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Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives

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BANISHMENT OF SEX OFFENDERS: LIBERTY, PROTECTIONISM, JUSTICE, AND ALTERNATIVES

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ABSTRACT

Although most sex offenses are committed by relatives or acquaintances of the victims, our public policy approach has been to focus on the stranger sex offender and punish sex offenders through residency restrictions. These residency restrictions effectively banish these locally undesirable and dangerous individuals from our communities in fear that they may reoffend in our neighborhoods. Rather than being thrust into some wilderness, sex offenders are "banished" to neighboring counties or states and into poor, minority neighborhoods where they often live in boarding houses with other sex offenders.

Banishing sex offenders through these residential restrictions impacts individual liberty, our national structure, and social policy considerations. This Article offers a legal analysis of the adverse impacts these restrictions impose on the constitutional rights of both sex offenders and our communities, which for economic or political limitations do not have the appropriate representation to mitigate these consequences. This Article also examines what methods from the environmental justice movement might be available to deal with the "social justice" issue of sex offenders disproportionately burdening poor, minority communities. Finally, because there is not yet evidence to support the efficacy of residency restrictions on sex offender recidivism, this Article concludes that legislators should reexamine the current trend of using residency restrictions to address concerns about sex offender recidivism. Instead, public policy decision makers should look toward alternatives, such as individualized risk assessment and management of these individuals, so

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that public resources can be properly directed to confine, monitor, and treat those sex offenders most likely to commit serious reoffenses.

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INTRODUCTION

Banishment is "a form of punishment imposed on an individual, usually by a country or state, in which the individual is forced to remain outside of that country or state."[1] It is also a traditional criminal sentence used by Native American tribes, to expel an offender "for the protection of the community."[2] Although most of us may think of banishment as archaic

1. American Law Encyclopedia, Banishment—Further Readings, http://law.jrank.org/pages/4646/Banishment.html (last visited May 13, 2009).

2. PAWNEE TRIBE OF OKLA. LAW AND ORDER CODE tit. V, § 404(a) (2005), *available at* http://www.narf.org/nill/Codes/pawneecode/crimproc.htm (defining banishment as "the traditional and customary sentence imposed by the Tribe for offenders who have been convicted of offenses which violate the basic rights to life, liberty, and property of the community and whose violation is a gross

or tribal, it is still used in some states as punishment,[3] and it appears to be the underlying basis of some of the recent legislation attempting to protect society against sex offenders.[4] About two dozen states and hundreds of local governments have created legislation to exclude sex offenders from living within proscribed areas around schools, parks, day care centers, or areas where children are known to congregate.[5] Part I of this Article views state and local exclusionary residence laws in the context of banishment, as it was historically understood, and explores how courts and policy makers view this concept as applied to sex offenders.

Recent cases have shown that courts are upholding the constitutionality of such restrictions,[6] although the Georgia Supreme Court struck down such a restriction on the constitutional ground that Georgia's law operates as a regulatory taking of property without just compensation.[7] Part II briefly discusses the major constitutional challenges to these residency restrictions. It also examines the potential challenges to private restrictive covenants created to exclude sex offenders from moving into privately controlled residential areas.

The practical effect of banishment on a national level must be understood in the context that there are few places in modern-day America to which a sex offender may be banished that are isolated from the rest of society. Rather than being excluded and thrust into some undeveloped wilderness, sex offenders are banished through residency restrictions to

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violation of the peace and safety of the Tribe requiring the person to be totally expelled for the protection of the community").

3. *See infra* Part I.B.

4. *But see* Doe v. Miller, 405 F.3d 700, 719–20 (8th Cir. 2005) (concluding Iowa statute which restricts the residency of sex offenders is not analogous to banishment and not punitive).

5. *See* Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 515 (2007) (noting that "[a]t least twenty-seven states and numerous municipalities" have restricted the residency of sex offenders); *see also* Kennedy v. Louisiana, 128 S. Ct. 2641, 2670–71 (2008); Jill Levenson et al., *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, FED. PROBATION, Dec. 2007, at 2; Wayne A Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 3 (2006); Caleb Durling, Comment, *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, 317 (2006). For a sampling of state residency restriction statutes, see *infra* note 75.

6. *See*, *e.g.*, Smith v. Doe, 538 U.S. 84, 106 (2003) (finding Alaska's sex offender registration and notification laws nonpunitive and for the protection of the public); *Miller*, 405 F.3d at 718–19 (holding that Iowa's police power could be used to establish residency restrictions for sex offenders, and such was a valid state purpose and furthered the health and safety of Iowa's citizens); State v. Seering, 701 N.W.2d 655, 670–71 (Iowa 2005) (upholding the same Iowa statute as constitutional).

7. Mann v. Ga. Dep't of Corr., 653 S.E.2d 740, 746 (Ga. 2007).

neighboring counties or states[8] and into poor, minority neighborhoods where they often live in boarding houses with other sex offenders.[9]

Banishment also brings with it federalism concerns similar to those that arise when states or municipalities attempt to exclude hazardous waste disposal from within the state. Such protectionist legislation has been the fodder of many lawsuits claiming Dormant Commerce Clause violations.[10] Judicial and legislative efforts to banish sex offenders to other states may also run afoul of Dormant Commerce Clause principles, which operate to discourage states from such protectionist activities. Part III explores the nationalism concerns under the Dormant Commerce Clause when residency restrictions at the state and local levels "dump" sex offenders into neighboring jurisdictions.

Disproportionate siting of sex offenders into poor neighborhoods of color is a social disaster. These neighborhoods are often characterized by dense living conditions and less parental supervision, providing ample opportunity for convicted offenders to reoffend.[11] This overconcentration of offenders may also result in lowered property values and other adverse community impacts.[12] The federal government addressed a similar issue when studies in the late 1980s reported that hazardous waste sites were being placed near poor and primarily minority neighborhoods. In 1994,

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8. *See* Logan, *supra* note 5, at 9 (noting that both state and local governments have shown interest in residency restrictions and "localities in jurisdictions adjacent to states with exclusion laws, fearful of an influx of sex offenders, have seized the initiative and enacted their own laws").

9. *See infra* note 224 and accompanying text. In the aftermath of Megan's Law, the California Department of Justice currently provides a public website allowing any person to search for registered sex offenders living in any area of California. Office of the Attorney General, Megan's Law Home, http://www.meganslaw.ca.gov (last visited May 13, 2009). A brief review of several southern California areas reveals that there are disproportionately more registered sex offenders living in poor and minority neighborhoods than in middle- or upper-class neighborhoods. Among the lower class neighborhoods, East Los Angeles (notorious for both poverty and crime) yielded the highest number of registered offenders in a single zip code with seventy-seven registered offenders. A close second was Fontana, having 197 registered sex offenders living within its five zip codes. Finally, Chino, spanning two zip codes, serves as a home to forty-five registered sex offenders. At the other end of the spectrum, the affluent neighborhood of Rancho Santa Margarita in Orange County reported zero registered sex offenders within its zip code. Moreover, La Cañada and Pacific Palisades showed a combined three registered sex offenders in three zip codes. Arcadia, a middle-class community located twenty miles east of downtown Los Angeles, recorded only twelve hits in four zip codes. The figures, although not comprehensive, tend to show that sex offenders are congregating in poorer neighborhoods.

10. *See infra* notes 179–221 and accompanying text.

11. *See* Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, 989 ANNALS N.Y. ACAD. SCI. 337, 344–45 (2003) (noting that websites used to notify communities about sex offender registrants are problematic in poorer communities, which may not have access to the Internet, and in which "registrants tend to cluster given the greater availability of affordable housing").

12. *See infra* notes 250–59 and accompanying text.

President Bill Clinton tried to remedy the problem with Executive Order 12,898, which required all federal agencies to consider, as a factor, the "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[13] In addition to the public policy approaches taken to resolve environmental justice concerns, the Fair Housing Act has been considered an important litigation tool to address this indirect racism. Part IV examines what methods from the environmental justice movement might be available to deal with this social justice issue of sex offenders disproportionately burdening the unwary in poor minority communities.[14]

The banishment of sex offenders through residential restrictions, whether legislative or private, impacts individual liberty, the division of power between states and the federal government, and social policy considerations. This Article offers a legal analysis of the adverse impact these restrictions impose on the constitutional rights of the sex offenders and the rights of communities to which they have been effectively banished, which because of economic or political limitations lack the appropriate representation to mitigate these consequences. Finally, because "there is no evidence to support the efficacy of broadly-applied residential restrictions on sex offenders,"[15] Part V briefly addresses alternative approaches to deal with concerns about sex offender recidivism.

I. BANISHMENT OF SEX OFFENDERS

A. The Problem of Sex Offenders in Society

No one wants a sex offender or child molester living in his or her neighborhood. In this Article, the author has classified these individuals as Locally Undesirable and Dangerous Individuals (LUDIs), coining this phrase to indicate a similarity to those noxious land uses aptly named Locally Undesirable Land Uses (LULUs).[16] However, just as noxious land uses have varying degrees of danger, as in the case of a toxic waste site

13. Exec. Order No. 12,898, § 1-101, 59 Fed. Reg. 7629 (Feb. 11, 1994).

14. For a brief explanation of how environmental justice is a response to indirect racism, see *infra* note 226 and accompanying text.

15. Richard Tewksbury, *Exile At Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 539 (2007) (quoting Am. Corr. Ass'n, Resolution on Neighborhood Exclusion of Predatory Sex Offenders (Jan. 24, 2007)).

16. *See* Logan, *supra* note 5, at 10 (observing that residency restriction laws "share an obvious common motivation with other types of Not in My Backyard ("NIMBY") legislation" and that these types of "efforts to exclude socially undesirable individuals" are historically grounded).

versus a municipal waste site, sex offenders may also be classified into different levels to indicate the risk associated with their behavior. The violent sexual predators, at the highest risk level to the community, would be roughly equivalent in degree to the presence of a nearby toxic waste site. Those offenders with a lesser sexual offense on record, such as indecent exposure, may still be of concern to the community, but generate a less adverse reaction similar to a community's desire to avoid a municipal waste siting. Communities and legislators have struggled to cope with concerns about the presence of these individuals in their neighborhoods after they have been released from prisons or other institutions.[17]

Relatively little is known about sex offenders and how best to deal with them through treatment and the criminal justice system.[18] There is not agreement among the experts as to whether there is an efficacious sex offender treatment model.[19] More research, and the communication of these research results from professionals, needs to occur so that the public and the policy makers understand that most sex offenders will return to the community and that risk assessment, treatment, and management options should be considered from a science-based approach rather than an emotionally charged approach.[20]

One major concern about these undesirable individuals is that they will reoffend and that the recidivism rate is higher for sex offenders than it is for other criminals.[21] Recent studies have shown that sexual recidivism is indeed a concern, as cumulative recidivism rates increase with time, even

17. *See, e.g.*, Tucker Carlson, *The Child Molester Next Door, No One Wants Released Offenders*, BALT. SUN, June 18, 1995, at 1F (discussing ex-felon who abducted, tortured, raped, and strangled an eight-year-old girl within months after being released from prison, where he served only five years of a twenty-year sentence).

18. *See* Laurie O. Robinson, *Sex Offender Management: The Public Policy Challenges*, 989 ANNALS N.Y. ACAD. SCI. 1, 3 (2003); *see also* Marnie E. Rice & Grant T. Harris, *What We Know and Don't Know About Treating Adult Sex Offenders*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 101, 103 (Bruce J. Winick & John Q. LaFond eds., 2003) (stating that "there are too few well-controlled studies of sex offender treatment to conduct an informative meta-analysis").

19. *See* Eric S. Janus, *Treatment and the Civil Commitment of Sex Offenders*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 119, 121 (noting that some have an optimistic outlook about the efficacy of treatment while others have found there to be no evidence showing that treatment can reduce recidivism); *see also* R. Karl Hanson et al., *Sexual Offender Recidivism Risk: What We Know and What We Need to Know*, 989 ANNALS N.Y. ACAD. SCI. 154, 162 (2003) ("[R]esearchers and policymakers have yet to reach consensus on whether treatment effectively reduces sexual recidivism.").

20. *See* Robinson, *supra* note 18, at 3–4.

21. *See* Rice & Harris, *supra* note 18, at 102 (noting that "the ultimate goal of sex offender treatment is the reduction of recidivism"); *but see infra* note 291 and accompanying text.

though individual offenders are less likely to recidivate the longer they remain offense-free in the community.[22] Unfortunately, there do not appear to be any published studies of sex offender recidivism that have shown treatments which have the "substantial ability to lower recidivism" rates.[23] In fact, some have concluded that sexual deviance and aggressive behavior "can be attributed to genetically and physiologically based enduring traits that, once initiated, exhibit life-long persistence."[24]

Another difficulty with addressing sex offending through public policy is that much of the public outcry and legislative action has resulted "from widely publicized heinous sex crimes committed by stranger offenders" rather than from the more prevalent victimizations that occur through incest and violations by a trusted authority figure.[25] More than ninety percent of sex crimes against children are committed by fathers, stepfathers, relatives, and acquaintances, rather than by the strangers.[26] In fact, the percentage of nonstranger molestations may be even higher as the majority of this type of sexual abuse is not reported and/or prosecuted.[27] Therefore, current legislation and public awareness focusing on the stranger may keep us from addressing solutions that would aid the majority of victims.[28] Educating parents and children about this higher risk from family members and acquaintances, along with teaching better communication skills about uncomfortable topics, may better protect our children against traumatic abuse than concentrating on legislation to protect them against strangers.[29]

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22. *See* Hanson et al., *supra* note 19, at 154–57. It has been predicted that "the 'typical' sexual offender has a 20% chance of reoffending," but that the actual cumulative recidivism rate may be in the range of 35–55% over a twenty-year period. *Id.* at 155, 157.

23. Grant T. Harris & Marie E. Rice, *Actuarial Assessment of Risk Among Sex Offenders*, 989 ANNALS N.Y. ACAD. SCI. 198, 207 (2003).

24. *Id.* at 208; *see also id*. (concluding that "[u]ntil treatment efficacy is demonstrated, the best that clinicians can do is to carefully assess risk and manage offenders accordingly, while continuing the search for effective interventions").

25. Leonore M. J. Simon, *Matching Leal Policies with Known Offenders*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 149, 149–50.

26. *See id.* at 150.

27. *See id.* While this estimate may have some margin for error, most studies have found similar percentages. *See* Durling, *supra* note 5, at 329–32.

28. *See* Simon, *supra* note 25, at 150 (noting that this "focus on the stranger offender belies the danger and harm posed by offenses committed by nonstrangers" which has a more devastating impact on victims "because of the betrayal of a trusted relationship").

29. *See id.* at 156; *see also* Jessica Coomes, *Residency Plan Targets Sex Offenders*, THE ARIZ. REPUBLIC, Mar. 16, 2007, *available at* http://www.azcentral.com/specials/special12/articles/0316 offender-buffer0316.html (quoting Nancy Sabin, executive director of the Jacob Wetterling Foundation, a victim advocacy organization in Minnesota, as saying "[a] national hysteria about sex offenders has led to illogical public policy that has not been proven to make children safer").

Society and the law must deal with the dangers of sex offenders while making sure that justice is done and constitutional constraints are observed.[30] In addition to criminal confinement, the three main legal mechanisms employed to deal with sex offenders in the last twenty years are identification and registration, restrictions on the location for housing and employment, and civil commitment.[31] Identification and registration systems requiring community notification as to the location of LUDIs were enacted nationwide during the 1990s in response to a number of high-profile sexual predator victimizations.[32] Megan's Law was enacted on a federal level in 1996 to encourage states to protect the public through sex offender registration and community notification.[33] Civil sex offender commitment laws have also received renewed support in the 1990s as we have become frustrated with the ability of the criminal justice system to keep sex offenders from reoffending.[34] However, this approach has been criticized since the goal of these laws is "'to incapacitate sex offenders and to reduce recidivism'" and the criminal system may be better equipped to meet such confinement expectations[35] within constitutional constraints requiring treatment.[36]

In recent years, sex offender laws have been directed at reducing recidivism risk by offender confinement, notice to potential victims, and expulsion. It appears that

> these new policies transfer the risk to two groups—sex offenders themselves, who may face permanent confinement or the risks of public lynching, and the individual citizens, community organizations, and families, who are expected to police themselves

30. *See* Stephen J. Morse, *Bad or Mad?: Sex Offenders and Social Control*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 180, 180 (concluding that "[a]lthough there are inevitable and difficult trade-offs in a free society between liberty and safety, a robust moral model robustly applied to sex offenders provides the greatest potential to achieve both justice and safety").

31. *See infra* notes 32–34 and accompanying text.

32. Logan, *supra* note 11, at 337.

33. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified at 42 U.S.C. § 14071 (2000)) (providing for public disclosure of detailed information on the whereabouts of registered sex offenders).

34. W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 27, 27–28.

35. *Id.* at 36 (quoting COMM. TO STUDY SEXUALLY VIOLENT PERSONS, REPORT OF THE COMMITTEE TO STUDY SEXUALLY VIOLENT PERSONS 2 (1999)).

36. *See* Janus, *supra* note 19, at 119–20.

