.<sup>38</sup> Together, these legislative measures effectively cut off all housing options for sex offenders.<sup>39</sup> To avoid violating their parole or probation conditions (and thus being sent back into Florida prisons), a group of sex offenders set up a shantytown community under the bridge.<sup>40</sup> After months of living in makeshift housing, enduring low overnight temperatures and unsanitary conditions, state legislators finally began paying attention when the American Civil Liberties Union of Florida sued on behalf of the Causeway residents.<sup>41</sup> Although the district court dismissed the ACLU’s case,<sup>42</sup> local lawmakers (perhaps because of the bad press the Causeway situation generated) agreed to

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35. See Durling, *supra* note 9, at 322–23 (discussing the measures taken by different local and state officials to restrict where sex offenders may live). As of 2006, thirteen states had enacted residency restrictions, creating buffer zones around parks, schools, day-cares, and other places where children may congregate. *Id.* at 322.

36. Greg Allen, *Sex Offenders Forced to Live Under Miami Bridge*, NAT’L PUB. RADIO, May 20, 2009, <http://www.npr.org/templates/story/story.php?storyId=104150499>; Damien Cave, *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, N.Y. TIMES, July 9, 2009, <http://www.nytimes.com/2009/07/10/us/10offender.html>; Catharine Skipp, *A Law for the Sex Offenders Under a Miami Bridge*, TIME MAG., Feb. 1, 2010, <http://www.time.com/time/nation/article/0,8599,1957778,00.html>.

37. Skipp, *supra* note 36.

38. Skipp, *supra* note 36.

39. Skipp, *supra* note 36.

40. Skipp, *supra* note 36.

41. Press Release, American Civil Liberties Union, ACLU Challenges Miami-Dade County’s 2,500 Foot Sex Offender Residency Restriction (July 9, 2009), *available at* [http://www.aclufl.org/news\\_events/?action=viewRelease&cemailAlertID=3760](http://www.aclufl.org/news_events/?action=viewRelease&cemailAlertID=3760).

42. Kyle Muzenrieder, *ACLU Lawsuit Dismissed, Sex Offenders Still Stuck Under Bridge*, MIAMI NEW TIMES BLOG (Sept. 17, 2009, 2:19 PM), [http://blogs.miaminewtimes.com/riptide/2009/09/aclu\\_lawsuit\\_dismissed\\_sex\\_off.php](http://blogs.miaminewtimes.com/riptide/2009/09/aclu_lawsuit_dismissed_sex_off.php).

reform the residency restrictions via county ordinance.<sup>43</sup> With the ACLU's appeal still pending, it is unclear whether and when more permanent changes to the county's laws will be enacted.<sup>44</sup>

Another issue facing sex offenders released from prison is the rise of involuntary, post-incarceration civil commitment statutes. Following the adoption of state involuntary commitment statutes in 1990, sex offenders in Washington State are now subject to post-incarceration placement on a "sex offender island" off the state's coast, aimed at treatment and containment of what the state calls its "most dangerous sex offenders."<sup>45</sup> McNeil Island, a small island nestled between Olympic National Park and Tacoma, is home to the Special Commitment Center ("SCC"), a maximum-security civil commitment facility for convicted sex offenders.<sup>46</sup> Individuals determined to be "sexually violent predators," ("SVPs"), may be committed to the SCC following a term of imprisonment if a judge concludes that the offender "[was] convicted of or charged with a crime of sexual violence; and . . . suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."<sup>47</sup>

Once committed to the SCC, an individual may remain there indefinitely, until the State determines he or she is no longer a threat to the public.<sup>48</sup> The State Attorney General, a frequent advocate for civil commitment following prison terms, reports that roughly 220 individuals are currently housed on McNeil Island.<sup>49</sup> The program is touted as a "management" and "treatment" program for those most at-risk of re-offending.<sup>50</sup>

Following Washington State's lead, a number of other states have adopted similar SVP laws to involuntarily hold sex offenders and pre-

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43. Julie Brown, *Miami-Dade OK's New Sex Offender Law*, MIAMI HERALD, Jan. 22, 2010, <http://www.palmbeachpost.com/news/state/miami-dade-oks-new-sex-offender-law-190870.html>.

44. See, e.g., Julie Brown, *Sex Offender Camp Beneath Julia Tuttle Causeway Finally Being Dismantled*, MIAMI HERALD, Feb. 27, 2010, available at [http://www.sdp123a.com/index.php?option=com\\_content&task=view&cid=826&Itemid=31](http://www.sdp123a.com/index.php?option=com_content&task=view&cid=826&Itemid=31).

45. *Sexually Violent Predators*, WASH. STATE OFFICE OF ATTORNEY GEN. (Mar. 13, 2011), <http://www.atg.wa.gov/SVP/default.aspx>.

46. *The Special Commitment Center Program*, WASH. STATE DEP'T OF SOCIAL & HEALTH SERVICES (Mar. 13, 2011), <http://www.dshs.wa.gov/SCC/default.shtml>. Offenders may be sent directly to the SCC in lieu of a sentence, or may be involuntarily committed there upon release from prison. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

vent them from re-entering society at the end of their prison terms.<sup>51</sup> As of December 2004, 3,493 people had been held for evaluation as an SVP in seventeen states.<sup>52</sup> The operation costs for SVP programs vary from state to state, but have been reported to cost some states over \$100,000 per year per offender.<sup>53</sup> In May 2010, the United States Supreme Court ruled that a federal law mandating civil commitment for sex offenders beyond their criminal sentences is constitutional, paving the way for such legislation in all fifty states.<sup>54</sup>

## II. THE CASE IN MICHIGAN

As states continue to implement these new methods of controlling the sex offender population, one cannot help but wonder what types of restrictions will come next. One of the more alarming examples of the movement towards more restrictive parole conditions comes from Michigan. There, the Parole Board's alleged current practice mandates the automatic imposition of special parole conditions for all sex offenders that prevent those offenders from having any contact with their minor children for all or part of their parole—even if the offense of conviction did not involve a minor.<sup>55</sup> This practice was recently challenged by a group of advocates who wanted the courts to recognize that the Constitution must restrict how far parole conditions may go in curtailing parolees' liberty rights.<sup>56</sup>

In the spring of 2009, the Michigan Clinical Law Program at the University of Michigan Law School along with the ACLU of Michigan and Legal Aid of Western Michigan filed suit against members of the Michigan State Parole Board.<sup>57</sup> This suit, *Houle v. Sampson*, challenged on Due Process and First Amendment grounds the alleged automatic imposition of certain “special conditions of parole” on any individual

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51. *Involuntary Commitment of Sexually Violent Predators: Comparing State Laws*, WASH. STATE INST. FOR PUB. POLICY (Mar. 1, 2005), <http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf>.

52. *Id.* at 1–5.

53. *Id.* at 6. The highest annual cost per offender, reported in 2004, was in Minnesota at \$109,000. *Id.* As a comparison, in 2009, the annual cost per inmate in the Minnesota Department of Corrections was only \$32,573. See Statistics for the State of Minnesota, NAT'L INST. OF CORRECTIONS, <http://nicic.gov/StateStats> (last visited Sept. 15, 2011).

54. *United States v. Comstock*, 130 S. Ct. 1949, 1949 (2010).

