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SENTENCE SERVED AND NO PLACE TO GO: AN EIGHTH AMENDMENT ANALYSIS OF "DEAD TIME" INCARCERATION

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ABSTRACT—Although the state typically releases incarcerated people to reintegrate into society after completing their terms, indigent people convicted of sex offenses in Illinois and New York have been forced to remain behind bars for months, or even years, past their scheduled release dates. A wide range of residency restrictions limit the ability of people convicted of sex offenses to live near schools and other public areas. Few addresses are available for them, especially in high-density cities such as Chicago or New York City, where schools and other public locations are especially difficult to avoid. At the intersection of sex offenses and indigency lies a sharper injustice. Indigent people convicted of sex offenses with no family or friends who are willing and able to house them face extended imprisonment, referred by them as "dead time" incarceration, while wealthier people convicted of sex offenses roam freely.

Such a system violates the Eighth Amendment's prohibition against cruel and unusual punishment. In *Robinson v. California*, the Supreme Court held that it is cruel and unusual to punish an individual on the basis of "status." Subsequently, federal circuit court decisions applied this principle to invalidate laws that punish individuals for being homeless. Then, federal district courts in Illinois and New York considered invalidating interpretations of residency laws and policies that caused the consequential reality of dead time incarceration in cases brought by indigent people convicted of sex offenses, but they reached very different conclusions. This Note argues that continued incarceration for indigent people convicted of sex offenses because they cannot secure approved housing constitutes a punishment based on their indigent status, thereby violating the Eighth Amendment's prohibition.

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"Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life."

—Justice William J. Brennan Jr.[†]

INTRODUCTION

Stanley Meyer was convicted of a sex offense and sentenced to serve 85% of a four-year sentence in prison, with an indeterminate mandatory supervised release (MSR) term of three years to life.[1] He served his sentence in the Illinois Department of Corrections (IDOC) and was approved for

[†] McCleskey v. Kemp, 481 U.S. 279, 343 (1986) (Brennan, J., dissenting).

[1] Murphy v. Raoul, 380 F. Supp. 3d 731, 744 (N.D. Ill. 2019). Under Illinois law, a period of MSR is added to the end of all criminal sentences other than a sentence of life. *See* 730 ILL. COMP. STAT. 5/5-4.5-15(c). MSR imposes many conditions, including a requirement to not commit any additional crimes, mandatory reporting requirements, and a ban on possessing weapons. *See id.* § 5/3-3-7(a)(1)–(3). People convicted of certain types of sex offenses are subject to additional restrictions, such as limitations on access to the internet, required electronic monitoring, and attendance in treatment programs. *See id.* § 5/3-3-7(a)(7). The MSR statute also contains eighteen potential requirements for people convicted of sex offenses, to be imposed at the discretion of the Prisoner Review Board (PRB). *See id.* § 5/3-3-7(b-1). Listed first among these is to "reside only at a Department [of Corrections] approved location." *Id.* § 5/3-3-7(b-1)(1).

release to begin his term of MSR.[2] But on his scheduled release date, Meyer was not free to leave the prison walls and reintegrate into society.[3] Like all people in Illinois convicted of sex offenses, a condition of his MSR term was that he reside in housing approved by IDOC.[4] But as an indigent person without family who was willing to help, he was unable to secure approved housing.[5] This caused him to immediately violate the conditions of his MSR and so he remained incarcerated.[6] Because he continued to be indigent and was unable to secure eligible housing, the prison doors remained closed to him for an additional seven years, all *after* Meyer had completed his prescribed incarceration term.[7]

Angel Ortiz served a ten-year sentence in New York's Department of Corrections and Community Services (DOCCS) custody.[8] As his release date approached, he tried to secure housing, first with his mother, but then at hotels, apartment buildings, and homeless shelters.[9] Ortiz's search spanned three counties and multiple boroughs in New York City.[10] DOCCS denied each request.[11] After the passage of his maximum sentence date, DOCCS released Ortiz into the custody of another prison's residential treatment facility (RTF)—which confines a person much like a regular prison.[12]

State criminal justice systems have kept indigent people convicted of sex offenses like Meyer and Ortiz in prison for months or even years past their carceral sentences. Due both to their indigency and their label as "sex offenders," individuals like Meyer and Ortiz often cannot find a post-release address that complies with the applicable laws and departments of corrections' policies.[13] Some people have family members who would be

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[2] *Murphy*, 380 F. Supp. 3d at 744.