> against sex offenders—with the role of the state reduced to that of facilitating protection through warnings.[37]

Unintended consequences may result from these new policies by causing sex offenders to encounter extreme difficulty in finding housing and employment.[38] Evidence is not yet available to indicate whether existing residency restrictions are effective to prevent recidivism. In fact, a 2007 study by the Minnesota Department of Corrections indicated that the major factor in sexual recidivism was the social relationship with the victim, not the residential proximity of the sex offender to the victim.[39] Although the alternative solutions will be briefly discussed in Part V, the focus of this Article is on the residential restriction approach, which attempts to exile or banish sex offenders from specific communities rather than identify or confine them.[40]

B. Banishment as an Alternative to Incarceration

Banishment was originally an effective punishment because it not only forced the offender to live in harsh physical conditions in the wilderness, but it also created emotional hardship by removing the offender from the support of family, neighbors, and the community.[41] Today, this

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37. Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 301, 314; *see* Patt Morrison, *Megan's Law of Unintended Consequences*, L.A. TIMES, Dec. 13, 2007, at A27, *available at* http://articles.latimes.com/2007/dec/13/opinion/oe-morrison13 (discussing vigilante case where a convicted rapist was killed by a fellow resident in a trailer park who was worried about the offender attacking his son after reading about his neighbor as a registered sex offender); *see, e.g.*, Brandon Bain & Erik German, *How a Cluster Grew So Large: Low Rents, Willing Landlords and Politics Play Roles*, NEWSDAY.COM, Sept. 26, 2006, http://www.newsday.com/news/nationworld/nation/ny-lisex264906969sep26,0,3948394.story?coll=ny-leadnationalnews-headlines (noting that a local man "was charged with attempted murder and attempted arson in an alleged plot to burn down the house [of sex offenders] and kill its occupants").

38. Michael Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 714–15 (2005).

39. *See* Levenson et al., *supra* note 5, at 2–3; *see also* Pamela Foohey, Note, *Conversation: GPS Monitoring of Domestic Violence Offenders: Applying the Lessons of GPS Monitoring of Batterers to Sex Offenders*, 43 HARV. C.R.-C.L. L. REV. 281, 283 (2008) (noting that "according to critics, residency restrictions do nothing to deter sex offenders from re-offending").

40. Brady Dennis & Matthew Waite, *Where Is a Sex Offender to Live?*, ST. PETERSBURG TIMES, May 15, 2005, at A1 (quoting Miami resident as saying, "I don't really care where they live," and "[a]t this point I don't care if they live out of civilization").

41. *See* American Law Encyclopedia, *supra* note 1. While banishment may take on many forms, at its core it involves three elements: (1) "expulsion in fact of a person from a community"; (2) "banishment . . . to a non-institutional setting"; and (3) "banishment is intended to sever ties to a community." Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 134 (2007).

punishment may still result in emotional hardship because of the removal from a particular community; however, the offender may more easily move into another unsuspecting community, without the hardship of living in the wilderness.[42] Thus, "[o]ne community's exile becomes the neighboring community's problem."[43] In 1930, the Michigan Supreme Court ruled in *People v. Baum*[44] "that citizens of the United States cannot be 'dumped' or exiled upon sister states and that interstate banishment is disruptive of the Union and against public policy."[45] Some states, such as California, have continued to follow the *Baum* decision and have determined that, just as a state could not banish a criminal to another state, a county or city could not suspend a judgment of imprisonment based on a condition that the defendant leave a particular county and stay away for a period of time.[46] Several states have explicit constitutional provisions or statutes prohibiting or restricting the exile of citizens.[47]

"Banishment has a long history in Western societies," which have utilized expulsion, prison colonies, and internal exile.[48] Modern banishment examples illustrate how this mechanism has been used to accomplish various purposes, including punishment, rehabilitation, and

42. *Compare* Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962) (holding that banishment condition is unconstitutional as either cruel and unusual punishment or denial of due process), *with* Lori Sue Collins, *Residency Restrictions on Sex Offenders—My Life Before and After HB 1059*, 42 HARV. C.R.-C.L. L. REV. 501 (2007) (discussing one sex offender's compelling story about the difficulty of dealing with housing, employment, and social connections given residency restrictions applied to her after her release from prison).

43. American Law Encyclopedia, *supra* note 1.

44. 231 N.W. 95 (Mich. 1930).

45. Brent T. Lynch, *Exile Within the United States*, 11 CRIME & DELINQUENCY 22, 25 (1965).

46. *See Ex parte* Scarborough, 173 P.2d 825, 826–27 (Cal. Dist. Ct. App. 1946); *see also* People v. Blakeman, 339 P.2d 202, 202–03 (Cal. Dist. Ct. App. 1959) (finding "[i]t was beyond the power of the court to impose banishment as a condition of probation" and that public policy does not permit "one political division to dump undesirable persons upon another").

47. *See, e.g.*, ALA. CONST. art. I, § 30 (2006) ("That immigration shall be encouraged; emigration shall not be prohibited, and no citizen shall be exiled."); ARK. CONST. art. II, § 21 ("[N]or shall any person, under any circumstances, be exiled from the State."); GA. CONST. art. I, § 1, para. XXI ("Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime."); ILL. CONST. art. I, § 11 ("No person shall be transported out of the State for an offense committed within the State."); MASS. CONST. pt. I, art. XII ("And no subject shall be arrested, imprisoned . . . exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."); TEX. CODE CRIM. PROC. ANN. art. 1.18 (Vernon 1965) ("No citizen shall be outlawed, nor shall any person be transported out of the State for any offense committed within the same.").

48. Yung, *supra* note 41, at 106; *see also id.* at 106–12. As an example, Yung notes the Soviet Union's "*Propiska*" policy which restricted the movement and domicile of "undesirable[]" citizens beyond the now-notorious 101st kilometer. *Id.* at 102. However, while modern prisons serve the same purpose, banishment itself has been disfavored in post-colonial America. *Id.* at 112–13.

isolation.[49] Some Native American tribes have modernly used banishment as punishment,[50] and some states have allowed judges to condition release of a prisoner on the prisoner's voluntary agreement to be exiled to another state or community in order to avoid punishment through continued confinement. For example, the Utah Supreme Court in *Mansell v. Turner* held that so long as the prisoner is given a choice between banishment and continued incarceration, such a condition should be upheld.[51] A federal court in *Rutherford v. Blankenship* also distinguished between banishment as a voluntary condition that is part of a plea bargain agreement and a mandatory court sentence that banishes the defendant.[52] Nevertheless, the *Blankenship* court held that the banishment condition, which required the defendant to leave Virginia after his twelve-month sentence for felony maiming, was unenforceable and he was committed to the original ten-year sentence, which had been suspended in exchange for his agreement to leave the state.[53]

While some states have allowed banishment to be used as a probationary condition in lieu of punishment through incarceration, other state courts have tended to use banishment for rehabilitation purposes and as a way to isolate the defendant from potential victims. The Mississippi Supreme Court in *Cobb v. State* upheld a probation condition requiring the defendant "to stay out of Stone County."[54] The defendant, Cobb, pled guilty to aggravated assault for shooting his nephew (his brother's son), but his twelve-year sentence was suspended and replaced by a five-year probationary term with the banishment condition because Cobb had displayed an uncontrollable temper and Cobb's residence in Stone County

49. Banishment for political purposes is not addressed in this Article. For a discussion of such, see Juan O. Tamayo, *Banishment Wears Down Cuban Dissidents*, MIAMI HERALD, Sept. 5, 1996, at 12A (discussing Cuban "tactics to control dissent" by "banishing critics to the provinces, pushing them into exile abroad or restricting their movements in and out of Havana").

50. Marissa Stone, *Dancing With Fire: Santa Clara Tribal Member Banished from Taos Pueblo for Writing About Tribe's Sacred Deer Dance*, THE NEW MEXICAN, Feb 6, 2004, *available at* http://www.williams.edu/go/native/naranjo.htm (discussing the story of a Santa Clara tribal member, married to a woman from Taos Pueblo, who was required to leave pueblo tribal land because he "caused irreparable harm to the sensible nature of the religious activity through exploitation" by writing an essay about Taos Pueblo's deer dance, which was published in a local paper); *see also* Dennis W. Lund, *Modern Applications of Traditional Sanctions*, 40 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 347, 349–50 (describing a situation where two Alaskan Tlingit Indian seventeen-year-olds were referred by a Washington state court to a tribal panel in 1994 to both punish and rehabilitate them for an aggravated assault which the youths committed).

51. Mansell v. Turner, 384 P.2d 394, 395 (Utah 1963); *see also* Lynch, *supra* note 45, at 22, 26.

52. Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979).

53. *Id.* at 1361.

54. Cobb v. State, 437 So. 2d 1218, 1220 (Miss. 1983).

was less than half a mile from his brother's house.[55] The court found "that the conditions imposed by the sentencing judge were reasonably related to Cobb's circumstances and his intended rehabilitation."[56] Subsequent banishment cases in Mississippi in 1991 and 2000 followed the *Cobb* decision and required that probationary terms with a banishment condition serve some rehabilitative purpose and bear a reasonable relationship to the offense committed.[57]

Rehabilitation purposes were served in an Illinois banishment case restricting a prostitution defendant from entering a fifty-block area of downtown Champaign as part of her probationary conditions.[58] Georgia courts have also agreed that banishment from certain areas of the state is a valid condition of probation, if reasonable and supported by rehabilitative purposes.[59] In *State v. Collett*, the Georgia Supreme Court upheld a trial court banishment of a drug offender, who was required to remain outside seven Georgia counties as a condition for suspending his sentence.[60] The banishment condition imposed within the state was not unreasonable and was related to the rehabilitative purpose of the drug crime sentence, even though "[t]he 1945 Georgia Constitution . . . expressly forbids banishment

55. *Id.* at 1219–20.

56. *Id.* at 1220–21.

57. *See* McCreary v. State, 582 So. 2d 425, 428 (Miss. 1991) (reversing sentence requiring the banishment of a rape defendant from the state because "banishment from a large geographical area, especially outside of the State, struggles to serve any rehabilitative purpose, and implicates serious public policy questions against the dumping of convicts on another jurisdiction"). A Mississippi court has required that a probation condition mandating that the defendant

> never return to the First Circuit Court District . . . must bear a reasonable relationship to the purpose of probation, the ends of justice and the best interests of the defendant and the public must be served, the public policy must not be violated, the rehabilitative purpose of the probation must not be defeated, and the defendant's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution must not be violated.

Hamm v. State, 1999-CP-00586-COA (¶ 12), 758 So. 2d 1042, 1045 (Miss. Ct. App. 2000).

58. People v. Pickens, 542 N.E.2d 1253, 1255 (Ill. App. Ct. 1989) (noting that geographic travel restrictions have been upheld by state courts to achieve rehabilitation and deterrence and that the restriction "would maximize defendant's chance of staying away from prostitution activity and . . . it was a reasonable and necessary condition to assist defendant in avoiding future criminal conduct"). *But see* People v. Harris, 606 N.E.2d 392, 397 (Ill. App. Ct. 1992) (finding a probation condition banishing a robbery defendant from the state is unreasonable, overbroad, and serves no valid purpose).

59. *See, e.g.*, Sanchez v. State, 508 S.E.2d 185, 186 (Ga. Ct. App. 1998) (finding that banishing an illegal alien from the state bore no "logical relationship to the rehabilitative purposes of a sentence for battery"); Wilson v. State, 260 S.E.2d 527, 531 (Ga. Ct. App. 1979) (upholding banishment of defendant convicted for terroristic threats against a woman and her family from the county as a condition to the court suspending his sentence against a per se attack).

60. State v. Collett, 208 S.E.2d 472, 474 (Ga. 1974) (presuming the regulation to be reasonable and finding "no showing . . . that the imposed condition to remain outside the seven specified counties for the period of the sentence (12 months) is unreasonable or otherwise fails to bear a logical relationship to the rehabilitative scheme of the sentence pronounced for this drug crime").

beyond the limits of the state."[61] Relying on *Collett*, the Georgia Supreme Court in its most recent banishment case, *Terry v. Hamrick*, upheld the banishment of a criminal defendant from 158 of Georgia's 159 counties because it did not banish him from the limits of the state.[62]

Most of the modern banishment cases require the state to show a logical relationship to a rehabilitative purpose before upholding geographically restrictive probationary conditions that are not unreasonable and do not violate public policy.[63] If the restricted area is reasonable in size and does not ban the defendant from the state entirely, such banishments have generally been upheld.[64] However, as the purpose of the banishment moves from rehabilitation to isolation, constitutional concerns related to the punitive nature of such isolation may arise.[65] Although isolation may be considered therapeutic or rehabilitative in some circumstances, in extreme cases it may constitute cruel and unusual punishment.[66]

Isolating defendants from the temptation to reoffend, as described above in the prostitution and drug offender cases, may logically relate to the defendant's rehabilitation. However, isolation may also be used either to protect the defendant from others or to protect the defendant's victim from the defendant. In *People v. Beach*, the court used a residency restriction to protect an elderly widow, who shot and killed a man she allegedly believed to be an intruder, from either reoffending or from the potential backlash of the community.[67] As a condition of her probation for an involuntary manslaughter conviction, the trial judge ordered the woman

61. *Id.* at 472–73 (citing GA. CODE ANN. § 2-107, art. I, § 1, para. 7 (1945)).

62. Terry v. Hamrick, 663 S.E.2d 256, 258–59 (Ga. 2008) (upholding the banishment condition because it was not unreasonable and it was logically related to rehabilitation); *see also* Hallford v. State, 657 S.E.2d 10, 13 (Ga. Ct. App. 2008) (upholding condition of banishment because it protected victim and served "a rehabilitative purpose by removing a temptation by [defendant] to re-offend").

63. *See supra* notes 54–56, 57–60, and 62.

64. *See supra* notes 54–56, 57–60, and 62.

65. As addressed in Part I.C, residency restrictions are geared more toward isolation than rehabilitative purposes. Part II addresses the major constitutional concerns about these restrictions, while Part III addresses Dormant Commerce Clause concerns about such.

66. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) (concluding that solitary confinement for some inmates may constitute cruel and unusual punishment under the Eighth Amendment); *see generally* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).

67. People v. Beach, 147 Cal. App. 3d 612, 618–19 (Ct. App. 1983). The underlying altercation began when the widow smeared fecal matter on the alleged intruder's windshield after he parked in her driveway, refused to move it, and then left the area. *Id.* at 619. When the alleged intruder returned, there was a verbal altercation and the widow, claiming she feared for her safety, shot him in defense. *Id.*

to relocate from her long-time home, both to prevent future acts of violence by her and to protect her personal safety from others in the community who might wish revenge.[68] The appellate court found this condition unreasonable and unconstitutional because the psychological stress caused by removing an elderly person from her home was "not necessarily rehabilitative" and the "value to the public does not manifestly outweigh any impairment of appellant's constitutional rights."[69]

Banishment used to isolate a defendant, whether to protect the defendant, as with the widow in the *Beach* case above, or to protect others from the defendant, is problematic and may be unconstitutional. In *State v. Stewart*, the trial court imposed a geographic restriction on the defendant as a condition of his probation in order to protect the victims of his crimes against future offenses of public nudity, masturbation, and the abuse of his wife and children.[70] Nevertheless, the appellate court found that this banishment from the entire township was too broad and that the term of his probation, which required that he have no contact with his victims or their families, was sufficient under the circumstances to protect the community.[71]

A similar effort to banish a sex offender from the county in which he resided was held to be unenforceable by the Montana Supreme Court in *State v. Muhammad*.[72] The court found that the banishment probation condition imposed by the trial court, presumably to protect the fourteen-year-old victim, "is not reasonably related to the goals of rehabilitation and is broader than necessary to protect the victim."[73] However, five years later in 2007, the Montana Supreme Court in *State v. Meyers* upheld a residency restriction preventing a domestic violence defendant from residing in a particular county unless he was also employed in that county.[74] In light of the heightened concerns about sex offenders, it seems

68. *Id.* at 620.

69. *Id.* at 622–23. The court further noted that "there were in fact other means that the court did utilize that were less subversive to appellant's constitutional rights and still comported with the purposes intended by the grant of probation." *Id.* at 623.

70. State v. Stewart, 2006 WI App 67, ¶ 15, 291 Wis. 2d 480 713, N.W.2d 165, 170 (Wis. Ct. App. 2006) (noting the trial court's finding that the defendant "'seemed to take a perverse delight in going after these particular neighbors'" and thus banishment from the neighborhood served to protect the community).

71. *Id.* ¶¶ 15–22 (holding that banishing the defendant from the township served the purposes of probation and extended supervision, but it was "unduly restrictive of his liberties" because it was too broad under the circumstances).

72. State v. Muhammad, 2002 MT 47, ¶ 27, 304 Mont. 1, 9, 43 P.3d 318, 324 (Mont. 2002).

73. *Id.*

74. State v. Meyers, 2007 MT 230, ¶ 12, 339 Mont. 160, 164, 168 P.3d 645, 649–50 (Mont. 2007). Defendant was charged with assault on a minor for hitting his eight-year-old child with a sandal

counterintuitive that the same court would enforce the residency restriction against the domestic violence defendant in *Meyers*, but not against the sex offender defendant in *Muhammad*.

C. Banishment Through Sex Offender Residency Restrictions

Sex offender residency restrictions[75] are intended to isolate defendants from potential victims and do not generally serve any rehabilitative purpose. While courts have been hesitant to allow defendants to be banished from local cities, counties, or states using probation conditions unrelated to rehabilitative purposes, residency restrictions have been the latest public policy approach to legislatively manage the problem of sex offenders living in the community.[76] These state statutes mandate buffer zones to keep sex offenders from living too close to schools, parks, day

between twelve and fifteen times. *Id.* ¶¶ 1–4. The court distinguished the "banishment" condition in *Muhammad* from the "residency restriction" condition in *Meyers* because the residency restriction in *Meyers* was sufficiently tailored to "satisf[y] the requirement [that it] be reasonably related to the protection of the victims and society." *Id.* ¶¶ 17–22.