55. First Amended Complaint, *Houle v. Sampson*, No. 2:09-cv-10504 (E.D. Mich. Aug. 5, 2009).

56. *Id.*

57. *Id.*

convicted of either a sexual offense or an offense with a child victim.<sup>58</sup> The two named plaintiffs were former Michigan Department of Corrections (MDOC) prisoners, released with parole conditions that prevented them from speaking with, much less seeing, their own children, as well as attending public activities, such as church services, in places where children may be present.<sup>59</sup> These conditions were motivated by public safety rationale.<sup>60</sup> Yet, as the plaintiffs argued, not *every* former prisoner truly needed these conditions, and the conditions did not meaningfully enhance public safety.<sup>61</sup>

The challenged parole conditions, hereinafter referred to as “no contact” restrictions, primarily prohibited individuals from (1) having any sort of contact with any person under the age of seventeen, (2) living in a residence where any person under the age of seventeen resided, and (3) having a romantic relationship with a parent of minor children.<sup>62</sup> These parole conditions were allegedly imposed without any review of the parolee’s individual case, family situation, or progress in therapy, and without notice or an opportunity to be heard.<sup>63</sup>

The automatic imposition of such conditions has devastating consequences for parolees and their families and makes little sense for many offenders. For example, one offender, “S”,<sup>64</sup> was arrested at the age of 18 for having a consensual sexual relationship with his girlfriend, who at

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58. *See id.*

59. *Id.* ¶¶ 66–78.

60. *See* Defendants’ Supplemental Response to Plaintiffs’ Motion for a Preliminary Injunction at 2–3, *Houle v. Sampson*, No. 2:09-cv-10504 (E.D. Mich. Aug. 3, 2009).

61. *See* First Amended Complaint, *supra* note 55, ¶¶ 66–78.

62. First Amended Complaint, *supra* note 55, ¶ 56 (“Special Condition 1.0 provides: ‘You must not have any verbal, written, electronic or physical contact with any individual age 17 or under, or attempt to do so, either directly or through another person.’”); *id.* ¶ 59 (“Special Condition 1.1 provides: ‘You must not live in a residence where any individual age 17 or under stays or is cared for. You must not provide care for any individual age 17 or under.’”); *id.* ¶ 60 (“Special Condition 1.3 provides: ‘You must not marry, date, or have any romantic involvement with anyone who resides with or has physical custody of any individual age 17 or under, without getting written permission from the field agent.’”).

63. *See* Plaintiffs’ Brief in Support of Motion for Preliminary Injunction at 1, *Houle v. Sampson*, No. 2:09-cv-10504 (E.D. Mich. Feb. 19, 2009).

64. These stories are taken from cases handled by the Michigan Clinical Law Program during the fall of 2010. The author was a student attorney in the clinic and handled intake for these cases. None of the examples used in this Article were named plaintiffs in the *Houle* suit; their stories come from intake calls at the Clinic in the wake of the dismissal of the *Houle* suit, and the Clinic’s temporary system set up to handle such cases. Information taken from intake interview questionnaires is confidential under attorney-client privilege and not available for public distribution. Approval was given to use these stories for the purposes of this Article, but any identifying information has been removed to protect the privacy and confidentiality of the clients.

the time of arrest was one month shy of sixteen, the age of consent in Michigan, making their relationship statutory rape.<sup>65</sup> S's girlfriend, pregnant with their first child, wrote a victim impact statement to the court stating that she was *not* a victim to any crime—that the only victim of criminalizing their relationship would be their unborn child. Due in part to this statement, S was originally given probation, with no restrictions on his ability to see his girlfriend. After S's sentencing, his girlfriend was over the age of consent. The couple gave birth to a healthy baby and went on to have another child together. It was only after committing a technical probation violation that S was incarcerated. Yet, when S was released from prison, he was given special parole conditions that effectively cut him off from his family. S's girlfriend was forced to raise their two children on her own, without emotional or financial support from the children's father, despite the fact that S clearly did not pose a threat to his family.

Another offender, “D”, was incarcerated close to thirty years ago after being involved in a drunk driving accident that resulted in the death of two children riding in another car. After serving twenty-five years for two counts of involuntary manslaughter, D was released from prison with special conditions on his parole that prevented him from having any contact with anyone under the age of seventeen. These conditions were automatically imposed because D's offense had “child victims,” not because of any empirically-based assessment of the risk D may pose to minors. The conditions prevented him from continuing his relationship with his grandchildren, all of whom had visited D while he was incarcerated. It also caused significant trouble for D when he was released, as the restrictions prohibited him from living with two of his three grown children, because they each had minor children living in their homes.

Stories like S's and D's were the focus of the *Houle* litigation, in which plaintiffs argued that not all prior offenders are a danger to their families or communities and that the automatic imposition of these conditions preventing contact with family members violated the parolees' constitutional rights.<sup>66</sup> However, parole in Michigan is imposed for a set period of years defined in the parole order,<sup>67</sup> and by the time the

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65. MICH. COMP. LAWS ANN. § 750.520d (West 2011).

66. See First Amended Complaint, *supra* note 55, ¶ 66 (“The Special Conditions prohibiting contact with minors are imposed by the defendants on virtually all parolees whose underlying conviction involves a sex offense, regardless of whether that offense involved children, regardless of whether that offense involved consensual sexual activity, and regardless of whether there is evidence to suggest that the parolee is likely to harm children.”).

67. MICH. COMP. LAWS ANN. § 791.242(1) (West 2011).

litigation worked its way through the courts, the named plaintiffs were either released from their parole restrictions or the MDOC voluntarily removed the conditions, thereby mooting their claims for declaratory and injunctive relief.<sup>68</sup> As a result, plaintiffs' counsel agreed to dismiss the suit voluntarily in exchange for the MDOC's promise to engage in a temporary ad-hoc remedy for wrongfully imposed conditions.

Since early 2010, the Michigan Clinical Law Program has received and continues to process scores of letters from parolees seeking to challenge the special conditions of their parole. Not all offenders subjected to the special conditions had straightforward cases like S, D, and the named plaintiffs in the *Houle* case. There were many cases where restrictions seemed appropriate, at least initially. Yet, it was impossible for clinical students to determine who needed more restrictive parole based on an offender's offense category or conviction alone. Instead, clinical students reviewed much more paperwork, including therapy progress reports and the arresting officer reports, and interviewed the legal guardians of the offender's children (often the mothers of the children). Based on this information, clinical students assessed the parolee's claim, and then wrote letters advocating for change to regional parole supervisors.

This system of post hoc review was never perfect, nor was it intended to be a long-term solution. Parolees would wait months to hear back after clinical students sent letters on their behalf. Holidays passed without family reunification. Parolees were forced to adjust to life without any family support or community connections. Decisions by the parole supervisor to change parole conditions were still made somewhat arbitrarily, despite the strength of many letters submitted by the clinic. And, although the MDOC always expressed interest in more comprehensive reform of the parole system in Michigan, that change was slow in coming and did not seem to be a high priority for MDOC and parole board administrators.

As legislators become more willing to impose ever-more restrictive conditions on this subclass of former prisoners, advocates fear that states might go too far.<sup>69</sup> Although there are a plethora of academic articles on

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68. Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction at 2, *Houle v. Sampson*, No. 2.09-cv-10504 (E.D. Mich. April 3, 2009).

69. See, e.g., Corey Kilgannon, *Woman With a Mission: Keeping Tabs on Sex Offenders*, N.Y. TIMES, Mar. 8, 2008, <http://www.nytimes.com/2008/03/08/nyregion/08sex.html>. In 2008, a \$593,000 federal grant was given to a non-profit group, Parents for Megan's Law and the Crime Victims' Center, dedicated to developing advanced mapping techniques so community members can identify and track sex offenders; one US Senator and three US Representatives even joined at the grant-giving ceremony. *Id.* Lawmakers worked with the founder of Parents for Megan's Law and the Crime Victims' Center to pass more restrictive federal legislation, including the

those types of restrictions,<sup>70</sup> little has been written about other parole conditions like the familial restrictions imposed in Michigan. Despite frequent criticism of residency and registration requirements on the grounds that such increased restrictions on paroled sex offenders violate their constitutional rights, many states are in step with Michigan, continuing to move towards more restrictive parole conditions.<sup>71</sup> It is important, therefore, to determine the point at which the constitutional rights of parolees *are* violated, to alert legislators to the fact that additional restrictions on parole may very well go too far.

### III. THE CONSTITUTIONAL CASE AGAINST NO CONTACT RESTRICTIONS

"No contact" restrictions go beyond previously upheld residency and registration restrictions and are unconstitutional.