[3] *See id.* at 744–45.

[4] *Id.* at 739.

[5] *Id.* at 744.

[6] *See id.*

[7] *Id.* at 744–45.

[8] People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1046 (N.Y. 2020), *cert. denied*, 142 S. Ct. 914 (2022).

[9] *Id.* at 1078.

[10] *Id.*

[11] *Id.*

[12] *Id.* ("Mr. Ortiz's time at both [RTF] 'residences' was nearly indistinguishable from his regular prison sentence.").

[13] While the statutory regulatory scheme is itself strict, the departments of corrections in Illinois and New York hold broad discretion over approving housing, which can further limit housing options. *See* 730 ILL. COMP. STAT. 5/3-3-7(b-1)(1), (12); N.Y. CORR. & CMTY. SUPERVISION, NO. 8303, SEX OFFENDER REGISTRANTS/PLACEMENT OF CERTAIN SEX OFFENDERS IN THE COMMUNITY (2020), https://doccs.ny.gov/system/files/documents/2020/12/8303.pdf [https://perma.cc/6QF8-J9MR].

willing to take them in, but do not live in housing that meets the strict laws and policies directed toward people convicted of sex offenses.[14] Others have neither family support nor the money to find their own housing. In either situation, indigent people convicted of sex offenses are unable to secure approved housing and so are rendered effectively homeless. With no suitable post-release residence lined up, officials refuse to release them, and they may remain in custody for months or years past their scheduled release date.[15] Indigent people convicted of sex offenses are forced to wait until they secure approved housing, which is unlikely for many people, or their entire MSR sentence runs out.

The people who are forced into this situation refer to this extended period of incarceration as "dead time" incarceration.[16] Ordinarily, time served while incarcerated is credited toward a criminal sentence. This is not the case with dead time incarceration. People in prison serving dead time incarceration have already served enough of their sentence to be entitled to release. In states like Illinois, people on indefinite MSR must wait three years to petition a court to end their MSR term.[17] Because only time spent outside of prison contributes to this three-year requirement, they receive no credit toward this minimum for the time they spend in prison because they are unable to secure housing.[18] The result is that the time they spend is dead—they are in prison simply because they cannot leave.

This Note argues that the Eighth Amendment prohibits forcing those convicted of sex offenses to remain in prison after they have served their entire sentence when they cannot find approved housing for reasons of

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For example, until recent litigation discussed in Part III, IDOC broadly prohibited *any* person convicted of sex offenses from residing at a host site that contained internet access, was occasionally visited by a child, or was within a 500-foot restriction from areas such as schools and parks, even though those restrictions were only statutorily directed toward people convicted of specific sex offenses. *See* Defendants' Compliance Plan at 2, Murphy v. Raoul, 380 F. Supp. 3d 731 (N.D. Ill. 2019) (No. 16 CV 11471).

[14] *See supra* note 13 and accompanying text.

[15] *See, e.g.*, *Murphy*, 380 F. Supp. 3d at 743–48 (introducing plaintiffs serving dead time incarceration); *Johnson*, 163 N.E.3d at 1056–58 (same).

[16] Class Action Complaint for Civil Rights Violations, Declaratory Judgment and Other Injunctive Relief at 8, *Murphy*, 380 F. Supp. 3d 731 (No. 16 C 11471). The phrase "dead time incarceration" has also been used by incarcerated people under circumstances that are not addressed in this Note. *See, e.g.*, Kincade v. Levi, 442 F. Supp. 51. 54 (M.D. Pa. 1977) (referencing dead time in the context of a case brought by an indigent incarcerated person to apply uncredited time on a reversed state charge to his federal sentence). However, for the purposes of this Note, "dead time incarceration" specifically refers to dead time served by indigent people convicted of sex offenses because they cannot secure approved housing due to their indigency.