75. *See, e.g.*, ALA. CODE § 15-20-26(f) (LexisNexis Supp. 2007) (setting forth a typical multi-layered exclusion zone policy applying to sex offenders who have committed crimes against children, supplemented with an additional loitering restriction); ARK. CODE ANN. § 5-14-128(a) (2006) (setting forth narrow exclusion zone policy, involving an individualized determination of the dangerousness of the offender); FLA. STAT. ANN. § 794.065 (West 2007) (providing exclusion scheme that applies only to those sex offenders whose crimes involved a minor); GA. CODE ANN. § 42-1-15 (Supp. 2007) (establishing one of the harshest exclusion zones, with a 1000-foot radius that applies to churches, swimming pools, parks, playgrounds, bus stops, gymnasiums, and other areas where "minors congregate"); IOWA CODE ANN. § 692A.2A (West 2003 & Supp. 2008) (applying restriction only to sex offenders that committed crimes against minors, but providing a broad exclusion zone radius of two thousand feet around designated areas); LA. REV. STAT. ANN. §§ 14:91.1(A)(2)–14:91.2 (2004 & Supp. 2009) (applies only to "sexually violent predator[s]" but creates exclusion zones around playgrounds, pools, youth centers, and arcades, in addition to the usual suspects). For a more comprehensive analysis of these statutes, see Yung, *supra* note 41, at 117–25.

76. *See* 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. J. OFFENDER THER. & COMP. CRIMINOLOGY 168, 168 (2005) (noting that these residence restrictions are the "newest wave" of legislation designed to control recidivism in addition to "policies mandating sex offender registration, community notification, civil commitment, castration, 'three-strikes and you're out,' and nondiscretionary sentencing"); *see also* Durling, *supra* note 5, at 322 (observing that "[t]hirteen states, including Illinois, have passed laws in the last five years banning sex offenders from living within a certain distance of schools, parks, day care centers, and 'places where children normally congregate'"); Katie Zezima, *After Rape, Calls to Limit Where Sex Offenders Go*, N.Y. TIMES, Feb. 18, 2008, at A9 ("Many states and municipalities have tried to enact restrictions on where sex offenders can live, including keeping them a certain distance away from parks, playgrounds and even bus stops, with mixed results."); Patty Salkin, Law of the Land, *Residency Restrictions for Convicted Sex Offenders Continuing Subject of Attention in New York* (Dec. 23, 2008), http://lawoftheland.wordpress.com/2008/12/23/residency-restrictions-for-convicted-sex-offenders-continuing-subject-of-attention-in-new-york/.

care centers, school bus stops, or other places where children may gather.[77] Such legislation may effectively banish sex offenders from a community, as the residency restrictions may have the cumulative effect of creating a black-out zone for virtually an entire town or city.[78] When such restrictions become a de facto banishment, they may be considered a form of punishment and implicate constitutional concerns.[79]

Concerns have been expressed about the effectiveness of residency restrictions given that such restrictions will likely reduce housing options for sex offenders.[80] When housing options are reduced, the resulting homelessness and transience will make monitoring and treatment of these individuals more difficult.[81] Offenders may be forced into rural areas without access to employment or into offender clusters in economically distressed urban neighborhoods.[82] The psychological stress from "isolation, disempowerment, shame, depression, anxiety, [and] lack of social supports . . . can trigger" deviant behavior and exacerbate, not decrease, sex offender recidivism.[83]

One exploratory study conducted in 2004 surveyed 135 sex offenders in Florida who were subject to residency restrictions.[84] The major themes that emerged from this study confirmed that offenders believed their risk of reoffending increased when they were isolated from family and friends as a result of these geographical restrictions and that the 1,000-foot rule in

77. *See* Levenson & Cotter, *supra* note 76, at 168.

78. *See id.* at 169 (noting that the "dispersal of parks and schools may lead to overlapping restriction zones thus making it essentially impossible for sex offenders in some cities to find suitable housing"); *see also* Lund, *supra* note 50, at 351 (noting that although "[b]anishment, in the form of forced change of geographic community location for offenders, cannot usually be officially employed in our democratic society. . . . [R]emoval of an offender from his or her own home base of operations for a short-term placement in a half-way-in house . . . is a mild form of banishment . . . ."); Duster, *supra* note 38, at 714–15; *but see* Doe v. Miller, 405 F.3d 700, 719 (8th Cir. 2005) (rejecting the analogy between banishment and Iowa's residency restriction statute for sex offenders).

79. *See* Smith v. Doe, 538 U.S. 84, 101–06 (2003). For an insightful discussion on the difference between cases imposing banishment in the probation context and exclusion laws, see Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 214–27 (2003) (distinguishing probation conditions as temporary while residency restrictions are permanent and apply to a wide swath of offenders, so the probationary purpose nexus is not met). For an overview on the decisions made by and discretion given to a parole board before a sex offender is released, see Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593 (2000).

80. *See* Levenson & Cotter, *supra* note 76, at 169; *see also* Michael Rothfeld, *A 2nd Look at Jessica's Law*, L.A. TIMES, Feb. 2008, at B1.

81. *See* Levenson & Cotter, *supra* note 76, at 169.

82. *See id.*

83. *Id.*

84. *Id.* at 170–71.

force in Florida likely had no effect on their risk of reoffending.[85] Factors such as whether an offender is committed to treatment and recovery are more important than geography.[86] Indeed, offenders tend to engage in criminal behavior outside of their own neighborhoods for fear of recognition.[87] The study concluded that sex offenders "will circumvent restrictions if they are determined to reoffend."[88] The benefits of residency restrictions in reducing recidivism have not been proven and authors of another recent study by the Minnesota Department of Corrections in 2007 concluded "that the potential deterrent effects of a residence restriction law would likely be 'marginal' at best."[89] Therefore, it is important to consider the potential for adverse, unintended consequences of this "banishment" policy approach when the benefits of such a policy are uncertain at best.

It appears necessary to take "[a] more individualized approach to sex offender management [that] can enhance public safety while promoting successful reintegration for offenders."[90] Banishment of sex offenders through judicial probationary conditions or legislative residency restrictions does not necessarily achieve the goal of protecting innocent victims from potential reoffending.[91] Moreover, as discussed below, these residency restrictions may be challenged as unconstitutional infringements on civil liberties, which are not justified if the purpose for enacting them is not being achieved and may, in fact, exacerbate the problem in certain situations.[92]

II. INDIVIDUAL RIGHTS CHALLENGES TO RESIDENCY RESTRICTIONS

Residency restrictions have generally been upheld, with a few exceptions,[93] in state and federal courts as valid constitutional constraints

85. *Id.* at 174.

86. *Id.*

87. *Id.*; *see also* Tewksbury, *supra* note 15, at 536 (noting that "a 2004 study by the Colorado Department of Public Safety showed that, if and when registered sex offenders recidivated, they were highly unlikely to commit a sex offense near their places of residence").

88. Levenson & Cotter, *supra* note 76, at 176.

89. Levenson et al., *supra* note 5, at 3.

90. Levenson & Cotter, *supra* note 76, at 176.

91. *See* Durling, *supra* note 5, at 335 (noting that "residency restrictions suffer from several practical problems that call into question their basis, efficacy, and fairness").

92. Adding additional insight, Yung analyzes some of the pros and cons of residency restrictions. *See* Yung, *supra* note 41, at 139–58. On one hand, exclusionary zones facilitate law enforcement and allow convicted sex offenders (who deserve to be punished) to avoid temptation. *Id.* at 154–58. On the other hand, exclusion zones reinforce the otherness of offenders by rendering them exiles and use a form of class-based banishment that is antithetical to American democracy. *Id.* at 139–47.

93. *See, e.g.*, Mikaloff v. Walsh, No. 5:06-CV-96, 2007 WL 2572268, at *4–12 (N.D. Ohio Sept. 4, 2007) (residency restriction found to be punitive and unconstitutional as an ex post facto law); Mann

on sex offender liberties.[94] For example, in *State v. Seering*, the Iowa Supreme Court upheld an Iowa statute, enacted in 2002, which prohibited sex offenders from living within two thousand feet of an elementary or secondary school or child care center.[95] Just a few months earlier, the Eighth Circuit upheld this same Iowa statute against constitutional challenges in *Doe v. Miller*.[96] In the Iowa state case, the *Seering* court reviewed procedural due process, substantive due process, ex post facto, Fifth Amendment, and Eighth Amendment challenges to the residency restrictions.[97] The Eighth Circuit in *Miller* similarly addressed the Iowa residency restrictions and upheld them against an ex post facto claim and other constitutional challenges.[98] Residency restrictions for sex offenders are the political response that followed the earlier implementation of registration laws, and reported cases of constitutional challenges to this recent legislation are limited.[99] The litigation challenges to the Iowa residency statute provide an illustration of how courts may approach this issue and demonstrate that these statutes will likely be upheld.

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v. Ga. Dept. of Corr., 653 S.E.2d 740, 745–56 (Ga. 2007) (finding that residency restriction "is unconstitutional to the extent that it permits the regulatory taking of appellant's property without just and adequate compensation"); State v. Pollard, 886 N.E.2d 69, 75 (Ind. Ct. App. 2008) (concluding that residency restriction statute is an ex post facto law because it is punitive and is applied retroactively to sex offenders); R.L. v. Mo. Dept. of Corr., 245 S.W.3d 236, 237–38 (Mo. 2008) (residency restriction violates Missouri's constitutional bar against retrospective civil laws because it imposes new obligations on defendants based on offenses committed before the statute was enacted).

94. *See, e.g.*, McAteer v. Riley, No. 2:07-CV-G92-WKW, 2008 WL 898932, at *5 (M.D. Ala. Mar. 31, 2008) (plaintiff did not show substantial likelihood of success on the merits to support his motion for a preliminary injunction against the Alabama residency and employment restrictions for sex offenders on the basis that they are ex post facto laws); People v. Morgan, 881 N.E.2d 507, 512 (Ill. App. Ct. 2007) (concluding that residency restrictions are constitutional and do not constitute an ex post facto law); Wright v. Iowa Dept. of Corr., 747 N.W.2d 213, 216–18 (Iowa 2008) (rejecting defendant's assertion that residency restrictions were unconstitutional as violating his equal protection and substantive due process rights and as an invalid bill of attainder).

95. State v. Seering, 701 N.W.2d 655, 659 (Iowa 2005) (upholding IOWA CODE § 692A.2A (2003)).

96. Doe v. Miller, 405 F.3d 700, 704–05 (8th Cir. 2005).

97. *Seering*, 701 N.W.2d at 662–70.

98. *Miller*, 405 F.3d at 705.

99. *See, e.g.*, Weems v. Little Rock Police Dept., 453 F.3d 1010, 1017 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2128 (2007) (finding the Arkansas residency restriction "on even stronger constitutional footing than the Iowa statute" upheld in *Miller*); Hodges v. Norris, No. 5:07-CV-00062, 2008 WL 80547, at *5 (E.D. Ark. Jan. 3, 2008) (dismissing ex post facto claim against residency restriction on the basis that it was enacted for a nonpunitive purpose in order to protect public safety and was, therefore, not unconstitutional); People v. Leroy, 828 N.E.2d 769, 776–77 (Ill. App. Ct. 2005) (upholding sex offender residency restriction law against substantive due process challenge); State v. Groves, 742 N.W.2d 90, 93 (Iowa 2007) (concluding that residency restriction did not violate substantive due process rights).

A. Due Process Challenges

In *Seering*, the defendant argued that the Iowa residency restriction interfered with his substantive due process right to freedom of choice as to where he could live and under what conditions.[100] The court found that the defendant's asserted interest was not a fundamental interest and required only a rational basis review.[101] The court found there to be a reasonable fit between the government interest in addressing the risk of sex offender recidivism and the residency restrictions used to advance the government's interest in reducing this risk.[102] The procedural due process challenge was similarly reviewed under a rational basis standard.[103] The court determined that the defendant had adequate notice and opportunity to be heard, as well as the opportunity to challenge the validly enacted statute in court.[104] Thus, while the defendant was entitled to minimal procedural protections, the defendant's due process rights were not violated.[105]

The *Miller* court determined that the statute did not violate procedural due process because it provided adequate notice as to the prohibited conduct of residing in restricted areas and it did not violate defendant's opportunity to be heard.[106] The statute was valid even though it failed to provide a process for determining the level of dangerousness for each individual.[107] The substantive due process challenge also failed because the court concluded residency restrictions did not infringe a fundamental right such as the right to privacy and family, or the right to travel or live where you wish, so the court did not apply strict scrutiny.[108] Thus, when examined under rational basis review, Iowa's decision to enact the statute was a rational approach to protect the health and safety of its citizens against unpredictable behavior by sex offenders, and the residency restriction rationally advanced this state interest.[109]

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100. *Seering*, 701 N.W.2d at 665.
101. *See id.*
102. *See id.*
103. *Id.* at 665–66.
104. *Id.*
105. *Id.*
106. Doe v. Miller, 405 F.3d at 700, 708–09 (8th Cir. 2005).
107. *Id.* at 709 (concluding that subjecting all offenders to the restrictions without allowing for exemptions did not violate procedural due process).
108. *Id.* at 709.
109. *Id.* at 714–16 (noting that twelve other states have enacted similar residency restrictions and that it is "'common sense' that limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense").

B. Self-Incrimination and Cruel and Unusual Punishment Challenges

The *Seering* defendant's claims under the Fifth Amendment that the residency restrictions compelled him to be a witness against himself were rejected by the court, which concluded that "there is nothing about the restriction that compels sex offenders to be witnesses against themselves."[110] The defendant's claim that the residency restrictions are cruel and unusual punishment under the Eighth Amendment was also rejected because the restriction was enacted to address the concerns about sex offender recidivism, not to punish the defendant, and the potential two-year punishment for violating the restriction was not considered disproportionate to the underlying crime.[111] In *Miller*, the Eighth Circuit determined that the Self-Incrimination Clause of the Fifth Amendment was not violated by the state because "the residency restriction does not compel a sex offender to be a witness against himself or a witness of any kind" since it only prohibits the offender from residing in certain areas and "does not require him to provide any information that might be used against him in a criminal case."[112]

C. Ex Post Facto Challenges

The ex post facto clause in both federal and state constitutions prohibits imposing new or more burdensome punishment in criminal cases after a crime has been committed, and sex offenders have utilized this clause to challenge residency restrictions as punishment by means of banishment.[113] In *Smith v. Doe*, the U.S. Supreme Court upheld Alaska's regulations requiring convicted sex offenders to register with the state as a reasonable and nonpunitive approach to address the concern of sex offender recidivism.[114] Relying on the Court's decision in *Smith*, the *Seering* court noted that while residency restrictions may impact the traditional punishment goals of deterrence and retribution, "many governmental programs exist that may 'deter crime without imposing punishment.'"[115] The *Seering* court recognized that residency restrictions have "some punitive impact," but the statute was rationally related to the nonpunitive

110. *Seering*, 701 N.W.2d at 669.
111. *Id.* at 670.
112. *Miller*, 405 F.3d at 716.
113. *Seering*, 701 N.W.2d, at 666–67 (citing U.S. CONST. art. I, § 10, and IOWA CONST. art. I, § 21, and noting that civil penalties are not subject to this restriction).
114. Smith v. Doe, 538 U.S. 84, 105 (2003).
115. *Seering*, 701 N.W.2d at 668 (quoting *Smith*, 538 U.S. at 102).

purpose of protecting society against the risk of sex offender recidivism.[116] Thus, the court upheld the restrictions against the ex post facto challenge because it concluded that the statute did not impose criminal punishment, and, even if it did, the statute did not punish "action that has occurred prior to the statute's enactment or increase[] . . . the punishment for a crime after its commission."[117]

The *Miller* court's analysis of the ex post facto clause was the most controversial portion of the federal decision analyzing the Iowa statute, and caused one of the panel's members to dissent as to the holding that the residency restriction did not amount to punishment.[118] The majority concluded that the purpose of the statute was intended to protect the health and safety of the citizens, not punish the defendant for a prior sex offense,[119] and the dissent agreed with this determination.[120] The court also considered five factors identified by the Supreme Court in *Smith* to determine whether "the law was nonetheless so punitive in effect as to negate the legislature's intent to create a civil, non-punitive regulatory scheme."[121]

In analyzing the five factors, the majority and dissent reached quite different conclusions. The first factor from *Smith* required the court to determine "whether the law has been regarded in our history and traditions as punishment."[122] The majority concluded that the residency restrictions were not equivalent to banishment as a traditional means of punishment.[123] The dissent disagreed and noted that while the residency restrictions might not constitute a complete banishment, the statute nevertheless "sufficiently resembles banishment to make this factor weigh towards finding the law punitive."[124] The dissent also disagreed with the majority's determination that the residency restriction did not serve a traditional aim of punishment. Instead, the dissent found that the deterrent effect of such restrictions in

116. *Id.*

117. *Id*. at 668; *see also id*. at 668–69 (concluding that punishment under the residency restrictions only results when the statute has been violated, not simply because the defendant is a convicted offender, and "it is the violation of the residency restriction statute itself that makes him subject to a new punishment").

118. Doe v. Miller, 405 F.3d 700, 723 (8th Cir. 2005) (Melloy, J., dissenting) (agreeing with the majority that the purpose of the statute was nonpunitive but disagreeing with majority's analysis and decision as to whether the statute was so punitive in effect as to offset the nonpunitive purpose).