It is easy to understand why legislators continue to churn out more restrictive parole conditions. As elected officials, they have a desire to prevent or deter future crimes, improve public safety, and keep their constituents at ease. This trend continues when parolees attempt to vindicate their rights in court. In challenges to parole conditions, judges typically defer to the legislature's reasoning or avoid ruling on the constitutionality of restrictions at all.<sup>72</sup> So far the United States Supreme Court has been reluctant to strike down most restrictions, including registration and notification requirements, "safe zone" legislation, and GPS monitoring programs.<sup>73</sup> However, there has not been a challenge in

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Adam Walsh Child Protection and Safety Act. *Id.* "Critics call [the founder's] zealous pursuit of sex offenders counterproductive and unconstitutional, and contend that overexposure can deter the offenders from checking in with the authorities." *Id.*

70. See, e.g., Durling, *supra* note 9; Hobson, *supra* note 16; Meghan S. Towers, *Protectionism, Punishment and Pariah: Sex Offenders and Residence Restrictions*, 15 J.L. & POL'Y 291 (2007).

71. Kurt Bumby et al., *Legislative Trends in Sex Offender Management*, CENTER FOR SEX OFFENDER MANAGEMENT 1, 2 (Nov. 2008), [http://www.csom.org/pubs/legislative\\_trends.pdf](http://www.csom.org/pubs/legislative_trends.pdf) ("Lawmakers nationwide have responded by proposing and enacting sex offender-specific legislation at an unprecedented level over the past few years. These laws include, but are not limited to, civil commitment, mandatory minimum sentences, expanded registration and community notification requirements, and proximity laws such as residency restrictions. In fact, sex offender management policy remains among the principal topics facing legislative bodies nationwide, alongside issues such as immigration, energy, environmental protection, and healthcare.")

72. See Hobson, *supra* note 16, at 966.

73. Hobson, *supra* note 16, at 967. Current and former parolees have also challenged residency restriction statutes, which create "buffer zones" around schools, playgrounds, and daycare facilities, where paroled sex offenders cannot live. For a



the higher courts to conditions that implicate the fundamental right of a parolee to maintain a relationship with his or her children.

The *Houle* litigation was premised primarily on two discrete constitutional claims: violation of the plaintiffs' "fundamental right to maintain relationships with their children"<sup>74</sup> and of their "fundamental right to marry and maintain personal relationships."<sup>75</sup> Although the court never reached a decision on the merits of the case, there is a strong argument that Michigan's and other states' restrictions infringing on familial relationships are unconstitutional on both substantive and procedural due process grounds.

This Part reviews the constitutional arguments against "no contact" parole restrictions. Section A addresses the substantive due process rights implicated by such restrictions, arguing that the right to be involved in the life of one's child is a fundamental right deserving strict scrutiny review, and that the restrictions are not narrowly tailored to meet a compelling government interest. Section A also argues that the "no contact" restrictions do not advance any such compelling government interest, and may actually threaten rather than enhance public safety. Section B turns to the procedural due process argument that the automatic coupling of "no contact" restrictions with certain offenses deprives parolees of notice and an opportunity to be heard.

#### *A. The Fundamental Right: No Contact Restrictions and Their Substantive Due Process Implications*

Substantive Due Process claims are premised on the idea that "the Due Process Clause specially protects those fundamental rights and liberties which are objectively 'deeply rooted in this Nation's history and tradition.'"<sup>76</sup> Claims of substantive due process violations must contain

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comprehensive review of state statutes creating such zones, see *Hobson*, *supra* note 16, at 970 n.54. For examples of challenges to such statutes, see *id.* at 971–72 n.55–65. These challenges were not successful in striking down the statutes, but support for reform of the statutes exists in dissenting opinions. *Id.* at 971.

74. First Amended Complaint, *supra* note 55, ¶ 79.

75. *Id.* ¶ 83. The *Houle* litigation also addressed the First Amendment right to practice religion, as the special parole conditions also prohibited parolees from attending church or other religious services, because children were likely to be present at houses of worship. See First Amended Complaint, *supra* note 55, ¶¶ 87–90. Although that claim presents interesting constitutional challenges in and of itself, this Article focuses on the parental rights of parolees and will not address the religious freedom implications of the MDOC parole conditions.

76. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

a "careful description of the asserted fundamental liberty interest."<sup>77</sup> Yet, in challenges to sex offender laws mandating registration, residency restrictions, or other limitations on parole, offenders are often unable to "articulate a specific, cognizable liberty interest" affected by the legislation.<sup>78</sup> The Constitution does not guarantee a right to live in a *particular* house or hold a *particular* job. In contrast, "no contact" conditions, such as those imposed in Michigan, infringe on an articulable, judicially recognized liberty interest: the "fundamental right to maintain a relationship with [one's] children."<sup>79</sup> Therefore, courts should subject such conditions to strict scrutiny review.

The Supreme Court consistently recognizes that the right of parents to "make decisions concerning the care, custody, and control of their children" is a fundamental right.<sup>80</sup> In fact, "it is well-established [by Supreme Court and lower court precedent] that a parent's interest in maintaining a relationship with his or her child is protected by the Due Process Clause of the Fourteenth Amendment."<sup>81</sup> Moreover, the Court notes that "family life, and the upbringing of children, are among associational rights this Court has ranked as of basic importance to our society, rights sheltered against the State's unwarranted usurpation, disregard, or disrespect."<sup>82</sup> Although this right is not absolute,<sup>83</sup> absent evidence that the parent poses a threat to his child, the Court is careful not to infringe on the rights of parents to raise their children, especially when the parent has been actively involved in his

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77. *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

78. Hobson, *supra* note 16, at 972. For an example of one such decision, see *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005). There, the court denied relief for the plaintiffs on their substantive due process claim because the plaintiffs were unable to articulate a "careful description" of a particular right protected by the Due Process Clause that was infringed upon by the sex offender registration statute. Although couched in terms of the right to associate with one's family, the plaintiffs were essentially claiming a right to be free from the burdens of a sex offender registry, which is not a right "deeply rooted in the Nation's history and tradition." *Doe v. Moore*, 410 F.3d at 1344-45.

79. Plaintiffs' Brief in Support of Motion for Preliminary Injunction, *supra* note 63, at 3.

80. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (noting that such an interest is "perhaps the oldest of the fundamental liberty interests recognized by this Court").

81. *U.S. v. Myers*, 426 F.3d 117, 125 (2d Cir. 2005).

82. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

83. *See, e.g., Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999) ("Although parents enjoy a constitutionally protected interest in their family integrity, this interest is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." (internal quotation marks omitted)).

child's life up until the point of incarceration.<sup>84</sup> Government intrusions into family relationships must be narrowly tailored to the interest the intrusion attempts to protect.<sup>85</sup>

Even though parolees have had limited success in challenging their parole conditions on substantive due process grounds, holdings from prior cases leave room to challenge the more restrictive "no contact" rules. In one line of cases in Iowa, paroled sex offenders "argued that residency restrictions infringe upon their fundamental rights by interfering with their ability to reside with family members that live within exclusionary zones."<sup>86</sup> In *Doe v. Miller (Miller II)*, for example, the Eighth Circuit reversed the lower court's holding that such restrictions violated the fundamental right to live with family members, primarily because "the laws [did] not directly specify with *whom* the offender can live, but rather merely indicate[d] *where* the offender can live."<sup>87</sup> In contrast to residency restrictions, "no contact" rules prevent parolees from having *any* contact with their minor children—much less living with them under the same roof.<sup>88</sup>

The implication of the Eighth Circuit's holding in *Miller II* is that laws that directly prevent offenders from living with their families—rather than just restricting where the family unit may live—may violate substantive due process. The Eighth Circuit and the Supreme Court previously held strict scrutiny should not apply when a statute's effect on the family relationship is merely incidental or unintended.<sup>89</sup> This distinction suggests that when a statute directly affects a family relationship, a heightened review of the purpose behind the statute is triggered, to ensure that it is neither overbroad nor overly burdensome

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84. See, e.g., *Lehr v. Robison*, 463 U.S. 248, 261 (1983) (holding that where the biological father has not "demonstrate[d] a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child," the father may not have as strong of a Due Process right to a relationship with his child) (internal quotation marks omitted).

85. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (noting that the government cannot intrude on a fundamental liberty interest "unless the infringement is narrowly tailored to serve a compelling state interest").

86. Hobson, *supra* note 16, at 974.

87. Hobson, *supra* note 16, at 974 (citing *Doe v. Miller (Miller II)*, 405 F.3d 700, 710–11 (8th Cir. 2005), *cert. denied*, No. 05-428, 2005 WL 3144173 (Nov. 28, 2005)); see also *Doe v. Petro*, No. 1:05-CV-125, 2005 WL 1038846, at \*3 (S.D. Ohio May 3, 2005) ("[The statute] does not prevent persons subject to its restrictions from living with their families, it only regulates where they may live. Plaintiffs are free to live with their families in non-restricted areas.").

88. See, e.g., First Amended Complaint, *supra* note 55.

89. *Miller II*, 405 F.3d at 710; see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 498–99 (1977).

for the individuals targeted by its terms.<sup>90</sup> Yet, unlike residency restrictions, under which families may move to locations that are not within “buffer zones” of schools, playgrounds, parks, or other prohibited locations, statutes prohibiting inmates from seeing their families clearly impact the family relationship directly and intentionally.

Once a plaintiff makes out a claim of intrusion into a fundamentally protected right, and strict scrutiny analysis is triggered, the intrusion is upheld only if it is narrowly tailored to a compelling government interest.<sup>91</sup> Few would argue that such restrictions fail to serve a legitimate and compelling purpose, if the restrictions actually serve their intended goal—keeping communities and children safe, and preventing recidivism. The question regarding “no contact” parole conditions, therefore, is twofold: (1) whether or not the effect is overbroad, and (2) whether or not that goal is served.<sup>92</sup>

### 1. Unreasonable and Unjustified: Why the Public Safety Justification Is Inapplicable

Although “no contact” restrictions are typically justified from a public safety perspective, research on recidivism and re-entry policies suggests that such conditions may instead have a negative impact on public safety.

Empirical studies suggest that strong support networks are among the most effective means to combat recidivism.<sup>93</sup> The few studies conducted on the link between familial support and recidivism show a positive relationship: strong family ties are correlated with lower recidivism rates for reentering offenders.<sup>94</sup> Other studies show that restrictive parole supervision does not necessarily lead to lower re-offending rates.<sup>95</sup>

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90. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

91. See, e.g., *Glucksberg*, 521 U.S. at 720–21; see also Hobson, *supra* note , at 988 (“Although many regulations in our society legitimately restrict citizens’ liberty by limiting where people may live and travel, at some point the magnitude of an interference with a person’s liberty becomes so severe that the interference must be justified by more than a mere rational basis.”).

92. See *U.S. v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (“[W]hen a fundamental liberty interest is implicated by a sentencing condition, we must first consider the sentencing goal to which the condition relates, and whether the record establishes its reasonableness. We must then consider whether it represents a greater deprivation of liberty than is necessary to achieve that goal.”).

93. See, e.g., James Austin & Patricia L. Hardyman, *The Risks and Needs of the Returning Prisoner Population*, 21 REV. OF POL’Y RES. 13, 18 (2004).

94. *Id.*

95. *Id.* at 17.

Offenders who are able to maintain relationships with their families during incarceration tend to have a higher success rate once released.<sup>96</sup> It seems that the ability to continue this relationship once offenders return to the community has a profound effect as well. Researchers agree that “family support can make or break a successful transition from prison to community,” and that family members “provid[e] former inmates with critical material and emotional support, including shelter, food, clothing, leads for jobs, and guidance in staying sober or avoiding criminal behavior.”<sup>97</sup> Others note that “sex offenders . . . need support systems made up of people who will accept their potential for deviant behavior . . . and empower them to engage in healthy, law-abiding, respectful relationships and activities” and that “family members can play an important role in this endeavor.”<sup>98</sup> Even more compelling is one study’s finding that “the strongest predictor of individual success [for parolees] was the perception by the person released that his family supported him.”<sup>99</sup>

Apart from the impact such “no contact” restrictions may have on the offenders themselves, the restrictions also profoundly affect the lives of the offender’s loved ones. Research shows that “invisible punishments and their consequences (i.e. . . . obstacles to assuming adult and parental roles) have a documented impact on families of criminal offenders.”<sup>100</sup> The invisible victims of “no contact” restrictions are the children of former sex offenders, who are forced to spend two years apart from a parent (at least in Michigan), and who may suffer developmental and emotional harm as a result.<sup>101</sup> The negative impact of parole conditions on the relationship between the offender and his or her children can also “influence [the children’s] own future criminal and non-criminal behav-

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96. See, e.g., *id.* at 20 (“We know that the risk of recidivism for an ex-prisoner is related to his or her ability to maintain healthy relationships with his or her spouse, children, or parent(s) while incarcerated.”).

97. Mike Bobbitt & Marta Nelson, *The Front Line: Building Programs that Recognize Families’ Role in Reentry*, VERA INST. OF JUSTICE 1 (Sept. 2004), [http://www.idvaac.org/media/publications/249\\_476.pdf](http://www.idvaac.org/media/publications/249_476.pdf) (last visited September 25, 2011).

98. Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54, 65 (2009).

99. Marta Nelson, Perry Deess, & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City*, VERA INST. OF JUSTICE 1, 10 (1999), [http://www.vera.org/download?file=219/first\\_month\\_out.pdf](http://www.vera.org/download?file=219/first_month_out.pdf).

100. Levenson & Tewksbury, *supra* note 98, at 64 (citing PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., Urban Institute Press 2003)).

101. See Levenson & Tewksbury, *supra* note 98, at 65 (“What remains unclear is the myriad of ways in which these experiences will impact [the children’s] psychosocial development, their interpersonal relationships, and their sense of self.”).

iors."<sup>102</sup> Studies show that the incarceration of parents, and the resulting separation of parents from their children, is "likely to perpetuate the cycle of criminal behavior and incarceration in the family."<sup>103</sup> Therefore, separating children from their parents may harm, rather than promote, public safety.

Of course, this will not be the case for every parolee. As mentioned earlier, there are some offenders who will not be ready to reunite with their family immediately upon release, particularly in cases where the offender's victim was his or her child or close family member.<sup>104</sup> This may also be the case where the victim was particularly young or the crime was particularly heinous. However, these distinctions speak more to the need for narrower tailoring of the parole conditions to the individual parolees than to the need for blanket provisions for all offenders. Without narrow tailoring, the conditions remain unconstitutional as applied to the numerous parolees who do not need to be separated from their children in order to keep the community safe. Further, such blanket provisions may not make communities any safer.

In this way, individualized assessment of each offender to determine appropriate parole conditions is constitutionally necessary and will better serve the goal of enhancing public safety. For many parolees, such "no contact" restrictions will make little sense because, despite the fact that restrictive parole conditions continue to be justified by claims of increasing public safety and preventing future criminal activity, "no contact" restrictions likely have the opposite effect. Cutting parolees off from their families and communities in general does not enhance public safety. Rather, it places parolees in situations where they are more likely to re-offend and potentially causes great harm to the social and emotional development of their children. In this way, the professed purpose behind such restrictions is neither narrowly tailored nor serving a legitimate government purpose.

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102. Levenson & Tewksbury, *supra* note 98, at 65.