[17] *See Murphy*, 380 F. Supp. 3d at 764 ("The only time a person can apply for the termination of his or her indeterminate MSR term is after successfully serving three years of that term outside of prison.").

[18] *Id.* at 739.

indigency.[19] This argument is based on *Robinson v. California*.[20] In *Robinson*, the Supreme Court ruled that punishment based on "status" violates the Eighth Amendment's prohibition of "cruel and unusual" punishment.[21] Following *Robinson*, several circuit courts have invalidated punitive statutes directed at homeless individuals.[22] Recently, indigent people convicted of sex offenses brought challenges in Illinois and New York federal courts based on *Robinson*.[23] These cases relied on the same argument: dead time incarceration violates the Eighth Amendment because it punishes individuals based on their indigent status.[24] The two federal district courts in Illinois and New York reached conflicting decisions.[25] This Note argues that both courts should have ruled for the challengers and provides a roadmap for how future courts should decide similar cases.

The subject of this Note has only recently been addressed by courts, so there is not an expansive wealth of scholarship to build on. The most similar academic piece is Allison Frankel's 2019 article, *Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants*.[26] Frankel focuses on New York and pays specific attention to the plight of people convicted of sex offenses who are also homeless and disabled.[27] She argues that forcing those people to serve dead time incarceration because they cannot afford approved housing is in violation of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Constitution.[28] While she dedicates significant attention to arguments based on "reasonable accommodation," Frankel also broadly identifies several grounds of attack that are applicable to people who are not disabled—including that dead time incarceration violates substantive due process, the Equal Protection Clause, and the Eighth Amendment.[29] Because the article was published just prior to the most recent case developments, this Note

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[19] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[20] 370 U.S. 660 (1962).

[21] *Id.* at 666–67.

[22] *See infra* Section II.C.

[23] *See Murphy*, 380 F. Supp. 3d at 731; Barnes v. Jeffreys, 529 F. Supp. 3d 784, 794–95 (N.D. Ill. 2021); Stone v. Jeffreys, No. 21 C 5616, 2022 WL 1292220 (N.D. Ill. Apr. 29, 2022); People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041 (N.Y. 2020), *cert. denied*, 142 S. Ct. 914 (2022).

[24] *See* cases cited *supra* note 23.

[25] *See* cases cited *supra* note 23.

[26] Allison Frankel, *Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants*, 129 YALE L.J.F. 279 (2019).

[27] *Id.* at 281.

[28] *Id.* at 302.

[29] *See id.* at 302–17.

builds on the scholarship in Frankel's article.[30] Within the broader literature, a recent comment argued that Washington's treatment of homeless people convicted of sex offenses is unconstitutional, although that state's scheme does not result in the same type of extended incarceration addressed in this Note.[31]

This Note builds on Frankel's article by focusing specifically on the Eighth Amendment. It also expands beyond the scope of her article by comparing how dead time incarceration manifests in Illinois and New York. In doing so, this Note offers the first evaluation and analysis of contradictory conclusions on the issue reached by federal district courts in Illinois and New York. This Note compares Illinois and New York because of their recent district court decisions; both were mentioned by Justice Sonia Sotomayor in her statement regarding the denial of certiorari in a case from New York.[32] There is growing popular and academic attention on the issue in both states. This Note responds to recent district court case law, particularly cases decided by Judge Virginia M. Kendall of the Northern District of Illinois.[33]

This Note proceeds as follows. First, Part I provides important background information on sex offender residency restrictions, which have been interpreted in ways that cause dead time incarceration. Section I.A presents a short history of residency restriction laws and briefly explains the state residency restrictions in Illinois and New York. Section I.B evaluates residency restrictions, the state's motivations and goals for having them, and the literature that addresses whether they have achieved these goals. This establishes that overly strict interpretations of residency laws are not necessary, especially when they lead to unconstitutional dead time incarceration for indigent people already in prison.