119. *Id.* at 718–19.

120. *Id.* at 723 (Melloy, J., dissenting).

121. *Id.* at 719 (majority opinion).

122. *Id.* at 719–20.

123. *Id.* (concluding that the "law is unlike banishment in important respects").

124. *Id.* at 724 (Melloy, J., dissenting).

keeping the offender from committing future crimes made it punitive.[125] The third factor, "whether it imposes an affirmative disability or restraint,"[126] was found by both the majority and the dissent to be present in the residency restriction, although the majority noted that it was much less disabling than civil commitment.[127] The dissent also agreed with the majority's finding that the residency restriction was rationally related "to the nonpunitive purpose of protecting the public."[128] When examining the fifth factor, whether the residency restriction is excessive with regard to its purpose of protecting the public, the majority found the restriction was reasonably related to its regulatory purpose and that the plaintiffs failed to establish it was excessive in relation to its legitimate statutory purpose.[129] In contrast, the dissent found that many of the offenders could not live with their families or communities, would be subject throughout their lives to the restriction because there is no time limit, and that the statute applies to all sex offenders without regard to the seriousness of their risk to the community.[130] While the majority found the statute nonpunitive and therefore constitutional, the dissent would have weighed the five factors in favor of finding the residency restriction to be punitive and, therefore, an unconstitutional ex post facto law.[131]

The five-factor analysis developed in *Smith* and applied to residency restrictions in both *Seeley* and *Miller* has been used by some state courts to uphold these restrictions as nonpunitive.[132] Other courts have resolved ex post facto challenges by using grandfather provisions and refusing to apply these statutes retroactively against sex offenders whose crimes were committed prior to the enactment of these restrictions.[133] However, in

125. *Id.* at 725 (Melloy, J., dissenting).

126. *Id*. at 719 (majority opinion).

127. *Compare id.* at 719–21 (majority opinion), *with id.* at 725 (Melloy, J., dissenting).

128. *Id.* at 725 (Melloy, J., dissenting).

129. *Id.* at 723.

130. *Id.* at 725–26 (Melloy, J., dissenting).

131. *Compare id.* at 723 n.6 (majority opinion) (noting that even if the residency restriction statute were punitive, it would not violate the Eighth Amendment because it is "neither barbaric nor grossly disproportionate to the offenses committed"), *with id.* at 726 (Melloy, J., dissenting).

132. *See, e.g.*, People v. Morgan, 881 N.E.2d 507, 508–10 (Ill. App. Ct. 2007) (noting that the legislature did not intend for the statute to be punitive and concluding that, based on the five-factor analysis adopted by an earlier Illinois decision in *People v. Leroy*, 828 N.E.2d 769, 779 (Ill. App. Ct. 2005), the Illinois residency restriction did not constitute an unconstitutional ex post facto law).

133. *See, e.g.*, Doe v. Schwarzenegger, No. 06-06968, 2007 WL 601977, at *2 (N.D. Cal. Feb. 22, 2007); Doe v. Schwarzenegger, 476 F. Supp. 2d 1178, 1181 (E.D. Cal. 2007); *see also* People v. Presley, 67 Cal. Rptr. 3d 826, 830 (Ct. App. 2007) (noting that the issue of retroactivity of residency restrictions was not before the court but citing the federal cases of *Doe v. Schwarzenegger*); State v. Finders, 743 N.W.2d 546, 549 (Iowa 2008) (main consideration of Iowa legislature in enacting the grandfather provision "was to avoid the harsh effect of the retroactive application of the two thousand

some cases where the court has found no exception or grandfather provision to prevent application of residency restrictions against sex offenders who were convicted before the statute's enactment, such legislation has been considered an unconstitutional ex post facto law.[134]

For example, in *Mikaloff*, a federal district court in Ohio applied the five *Smith* factors to find an Ohio residency restriction to be in violation of the Constitution's ex post facto clause.[135] First, the *Mikaloff* court found that the Ohio legislature intended the residency restriction to be punitive and that even if this intent was not express, its punitive purpose was implied as evidenced by the restriction's inclusion in Ohio's criminal code.[136] However, the court also used the *Smith* factors to consider the statute's effect and determined that the restriction "imposes an onerous affirmative disability and restraint."[137] The court found that preventing a sex offender from living in his home, even if he purchased it before the residency restriction took effect, was a "substantial housing disadvantage" and affected a person's freedom to live on his own property.[138] This housing disadvantage consequently restrains the sex offender from having access to other important opportunities such as employment, schooling for children, drug treatment programs, and medical care.[139] The court found that the restrictions were analogous to probation and parole, but were more restrictive in that they applied for life and significantly deprived the offender of liberty and property interests and "sentence[d] them to a life of transience."[140]

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foot rule"). Such was also at issue in a trio of Ohio cases: Hyle v. Porter, 117 Ohio St. 3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶ 24 (Ohio 2008) (concluding that the residency restriction statute was not expressly made retroactive and "does not apply to an offender who bought his home and committed his offense before the effective date of the statute"); State v. Ware, No. 90051, 2008 WL 2350626, at *2 (Ohio Ct. App. June 9, 2008) (refusing to apply the residency restriction to defendants who bought their home and committed their sexually oriented offense before the restriction was enacted); Vandervoot v. Larson, No. 07CA46, 2008 WL 2573296, at *2 (Ohio Ct. App. June 9, 2008) (noting that *Hyle* "is expressly limited to situations in which the offender not only committed his offense before the effective date of the statute, but also purchased his home before the effective date of the statute").

134. *See, e.g.*, Mikaloff v. Walsh, No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007).

135. *Id.* at *8.

136. *Id.* at *5. The *Mikaloff* court also noted that "[t]wo Ohio Courts have considered similar challenges and have found the legislature intended the residency restriction to be civil." *Id.* at *7 (citing Doe v. Petro, No. 1:05-CV-125, 2005 WL 1038846 (S.D. Ohio May 3, 2005); State *ex rel.* White v. Billings, 139 Ohio Misc. 2d 76 (Ohio Ct. C. P. Clermont County 2006)).

137. *Id.* at *8.

138. *Id.* at *9.

139. *Id.*

140. *Id.* at *10.

Finding that the Ohio statute significantly furthered retribution and promoted general deterrence, the court concluded that the restriction was vengeful in nature because it failed to differentiate between offenders and their risk of reoffense.[141] Although the court concluded that there was some rational connection between the residency restriction and protecting children, it pointed out the absurdity of the regulation: the regulation allowed the sex offender to stay in the restricted residence during the day when children were attending the nearby school, but required the offender "to sleep in his truck at night, when, presumably, the children are safely at home."[142] The court also noted that the restrictions do "not address the majority of child sex abuse cases because those cases involve family members or acquaintances" and such an offender is not automatically restricted from living with their previous victims.[143] Finally, the *Mikaloff* court determined that even though the statute was rational, it was excessive in regards to its purpose because it was not based upon an individualized risk assessment.[144] After this very compelling analysis, the court held that the sex offender's "inability to continue to reside in his home would cause him severe injury" and that the statute "violates the *ex post facto* clause of the Constitution."[145]

D. Takings Challenges

Sex offender residency restrictions have been challenged as a taking under the Fifth Amendment, which provides in part, "nor shall private property be taken for a public purpose without just compensation."[146] When government regulation "goes too far"[147] such that it deprives the landowner of economically viable use, the government will be required to pay just compensation as though it had used its eminent domain power to take the landowner's property.[148] Residency restriction statutes that deprive a sex offender of a property interest without the payment of just compensation may be considered a taking if, under the factors identified

141. *Id.* at *11 (noting that the residency restriction requires that "[a] feeble, aging paraplegic must leave his home just as a younger one").

142. *Id.* The court also noted that if sex offenders lived near the school, parents would be notified of their presence, but if they stay in the residence next to the school, but did not sleep there, the registration process would not alert parents to the nearby potential danger. *Id*.

143. *Id.* at *12.

144. *Id.*

145. *Id.* at *13.

146. U.S. CONST. amend. V.

147. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

148. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

by the Supreme Court in *Penn Central*, the economic impact of the restriction on the offender's "investment-backed expectations" is particularly severe.[149] The property interest impacted may be a real property interest, if the offender is forced to move from a home he or she owns, or a personal property interest, if the offender's employment, business, or a lease agreement is affected by a geographic restriction regulation.[150]

In *Mann v. Georgia Department of Corrections*, the Georgia Supreme Court applied the *Penn Central* factors and found an unconstitutional regulatory taking of a sex offender's property where the offender was forced to move from his home after a child-care facility opened within one thousand feet of his property.[151] First, in determining the severity of the economic impact suffered by the offender, the court found that the residency restriction mandated the immediate physical removal of the offender from the home that he and his wife purchased as their primary residence prior to the location of the child-care facility.[152] This immediate physical removal from his property was a significant economic burden on the offender because he was required to find a new, unrestricted residence and maintain both until he and his wife could dispose of the now restricted residence.[153] Second, the court found the restriction "positively precludes [the offender] from having any reasonable investment-backed expectation in any property purchased as his private residence" because the residency restriction could potentially force the offender from any location in which he might choose to relocate whenever a sensitive use, such as a day care center, a bus stop, a playground, or a church locates within the statutory

149. *Id*.

150. *See, e.g.*, Mann v. Ga. Dep't of Corr., 653 S.E.2d 740, 746 (Ga. 2007) (finding a regulatory taking of a real property interest, but rejecting offender's claim that workplace restrictions unconstitutionally deprived him of a property interest in his business without just compensation); *see also* State v. Pollard, 886 N.E.2d 69, 74–75 (Ind. Ct. App. 2008) (noting that applying a residency statute to property owned and resided in as a home before the offender's conviction would affect substantial property rights, thus court refused to enforce the regulation as an unconstitutional ex post facto law). *But see* People v. Marshall, No. A117256, 2008 WL 2487865, at *1, 3-4 (Cal. Ct. App. June 23, 2008) (holding that residency restriction was not "unconstitutional under the Takings Clause of the Fifth Amendment" because there was not a sufficient property interest alleged since offender could not show that he would be contributing financially to the rent, mortgage, or other expenses in order to live at his friend's home in a restricted area).

151. *Mann*, 653 S.E.2d at 743 (analyzing claims of regulatory takings as an ad hoc factual inquiry as to the severity of the burden imposed by the government regulation, the degree to which it interferes with reasonable investment-backed expectations, and the character of the government action) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

152. *Id.* at 743–44.

153. *Id.* at 744.

1,000-foot buffer zone.[154] Finally, private third parties could force the offender to forfeit property rights by establishing a child-care facility or any other "sensitive use" into the zone surrounding the offender's property.[155] Thus, in assessing the character of the government action, the statute effectively empowered private third parties with the state's police power.[156] Recognizing that the residency restrictions were enacted for the purpose of protecting the public, the Georgia court observed that "registered sex offenders alone bear the burden of the particular type of protection provided by the residency restriction" and concluded that "justice requires that the burden of safeguarding minors from encounters with registered sexual offenders must be 'spread among taxpayers through the payment of compensation.'"[157] Thus, the court found the residency restriction regulation to be an unconstitutional regulatory taking of the sex offender's real property without just compensation.[158]

Prior to the *Mann* decision, a federal district court in Georgia dismissed a sex offender's claim that, because he was forced from living with his wife, daughter, son, and mother-in-law at the family residence after the residency act was enacted, the residency restriction constituted an unconstitutional taking.[159] The court in *Doe v. Baker* applied the *Penn Central* factors and concluded the following: (1) the economic impact was minimal because the plaintiff was not forced to sell his home, but merely prohibited from living in his family residence; (2) the regulation did not interfere with any reasonable investment-backed expectations because he was not required to rent the house against his will, and he retained the right to make other reasonable use of the property; and (3) the character of the action—to protect minors—weighed against finding a regulatory taking.[160]

The Georgia Supreme Court's finding of a regulatory taking in *Mann* seems more reasonable than the approach expressed by the federal court in *Baker*, which allows a landowner to be ousted from his property without compensation by stating that he can make reasonable use of his home,

154. *Id.*
155. *Id.* at 742–43.
156. *Id.* at 745.
157. *Id.* (quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005)).
158. *Id.* The court did not find the work restrictions in the regulation to be an unconstitutional taking and rejected the challenge. *Id.* at 745–46.
159. *See* Doe v. Baker, No. Civ. A. 1:05-CV-2265, 2006 WL 905368, at *1 (N.D. Ga. Apr. 5, 2006) (dismissing plaintiff's ex post facto, substantive and procedural due process, and Eighth Amendment challenges).
160. *Id.* at *8–9 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

even if he cannot live in it. It is difficult to understand how a newly enacted regulation, or having a new sensitive use move into a restricted buffer zone, could constitutionally require a landowner, even a registered sex offender, to move from his primary residence. It might also be possible for the government to argue, by analogy to criminal forfeiture proceedings, that applying a criminal law that results in a loss of property cannot be considered a compensable taking.[161] However, once a residency restriction is considered criminal and punitive in nature, it cannot survive an ex post facto challenge if it is punishment enacted after an offense is committed. As punishment, it could only apply prospectively to sex offenders who commit their offense after the residency restriction is enacted.[162]

In addition to arguing that residency restrictions constitute a taking when they require a forfeiture of real property rights, sex offenders can allege a taking of a personal property interest, if they can first establish a property interest in a lease, a business, or other type of entitlement. In *Mann*, the sex offender alleged that he was deprived of his property interest in his business because the residency statute also prohibited him from working at the restaurant, in which he owned a half interest.[163] The court held that although the offender was not allowed to work at the restaurant he did not establish that this restriction unduly burdened his financial interest or reasonable investment-backed expectation in his business, since he was able to retain his half interest and perform some of his duties, such as accounting, off site.[164] The offender did establish a property interest, but the takings claim for an unconstitutional interference with the personal property interest in his business was rejected by the court.[165]

E. Private Restrictive Covenants

Private restrictive covenants, commonly used for homeowner association rules, are another source of sex offender residency restrictions.

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161. *See* People v. Marshall, No. A117256, 2008 WL 2487865, at *4 (Cal. Ct. App. June 23, 2008) ("[I]t is questionable whether the application of a criminal law that results in a loss of property supports a constitutional takings claim.").

162. *See, e.g.*, State v. Pollard, 886 N.E.2d 69, 74–75 (Ind. Ct. App. 2008) (concluding that a residency statute is a criminal statute and applying it to property owned before the enactment of the statute would be unconstitutional).

163. Mann v. Ga. Dep't of Corr., 653 S.E.2d 740, 746 (Ga. 2007) (restaurant had a lease for property that was within one thousand feet of a child care facility, school, or church).

164. *Id.*

165. *Id.*

The New Jersey court in *Mulligan v. Panther Valley Property Owners Association* concluded that the record was insufficient to determine whether an amendment made to a residential community's Declaration of Covenants and Restrictions that prohibited the sale of residences to Tier 3 sex offenders was invalid.[166] The court reviewed the plaintiff's arguments and noted that her contention that the prohibition unlawfully infringed her right to alienate her property was unconvincing since there were only eighty Tier 3 sex offenders in a population of 8.4 million to whom plaintiff could not sell her home.[167] In addition, the court considered her argument that the prohibition "compels her to violate the law by obligating her to seek out and identify such Tier 3 registrants" to be "wholly insubstantial."[168]

The *Panther Valley* court did consider carefully plaintiff's third argument that the prohibition violates public policy.[169] Not knowing how many communities in New Jersey had passed similar residency restrictions against Tier 3 sex offenders, the court was concerned that such restrictive covenants could "make a large segment of the housing market unavailable to one category of individual and indeed perhaps to approach 'the ogre of vigilantism and harassment.'"[170] While the court recognized that sex offenders are not a protected group under New Jersey's Law Against Discrimination or under the federal Fair Housing Act, it nevertheless questioned whether "large segments of the State could entirely close their doors to such individuals, confining them to a narrow corridor and thus perhaps exposing those within that remaining corridor to a greater risk of harm than they might otherwise have had to confront."[171] Thus, the New Jersey court was concerned not only about the individual rights of sex offenders, but also about the potential impact on the communities to which these individuals would be relegated. Because of the broad social and legal issues presented, the court declined to attempt a solution when the record was insufficient to permit a proper determination.[172]

166. Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1193 (N.J. Super. Ct. App. Div. 2001) (reversing trial court's judgment upholding the amendment's validity).

167. *Id.* at 1192. Tier 3 sex offenders are the highest classification within Megan's law and are classified as such because they "pose a high risk of re-offending." *Id.* at 1189.

168. *Id.* at 1192.

169. *Id.* (noting that it "gives us pause, at least in one regard").

170. *Id.* at 1192–93 (quoting Doe v. Poritz, 662 A.2d 367, 422 (N.J. 1995)). The court noted the New Jersey Supreme Court was concerned about this danger when it upheld Megan's Law in *Poritz*. *Id.*

171. *Id.* at 1193.

172. *Id*.