103. Austin & Hardyman, *supra* note 93, at 21 (citing a study linking the incarceration of mothers to future criminal behavior of their children). Although "it is more likely that children will experience separation from a mother than separation from a father [during incarceration]," incarceration of either parent, and further isolation of that parent during the parole period, can have profound emotional and behavioral affects on children. Rose D. Parke & K. Alison Clarke-Steward, *The Effects of Parental Incarceration on Children: Perspectives, Promises, and Policies*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 189, 200 (Jeremy Travis & Michelle Waul eds., Urban Institute Press 2003).

104. See *supra* Part I.

## 2. What Is Good for One Is Not Always Good for All: The Need for Narrow Tailoring

The Eighth Amendment's ban on cruel and unusual punishment recognizes this limitation on the state's ability to punish convicted criminals—punishment must not be arbitrary, capricious, or unconnected to the crime.<sup>105</sup> Under federal law, the court can impose a sentence that is “sufficient, but not greater than necessary,” to accomplish the purposes of punishment.<sup>106</sup> In deciding what punishment is necessary, the court may consider the nature and circumstances of the crime, the need to deter future criminal activity, the need to protect the public, and the best ways to rehabilitate the offender.<sup>107</sup>

Parole is structurally and statutorily different from criminal sentencing, although the two are intrinsically intertwined. When it comes to terms of supervised release following a prison sentence, however, either through parole or probation, the court may only “impose special conditions of supervised release that are [(1)] to certain statutory factors governing sentencing, [(2)] ‘involve[ ] no greater deprivation of liberty than is reasonably necessary’ to implement the statutory purposes of sentencing, and [(3)] are consistent with pertinent Sentencing Commission policy statements.”<sup>108</sup> Moreover, courts often hold that “associational parole conditions [conditions limiting the relationships parolees may have with others] are valid only if the association would undermine the parolee's rehabilitation or endanger public safety.”<sup>109</sup> When a restriction is “poorly designed” to accomplish the government's “speculative goals,” then the restriction is invalid from a constitutional perspective because it is not narrowly tailored to a legitimate purpose.<sup>110</sup>

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105. U.S. CONST. amend. VIII.

106. 18 U.S.C. § 3553 (2006).

107. 18 U.S.C. § 3553(a)(2) (2010).

108. *United States v. Myers*, 426 F.3d 117, 123–24 (2d Cir. 2005) (citing 18 U.S.C. § 3583(d)).

109. Plaintiffs' Brief in Support of Motion for Preliminary Injunction, *supra* note 63, at 6 (citing *United States v. Bortels*, 962 F.2d 558, 559–60 (6th Cir. 1992) (upholding a restriction on defendant's contact with her fiancé because the defendant's crime resulted directly from that relationship)). *But see* *United States v. Worthington*, 145 F.3d 1335, at \*18 (6th Cir. 1998) (striking down condition that prevented former offender from living with unrelated female, because it was “unclear what relation the condition bears to the nature and circumstances of the offense, rehabilitation of the offender, or protecting the public.”).

110. Plaintiffs' Brief in Support of Motion for Preliminary Injunction, *supra* note 63, at 6 (citing *Worthington*, 145 F.3d at \*18).

Although the issue of associational parole conditions has yet to reach the U.S. Supreme Court, circuit courts have been reluctant to uphold parole conditions that seem too loosely tailored to the actual threat posed by the former offender.<sup>111</sup> In *United States v. Davis*, the Eighth Circuit held that a parole condition prohibiting the defendant from having unsupervised visitation with his minor daughter was unconstitutional, even though the defendant was originally convicted on child pornography charges.<sup>112</sup> The court determined that "[t]here [was] no evidence in the record that [the defendant] has ever sexually abused a child or that he would try to abuse his daughter once released from prison," and therefore, the condition prohibiting visitation with his daughter was impermissible.<sup>113</sup> The court explicitly stated that, "the government may circumscribe [the parolee's relationship with his child] only if it shows that the condition is no more restrictive than what is reasonably necessary."<sup>114</sup>

The Second and Third Circuits have reached similar holdings.<sup>115</sup> In *United States v. Myers*, a Second Circuit case, a parolee convicted of child pornography challenged the "no contact" rule that prevented him from seeing his son without first notifying his probation officer.<sup>116</sup> Myers argued that the condition was unjustified because the offense of which he was convicted did not involve his son, he had no history of harming or threatening to harm his son, and other conditions of supervised release would address the court's concerns for public safety.<sup>117</sup> In support of his claim, Myers argued that "limitations on [his] contact with his son were a greater deprivation of liberty than reasonably necessary under 18 U.S.C. §§ 3553(a) and 3583(d), and unconstitutionally interfered with the parent child relationship in the absence of any evidence that [he posed] a threat to his own child."<sup>118</sup> The court then changed the "no contact" restriction to allow Myers to visit his own son, provided that the probation officer granted approval for each visit in advance.<sup>119</sup> Even though he was allowed visits with his son, Myers appealed the

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111. See, e.g., *Myers*, 426 F.3d at 123; *Worthington*, 145 F.3d at 18.

112. *United States v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006).

113. *Davis*, 452 F.3d at 995.

114. *Davis*, 452 F.3d at 995.

115. See, e.g., *Myers*, 426 F.3d at 120; *United States v. Voelker*, 489 F.3d 139, 155 (3d Cir. 2006); *United States v. Loy*, 237 F.3d 251, 270 (3d Cir. 2001). These cases are also highlighted in the Plaintiffs' Brief in Support of Motion for Preliminary Injunction, *supra* note 63, at 4.

116. *Myers*, 426 F.3d at 122.

117. *Myers*, 426 F.3d at 121.

118. *Myers*, 426 F.3d at 122 (internal quotation marks omitted).

119. *Myers*, 426 F.3d at 122.



condition, arguing that the approval requirement unconstitutionally interfered with his parental rights absent any tangible evidence that Myers posed a threat to his son.<sup>120</sup>

Current Supreme Court Justice Sonia Sotomayor, then sitting for the Second Circuit, agreed.<sup>121</sup> Writing for the court, then-Judge Sotomayor stated, “if the goal of the condition . . . was to protect Myers’s own son, the district court will need to develop a record demonstrating the danger to that child, because we cannot say on the basis of the record before us that such a danger has been demonstrated.”<sup>122</sup> Because “neither the offense of conviction nor the prior offense . . . involved Myers’s own child,” and both of Myers’s offenses involved girls, rather than boys, the record did not support a condition limiting Myers’s interaction with his son.<sup>123</sup> The case was remanded for further examination, and Sotomayor noted that if the district court wished to impose a special condition limiting contact between Myers and his son, it must first decide:

(1) what the goal of the condition is; (2) if the goal is to protect Myers’s own child, whether an adequate record can be developed to support it; (3) whatever the goal of the condition, whether Myers has any constitutionally protected right to a relationship with his child; and (4) what terms of the condition are necessary and not a greater deprivation of any identified liberty interests than reasonable to achieve the sentencing goal.<sup>124</sup>

The *Myers* opinion therefore supports the *notion* that, “even a pedophile may not be deprived of contact with his child, absent an individualized showing that the deprivation is *narrowly tailored* to meet the legitimate goals of advancing rehabilitation or protecting that child.”<sup>125</sup>

It is the “automatic” nature of the conditions that raises the most serious constitutional concerns. For example, the MDOC allegedly imposes the “no contact” restriction on anyone convicted of a sexual crime or a crime that involved a child victim, whether sexual in nature or

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120. *Myers*, 426 F.3d at 122.

121. *Myers*, 426 F.3d at 127–28.

122. *Myers*, 426 F.3d at 127–28.

123. *Myers*, 426 F.3d at 128.

124. *Myers*, 426 F.3d at 130.

125. Plaintiffs’ Brief in Support of Motion for Preliminary Injunction, *supra* note 63, at 4.

not.<sup>126</sup> A computer automatically links the restriction to the offender, and little or no individual assessment is ever conducted.<sup>127</sup> The constitutional problem with the restriction is not just the restriction itself—it is also the imposition of the restriction without any review of its necessity for the particular offender.