In Part II, the Note discusses the Eighth Amendment. In Section II.A, it presents the history of the Eighth Amendment, tracing it back to its English origins and analyzes the original intentions behind its language. In Section II.B, the Note looks at Supreme Court cases establishing that punishment based on status violates the Eighth Amendment. Beginning with

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[30] Ms. Frankel wrote her article as a *Yale Law Journal* Public Interest Fellow with the Center for Appellate Litigation and currently works as a staff attorney with the ACLU's Criminal Law Reform Project. *Id.* at 323; *Allison Frankel*, ACLU, https://www.aclu.org/bio/allison-frankel [https://perma.cc/A6HG-2K4E].

[31] Sarah Kohan, Comment, *Registering a Home When Homeless: A Case for Invalidating Washington's Sex Offender Registration Statute*, 95 WASH. L. REV. ONLINE 205, 215, 242 (2020).

[32] Ortiz v. Breslin, 142 S. Ct. 914, 915–17 (2022) (Sotomayor, J., statement respecting denial of certiorari).

[33] *See infra* Section III.A.

Robinson v. California,[34] the Note moves on to address how *Powell v. Texas*[35] developed Eighth Amendment jurisprudence, before looking at other Supreme Court decisions that define the Court's view on status-based punishment. Section II.C gives recent examples of case law out of the Fourth and Ninth Circuits that apply these same principles to invalidate laws that punished people because they were homeless.

Then, Part III analyzes and compares recent decisions reached by district courts in Illinois and New York. Section III.A focuses on Illinois and a trio of cases in which the federal district court ruled in favor of the plaintiffs, stating that continued dead time incarceration of people because they are indigent and cannot find approved housing for release is an Eighth Amendment violation. Section III.B focuses on New York, in which the highest state court and the federal district court ruled that it was not a violation of the Eighth Amendment to continue to incarcerate an indigent person who cannot meet the residency restrictions for independent housing and is waiting for a shelter bed to become available.

Finally, Part IV argues that continued imprisonment of those convicted of sex offenses because their indigency makes them unable to meet sex offender residency restrictions violates the Eighth Amendment under *Robinson*. In so doing, Part IV ties together Eighth Amendment jurisprudence with recent case law in a cohesive way that can be adopted by future courts.

I. SEX OFFENDER RESIDENCY RESTRICTIONS

A. Introduction to Sex Offender Restrictions

Sex offenders are one of the most reviled groups in the United States.[36] Popular TV shows with vast audiences like *To Catch a Predator* and *Law & Order: Special Victims Unit* portray sex offenders as strangers who prey on unsuspecting children.[37] News programs focus on salacious details to bring

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[34] 370 U.S. 660 (1962).

[35] 392 U.S. 514, 535 (1968) (plurality opinion).

[36] Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 17 (2008).

[37] These shows have enjoyed considerable popularity during their time on television. Brian Stelter, *'To Catch a Predator' Is Falling Prey to Advertisers' Sensibilities*, N.Y. TIMES (Aug. 27, 2007), https://www.nytimes.com/2007/08/27/business/media/27predator.html [https://perma.cc/U5AP-L3TC] (noting an average of 7 million viewers watched the *To Catch a Predator* program, which was more than the 6.2 million for other *Dateline* programs and represented nineteen of MSNBC's twenty-five highest rated hours one month); Caroline Schneider, *These Four Shows Are Some of the Longest-Running Primetime Shows of All Time- and Still Airing!*, HOLLYWOOD INSIDER (Mar. 27, 2021),

local tragedies to national audiences. These programs emphasize that these crimes are perpetrated by people who, unbeknownst to the victims' parents, bore the label of "sex offender."[38] In reality, studies demonstrate that strangers commit a relatively small percentage of sexual crimes against children.[39] Nevertheless, legislators have noticed the public concern and disgust directed toward this specific scenario. Motivated by constituent fears of "stranger danger," state and federal legislatures over the last several decades have established a penal system that uniquely restricts the civil liberties of people convicted of sex offenses.[40]

Unlike punishment for other serious crimes, punishment for sex offenses focuses on ostracizing the perpetrators, even after their release from a period of imprisonment.[41] Post-release restrictions are imposed through a variety of avenues. Some requirements are mandated through federal legislation such as the Adam Walsh Act, while others are created or defined

https://www.hollywoodinsider.com/primetime-shows-longest/ [https://perma.cc/V89V-XF5Y] ("'Law & Order: SVU' holds the record for the longest-running primetime U.S. live-action series and has no plans to stop any time soon.").