One remaining question about private covenants prohibiting sex offenders is whether these covenants may be challenged on constitutional grounds. Private covenants are generally not considered state action subject to constitutional restraints, unless they can be so considered under the principles from *Shelley v. Kraemer*.[173] In *Shelley*, the U.S. Supreme Court refused to enforce a racially restrictive private covenant because to do so would violate the Equal Protection Clause of the Fourteenth Amendment.[174] The Court determined that judicial enforcement of the private covenant constituted state action, a conclusion that made it possible to claim that a private restrictive covenant violated a constitutional right.[175] Since it is unlikely that courts will extend the *Shelley* holding in order to subject covenants discriminating against sex offenders to constitutional constraints, any challenges to these private agreements affecting residency will need to be based on public policy grounds.[176] Alternatively, residential community associations that are viewed as quasi-governmental because they function as a public entity may be subject to constitutional limitations such as those discussed above for legislative restrictions on sex offender residency.[177]

There are several viable constitutional challenges to state and local residency restrictions that can be asserted to protect the individual liberties of convicted sex offenders. These challenges have received little sympathy from the courts and public opinion because sex offenders are a portion of our society many would prefer to see disappear.[178] However, society in general may be at a greater risk because of these types of regulations as they may result in homelessness and hopelessness for sex offenders. Further state and local residency restrictions may result in "dumping" these unwanted citizens into neighboring municipalities, counties, and even states, thereby creating a national problem. In particular, economically distressed and rural neighborhoods may be adversely

173. 334 U.S. 1 (1948).

174. *Id.* at 20.

175. *Id.* (noting that "[s]tate action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms").

176. *See* Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time For Keeping; A Time For Throwing Away"?*, 47 U. KAN. L. REV. 61, 120 (1998) (suggesting that *Shelley* no longer be used to subject private action to constitutional limitations); John J. Herman, Comment, *Not in My Community: Is It Legal for Private Entities to Ban Sex Offenders from Living in Their Communities?*, 16 WIDENER L.J. 165, 188 (2006) (noting that a majority of states have not concluded as Texas has that "state action exists in enforcing community association restrictive covenants and that constitutional analysis must be undertaken") (quoting David Ramsey, *Megan's Law and Community Associations: The Case for Banning Sex-Offenders*, 2 CAI'S J. COMMUNITY ASS'N L. 2, 6 (1999)).

177. *See* Herman, *supra* note 176, at 188–89.

178. *See, e.g.*, Dennis & Waite, *supra* note 40.

affected by these regulations as sex offenders are pushed to the outer edges of the community, either geographically or economically. This effect raises concerns about racism and general fairness, similar to those expressed through the environmental justice movement.

III. NATIONAL CHALLENGES TO BANISHMENT: PROTECTIONISM AND THE DORMANT COMMERCE CLAUSE

Protectionist public policies adopted by state and local governments may be subject to constitutional challenge on a national level as sex offenders are banished from their own communities into surrounding neighborhoods and even other states.[179] Professor Wayne Logan, in his powerful article, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, articulates the potential Dormant Commerce Clause challenge against state and local sex offender residency restrictions and concludes that such a challenge, along with a potential claim sounding in the Privileges and Immunities Clause, "hold[s] little promise for ultimate success."[180] This Article addresses only the potential Dormant Commerce Clause challenge to state and local protectionist restrictions, but as Professor Logan so ably argues in his essay about the undermining of American constitutional collectivism by local sex offender controls, "the treatment of ex-offenders is manifestly a national concern that ultimately must be addressed by the constituent parts of the nation as a whole."[181]

Analyzing a claim for a violation of the Dormant Commerce Clause requires a determination of whether the challenged state or local regulation unduly burdens interstate commerce. First, the regulation must actually affect interstate commerce and the U.S. Supreme Court has broadly defined the scope of commerce to include trash,[182] water,[183] birds,[184] and even the transportation of people.[185] In *Edwards v. California*, the Court held that states are prohibited from isolating themselves "from difficulties common to all of them by restraining the transportation of persons and

179. *See* Logan, *supra* note 5, at 4–5 (addressing national concerns impacted by state and local residency restrictions and recognizing "the need to limit state efforts to isolate themselves from the collective social responsibility of ex-offender reentry"). *Cf.* G.H. v. Township of Galloway, No. A-64/65, 2009 WL 1272549 (N.J. May 7, 2009).

180. *Id.* at 34.

181. *Id.* at 40.

182. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

183. *See* Sporhase v. Nebraska, 458 U.S. 941, 960 (1982).

184. *See* Hughes v. Oklahoma, 441 U.S. 322, 338–39 (1979).

185. *See* Edwards v. California, 314 U.S. 160, 172 (1941) ("[I]t is settled beyond question that the transportation of persons is 'commerce' . . . .").

property across its borders."[186] At issue in *Edwards* was a California state law criminalizing any attempt to bring or assist bringing an indigent person into the state.[187] The Court made it clear that the Constitution "'was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division'"[188] and that "the relief of the needy has become the common responsibility and concern of the whole nation."[189]

Managing the problem of sex offender recidivism is a national concern since individuals are mobile and may freely cross state borders. In *Edwards*, the state attempted to keep poor people out, while in recently enacted residency restrictions, states effectively push sex offenders out and try to keep them out. The Court in *Edwards* concluded that the California statute directed against allowing indigent individuals into the state "imposes an unconstitutional burden upon interstate commerce."[190] In order to find a Dormant Commerce Clause violation imposed by state and local sex offender residency restrictions, the courts will need to find that these restrictions similarly constitute an unconstitutional burden on interstate commerce. Dormant Commerce Clause concepts developed in cases where states used traditional police powers to isolate or protect themselves from harm will be the most relevant to determining whether these restrictions unconstitutionally burden interstate commerce[191] because residency restrictions have generally been enacted for the purpose of protecting the public health, safety, and welfare against sex offender recidivism.[192]

Residency restrictions which effectively constitute banishment may burden interstate commerce if sex offenders are dumped into other states because they cannot find a place to live when their own state has enacted particularly restrictive conditions.[193] This problem of dumping was identified in 1930 by the Michigan Supreme Court in *People v. Baum*, where the court refused to allow a criminal defendant, who violated a liquor law, to be banished from the state during his probationary period.[194]

186. *Id.* at 167.
187. *Id.* at 165–66 (citing CAL. WELF. & INST. CODE § 2615 (West 2003)).
188. *Id.* at 174 (quoting Baldwin v. Seelig, 294 U.S. 511, 523 (1998).
189. *Id.* at 175.
190. *Id.* at 177.
191. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1798 (2007) (observing that "[t]he Counties' ordinances are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government").
192. *See* Levenson & Cotter, *supra* note 76.
193. *See generally* Tewksbury, *supra* note 15.
194. People v. Baum, 231 N.W. 95, 96 (Mich. 1930).

The court stated its rationale:

> To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the states which is the basis of the Union itself.[195]

In addition to burdening interstate commerce under a Dormant Commerce Clause analysis, the dumping of sex offenders into other states may generate tort liability between states similar to other interstate common law cases where a state has been allowed to "sue for an injunction to restrain another state from polluting its waters or from using the quarantine power to injure its neighbor's commerce or to prevent the diversion of water to the injury of its citizens."[196] Because the "dumping" states are aware of the dangerous nature of these criminals, the harm of their reoffending is foreseeable and a state may be liable for expelling a criminal, particularly if they are still on probation or receiving an order of banishment in lieu of a prison sentence.[197]

Once it is established that the regulation at issue affects interstate commerce, the major question in these challenges is whether the benefits of the state or local regulation outweigh any burdens on interstate commerce.[198] This balancing is guided by "whether the state or local law discriminates against out-of-staters or treats in-staters and out-of-staters alike."[199] If the law discriminates against out-of-staters, it will be invalidated unless it is "necessary to achieve an important [government] purpose."[200] If the law is not discriminatory, it will not be unconstitutional unless it places a burden on interstate commerce that outweighs the law's benefits.[201]

Assuming it can be shown that residency restrictions potentially burden interstate commerce, it must be determined whether these restrictions

195. *Id.*

196. Lynch, *supra* note 45, at 27–28 (citing Missouri v. Illinois, 180 U.S. 208 (1901)); *see also* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Kansas v. Colorado, 185 U.S. 125 (1902); Louisiana v. Texas, 176 U.S. 1 (1900).

197. *See* Lynch, *supra* note 45, at 28.

198. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 5.3 (2d ed. 2002).

199. *Id.* § 5.3.3.2.

200. *Id.*

201. *Id.*

discriminate against out-of-staters or treat them the same as in-staters. State and local residency restrictions are intended to restrict convicted sex offenders from residing, working, and sometimes just being present in particular geographical locations which may give them access to potential victims, particularly children.[202] These restrictions are not imposed based on the offender's city, county, or state of origin, but instead are based on the offender's status as a convicted sex offender. While these restrictions constitute protectionism in favor of the state and local communities, they are not motivated by "simple economic protectionism" and are not *per se* invalid as discriminatory.[203] Thus, it is doubtful that any allegation of discrimination against out-of-state sex offenders would be successful unless the restrictions explicitly excluded in-state offenders or expressly targeted out-of-state offenders.[204]

The U.S. Supreme Court in *United Haulers* upheld against a Dormant Commerce Clause challenge some New York county flow control ordinances, which required trash haulers to bring waste to state government disposal facilities.[205] The Court observed that "[d]isposing of trash has been a traditional government activity for years" and concluded that the flow control ordinances in this case did not discriminate against interstate commerce.[206] It justified treating laws favoring public facilities differently from those favoring private interests over competitors by reference to the government's police power to protect the health, safety, and welfare of the community.[207] Recognizing that "a law favoring a public entity and treating all private entities the same does not discriminate against interstate commerce as does a law favoring local business over all others,"[208] the Court concluded that "[l]aws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism."[209]

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202. *See* Levenson & Cotter, *supra* note 76.

203. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

204. *See* Logan, *supra* note 5, at 34 (noting that "no successful [Dormant Commerce Clause] challenge would likely lie because the facially neutral character of exclusion laws would relegate their analysis to a less demanding standard of constitutional review").

205. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1790 (2007).

206. *Id. But see id.* at 1804 (Alito, J., dissenting) (disagreeing that the current case was distinguishable from *Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), in that " [t]he only salient difference between the cases is that the ordinance invalidated in *Carbone* discriminated in favor of a privately owned facility, whereas the laws at issue here discriminate in favor of facilities owned and operated by a state-created public benefit corporation" (internal quotation omitted)).

207. *See id.* at 1795 (majority opinion).

208. *Id.* at 1796 n.6.

209. *Id.* at 1796. However, in an earlier trash quarantine case, *City of Philadelphia v. New Jersey*,

Criminal punishment, sentencing, and establishing probationary conditions are also traditional government activities within the police power of the state and local government.[210] Protectionism exercised by state and local government in favor of its citizens under the police power, such as with the flow control ordinances in *United Haulers*, is not for the purpose of favoring economic protectionism against competitors and is not discriminatory against interstate commerce. However, as Professor Logan notes in *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, "post-confinement disposition of criminal offenders, much like care of the poor and *disposal of waste*, has become a problem of national concern."[211] Consequently, states need to take responsibility for offender reentry and "share in shouldering the burdens of integrating ex-offenders into the ranks of law-abiding society."[212]

Residency restrictions will likely be considered nondiscriminatory and subject to the balancing test of whether the burdens on interstate commerce outweigh the benefits of the restrictions to the state or local communities.[213] The balancing test articulated in *Pike v. Bruce Church, Inc.* provides that when a law "regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such

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437 U.S. 617 (1978), the court rejected New Jersey's attempt to exclude out-of-state waste, finding that mere movement of ordinary solid waste into the state from elsewhere did not pose any particular problems. One might argue that this is distinguishable from the movement of convicted criminals with a high recidivism rate, which *does* pose a special problem, especially if registration statutes are not particularly effective. Thus, states might be able to seek to exclude out-of-state offenders on the grounds that they have their own offenders to deal with. These statutes would likely be facially neutral and certainly would not be motivated by a desire to "protect" the local market for sex offenders from out-of-state competition.

210. *See* Logan, *supra* note 5, at 30 (noting that, historically, "crime control efforts were of little national consequence," but that "post-confinement disposition of criminal offenders, much like care of the poor and disposal of waste, has become a problem of national concern").

211. *Id.* (emphasis added).

212. *Id.* at 31. Logan also discusses the Interstate Compact on Adult Offender Supervision, signed by forty-eight states and the District of Columbia, whose purpose is

> [t]hrough means of joint and cooperative action among the compacting states: to provide for the promotion of public safety and protect the rights of victims through the control and regulation of the interstate movement of offenders in the community; to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving states; and to equitably distribute the costs, benefits, and obligations of the compact among the compacting states.

Id. (quoting INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION, BENCH BOOK FOR JUDGES AND COURT PERSONNEL 107 (2006)).

213. *See id.* at 34 (discussing the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

commerce is clearly excessive in relation to the putative local benefits."[214] As reaffirmed by the Court in *United Haulers*, legislation passed pursuant to the police power should not be rigorously scrutinized by the judiciary in order to effectuate social policy judgments.[215] However, the burden and benefits should be weighed whenever state action affects national interests.

The potential burden imposed on other states by sex offender residency restrictions is not incidental; it is of major concern to many citizens who are fearful of recidivism and who wish to keep these LUDIs out of their neighborhood.[216] When state and local governments enact residency restrictions, which essentially banish sex offenders because of lack of available housing options, other states may become a dumping ground for neighboring states' criminals.[217] Burdening other states by enacting protectionist legislation should be prohibited as a Dormant Commerce Clause violation, particularly given the lack of any evidence that shows the legislation is an effective means of reducing recidivism and the risk it may actually increase it. The excessive burden conferred on other states by effectively banishing sex offenders is not outweighed by the illusive benefits gained by restricting residency.[218] And, as discussed in Part V, there may be alternative ways to deal with this problem that will have a lesser impact on interstate activities.[219]

Professor Logan may indeed be correct in his assessment that a Dormant Commerce Clause claim will be doomed because courts will defer to state legislative decisions on public policy issues.[220] In fact, it has been more than twenty-five years since the Court has struck down a case using the *Pike* balancing test.[221] However, when these national concerns of protectionism are added to individual liberty challenges, disproportionate

214. *Pike*, 397 U.S. at 142.

215. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, (2007).

216. *See* Logan, *supra* note 5, at 18–19 (noting that when one state enacts residency restrictions, the effective result may be state-wide exclusion and "[o]ther states, in turn, alarmed that they will become a magnet for ex-offenders, or if otherwise enamored of the strategy in principle, embrace exclusion as a social control measure").

217. *See, e.g.*, *id.* at 9.

218. *But see id.* at 34–35 (concluding that "despite the highly questionable efficacy of residence exclusion laws, courts applying *Pike* will defer to the judgment of state legislatures on their public policy wisdom") (footnote omitted)).

219. *See infra* Part V.

220. Logan, *supra* note 5, at 34–35.

221. One would have to develop some pretty compelling factual bases for comparing benefits to be successful under *Pike*. The strongest case would be one in which the benefits were zero or less than zero compared to the costs. Yet the costs in sex offender cases are not readily reducible to dollars; thus, courts would likely tend to stay away from the issue.

siting in poor and minority communities, and the fact that there is no evidence these restrictions are at all effective, the public may eventually embrace other alternatives to address their fears of sex offender recidivism.

IV. ENVIRONMENTAL JUSTICE AND DISPROPORTIONATE SITING OF SEX OFFENDERS

Environmental justice has been defined as "the idea that minority and low-income individuals, communities, and populations should not be disproportionately exposed to environmental hazards, and that they should share fully in making the decisions that affect their environment."[222] Recent data have shown that sex offenders tend to disproportionately locate in poor, minority neighborhoods in some cities.[223] While it is unclear why this disproportionate siting occurs, the residents in these urban communities "are more often poor with less education; many times they're immigrants with limited English . . . [and] [s]o the public outcry can be muted compared to more affluent neighborhoods."[224] In this Article, I propose by way of analogy that these same individuals, communities, and populations should not be exposed to an increased number of sex

222. Michael B. Gerrard, *Preface to the First Edition* of THE LAW OF ENVIRONMENTAL JUSTICE, at xxxiii (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

223. *See, e.g.*, S.K. Bardwell, *Sex Offenders Clustering in Poor Neighborhoods*, HOUS. CHRON., Jan. 25, 2003, at A1 (identifying the growing concern troubling "many cities: clusters of sex offenders that infect low-income neighborhoods"); Dennis & Waite, *supra* note 40 (noting that "offenders cluster in poor neighborhoods, staying in motels, apartments, mobile homes or anywhere that will take them"); Lori Rackl & Chris Fusco, *Nothing More Vile than Sex Offenders: Governor Will Make Rules Tougher Starting Today*, CHI. SUN-TIMES, July 10, 2005, at 7 (stating that idea to prohibit more than one sex offender from living at the same address "grew out of Corrections Department data that showed paroled sex offenders were being clustered in group homes in poor South Side neighborhoods"); Editorial, *Protection from Predators*, CHI. TRIB., Mar. 21, 2005, at 18 (noting that "[a] Tribune analysis found that a large number of sex offenders released from prison are concentrated in a handful of poor, African-American neighborhoods of Chicago"). *But see* Doe v. Miller, 405 F.3d 700, 724 (8th Cir. 2005) (upholding district court factual findings regarding housing availability under Iowa's residency restrictions: "[s]ex offenders are completely banned from living in a number of Iowa's small towns and cities. In the state's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited."); Scott Jason, *31 Sex Offenders Arrested in Sweep*, MERCED SUN-STAR (Cal.), Oct. 14, 2006, at 1 (quoting Merced County Sheriff's spokesman Rich Howard as saying "[t]here's not a neighborhood in the county that's immune to [sex offenders] . . . [f]rom upper middle class to the really poor neighborhoods, it's pretty evenly spread").