So how do we determine whether no contact parole conditions are actually necessary to protect the children of convicted sex offenders? Politicians fear, perhaps rightfully so, that "if a single paroled lifer commits a major crime and receives extensive media attention, the blame will come back on them."<sup>128</sup> Yet, given the constitutional protections parents are afforded when it comes to relationships with their children, political fear should not be controlling.

Instead, to ensure "narrow tailoring" of the restriction to its purpose, an individualized inquiry and risk assessment should be done before "no contact" restrictions are imposed. Researchers acknowledge that "behavior is influenced by a variety of internal and external factors that can change over the life course."<sup>129</sup> Moreover, while "all sexual offending is, by definition, socially deviant . . . not all sexual offenders have deviant sexual interests or preferences."<sup>130</sup> Granted, many sex offenders continue to have deviant sexual interests after their period of incarceration; they either do not respond positively to therapy, or they are unable to cope with triggers in the community that create inappropriate arousal. Generalizing all sex offenders in this way, however, would do a great injustice to all those who have reformed their behavior while incarcerated and who are able to lead productive, law-abiding lives in the community.

For example, a man convicted of Criminal Sexual Conduct in the Fourth Degree under Michigan's criminal statute for grabbing a woman's buttocks at a dance club is not comparable to a man who violently rapes a stranger or repeatedly molests children. Yet, under the automatic

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126. First Amended Complaint, *supra* note 55, ¶¶ 51–53.

127. First Amended Complaint, *supra* note 55, ¶¶ 51–53. However, the defendants in the *Houle* litigation maintained that the computerized linking of offenses and special conditions of parole was reviewed individually by the Parole Board member conducting the parole interview. See Defendants' Supplemental Response to Plaintiffs' Motion for Preliminary Injunction, *supra* note 60, at 2.

128. Austin & Hardyman, *supra* note 93, at 25.

129. R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 348 (1998).

130. *Id.* at 349 (pointing out that some sexual offenders may have merely misperceived the illegality of their actions, e.g., "date rapists," who believed "no means yes," or "statutory rapists," who believed their victim was over the age of consent).

coupling system used in Michigan, these two offenders are treated as an equal risk to the safety of the public and equally deserving of restrictive parole conditions.

Due to the variation in risk level among all those lumped into the category of “sex offenders,” clinicians and reviewing courts often argue for a detailed review of the offender’s sexual offense history, psychological adjustment, motivation to change, overall behavior, response to sex offender therapy, and more.<sup>131</sup> Meta-analysis of risk factors for sexual re-offending suggests that “static, historical” variables, such as general criminality, sexual offense history, and stranger victims, increase risk of recidivism.<sup>132</sup> These studies also consider “dynamic” variables, including drug use and steady employment, and conclude that identification of dynamic risk factors may be the key to appropriate intervention and prevention.<sup>133</sup> These studies, taken together, suggest that risk for re-offending is highly individualized. Sex offenders are not likely to recidivate just because they offended in the past; rather, there are many other factors in play.

Although recidivism research on sex offenders is far from conclusive, the Center for Sex Offender Management, an office established through a partnership between the U.S. Department of Justice’s Office of Justice Programs, the American Parole and Probation Association, the National Institute of Corrections, and the State Justice Institute, notes that “only about 12-24% of sex offenders will re-offend . . . [and] when sex offenders do commit another crime, it is more often not sexual or violent.”<sup>134</sup> Nevertheless, the majority of the population continues to fear sex offenders.<sup>135</sup> Naturally, we are more afraid of the more serious offenders, because instinct tells us that the seriousness of a crime means the offender is less likely to be rehabilitated and more likely to re-offend. Perhaps our fear is based on some general gut feeling that mur-

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131. See, e.g., *id.*; see also *United States v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006) (holding that inquiries into the dangerousness of paroled offenders “must take place on an individualized basis; a court may not impose a special condition on all those found guilty of a particular offense”).

132. R. Karl Hanson & David Thornton, *Improving Risk Assessment for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 L. & HUM. BEHAV. 119, 120 (2000).

133. Bynum et al., *supra* note 4.

134. *Fact Sheet: What You Need to Know About Sex Offenders*, CENTER FOR SEX OFFENDER MANAGEMENT 1, 3 (2008), [http://www.csom.org/pubs/needtoknow\\_fs.pdf](http://www.csom.org/pubs/needtoknow_fs.pdf).

135. See *Exploring Public Awareness*, *supra* note 19, at 3 (noting that in a recent study, “well over half of [the] national sample (60%) believed that sex offenders who commit new crimes are most likely to perpetrate another, similar sex offense. One third (33%) were of the opinion that, if sex offenders recidivate, they are most likely to engage in criminal conduct that is more serious and violent than [sic] their prior offenses.”).

ders, armed robbers, or sex offenders have innate personality characteristics that compel them to commit such heinous acts. Yet, research does not support our assumptions.<sup>136</sup> Moreover, early studies show that crime rates are much more related to community structures and support systems than the attributes of individual offenders.<sup>137</sup>

Research continues to evolve. In the last ten years, treatment and risk classification professionals turned to newly developed actuarial models to predict risk of re-offending.<sup>138</sup> Although classification and risk assessment instruments are far from perfect, empirical models are useful tools for departments of corrections when determining the appropriate parole conditions for any given offender.<sup>139</sup>

No matter which risk assessment model is used, substantive due process protections clearly mandate *some* sort of individualized assessment to assure that the restrictions imposed are narrowly tailored to the risk posed by each parolee. Although these individuals may have committed egregious crimes in the past, they still deserve constitutional protection. "No contact" restrictions, which threaten an individual's constitutional right to a relationship with his or her children, should not be imposed on any offender unless the state can clearly demonstrate that the restriction is necessary for that given offender.

### *B. The Opportunity To Be Heard: Procedural Due Process Implications*

Even if states move towards individualized assessment before imposing "no contact" restrictions, procedural due process guarantees offenders notice and the opportunity to be heard before their fundamental right to parenting is restricted by the state.<sup>140</sup>

Procedural Due Process under the Fourteenth Amendment is implicated when offenders are deprived of a liberty interest without due

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136. *Exploring Public Awareness*, *supra* note 19, at 3 ("These perceptions do not comport with research that indicates that sex offenders are more apt to be rearrested or reconvicted for non-sexual, non-violent crimes than for additional sex offenses.").

137. See generally ARNOLD S. LINSKY & MURRAY A. STRAUS, *SOCIAL STRESS IN THE UNITED STATES* (1986).

138. *Id.* at 120.

139. See Bynum et al., *supra* note 4, at 17 (concluding that empirical risk assessment tools are useful for practitioners, but that more research is needed on the effects of "various treatment approaches and community supervision.").

140. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard . . . and it is to this end, of course, that summons or equivalent notice is employed.").

process of law.<sup>141</sup> Either state or federal law can create liberty interests subject to due process protections.<sup>142</sup> Regardless of the nature of the liberty interest at stake, the Court has held that pre-deprivation process is required when the deprivation is foreseeable or recurring.<sup>143</sup> And, when pre-deprivation process is required, that process typically requires giving the parolee notice of the deprivation and the opportunity to respond to its justifications.<sup>144</sup>

Offenders currently receive a list of their parole conditions prior to release.<sup>145</sup> Presumably, this is enough to satisfy the “notice” requirement of due process. At least in Michigan, however, offenders are not given the opportunity to contest their conditions prior to release<sup>146</sup>—a clear violation of the due process requirement that offenders be given the opportunity to be heard prior to deprivations of fundamental rights.