[38] Wright, *supra* note 36, at 19–20; *see also* Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 249 (2016) (highlighting a "dramatic spike in media reports recounting misconduct against children" including an "estimate[d] . . . 128% increase in newspaper accounts focusing on sexual offenses . . . despite an appreciable reduction in actual crime rates").

[39] *See* HOWARD N. SNYDER, DOJ, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), https://bjs.ojp.gov/library/publications/sexual-assault-young-children-reported-law-enforcement-victim-incident-and [https://perma.cc/8FPV-U44D] (providing data that strangers represented only 7% of sexual assault perpetrators when juveniles were the victims); *see also* Wright, *supra* note 36, at 23 ("The NVAW survey also focused, retrospectively, on adults' childhood victimization experiences. They found that 15.7% of men and 10.8% of women who reported being raped as children, were raped by a stranger. This national study found that approximately 80% of the time, a pre-existing relationship existed between the rapist and the victim, arguing against the danger of stranger sexual assault.").

[40] While this Note is focused on punishments that follow criminal conviction, civil confinement outside of the criminal system has also been used to keep individuals considered "sexually dangerous" away from general society. Individuals, some of whom have never been convicted, are civilly confined in conditions that mirror prisons. It represents another key example of how certain individuals are removed from society. The constitutional concerns with this system have been the subject of recent scholarship. *See, e.g.*, Arielle W. Tolman, Note, *Sex Offender Civil Commitment to Prison Post*-Kingsley, 113 NW. U. L. REV. 155, 162–63 (2018) (arguing that civil commitment schemes for people deemed "sexually dangerous" in which the conditions are indistinguishable from those of criminal incarceration are unconstitutional).

[41] *See* Alexandra Stupple, *Disgust, Dehumanization, and the Courts' Response to Sex Offender Legislation*, 71 NAT'L LAWS. GUILD REV. 130, 134 (2014); Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 47–48 (2010).

by the individual states.[42] Collateral consequences for people convicted of sex offenses typically include public registration, extended supervision, and residency restrictions.[43] Since Alabama pioneered them in the mid-1990s, residency restrictions have proliferated within hundreds of localities, often in the wake of highly publicized sex crimes.[44] Residency restrictions present significant challenges for reintegration into society, especially for people who are unable to stay with family members or friends post-release.[45] Residency restrictions can eliminate housing options for already vulnerable individuals who rely on social services, such as individuals who are indigent or homeless.

On a social level, these residency restrictions amount to banishment from society.[46] Those who have been convicted of qualifying sex offenses are deemed too dangerous to be trusted around schools, parks, and other areas that children typically frequent.[47] Under an Illinois statute, people convicted of sex offenses against children cannot live within 500 feet of certain areas, all people convicted of sex offenses must be under supervision, and the Prisoner Review Board (PRB) can set further residency requirements

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[42] Kari White, Note, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 CASE W. RSRV. L. REV. 161, 161–63 (2008). The Adam Walsh Act is federal legislation that was signed by President George W. Bush in 2006. Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 702. The Act expanded on existing federal mandates that require states to utilize sex offender registries and notification systems, while also creating new penalties for people convicted of sex offenses who fail to register. *See id.* at 702, 705–06.

[43] Mary P. Brewster, Philip A. DeLong & Joseph T. Moloney, *Sex Offender Registries: A Content Analysis*, 24 CRIM. JUST. POL'Y REV. 695, 696, 713 n.9 (2013).

[44] Lorine A. Hughes & Keri B. Burchfield, *Sex Offender Residence Restrictions in Chicago: An Environmental Injustice?*, 25 JUST. Q. 647, 649–50 (2008); Jill Levenson, Kristen Zgoba & Richard Tewksbury, *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, 71 FED. PROB. 2, 2 (2007) ("Since a series of highly publicized murders of several young children by convicted sex offenders around the country in 2005, hundreds of cities and towns nationwide have also passed local ordinances, often increasing restricted zones to 2,500 feet.").