224. Associated Press, *Released Sex Offenders Cluster in Minneapolis*, GRAND FORKS HERALD (N.D.), Feb. 7, 2004, at 6 (noting that Minneapolis Police Offender Notification Supervisor Jon Hinchliff "thinks one alternative is to funnel offenders to a designated site outside of residential areas" which is similar to the idea of banishment).

offenders in their community without having a voice about the effect on their neighborhoods.

The landmark genesis of the concept of environmental justice was a 1987 report, *Toxic Wastes and Race in the United States*, prepared by the Commission on Racial Justice of the United Church of Christ.[225] This report purported to expose "the gross disregard for people of color as toxic waste landfills were sited in their communities throughout the nation."[226] Governmental siting of a sex offender in a community as a LUDI through residency restrictions barring them from other neighborhoods is analogous to the governmental siting of toxic landfills as LULUs through government permitting and regulation. This Part will explore how lessons from environmental justice concerns about toxic landfills can inform those communities which experience the "dumping" of sex offenders in their neighborhoods.

The major controversy in the environmental justice movement has been whether the overconcentration of LULUs in minority communities is the result of economics, in that land in these neighborhoods may be less expensive, or the result of either overt or indirect racial discrimination.[227] A 2001 California study on the issue of which came first, toxic facilities or minority move-in, concluded that the siting of toxic facilities was most directly associated with "[d]emographics reflecting political weakness—including a higher presence of minorities, a lower presence of home owners, or a significant degree of ethic churning."[228]

A 2006 study by University of Michigan and University of Montana researchers found that by applying alternate methods to assess disparities in the location of environmental hazards, race seemed to matter more than previous studies had revealed.[229] The researchers determined that while "national studies using the traditional method report that mostly occupational variables—not racial variables—are significant predictors of

225. Rev. M. Linda Jaramillo, *Foreword* to ROBERT D. BULLARD ET AL., UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES, TOXIC WASTES AND RACE AT TWENTY: 1987–2007, at vii (2007).

226. *Id.*

227. *See* Manuel Pastor, Jr. et al., *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. URB. AFF. 1, 2 (2001) (noting that "[d]espite the ongoing response at the policy level, the research on disproportionate exposure by race has yielded mixed results").

228. *Id.* at 19. *See also id*. (also concluding that the best way to address environmental justice concerns from a policy standpoint is to continue "building social capital across ethnic lines by an explicit commitment to a people of color movement").

229. *See* University of Michigan News Service, Study Reveals a Disproportionately High Number of Minorities and Poor Live Near Toxic Waste Facilities (May 19, 2006), http://www.ns.umich.edu/htdocs/releases/story.php?id=259.

the locations of these facilities," this traditional method of analysis "'has largely camouflaged racial and economic disparities that are much larger than previously reported.'"[230] Finally, the most recent comprehensive study of this issue, *Toxic Wastes and Race at Twenty: 1987—2007*, prepared for the United Church of Christ Justice & Witness Ministries, purports to find "clear evidence of racism where toxic waste sites are located and the way government responds to toxic contamination emergencies in people of color communities."[231]

Just as "[p]olluting industries still follow the path of least resistance"[232] and locate LULUs in communities "where land, labor and lives are cheap"[233] and regulatory protections are weak, LUDI sex offenders often locate in these same communities because rent prices are cheap, landlords are willing to accept sex offenders, they are homeless, a social services department is placing them there, and the community lacks the political strength to resist.[234] Problems experienced by sex offenders in trying to re-enter a community, such as unemployment and social exclusion resulting from public identification, can also result in "many of them end[ing] up living in socially disorganized, economically deprived neighborhoods that have fewer resources for deterring crime and protecting residents."[235] Research has shown that registered sex offenders do not appear to live in these areas by choice, but are instead more likely to be relegated to these poorer communities, "characterized by economic disadvantage, lack of physical resources, relatively little social capital, and high levels of social disorganization."[236] Public policy choices in deciding whether to implement sex offender residency restrictions must take into account the unintended consequences of forcing these "banished" individuals into less politically powerful communities, which are more vulnerable to an overconcentration of LULUs and LUDIs.

Those organizations protecting economically disadvantaged and minority communities from environmental hazards should also apply pressure to policy makers to protect these same communities from other types of LULU overconcentrations, such as liquor outlets,[237] and from sex

230. *Id.* (quoting Paul Mohai discussing study appearing in May 2006 issue of Demography).
231. Jaramillo, *supra* note 225, at vii.
232. ROBERT D. BULLARD ET AL., UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES, TOXIC WASTES AND RACE AT TWENTY: 1987–2007, at xii (2007).
233. *Id.*
234. *See* Bain & German, *supra* note 37.
235. Levenson et al., *supra* note 5, at 4 (internal citations omitted).
236. Tewksbury, *supra* note 15, at 535.
237. *See* Shelley Ross Saxer, *"Down with Demon Drink!": Strategies for Resolving Liquor Outlet*

offenders, particularly those identified as LUDIs. In addition to informing and influencing political decision makers about these issues, communities should explore other environmental justice theories to determine if they are appropriate to address these disproportionate risks. Although equal protection challenges have been generally unsuccessful in the environmental justice movement because of the need to show intentional discrimination,[238] other environmental justice theories, such as Fair Housing Act claims, could prove successful for addressing overconcentration concerns.[239] Claims under Title VI,[240] which provides that programs discriminating on the basis of race are not entitled to funding from federal agencies and departments, have been limited in effectiveness for environmental racism claims by recent court decisions and agency regulations, which also require a showing of intentional discrimination.[241]

Under Executive Order 12,898, issued by President Clinton in 1994, all federal agencies must "collect data about the health and environmental impact of their actions on minority groups and low-income populations and develop policies to achieve environmental justice '[t]o the greatest extent practicable and permitted by law.'"[242] The Environmental Protection Agency (EPA) and other federal agencies have made major strides in adopting environmental justice strategies and encouraging greater communication with, and participation by, minorities and low-income communities when government actions affect these populations.[243] However, more than ten years later, there are concerns as to how well these agencies have implemented their environmental justice strategies, and "[t]he challenge of fulfilling the order's goals remains unfinished."[244]

Overconcentration in Urban Areas, 35 SANTA CLARA L. REV. 123 (1994).

238. *See* Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 222, at 3, 13 (noting that "the intent requirement has proven an obstacle to many, though not all, environmental justice suits based on equal protection assertions").

239. Colin Crawford, *Other Civil Right Titles*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 222, at 67, 67 (citing civil rights attorney, the late Ralph Santiago Abascal, as stating that civil rights claims under the Fair Housing Act (FHA) may be more likely to achieve success than those claims litigated under Fourteenth Amendment Equal Protection).

240. Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (2006).

241. *See* Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 222, at 23, 23–25.

242. Bradford C. Mank, *Executive Order 12,898*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 222, at 101, 101 (quoting Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994)).

243. *Id.* at 142.

244. *Id.* at 143 (noting that state and local regulators will need to spend more time evaluating environmental impact on these communities and considering alternative sites and mitigation before issuing permits).

While it might be symbolically helpful to obtain an Executive Order requiring that federal agencies take into account whether their actions tend to encourage an overconcentration of sex offenders in low-income and minority communities, it is doubtful that such an order would be effective since it could not be applied to state and local actions that restrict sex offender residency in such a way as to encourage their movement into these communities. Instead, community advocates might focus on exploring state environmental justice programs and policies directed at the state and local level to see if similar policies could be developed to address the disproportionate siting of sex offenders in poor, minority neighborhoods.[245]

Fair Housing Act (FHA) claims under Title VIII may present the most viable civil rights approach to protect minority communities from actions that encourage sex offenders to locate in their neighborhoods because discriminatory intent is not required, only a showing of discriminatory effect.[246] While legislators may have intentionally discriminated against sex offenders when enacting residency restrictions,[247] this discrimination has only indirectly had an impact on those communities protected by the FHA. Environmental justice plaintiffs have focused on three FHA sections: 42 U.S.C. § 3604(a), 42 U.S.C. § 3604(b), and 42 U.S.C. § 3617.[248]

Under § 3604(a), it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[249] This section can be used to challenge actions by individuals or governmental units that directly affect the availability of housing for communities of color. Claims that certain actions have caused such neighborhoods to deteriorate and decline in property value have been rejected[250] and courts have refused to extend § 3604(a) to cover claims

245. *See* Nicholas Targ & Steven G. Bonorris, *State Environmental Justice Programs and Related Authority*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 222, at 157, 157–98 (describing various state programs).

246. *See* Colin Crawford, *Other Civil Rights Titles*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 222, at 67, 68.

247. For a review of how legislative debates analogized the sex offender concerns to "toxic waste," see Logan, *supra* note 5, at 5–12 & nn.17–69 and accompanying text, and Dan Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 346–62 (2001).

248. Crawford, *supra* note 246, at 69–78.

249. *Id.* at 69 (quoting 42 U.S.C. § 3604(a) (2000)).

250. *Id.* (citing Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984)).

such as siting decisions involving LULUs because Section 3604(a) does not protect "intangible interests in the already-owned property."[251] However, it may be possible for a plaintiff to claim that if siting a LULU "'would result in greater segregation in the community by discouraging whites from living in the neighborhood, § 3604(a) might apply, despite the already-owned property exclusion.'"[252]

Communities receiving an overconcentration of sex offenders could allege a § 3604(a) violation by showing that residency regulations or private restrictions directed against sex offenders have pushed LUDIs into their neighborhoods and have directly limited housing opportunities for people of color.[253] Suppose an affluent neighborhood agrees to enforce a private covenant that prohibits any homeowner from selling to a convicted sex offender. A convicted sex offender who would otherwise have moved there because he has family in the neighborhood must now find an apartment in a nearby community that consists of subsidized housing projects occupied by primarily African American and Hispanic families. If one of the neighbors in this apartment complex challenges the enforceability of the private covenant under the Fair Housing Act[254] on the theory that court enforcement of the covenant would have an adverse impact on her family and those similarly situated, would this challenge be viable?

A similar FHA claim was made in *Coalition of Bedford-Stuyvesant Block Association, Inc. v. Cuomo*[255] by a community organization, which asserted constitutional violations along with a § 3604(a) claim based on the intentional and discriminatory siting of homeless shelters in a minority area.[256] Although the court dismissed the FHA claim, it based the dismissal on the plaintiff's failure to show that siting these LULUs directly affected housing availability for people of color.[257] Therefore, it may be possible for communities of color to assert such a claim for the overconcentration of LUDIs if they have sufficient evidence to show that government or private actions restricting residency of sex offenders

251. *Id.* at. 69 (internal quotation omitted).

252. *Id.* at 71–72 (quoting Vicki Been, *Environmental Justice and Equity Issues*, *in* ZONING AND LAND USE CONTROLS, § 25D.05[1][a][i] & n.17 (Patrick Rohan ed., 1995)).

253. *Id.* at 70.

254. 42 U.S.C. § 3604 (2006).

255. Coal. of Bedford-Stuyvesant Block Ass'n, Inc. v. Cuomo, 651 F. Supp. 1202 (E.D.N.Y. 1987).

256. *Id.* at 1206–08.

257. *Id.* at 1208 n.2.

directly affects the availability of housing for minority neighborhoods.[258] In addition, a § 3604(a) claim may be based on showing that the "dumping" of sex offenders in minority neighborhoods "'would result in greater segregation in the community by discouraging whites from living in the neighborhood,'"[259] or "had the effect of making housing unavailable by forcing members of a protected class to leave an area."[260]

Department of Housing and Urban Development regulations may also be used to support a § 3604(a) claim based on discriminatory housing practices, which might rely on sex offender registration and residency restrictions.[261] One of the provisions intended to help define the phrase "otherwise make unavailable or deny"[262] in a § 3604(a) claim states:

> It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, *to restrict or attempt to restrict* the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling *so as to perpetuate, or tend to perpetuate* segregated housing patterns, *or to discourage or obstruct choices in a community, neighborhood or development*.[263]

Under this provision, minority neighborhoods may be able to argue that residency restrictions (either public or private) disproportionately pushing sex offenders into their neighborhoods have *discouraged or obstructed choices* in a community saturated with LUDIs. Such an assertion may support a FHA claim against local government or private homeowner associations with restrictive covenants prohibiting sex offenders.[264] In addition, "if a real estate agent discourages a prospective buyer or renter by exaggerating drawbacks or failing to inform [that prospective buyer or renter] of desirable features of a dwelling or of a community, neighborhood, or development," he may be subject to an FHA violation claim.[265] Such a claim would be possible if it could be alleged that the

258. Crawford, *supra* note 246, at 70–71.

259. *Id.* at 71–72 (quoting Been, *supra* note 252, § 25D.05[1][a][i] & n.17); *see also id*. at n.35 (noting that "[t]he *Southend* reasoning also might not bar a Sec. 3604(a) claim regarding the harm a siting does its neighbors if the neighbors could prove that the siting had the intent or effect of driving people of color from the community") (quoting Been, *supra* note 252, at 25D.05[1][a][i] & n.17).

260. *Id.* at 72 (citing Avery v. City of Chicago, 501 F. Supp. 1 (N.D. Ill. 1978)).

261. *Id.* (citing 24 C.F.R. §§ 100.50–100.304 (1988)).

262. 42 U.S.C. § 3604(a) (2000).

263. Crawford, *supra* note 246, at 72 (emphasis added) (quoting 24 C.F.R. § 100.70(a) (1988)).

264. *Id*. (suggesting that environmental justice plaintiffs consider using such arguments when multiple LULUs have been sited in their neighborhoods).

265. *Id.* at 73 (quoting 24 C.F.R. § 100.70(c)(1)–(2) (1988)).

agent discouraged a prospective white buyer or renter from investing in a minority neighborhood by using the sex offender registry, instead of racial or ethnic references, as a way to promote segregated housing.[266]

Section 3604(b) offers a potential litigation strategy for minority neighborhoods suffering from an overconcentration of sex offenders. This section makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of service or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[267] Under this section, owners and renters of already-acquired property may be able to bring an action against public entities for "discriminating against [them] 'in connection' with 'the terms, conditions, or privileges of sale or rental of a dwelling'" by diminishing their property values as a result of dumping sex offenders into their communities of color based on residency restrictions.[268]

Federal courts have narrowly interpreted the statutory phrase "provision of services"[269] to apply to "'services generally provided by governmental units such as police and fire protection or garbage collection.'"[270] Therefore, it may be difficult to successfully claim that municipal actions restricting the residency of sex offenders is a *provision of service* unless the range of services *generally provided* by local governments can be expanded under this interpretation to include the typical police power purposes of promoting the health, safety, and general welfare of the community.[271] Additionally, some courts have indicated receptiveness to § 3604(b) claims by environmental justice plaintiffs, noting that exclusionary zoning actions would be subject to FHA challenges and municipal decisions siting LULUs in already disproportionately burdened communities of color may be legally questionable.[272] This receptiveness to environmental justice claims

266. *See id.* (suggesting the use of this regulatory provision for environmental justice advocates if noxious uses in the minority neighborhood are used for such a discriminatory practice).

267. *Id.* (quoting 42 U.S.C. § 3604(b)).

268. *See id.* at 74 (discussing potential claims under § 3604(b) by environmental justice plaintiffs claiming "that a proposed incinerator or waste disposal and storage facility would diminish her property values and thus discriminate against her 'in the terms, conditions, or privileges of sale'" (quoting 42 U.S.C. § 3604(b)).

269. 42 U.S.C. § 3604(b).

270. Crawford, *supra* note 246, at 74 (quoting Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984)).

271. *See id.* at 75 (questioning whether zoning is a service "generally provided").

272. *See id.* at 75–76 (citing Oak Ridge Care Ctr., Inc. v. Racine County, 896 F. Supp. 867, 872–73 (E.D. Wis. 1995)).

involving the disproportionate siting of LULUs may also signal a receptiveness to FHA claims involving the "dumping" of sex offenders on minority neighborhoods.

The third potential FHA claim environmental justice litigants may consider is § 3617. This section provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by . . . [inter alia] Section 3604 of this title.[273]

While a § 3617 claim may be advantageous to environmental justice litigants because it has a broad reach and can be used to sue "defendants other than housing providers and governmental entities,"[274] there does not appear to be an obvious potential value to minority communities wishing to prevent the dumping of sex offenders in their neighborhood as a result of residential restrictions. One possibility for such an FHA challenge is if neighbors protest against the siting of a halfway house for sex offenders and they are harassed, threatened, or sued by the siting entity for protesting, they may have the right to assert a § 3617 claim in response.[275]

FHA civil rights challenges may be an effective tool for communities of color to prevent the dumping of sex offenders in their neighborhoods because of residency restrictions enacted and enforced by more politically powerful municipalities and private associations. Although FHA claims have also been asserted in favor of sex offenders and against community agitators, this Article does not address potential FHA claims against community protesters who interfere with housing projects for individuals protected by the act, such as disabled individuals,[276] or the claims of sex offenders alleging FHA violations.[277]

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273. *Id.* at 77 (quoting 42 U.S.C. § 3617).

274. *Id.* at 78.

275. *See id.* (discussing potential scenario in which "community group was opposing the proposed siting of a low-level radioactive waste dump and also working concurrently to develop low-income housing in a predominantly Latino-American neighborhood" and suggesting that "if the prospective dumper then filed a so-called SLAPP suit against the community group, the community group in turn might have grounds to successfully advance a Section 3617 claim").

276. *See, e.g.*, Garrett Therolf, *Protester of Group Home Is Targeted*, L.A. TIMES, Mar. 20, 2007, at B1 (HUD opened an investigation against a woman who protested a group home for the developmentally disabled that was purported to be accepting sex offenders as well).