Supreme Court precedent articulates the constitutional need for pre-deprivation procedure in circumstances where the administrative deprivation drastically changes an inmate’s circumstances and places the inmate at risk of unjustified harm.<sup>147</sup> In *Vitek v. Jones*, the Court held that a Nebraska statute authorizing medical officials to transfer inmates to mental hospitals without a hearing violated due process.<sup>148</sup> The Court determined that the mandatory treatment in the hospital, coupled with the stigmatizing nature of being a mental institution, meant that such a transfer “constituted a major change in the conditions of confinement amounting to a ‘grievous loss’ that should not be imposed without the opportunity for notice and an adequate hearing.”<sup>149</sup>

The Fifth Circuit further interpreted *Vitek* in the context of special conditions of parole for sex offenders. There, the court held that the imposition of parole conditions that are atypical, significantly stigmatizing or harmful to the offender, and highly intrusive on the liberty interests of the offender require proper procedures before such conditions may be imposed.<sup>150</sup> The court determined that, as in *Vitek*, mandatory sex offender therapy for a parolee, absent proof that such

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141. U.S. CONST. amend. XIV, § 1, cl. 3.

142. See *Sandin v. Conner*, 515 U.S. 472, 478–79 (1995).

143. See *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

144. See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard”) (internal quotations omitted); *Morrisey v. Brewer*, 408 U.S. 471, 487–88 (1972).

145. See generally MICH. COMP. LAWS ANN. § 791.236 (West 2011).

146. See First Amended Complaint, *supra* note 55, ¶ 54.

147. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

148. *Vitek*, 445 U.S. at 488.

149. *Vitek*, 445 U.S. at 488.

150. *Coleman v. Dretke*, 395 F.3d 216, 222 (5th Cir. 2004)

treatment was needed, was "qualitatively different from other conditions which may attend an inmate's release."<sup>151</sup> A strong argument exists that the mandatory imposition of "no contact" restrictions, absent proof that such restrictions are needed, also trigger procedural due process under the *Vitek* reasoning. The fact that offenders are entitled and allowed to see their children while incarcerated only lends further weight to the argument that "no contact" rules are "qualitatively different" from the types of restrictions inmates—much less parolees—typically face. As articulated by the *Houle* plaintiffs, seeing one's family, maintaining personal relationships, and developing healthy ties to one's children are all the *normal* elements of being on parole.<sup>152</sup> In fact, they are the types of behaviors that parole is intended to facilitate.<sup>153</sup>

Granted, requiring notice and an opportunity for parolees to be heard will come at a cost to the state. Yet, cost savings alone is rarely a justification for denial of procedural due process, especially when lack of process threatens such a fundamental right as the right to have a relationship with one's children.<sup>154</sup> Moreover, in the interest of protecting fundamental rights of parolees, individualized review should be implemented regardless of cost. As it is, regional parole supervisors and parole board members must return to their old files, spending additional time reviewing new letters from clinical students, speaking with supervisors, and submitting paperwork to modify inappropriate or unnecessary conditions. These modifications probably take more time, and thus more money, away from state officers than an initial individualized review or hearing, prior to the assignment of parole conditions, would require. Thus, in the end, in addition to being unconstitutional, the "no contact" restrictions also amount to an expensive waste of time and resources for the state.

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151. *Coleman*, 395 F.3d at 223.

152. Plaintiffs' Brief in Support of Motion for Preliminary Injunction, *supra* note 63, at 11.

153. See *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (noting that the purpose of parole is to help offenders reintegrate into society and become productive members of their community).

154. See *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision . . . More is implicated in cases of this type than ad hoc weighing [of costs and benefits] . . . The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.").

#### IV. RESTRICTIONS GOING FORWARD: ALTERNATIVES AIMED AT INCREASING PUBLIC SAFETY WITHOUT CONSTITUTIONAL VIOLATIONS

As states continue to grapple with determining the best ways to transition offenders from incarceration into society, legislators and state departments of corrections should learn from the evaluation of restrictive parole conditions and the failures of other states. There are alternatives to the automatic imposition of restrictive “no contact” conditions—alternatives that are not only constitutional, but also could help keep communities safe. These alternatives include individualized assessment of parolees to determine the appropriate conditions; using a baseline assumption that a parolee *should* have contact with his or her children upon release, absent any evidence requiring otherwise; and using the safeguards in place when children visit their parents during incarceration to ensure that visitation between parolees and their children will not be harmful.

None of the below suggestions are meant to be the exclusive way for states to ensure constitutional parole conditions for sex offenders. Rather, they are suggestions for reform in places like Michigan, where “no contact” restrictions are assigned automatically and rarely removed absent intervention from advocates.

##### *A. Streamlining the Decision to Grant Parole and the Determination of Risk*

As a preliminary matter, it is important to recognize how states make their initial parole decisions. In most jurisdictions, an offender is eligible for parole when he has served the court-imposed mandatory minimum for his sentence, less good time credits (if it is not a “truth-in-sentencing” jurisdiction<sup>155</sup>) or including disciplinary credits, where applicable.<sup>156</sup> Once an offender is parole-eligible, he or she typically

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155. “Truth in sentencing” refers to the statutory requirement in some jurisdictions that an offender serve a specific portion of their court-imposed sentence before he or she may be considered for parole. See NAT’L INST. OF CORRECTIONS, U.S. DEP’T OF JUSTICE, STATE LEGISLATIVE ACTIONS ON TRUTH IN SENTENCING: A REVIEW OF LAW AND LEGISLATION IN THE CONTEXT OF THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (1995).

156. See, e.g., *The Parole Consideration Process*, MICHIGAN DEPARTMENT OF CORRECTIONS, <http://www.michigan.gov/corrections/0,1607,7-119-1435-22909--,00.html> (last visited Sept. 14, 2011).

applies to or goes before a state parole board to ask for parole release.<sup>157</sup> In Michigan, a three-member panel of its Parole and Commutation Board considers numerous factors in evaluating whether parole should be granted, including, "the nature of the current offense, the prisoner's criminal history, prison behavior, program performance, age, parole guidelines score, risk as determined by various validated assessment instruments and information obtained during the prisoner's interview, if one is conducted."<sup>158</sup>

With all the detailed assessment that the Parole and Commutation Board is required to conduct before releasing an offender on parole, it is unclear why the Board does not consider assignment of appropriate parole conditions as part of its review. One of the most significant problems with Michigan's current system is that it automatically couples offenses with conditions without reviewing the conditions each offender truly needs. Moreover, Michigan's condition assignment process is done by a computer program and never corrected by the parole board or an inmate's parole officer. But if individual assessment is already happening to determine parole eligibility, why not include assessment of the needed parole conditions for each offender? How much additional time, effort, or cost would be required of the state?

### *B. Determining a Baseline and Analyzing Risk Factors*

If individualized assessment is constitutionally necessary, then the real question becomes one of starting points. Should the Board really have "default" conditions, which serve as a starting point? What should those default conditions be, and what factors should trigger variations from the default?

To uphold the constitutional right of parents to maintain relationships with their children, the Board should start with the assumption that an offender will not be a threat to his or her children, and only depart from that assumption if there is evidence to the contrary. Although advocates have been unsuccessful in advancing this argument for restrictive conditions on residency or registration,<sup>159</sup> the unique constitutional implications of separating an offender from his or her family call for starting with a lower baseline and raising it only when necessary. To avoid constitutional challenges, states should carefully tailor their means to their ends by reserving the most restrictive conditions for the offenders who

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157. *See id.*

158. *Id.*

159. *See generally* Hobson, *supra* note 16, at 973-74.



truly need them most. The default parole condition should be either supervised or unsupervised visitation between the offender and his or her children. Based on the individualized assessment, the Board can increase the restrictiveness of an offender's condition from there, but only in cases where it is truly necessary.

This leads to a second question: what should be taken into account when determining whether an offender is truly a threat to his or her family? According to experts, "recidivism rates vary based on the type of offense and other risk factors such as offender age, degree of sexual deviance, criminal history, and victim preference."<sup>160</sup> In advocating on behalf of individual clients in Michigan, the Michigan Clinical Law Program considers the underlying offense, the age and gender of the victim, the offender's connection to his or her family, the offender's progress in therapy (both while incarcerated and while in the community), and the personal preferences of the other biological parent. Although none of these factors is dispositive, together they paint a picture of an offender's ability to cope with his prior conviction and interact with his family and children in positive, healthy, and meaningful ways.