[45] White, *supra* note 42, at 175, 182–83 (2008) ("[S]tudies have shown that restricting housing and work options of released offenders only inhibits their reintegration into society—which, in turn, markedly increases the chance of their recidivating."); Huffman, *supra* note 38, at 266–67 (stating that residency restrictions can limit people convicted of sex offenses' ability to reside with supportive family members, which can "engender further feelings of stress, fear, and hopelessness, serving as a potential trigger for relapse or recidivism"); Gina Puls, Note, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C. J.L. & SOC. JUST. 319, 349–51 (2016) (explaining the benefits of allowing people convicted of sex offenses to reside with supportive family members).

[46] Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 135 (2007) ("Sex offender exclusion zones fit all three of the elements of banishment . . . ."); *see also* Hughes & Burchfield, *supra* note 44, at 649–50; Stupple, *supra* note 41, at 131, 134. *But see* Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (finding that Iowa's residency restriction was not banishment).

[47] *See* Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 610–11 (2009); *see also* Stupple, *supra* note 41, at 135.

for all people convicted of sex offenses as they see fit.[48] New York has similar laws. Under the Sexual Assault Reform Act (SARA), certain people convicted of sex offenses are barred from entering school grounds.[49] SARA broadly defines "school grounds" as all areas within 1,000 feet from a school or other qualifying area.[50] These restrictions obviously place a heavy burden on where people convicted of sex offenses can live, especially in dense, urban areas with many schools.[51]

B. Concerns About Sex Offender Restrictions

Lawmakers clearly have an obligation to protect the most vulnerable members of society from potential harm. In theory, residency restrictions do indeed protect the vulnerable. But in practice, scholars, activists, and even government agencies have expressed concerns that residency restrictions have failed.[52] For example, Professor Emily Horowitz has argued that

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[48] 720 ILL. COMP. STAT. 5/11-9.3(b-5), (b-10), (b-15) (restricting people labeled as child sex offenders from "knowingly resid[ing] within 500 feet of a school building . . . . playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age . . . . [and the] victim of the sex offense"). The 500 feet is calculated by looking at the distance between the closest edge of the individual's residence and the edge of the location. *Id.* § 5/11-9.3(e). As an example, in Chicago, registrants are precluded from living 500 feet from any border of Lincoln Park, even though they may be much further than 500 feet away from the location of any playground area within the park. Because of this definition, the distance limitation can in practice be much more than 500 feet. *Id.* The PRB can impose harsh restrictions on where people convicted of sex offenses can live with extremely broad discretion. Illinois statutory law provides that as a condition of release the Board can mandate released people convicted of sex offenses "reside only at a Department approved location . . . not reside near, visit, or be in or about parks, schools, day care centers, swimming pools, beaches, theaters, or any other places where minor children congregate without advance approval of an agent of the Department of Corrections and immediately report any incidental contact with minor children to the Department." *Id.* § 5/3-3-7(b-1)(1), (12).

[49] N.Y. EXEC. LAW § 259-c(14) (McKinney).

[50] N.Y. PENAL LAW § 220.00(14)(b) (McKinney).

[51] While the impacts on people desiring to reside in urban environments are readily apparent, restrictions can also limit access to rural communities. *See, e.g.*, Nelson v. Town of Paris, 616 F. Supp. 3d 844, 848–49 (E.D. Wis. 2022) (challenging a residency restriction that required people convicted of sex offenses to reside at least 6,500 feet away from both public places, like parks and schools, and each other, with plaintiff claiming it kept him from residing in a rural environment), *aff'd in part, vacated in part, and remanded*, 78 F.4th 389 (7th Cir. 2023).