277. *See, e.g.*, City of Northglenn v. Ibarra, 62 P.3d 151, 153 (Colo. 2003) (upholding on state preemption grounds, rather than on FHA grounds, the lower court decision that an ordinance which

Concerns about the siting of environmental hazards in neighborhoods of color have motivated the development of the environmental justice movement, and there are both public policy and litigation mechanisms these communities can use to protect themselves from such risks. These same neighborhoods have also suffered from the disproportionate siting of sex offenders, which at a minimum, has resulted in a decrease in property values as more people become aware of sex offender registries and as residency restrictions force more sex offenders into the homeless population.[278] Impacted communities should have a voice to protect themselves against the isolationist states, local regulations, and private associations attempting to protect their own communities against sex offenders.

V. ALTERNATIVE SOLUTIONS

Sex offender registration statutes may be valuable and constitutionally valid; however, residency restrictions, which effectively attempt to banish sex offenders, are problematic in several ways.[279] They arguably violate civil rights of sex offenders, exhibit protectionist behavior in violation of the Dormant Commerce Clause, effectively banish sex offenders into poorer, minority communities with less political power to object, and there is no evidence that they are effective in protecting against recidivism concerns.[280] Enacting residency restrictions is a politically popular

prohibits registered sex offenders from living together in a single-family residence "discriminates on the basis of familial status in violation of the federal Fair Housing Act, 42 U.S.C. § 3601"); Megan A. Janicki, *Better Seen than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 B.U. PUB. INT. L.J. 285, 287 (2007) (noting that sex offenders are not protected under the Fair Housing Act).

278. For example, in the two years after California passed Proposition 83, an initiative that imposed harsh restrictions on where sex offenders could live, the number of homeless sex offenders on parole shot up sixty percent. *See* Michael Rothfeld, *Homeless Sex Offenders on Parole Jumps Sharply*, L.A. TIMES, Dec. 19, 2008, at B2.

279. *See* Logan, *supra* note 11, at 338 (observing that registration and notification "laws have proven enormously popular with the public and legislators, yet their effects remain largely unexplored and untested"). *But see* Richard Tewksbury & Matthew B. Lees, *Perceptions of Punishment: How Registered Sex Offenders View Registries*, 53 CRIME & DELINQ. 380, 402 (2007) (discussing study results indicating that sex offenders generally believe a sex offender registry can be effective in promoting public safety, but were "divided in their views regarding the practicality of sex offender registries" and saw the main weakness in the existing systems to be "the failure to distinguish among different types of sex offenders"); Blair Anthony Robertson, *Illuminating a Dark Subject*, SACRAMENTO BEE, Feb. 6, 2005, at A3 (discussing various views as to whether "public notification like this reduces sex offending or makes the community safer") (internal quotation omitted).

280. *See, e.g.*, Margaret Troia, Note, *Ohio's Sex Offender Residency Restriction Law: Does It Protect the Health and Safety of the State's Children or Falsely Make People Believe So?*, 19 J.L. & HEALTH 331, 370 (2004–05) (concluding that "Ohio's sex offender residency law places unjustified

response to citizen concerns about the dangers of sexual offender recidivism in a community.[281] Nevertheless, this legislation promotes "a false sense of security, lulling parents and children into the big-bad-man mindset when many molesters are in fact trusted authority figures or family members."[282] Given the legal and practical problems with residency restrictions[283] identified in the sections above, alternative approaches to dealing with the important concerns and fears about sex offender recidivism should be examined.

There are two major approaches to dealing with sex offenders—the criminal approach and the mental illness approach.[284] Under the criminal approach, confinement and monitoring are important tools to manage the sex offender, whom we expect to reoffend if released back into society.[285] Under the mental illness approach, various treatment methodologies are explored to rehabilitate the offender so that he or she can reenter the community without risking the public safety.[286] Certainly, both of these approaches can be used simultaneously—convicted sex offenders should receive appropriate treatment while incapacitated in order to reduce the

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burdens on sex offenders and increases the chances for recidivism"); *see also* MINN. DEP'T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: REPORT TO THE LEGISLATURE 11 (2003) (findings noted that "[t]here is no evidence in Minnesota that *residential* proximity to schools or parks affects re-offense" and also that "[t]he result of proximity restrictions would be to limit most level three offenders to rural, suburban, or industrial areas"); Richard B. Krueger, Opinion, *The New American Witch Hunt: It Makes Little Sense to Demonize Sex Offenders Rather Than Treat Their Problems*, L.A. TIMES, Mar. 11, 2007, at M1 (suggesting that public policy approaches to sex offenses need to be reexamined and that we need to "develop empirically based, scientifically sound measures and treatments").

281. *See* Durling, *supra* note 5.

282. Simon, *supra* note 25, at 149 (quoting Ann Quindlen, *So What If Law Isn't Fair to Sex Offenders? Children Come First*, CHI. TRIB., Aug. 8, 1994, at 13).

283. *See* Rothfeld, *supra* note 80 (noting that "[t]he law voters passed to crack down on sex offenders could actually be increasing the danger such offenders pose by driving them into homelessness at a significant rate" according to California's Sex Offender Management Board).

284. *See* Morse, *supra* note 30, at 165–70 (discussing differences between the moral model and medical model as responses to sexual misconduct); Robert F. Schopp, *"Even A Dog . . .": Culpability, Condemnation, and Respect For Persons*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 183, 194 (expressing concern that sexual predator statutes "undermin[e] the distinction between criminal justice and mental health institutions of social control"); *see also* Bruce J. Winick, *A Therapeutic Jurisprudence Assessment of Sexually Violent Predator Laws*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 317, 318 (observing that sex offender policy "has fluctuated between two polar approaches," subjecting sex offenders to criminal punishment under a criminal model and labeling them as "'sexual psychopaths'" under an illness model).

285. Winick, *supra* note 284, at 319 (discussing the criminal approach which "imposes criminal incarceration as a means of incapacitation, deterrence, and retribution").

286. *Id.* (discussing the new illness model which determines that a sex offender's "mental abnormality renders them unable to control their strong urges to engage in violent sexual conduct").

risk of reoffense.[287] Risk assessment and management are critical under either of these approaches, but because the risk depends upon individual behavior, the risk assessment must be individualized and the appropriate approach utilized.[288] General residency restrictions are not individualized risk assessments and appear to be only a political response without any proven effectiveness.[289]

A. The Criminal Approach: Confinement & Monitoring

Assessing risk for sex offender recidivism is the primary justification for responding to conduct through confinement and monitoring under the criminal model.[290] Policy makers have inaccurately assumed (1) that stranger sex offenders target neighborhood children, when studies have found that between eighty and ninety percent of sex offenses are committed by relatives, friends, and people in authority,[291] and (2) that recidivism rates for sex offenders are higher than for other felons, when some studies have indicated lower recidivism rates for sex offenders.[292] The belief that risk assessment is not accurate has also allowed judges, juries, and experts to have wide discretion in deciding what level of risk justifies the deprivation of personal liberty.[293] However, technologies, such as actuarial risk assessment instruments,[294] are improving such that the risk

287. *Id.* (concluding that "on balance, a criminal approach that offers treatment in prison on a voluntary basis is preferable to the new sexual predator statutory schemes"); *see also* Roxanne Lieb, *State Policy Perspectives on Sexual Predator Laws*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 41, 58 (concluding that existing sexual predator approaches "operate in a no-man's land between mental hospitals and prisons, mixing laws, procedures, and working cultures from each").

288. *See* Durling, *supra* note 5, at 349–50 (observing that judges and scholars are critical of the more general residency restrictions and have advocated an individualized approach based on risk assessment).

289. *See* Lucy Berliner, *Victim and Citizen Perspectives on Sexual Offender Policy*, 989 ANNALS N.Y. ACAD. SCI. 464, 473 (2003) (concluding that "[s]exual offender experts can and should be important contributors to social policy regarding what happens to sexual offenders").

290. Eric S. Janus, *Legislative Responses to Sexual Violence: An Overview*, 989 ANNALS N.Y. ACAD. SCI. 247, 252–53 (2003) (noting that the ability of mental health experts to determine risk of reoffense may be better than believed by those seeking confinement to avoid assessment inaccuracy).

291. *See* Durling, *supra* note 5, at 329–32. In fact, according to some studies, this number could exceed ninety percent. *See* Simon, *supra* note 25, at 149–50.

292. *See* Durling, *supra* note 5, at 329–32.

293. Janus, *supra* note 290, at 253.

294. Actuarial risk assessment typically appears in the context of statistically calculating risk for insurance companies, but the method can be applied in a judicial context for sex offenders. *See* Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1454 (2003). Using statistics, actuarial scales are developed for groups of released sex offenders, both groups that reoffend and those with no subsequent convictions. *Id.* Utilizing these known outcomes, actuaries can determine which predictor

of recidivism may be more accurately measured, predicted, and communicated to help balance public safety and personal liberty.[295] Using a risk management model, instead of relying only on a risk prediction model, will likely be more accurate and helpful to legal decision makers and will give offenders an incentive to modify their behavior in order to gain or retain their liberty interests.[296]

Based on either a general risk assessment model or on an individualized assessment, decision makers determine how best to minimize the risk to the public from sex offenders who are expected to reoffend.[297] The perceived risk to public safety will likely govern whether the sex offender is subjected to the criminal model, the illness model, or a combination of the two. Confinement and/or monitoring to guard against the risk of reoffense can be achieved through extended or indeterminate prison terms, civil commitment, and Global Positioning System (GPS) monitoring. These alternatives, combined with voluntary cognitive behavioral therapy, in and out of confinement, should replace residency restrictions, and possibly registration statutes, which may actually increase recidivism because they tend to be psychologically damaging to sex offenders and counterproductive to rehabilitation.[298]

Isolation and quarantine laws are justified by the government's duty to protect public health similar to the government's use of civil confinement to reduce the risk to public safety from sex offender conduct.[299] In both

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variables best forecast which offenders will reoffend and which offenders will not. *Id.* The predictor variables are then weighted accordingly, combined to form a scale, and after sufficient testing and checking, the scale can be used to provide "probabilistic estimates of reoffense for each score, or range of scores, for different time frames," typically expressed as a percentage of sex offenders predicted to reoffend. *Id.*

295. *Id.* at 255–56 (noting that improved risk assessment techniques may have adverse, unintended consequences because public policy still needs to decide who bears the known risk and it may diminish personal accountability); *see also* Hanson et al., *supra* note 19, at 164 (suggesting that weather forecasting may be a helpful model in determining how best to use prediction models in order to "improve the assessment and management of sexual offenders"); Harris & Rice, *supra* note 23, at 207–08 (concluding that "no studies of sex offender recidivism yet published have included treatments with substantial ability to lower recidivism" and therefore clinicians need "to carefully assess risk and manage offenders" until appropriate therapies are found); Commentary, *Risk Assessment: Discussion of the Section*, 989 ANNALS N.Y. ACAD. SCI. 236, 236–46 (2003) (presenting commentary by scholars of research literature on risk assessment of sex offender recidivism).

296. Winick, *supra* note 284, at 222–23.

297. *Id.* at 317–18.

298. *Id.* at 328–29 (arguing that "[s]exually violent predator laws should be repealed or not adopted in states that do not presently have them" because they carry "high fiscal costs and antitherapeutic consequences" such that "the negative effects of these laws far exceed their positive value" as compared to extended imprisonment through the criminal punishment model).

299. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 366 (1997) (comparing civil confinement of sexually violent offenders to "involuntarily confining persons afflicted with an untreatable, highly

situations, there is a tension between protecting the public and respecting individual liberty and privacy interests.[300] Public health experts have "recommend[ed] the following criteria to assess the ethical and legal justification for isolation and quarantine: scientific assessment of risk, targeting restrictive measures, a safe and humane environment, fair treatment and social justice, procedural due process, and the least restrictive alternative."[301] Policy makers addressing sex offender recidivism concerns for public safety should use very similar criteria to address confinement and restriction of sex offenders. However, in viewing sex offenders as a problem similar to infectious disease, we may exacerbate the current regulatory approaches to sex offenders which look to the goal of "waste management" and apply punitive policies to transform the sex offender "crime as disease back to an earlier conception of crime as monstrosity."[302]

Longer, determinate sentencing is one approach to dealing with sex offenders under a precautionary principle model.[303] Because we are still lacking definitive information as to treatment effectiveness and the predictability of reoffense, public policy may encourage longer prison terms for sexual offenses in order to confine these individuals and shift the risk of harm away from the general public.[304] Indeterminate sentencing

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contagious disease"); *see also* Morse, *supra* note 30, at 170 (suggesting that "a purely preventive regime in which confinement is authorized for dangerousness alone, untied to culpability or nonresponsibility" could be used instead of distinguishing between civil and criminal confinement and that "[t]his would be a scheme of 'behavioral quarantine,' analogous to medical quarantine to prevent the spread of infectious disease").

300. *See* Ronald Bayer & James Colgrove, *Rights and Dangers: Bioterrorism and the Ideologies of Public Health*, *in* PUBLIC HEALTH ETHICS: THEORY, POLICY, AND PRACTICE 289, 289 (Ronald Bayer et al. eds., 2007) (discussing the historical controversy over state restrictions on liberty to protect against public health threats); *see also* Lawrence O. Gostin et al., *Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome*, *in* PUBLIC HEALTH ETHICS: THEORY, POLICY, AND PRACTICE, *supra*, at 261, 261.

When severe acute respiratory syndrome (SARS) first appeared in 2003, and even earlier in the 1980s when the HIV/AIDS pandemic arose, public health approaches included reporting, surveillance, isolation, and quarantine. Gostin et al., *supra*, at 261. Similarly, public safety approaches to sex offenders have included registration, monitoring, confinement, and residency restrictions. In each case the precautionary principle may be applied to guide decision making in light of incomplete knowledge and information about the risk to public health and safety. *See id.* at 265.

301. Gostin et al., *supra* note 300, at 269.

302. Simon, *supra* note 37, at 304.

303. Morse, *supra* note 30, at 172 (observing that "it is within the state's power to reduce sexual offense recidivism by criminal sentences").

304. *See, e.g.*, James L. Johnson, *Sex Offenders on Federal Community Supervision: Factors that Influence Revocation*, FED. PROBATION, June 2006, at 18 (2006) (noting that "State legislators and Congress have instituted legislation that mandates sex offender registration and public notification, longer prison sentences for certain sexual crimes, and stricter enforcement of existing laws"); Ronnie Hall, Note, *In the Shadowlands:* Fisher *and the Outpatient Civil Commitment of "Sexually Violent*

and civil confinement are semi-criminal model approaches for dealing with the sex offender recidivism risk. However, civil confinement under sexually violent predator (SVP) laws may generate high costs from unnecessary and expensive confinement, which will be required to meet constitutional standards for treatment since civil confinement is not intended to be punitive.[305] As one commentator has noted, tragedies resulting from dangerous people being released from confinement "can be entirely prevented only by exceptionally harsh and probably disproportionate sentences or by an expanded scheme of civil commitment. The former will be unjust and expensive. The latter will threaten the liberty of all and will be both unjust and expensive."[306]

Civil commitment of sex offenders is currently provided for in more than fifteen states.[307] Commitment was initially viewed in earlier legislation as an opportunity for treatment of sex offenders in lieu of a prison sentence; however, more recent enactments and revisions have not been rehabilitative in nature, but have instead been guided by attempts to confine sex offenders for as long as possible to minimize the risk to public safety from recidivism.[308] Civil commitment laws for sexually violent predators have been upheld against constitutional challenges,[309] but

Predators" in Texas, 13 TEX. WESLEYAN L. REV. 175, 212 (2006) (suggesting that longer prison terms might be a better alternative than outpatient civil commitment); Allison Morgan, Note, *Civil Confinement of Sex Offenders: New York's Attempt to Push the Envelope in the Name of Public Safety*, 86 B.U. L. REV. 1001, 1017 (2006) ("[I]t is paradoxical to hold a person responsible for his acts during his prison term and then determine that he is unable to control himself after that term has been completed.").

305. *See* Lieb, *supra* note 287, at 55 (noting that Washington was required to invest significant funds into treatment facilities under the SVP program in order to meet constitutional requirements). Washington, the first state to enact a post-sentence commitment law for sex offenders, did so in 1990 after a "task force concluded that sentence increases alone were an insufficient remedy to prevent dangerous sex offenders from committing new sex crimes after their release from prison." *Id.* at 43–44. In response to the high costs resulting from the SVP statute, Washington lawmakers in 2001 enacted indeterminate civil commitment sentencing for violent sex offenders, allowing judges to impose maximum sentences under the guidelines for a SVP or order a minimum prison term. *Id.* at 55–56.

306. Morse, *supra* note 30, at 180.

307. W. Lawrence Fitch, *Sexual Offender Commitment in the United States: Legislative and Policy Concerns*, 989 ANNALS N.Y. ACAD. SCI. 489, 490 (2003). Civil commitment is allowed in all states for the involuntary hospitalization of the mentally ill, but it is "[g]enerally reserved for individuals with serious psychiatric disorders . . . [and] when an individual's symptoms become acute and place the individual at imminent risk of serious harm." *Id.* at 489. It is also allowed for "individuals charged with a criminal offense and found to be incompetent to stand trial or not criminally responsible (legally 'insane')." *Id.*

308. *Id.* at 490.