There is little disagreement that a holistic approach is necessary to determine what triggers an offender's criminal behavior and how to prevent it.<sup>161</sup> Yet, some scholars disagree on the degree to which an offender's prior offense record may be predictive of the types of offenses he or she may be inclined to commit in the future.<sup>162</sup> This argument, often referred to as the "cross-over effect," asserts that some individuals who commit one type of sexual crime, such rape of an adult woman, may also commit other types of sexual crimes, such as sexual assault of a child, if given the opportunity to engage in more aggressive behavior.<sup>163</sup> Because of the cross-over effect, some argue, more restrictive conditions

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160. Fortney et al., *supra* note 15.

161. See, e.g., Kim English, *The Containment Approach to Managing Sex Offenders*, 34 SETON HALL L. REV. 1255, 1263 (2004) [hereinafter English, *Managing Sex Offenders*] (noting the importance of learning an offender's assault patterns, and once they are known, creating "supervision and surveillance strategies that are customized to each offender's" patterns); Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 175 (2005) (arguing that "blanket restrictions may fail to address individualized risk factors that are related to potential offending patterns").

162. Levenson & Cotter, *supra* note 161, at 175.

163. Kim English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, 4 PSYCHOL., PUB. POL'Y & LAW 218, 223-224 (1998) [hereinafter English, *Aggressive Strategy*]; see also Peggy Heil, Sean Ahlmeyer, & Dominique Simons, *Crossover Sexual Offenses*, 15 SEXUAL ABUSE: J. OF RES. & TREATMENT 221, 221 (2003).

are needed to avoid giving "significant access to victims and an inordinate amount of privacy with vulnerable children and adults," which may result in "the approved parole plan . . . [being] the first step in an officially sanctioned opportunity for the offender to rape again."<sup>164</sup>

But, reliance on the so-called "cross-over effect" in setting parole restrictions is speculative at best. There is little to no empirical basis behind the idea that because an offender committed one type of sex offense, against a victim of a particular age or gender, that he or she is likely to commit sexual offenses against anyone else, regardless of age or gender. Kim English, Research Director for the Colorado Department of Corrections, who previously gave weight to the cross-over effect,<sup>165</sup> recently retreated from this stance, noting that Colorado's "containment approach" to sex offenders was not based on the cross-over effect per se, but rather the need to know the "assault history of each offender . . . so that the duration, frequency, and variety of dangerous behavior is fully known by those who intend to provide treatment and supervision."<sup>166</sup>

Aside from the offense of conviction and individualized assessment of sexual proclivities and risk factors, progress in therapy is an important component in developing appropriate parole plans for each offender. Recent studies have shown that sex offender therapy programs, coupled with strong relapse prevention plans, may be quite effective in reducing recidivism rates and curbing criminal tendencies among convicted sex offenders.<sup>167</sup> Risk analysis conducted by the treating therapist at the prison or jail would therefore be a useful tool for corrections administrators and parole boards in deciding on appropriate parole conditions. Therapists' reports will provide vital insight into the risk each particular offender poses to his or her children. Although successful completion of an empirically-based sex offender treatment program will almost never be conclusive in and of itself, completion of therapy and a positive therapy report are certainly important factors to consider in evaluating an offender's potential dangerousness to his own family.

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164. English, *Aggressive Strategy*, *supra* note 163, at 224.

165. English, *Aggressive Strategy*, *supra* note 163, at 224.

166. English, *Managing Sex Offenders*, *supra* note 161, at 1267.

167. See generally R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 *SEXUAL ABUSE: J. OF RES. & TREATMENT* 169 (2002).

*C. Eliminating the Disconnect Between Visitation During Incarceration and Visitation During Parole*

Although there may be strong opposition to setting the default at non-restrictive contact between sex offenders and their own children, especially given the heinous cases usually presented by the news media, perhaps the best argument in favor of such an approach is the fact that offenders are permitted to interact with their families while they are still incarcerated. Inmates serving active sentences are often allowed visitation rights with their families—albeit only on certain days and at certain times, and only after an application for visitation is approved.<sup>168</sup> Visitation rights may be taken away, however, if the inmate is involved in an altercation or disciplinary infraction within the facility, or if there are institutional security concerns.<sup>169</sup> With the rare exception,<sup>170</sup> however, the baseline rule adhered to by the MDOC is that all inmates are allowed to visit with their minor children—even inmates in maximum-security facilities and administrative segregation units.<sup>171</sup>

Parsing the distinction between appropriate policies for inmates versus parolees is important, particularly because a parolee's "condition is very different from that of confinement in prison," in that a parolee enjoys substantially more freedom and liberty than those who remain incarcerated.<sup>172</sup> Although it is true that visitation rooms in prisons are relatively controlled environments where the potential for abuse is low, and inmates remain under the watchful eye of correctional officers at all times, there is no reason to assume that such protections are impossible in "free world" visitation as well. Perhaps, where necessary, some of the methods of protection and safety utilized during visits to corrections facilities could be required for home visits as well. Supervised visitation

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168. See *How Do I Visit a Prisoner?*, MICHIGAN DEPARTMENT OF CORRECTIONS, [http://www.michigan.gov/corrections/0,1607,7-119-9741\\_12798-179676--,00.html](http://www.michigan.gov/corrections/0,1607,7-119-9741_12798-179676--,00.html) (last visited Jan. 25, 2011).

169. See generally *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (upholding restrictions on visitation in part for reasons of institutional security, and because inmates had other means to communicate with their loved ones, i.e. telephone calls and letters).

170. The MDOC requires special approval for an inmate's child to visit the inmate in prison if that child was the victim of the inmate's criminal sexual conduct offense. MICHIGAN DEPARTMENT OF CORRECTIONS, *supra* note 168.

171. See Memorandum from Dennis M. Straub, Deputy Director, Correctional Facilities Administration, Michigan Department of Corrections, to Wardens, Correctional Facilities Administration, Michigan Department of Corrections 3 (July 26, 2010), available at [http://www.michigan.gov/documents/corrections/Visiting\\_Standards\\_-\\_2007\\_209112\\_7.doc](http://www.michigan.gov/documents/corrections/Visiting_Standards_-_2007_209112_7.doc) (last visited Jan. 25, 2011).

172. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

remains a perfectly viable equivalent. By requiring the presence of an adult responsible for the child's well-being, or in special cases requiring the presence of the parole officer, administrators can ensure the safety of the children and avoid the significant constitutional violations caused by no-contact restrictions.

### CONCLUSION

As state and local lawmakers continue to move toward more restrictive parole conditions for sex offenders, it is worth pausing to ask whether our policy goals are being met. Residency restrictions, registration requirements, and now, in some states, "no contact" restrictions, serve only as bricks in walls we hope to build around those whom we fear—individuals capable of sexually violating us, or worse, our children. Yet, in our attempt to "contain" sex offenders, one of the most complex and challenging groups involved in the criminal justice system, we may not be doing what is actually best for our communities. Public perceptions about sex offenders are greatly contradicted by empirical research.<sup>173</sup> Moreover, cutting offenders off from society, and from their families in particular, may actually increase their propensity to recidivate.

At the crossroads of public safety and constitutional rights, states must think intelligently and compassionately about the relationship between a parolee and his or her child. Most offenders will pose no risk to their children. The collateral consequences of family separation are great, for offenders, their children, and the greater community. By conducting case-by-case reviews of each offender to determine the appropriate conditions for his or her parole, and by starting with the presumption of the least restrictive alternative, states will go a long way in potentially improving public safety and protecting the constitutional rights of parolees. ✿

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173. Jill S. Levenson, Yolanda N. Brannon, Timothy Fortney & Juanita Baker, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOCIAL ISSUES & PUB. POL'Y 1, 2 (2007).