[52] *See, e.g.*, Frankel, *supra* note 26, at 302 ("[R]esidency restrictions . . . at best, miss the mark of improving public safety, and, at worst, actively hinder it."); Daniel Pacheco & J.C. Barnes, *Sex Offender Residence Restrictions: A Systematic Review of the Literature*, *in* THE WILEY-BLACKWELL HANDBOOK OF LEGAL AND ETHICAL ASPECTS OF SEX OFFENDER TREATMENT AND MANAGEMENT 424, 437 (Karen Harrison & Bernadette Rainey eds., 2013) ("[S]ex offender residency restriction policy is not evidence-based and is largely constructed on weak theoretical and logical arguments."); MINN. DEP'T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA 1–2 (2007), https://mn.gov/doc/assets/04-07SexOffenderReport-Proximity_tcm1089-272769.pdf [https://perma.cc/WAZ5-WAFK] (concluding that in a study of people convicted of sex offenses who were reincarcerated for sex crimes, "[n]ot one of the 224 sex offenses would likely have been deterred by a residency restrictions law").

residency restrictions primarily act as measures of perpetual punishment that do relatively little to improve community safety.[53] This Note does not challenge the constitutionality of residency restrictions themselves. Rather, it focuses on the impact the restrictions can have on indigent people convicted of sex offenses—namely, forcing them to serve dead time incarceration. This Section shows that justifying dead time incarceration for reasons of public safety is misguided. Because public safety arguments are undermined by the reality of residency restrictions, they cannot stand as support for the continued violation of people's Eighth Amendment rights.[54]

Post-conviction restrictions only apply to people actually convicted, not those merely charged with a triggering offense. As such, the restrictions' success should be analyzed in light of whether they prevent the occurrence of future sexual offenses by the registrants subject to them.[55] Two appropriate focus points are (1) whether the restrictions accurately respond to potential recidivist sexual crimes and (2) whether there is evidence that the restrictions do, in fact, prevent recidivist sexual crimes. The literature and data make clear that residency restrictions have failed in both regards.

Evidence shows increasingly that residency restrictions respond to a misunderstood threat and are built on a faulty understanding regarding sexual crimes, particularly those against children. As previously explained, residency restrictions were designed to prevent future attacks by people previously convicted of sex offenses against children in the community.[56] Early residency restriction laws operated by notifying the community of local people convicted of sex offenses.[57] Eventually, policies evolved to also physically ostracize those people.[58]

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[53] *See* Emily Horowitz, *The Real Monsters: Sex Offender Registries Don't Make Us Any Safer. Abolishing Them Would*, INQUEST (June 3, 2022), https://inquest.org/the-real-monsters/ [https://perma.cc/53VQ-5JB5].

[54] *See infra* Part IV.

[55] While it could also be argued that the lasting weight of sex offender restrictions has a deterring effect on people who would be convicted of sex offenses for the first time, because sex offenses often carry significant primary penalties and even the DOJ acknowledges that "[i]ncreasing the severity of punishment does little to deter crime," there is questionable benefit from assessing the restrictions through the lens of deterring people who would be convicted of sex offenses for the first time. *See* NAT'L INST. OF JUST., DOJ, FIVE THINGS ABOUT DETERRENCE 1 (2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf [https://perma.cc/XV9V-FJQ4].

[56] *See* Tekle-Johnson, *supra* note 47, at 610–11.

[57] Frankel, *supra* note 26, at 284–85.

[58] *See id.*

Two criminology theories are generally recognized as providing support for residency restrictions.[59] One is "rational choice theory," which assumes that "criminals" are rational actors who commit more crimes when (1) the crimes are more readily available, (2) they have a lower chance of being caught, and (3) the punishments are less severe.[60] On the other hand, rational choice theory expects criminals commit fewer crimes when those crimes are more difficult, accountability is likely, and the punishments are more severe.[61] The other recognized theory is the "routine activity theory," which posits that "three elements are necessary for a criminal event, or a victimization event, to occur: a motivated offender, a suitable target and the absence of capable guardians."[62]

Both the rational choice theory and the routine activity theory provide an ideological basis for residency restrictions. Based on both theories, children are less likely to be victimized if people convicted of sex offenses are physically removed from residing near areas children frequent. This makes some sense given the context in which these laws were frequently passed.[63] However, there is evidence that while they respond to the public's conception of sexual crimes against children and certain theoretical frameworks, they bear relatively little relation to the reality of the vast majority of people convicted of sex offenses.