309. *See* Bourquez v. Superior Court, 68 Cal. Rptr. 3d 142, 149–52 (Ct. App. 2007) (upholding California's Sexually Violent Predators Act, as amended by SB 1128 and by Proposition 83 to change the commitment term to an indeterminate term, as applied to SVPs confined prior to enactment of the

continue to be controversial in the legal and the therapeutic communities.[310] The legality and efficacy of these laws continue to be subject to criticism,[311] but they are certainly an alternative to residency restrictions if specifically directed to those dangerous sexual predators who are the most likely to seriously reoffend. Nevertheless, states are finding that the cost of civil commitment and monitoring is high and government agencies are exploring treatment options to avoid confinement and recidivism.[312]

The advantage of using civil commitment and indeterminate sentencing instead of residency restrictions, registration, and monitoring, is that those individuals who have been identified as sexually violent predators are confined so that they do not have access to potential victims. Since approximately ninety percent of sex offenders are known to their victims[313] and following incarceration may return to the homes where they committed the initial offenses, those that are at higher risk of seriously harmful reoffense are kept away from future victims. Instead of directing inefficacious laws against the small number of "stranger" offenders, which

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amendments); *see also* People v. Shields, 65 Cal. Rptr. 3d 922, 925 (Ct. App. 2007) (concluding that the "indeterminate term provisions of section 6604 apply to persons confined as SVP's for two-year terms under the former version of section 6604").

Myriad constitutional challenges were levied (and withstood) in *Kansas v. Hendricks*, 521 U.S. 346 (1997), as the U.S. Supreme Court upheld the Kansas Sexually Violent Predator Act, concluding that it did not violate due process or double jeopardy principles and that it was not an ex post facto law. The Court determined that the Act did not impose punishment, but instead "permit[ted] involuntary confinement based on a determination that the person *currently* both suffers from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public." *Id.* at 371. However, the *Hendricks* decision was not clear as to the level of scrutiny that should apply to involuntary commitment proceedings. Justice Kennedy's concurrence pointed out that although the Kansas law met the constitutional requirements established by the Court's precedents, civil confinement cannot be used if the purpose is punitive and becomes "confinement for life." *Id.* at 372–73 (Kennedy, J., concurring). The dissent agreed with the majority that the Act's "definition of 'mental abnormality' satisfies the 'substantive' requirements of the Due Process clause," but because treatment was not properly provided for a treatable condition, the dissent argued that civil confinement was "an effort to inflict further punishment upon him" and violated the Ex Post Facto Clause. *Id.* at 373–74 (Breyer, J., dissenting) (quoting majority opinion).

310. *See* Fitch, *supra* note 307, at 500.

311. *See, e.g.*, Fitch & Hammen, *supra* note 34, at 37 (concluding that "[s]pecial commitment laws aimed specifically at sex offenders may enhance public safety, but they wreak havoc on public mental health systems and strain constitutional principles").

312. Matthew V. Daley, Note, *A Flawed Solution to the Sex Offender Situation in the United States: The Legality of Chemical Castration for Sex Offenders*, 5 IND. HEALTH L. REV. 87, 88 (2008); *see also* Fitch & Hammen, *supra* note 34, at 36–37 (noting that a 1999 survey of mental health authorities indicated that fiscal impact was a significant factor in the failure of commitment legislation in some states); Lieb, *supra* note 287, at 54–56 (discussing increasingly high cost of civil commitment in Washington State).

313. *See supra* note 291 and accompanying text.

sweep far too many individuals into their scope of regulation,[314] we hope that the truly dangerous individuals—whether they are stranger or relative—will be locked away.[315] If we are going to rely on the state to use its police power to protect us against dangerous sex offenders, longer prison terms and civil confinement for SVPs will be a better alternative than residency restrictions and registration statutes. Otherwise, we are allowing the state to avoid accountability for sex offender recidivism by shifting the risk to the community to use registration and residency to protect themselves against SVPs and to sex offenders, who must choose between confinement and being subject to vigilantism.[316]

Electronic surveillance through a GPS is a relatively new technology approach to monitoring sex offenders in order to address recidivism.[317] While the GPS approach has been adopted by at least seventeen states since 2006,[318] residency restrictions have been the more prevalent legislative choice, even though, as discussed above, critics have questioned the effectiveness of these residency restrictions in deterring sex offender recidivism.[319] GPS monitoring has been used to help support the

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314. One commentator has described individuals who are forced to register as sex offenders such as a twenty-six-year-old female who

> [a]t age seventeen . . . had consensual oral sex with a fifteen-year-old male[;] . . . a mother of five [who] was convicted as a party to statutory rape when her daughter became pregnant at the age of fifteen and she later allowed the boy who impregnated her daughter to move into their house[;] . . . and a twenty-three-year-old college student . . . [who as] a freshman in college . . . pled guilty to a sexual offense for inappropriately touching an adult female college friend while highly intoxicated at a freshman party.

Jacqueline Canlas-LaFlam, Note, *Has Georgia Gone Too Far—or Will Sex Offenders Have To?*, 35 HASTINGS CONST. L.Q. 309, 309 (2008) (internal quotation omitted).

315. *See* Roy B. Lacoursiere, *Evaluating Offenders Under a Sexually Violent Predator Law: The Practical Practice*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 75, 77 (explaining that "most definitions of an SVP generally require (a) prior conviction for a qualifying sexually violent crime, (b) some particular type or types of mental condition, and (c) a nexus between the mental condition and sexual (mis)behavior that causes the individual to be a significant risk to reoffend in a sexually violent way if released from confinement").

316. *See* Simon, *supra* note 37, at 314 (concluding that the state is giving up its role of using "scientific expertise to normalize the dangerously deviant" and instead using "new policies [to] transfer the risk to two groups—sex offenders themselves, who may face permanent confinement or the risks of public lynching, and the individual citizens, community organizations, and families, who are expected to police themselves against sex offenders—with the role of the state reduced to that of facilitating protection through warnings").

317. *See* Foohey, *supra* note 39, at 281–82 (noting that "GPS monitoring has been hailed as a valuable device to combat recidivism").

318. *See id*. at 281.

319. *Id.* at 281–83 (noting that residency restriction laws do not "'account for the fact that sex offenders are more likely to travel outside of their neighborhood to avoid recognition if they attempt to re-offend'") (quoting Meghan Sile Towers, Note, *Protectionism, Punishment and Pariahs: Sex Offenders and Residency Restrictions*, 15 J.L. & POL'Y 291, 319 (2007)).

domestic violence protective order system because it can be individually tailored and reduces the reliance on victims to report violations.[320] Questions remain about the constitutionality and efficacy of applying this technology to sex offenders;[321] however, it is a viable alternative to residency restrictions and civil confinement.[322] GPS monitoring allows individual tracking of sex offenders to determine whether they are entering zones of likely reoffense based on their individual characteristics and locations of concern, such as former victim locations, so that they can be stopped before the harm occurs.[323]

As with extended prison terms and civil confinement, the fiscal impact of GPS monitoring is substantial.[324] While GPS monitoring is certainly an alternative that allows for individual administration, it is only one tool available to law enforcement and will not necessarily allow the police to have complete control over sex offenders to prevent the recidivism feared by the public.[325]

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320. *Id.* at 281 n.1.

321. *See* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1322 (2008) (describing the Article as an examination of "the generally unheeded intersection of two well-documented trends: the state's increasing desire to preventively regulate targeted classes of individuals and its increasing capacity to use innovative technologies, rather than physical incapacitation, to realize that desire"); Zoila Hinson, Comment, *GPS Monitoring and Constitutional Rights*, 43 HARV. C.R.-C.L. L. REV. 285 (2008) (concluding that the Massachusetts law authorizing GPS monitoring of sex offenders will likely be upheld as constitutional, as opposed to other states' statutes, because Massachusetts law requires individual tracking based on wearer identity and the area tracked).

322. *See* Foohey, *supra* note 39, at 283–84 (concluding that "GPS monitoring [is] a compelling alternative to ineffective residency restrictions" and that initial studies have shown that monitoring decreases recidivism and allows police to apprehend sex offenders before the harm).

323. *Id.* at 284.

324. For example, California enacted Proposition 83, also known as Jessica's Law, after it was approved by seventy percent of the voters in 2006. Michael Rothfeld, *Viability of Sex-Offender Law in Doubt*, L.A. TIMES, Nov. 27, 2007, at A1. The law increased penalties for sex offenders, eliminated good time credits for early release, made simple possession of child pornography a felony, and established a lifelong GPS monitoring of High Risk Sex Offenders. CAL. ATTORNEY GEN., SEX OFFENDERS, SEXUALLY VIOLENT PREDATORS, RESIDENCE RESTRICTIONS, AND MONITORING INITIATIVE STATUTE, PROP. 83, *available at* http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_83/entire_prop83.pdf (last visited May 13, 2009). Although law enforcement groups contend that the law is beneficial, it is unclear which agency or government unit is responsible for the monitoring and its associated financial burden. Rothfeld, *supra*. The cost per day to monitor a sex offender using GPS is estimated to be $33 a day, imparting a total cost to the state of about $90 million a year to monitor the approximately 9000 sex offenders on parole. *Id.*

325. Rothfeld, *supra* note 324 (citing a police department chief who testified that it is misleading for people to think that GPS monitoring is better than lifetime parole or probation since "local police and sheriff's deputies are not trained to monitor criminals the way parole agents or probation officers do").

B. The Mental Illness Approach: Treatment

Treatment of sex offenders should accompany all other alternatives if we hope to prevent or reduce recidivism once the offender leaves criminal or civil confinement.[326] Indeed, treatment is constitutionally required when sex offenders are civilly committed because without treatment the confinement constitutes punishment and constitutional principles of double jeopardy and ex post facto laws are implicated.[327] However, the efficacy of treatment is controversial,[328] with some experts optimistically seeing hope in new methodologies and others "pessimistically conclud[ing] that 'there is little evidence that high-quality, state-of-the art treatments significantly reduce recidivism.'"[329] These possible treatments include a cognitive-behavioral therapy known as relapse prevention and the less common approach of surgical or pharmacological castration to reduce the sex drive.[330] Again, cost concerns are critical in looking at treatment alternatives since humane and therapeutic treatment is considerably more expensive than confinement or community monitoring through registration statutes, residency restrictions, or GPS monitoring.[331]

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326. *See* Lacoursiere, *supra* note 315, at 89–91 (discussing treatment alternatives for SVPs).

327. *See* Kansas v. Hendricks, 521 U.S. 346, 366 (1997); *see also* Janus, *supra* note 19, at 126–28 (concluding that treatment is required for civil commitment, but permanent confinement may not be constitutional for those who are not treatable); Scott Gold & Lee Romney, *Treatment Replaced by Turmoil*, L.A. TIMES, Nov. 15, 2007, at A1 (reporting about the unrest in California's new state hospital in Coalinga for SVPs because patients do not believe they are receiving the treatment required to constitutionally confine them). For a look at the impact of the Hendricks decision, see John Kip Cornwell, *Sex Offenders and the Supreme Court: The Significance and Limits of* Kansas v. Hendricks, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 197.

328. *See, e.g.*, Rice & Harris, *supra* note 18, at 109 ("[T]he effectiveness of adult sex offender treatment has yet to be demonstrated."); Hanson et al., *supra* note 19, at 162 (observing that there is "no evidence that treatment reduced recidivism for sexual offenders"); Harris & Rice, *supra* note 23, at 207 (concluding that "no studies of sex offender recidivism yet published have included treatments with substantial ability to lower recidivism").

329. Janus, *supra* note 19, at 119, 121 (quoting Roxanne Lieb, Vernon Quinsey & Lucy Berliner, *Sexual Predators and Social Policy*, 23 CRIME & JUSTICE 43, 93 (1998)).

330. *Id.* at 121. For information discussing the legal and ethical challenges regarding castration as treatment, see Robert D. Miller, *Chemical Castration of Sex Offenders: Treatment or Punishment?*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 249, 249; *see also* Daley, *supra* note 312.

331. Janus, *supra* note 290, at 256 (stating that "[s]tate of the art treatment, provided in a humane, therapeutic environment is much more expensive than the standard punitive conditions of correctional institutions or even intensive supervision in the community"); Rice & Harris, *supra* note 18, at 105–07 (concluding that castration reduces sex drive and will likely result in reducing reoffending, but noting that "no one has argued that castration is appropriate for the large proportion of sex offenders" and that few offenders agree to such treatment).

Until evidence is available to support the efficacy of various treatments for sex offenders to prevent recidivism, public policy must encourage confinement or police and community monitoring to reduce the risk to public safety.[332] However, monitoring techniques such as registration and notification laws subject sex offenders to stigmatizing and psychologically damaging labeling, which may negatively impact therapeutic treatment by creating a sense of hopelessness and banishment from the community.[333] Instead, laws targeting sex offenders should offer treatment and monitoring based on individualized decisions to reflect risk management concerns so that individuals have the incentive to control their behavior.[334]

Commentators have suggested other alternatives for addressing sexual offender recidivism such as sex offender reentry courts, restorative justice, community containment, and even "island or wilderness colonies for long term prisoners."[335] Sex offender reentry courts are specialized courts, similar to those used for drug treatment, and serve as the centerpiece for managing sex offenders through treatment supervision and accountability for individual behavior.[336] These specialized courts are "a more cost-effective strategy both for protecting the community and for rehabilitating sex offenders" and are particularly suited for addressing the eighty to ninety percent of sex offenses which are committed by perpetrators who know their victims.[337] Restorative justice is similar to the reentry court model, but operates preconviction to involve victims in choosing how to address their violation through a victim-driven process and by "emphasiz[ing] offender accountability through reparations and rehabilitation rather than punishment."[338] The community-containment

332. Harris & Rice, *supra* note 23, at 207–08 (concluding that since studies have not indicated that treatment lowers recidivism, management of sex offenders must utilize risk analysis to predict recidivism based upon psychological characteristics while searching for effective treatment methodologies).

333. Winick, *supra* note 284, at 329 (concluding that "[i]nstead of subjecting sex offenders to psychologically damaging labeling and perpetual stigmatization, we should offer meaningful treatment and incentives that motivate them to accept treatment and to learn how to control their behavior").

334. *Id.* at 227; *see also* Janus, *supra* note 290, at 259 (concluding that risk assessment should focus on individual risk so that sex offenders are allowed freewill and given the opportunity to take individual responsibility for their actions).

335. Lee H. Bowker, *Exile, Banishment and Transportation*, 24 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 67, 73 (1980).

336. Durling, *supra* note 5, at 359–60 (describing how these courts rely on polygraph testing to monitor behavior and treatment, which serves a similar purpose as drug testing for drug abuse management).

337. *See* John Q. LaFond & Bruce J. Winick, *Sex Offender Reentry Courts: A Cost Effective Proposal for Managing Sex Offender Risk in the Community*, 989 ANNALS N.Y. ACAD. SCI. 300, 301, 318 (2003).

338. Mary P. Koss et al., *Restorative Justice for Sexual Violence: Repairing Victims, Building*

approach is similar to both restorative justice, in that it adopts a victim-centered philosophy, and the sex-offender-reentry-courts model, because it involves criminal justice supervision, monitoring, and polygraph tests.[339] Community containment is a risk management and treatment approach that uses an interdisciplinary team of criminal justice officers, the judiciary, and treatment providers.[340] These newest alternatives are innovative approaches to sex offender recidivism, which take into account the practical difficulties with confinement, treatment, and the inevitable risk of releasing sex offenders back into the community.

CONCLUSION

Sex offender residency restrictions effectively banish these locally undesirable and dangerous individuals from politically powerful communities because of the fear that they may reoffend in local neighborhoods. Although most sex offenses are committed by relatives or acquaintances of the victims, rather than by strangers, our public policy approach has been to focus on the stranger sex offender. This focus, while politically popular, does little to address continuing concerns about reoffense by these individuals. The current legislative approaches to sex offender recidivism include sex offender registration and residency restrictions, which impose responsibility on the public to protect children and others against disclosed, but unmanaged, risk. In addition, residency restrictions attempt to "dump" these risks on unsuspecting communities or other states by effectively banishing these individuals.

There is not yet sufficient evidence showing that residency restrictions are effective at preventing or reducing sex offender recidivism. In fact, there are grave concerns that these restrictions are forcing sex offenders into homelessness, hopelessness, and transience, making them even more dangerous to our communities because the tasks of accurate registration and subsequent monitoring become much too difficult and expensive. Not only do residency restrictions generate individual liberty constitutional challenges, such as ex post facto claims and takings claims, but banishing

Community, and Holding Offenders Accountable, 989 ANNALS N.Y. ACAD. SCI. 384, 388 (2003).

339. *See* Kim English et al., *Community Containment of Sex Offender Risk: A Promising Approach*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 18, at 265, 268, 275 (observing that often "well-intentioned community notification laws may have a devastating effect on the victim if the perpetrator is a family member, as often is the case").

340. *See id.* at 277; *see also* LaFond & Winick, *supra* note 337, at 310 (stressing the importance of polygraph testing to assist in risk management and the treatment process).

these individuals into poor minority neighborhoods and/or other states may implicate policy concerns similar to environmental justice and state protectionism, potentially invalid under the Dormant Commerce Clause.

Local and state legislators should seriously reexamine the current trend of using residency restrictions to address concerns about sex offender recidivism. Such regulations give the public a false sense of security against the stranger sex offender, but they do not address the much greater problem of sex offenses committed by the victims' relatives and acquaintances. Additionally, residency restrictions may exacerbate recidivism by forcing sex offenders into homelessness and by uprooting them from family or community support networks. Instead, public policy decision makers should look toward alternatives, such as individualized risk assessment and management of these individuals, so that public resources can be properly directed to confine, monitor, and treat those sex offenders most likely to commit serious reoffenses.