Research has shown that the "stranger danger" style of attack is rare.[64] The DOJ found that strangers were perpetrators in only 7% of cases of sexual violence against juveniles.[65] Because most sex offenses are committed by family members or acquaintances, it raises questions about the efficacy of prohibiting people convicted of sex offenses from living near parks. Additionally, residency restrictions are unlikely to deter those who do intend to recidivate, as those individuals are more likely to perpetrate their crimes at locations outside of their home neighborhood where they are more easily

[59] *See* Pacheco & Barnes, *supra* note 52, at 425–26 ("[T]he two most prominent theoretical traditions that appear to be the basis for sex offender residence restrictions: deterrence or rational choice theory and routine activities theory." (citations omitted)); Michele P. Bratina, *Sex Offender Residency Requirements: An Effective Crime Prevention Strategy or a False Sense of Security?*, 15 INT'L J. POLICE SCI. & MGMT. 200, 204–06 (2013).

[60] Pacheco & Barnes, *supra* note 52, at 425–26; Bratina, *supra* note 59, at 205–06.

[61] *See* Pacheco & Barnes, *supra* note 52, at 425–26; Bratina, *supra* note 59, at 206.

[62] Bratina, *supra* note 59, at 205.

[63] Many of the laws were passed as a response to high-profile sex crimes against children. *See* sources cited *supra* note 44.

[64] Wright, *supra* note 36, at 21.

[65] SNYDER, *supra* note 39, at 15.

recognized.[66] Because strict interpretations of residency laws limit access to support networks for those who truly want to reintegrate into society, there is limited justification for preferencing those policies over individuals' rights.

Studies have also shown that residency restrictions do little to improve public safety. After comprehensively reviewing scholarly work related to sex offender residency restrictions, Daniel Pacheco and Professor J.C. Barnes found "no evidence, to date, that suggests that sex offender residency restrictions have a favorable impact on recidivism."[67] There are several bodies of research that support this assertion. In an analysis of the effects of residency restrictions in Michigan and Missouri, researchers found that "if residency restrictions have an effect on recidivism, the relationship will be very small."[68] In another study, Professors Kristen M. Zgoba and Jill Levenson used data from the New Jersey Department of Corrections to compare the rates of sex offense recidivism between populations who were properly registered and those who had failed to register.[69] Zgoba and Levenson found that failure to register "was not a significant predictor of either sexual or nonsexual recidivism."[70] In a comprehensive literature study focused on the impact of residency restrictions in protecting children, Professor Joanne Savage and Casey Windsor, while acknowledging a need for more research, found that "the indirect tests that we reviewed here do not provide evidence that residence restrictions even have the *potential* to substantially reduce sex crimes against children."[71] A research report conducted by Minnesota's Department of Corrections looked at 224 cases

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[66] Brian Griggs, Note, *Homeless Is Not an Address: States Need to Explore Housing Options for Sex Offenders*, 79 UMKC L. REV. 757, 771 (2011) ("Regardless of blanket residential restrictions, sex offenders who are attracted to school yard locations more likely will travel to a school yard in another neighborhood in order to act in secret, rather than to seek victims in a local area where they may be well-known.").

[67] Pacheco & Barnes, *supra* note 52, at 436.

[68] BETH M. HUEBNER, TIMOTHY S. BYNUM, JASON RYDBERG, KIMBERLY KRAS, ERIC GROMMON & BREANNE PLEGGENKUHLE, DOJ, AN EVALUATION OF SEX OFFENDER RESIDENCY RESTRICTIONS IN MICHIGAN AND MISSOURI 69–70 (2013), https://www.ojp.gov/pdffiles1/nij/grants/242952.pdf [https://perma.cc/9JNV-9UNS] ("In Michigan, trends indicate that this effect would lead to a slight increase in sex offender recidivism rates, while in Missouri this effect would lead to a slight decrease in sex offender recidivism rates. Unfortunately, bivariate and multivariate models indicated that residency restrictions did not affect recidivism rates. There were no effects of residency restrictions on recidivism when rates were measured as reconviction on any offense or sex offense conviction."). The researchers were unable to provide sex-offense-only recidivist statistics, due to the scarcity of their occurrence, despite analyzing a large sample size of registrants. *Id.* at 70.

[69] Kristen M. Zgoba & Jill Levenson, *Failure to Register as a Predictor of Sex Offense Recidivism: The Big Bad Wolf or a Red Herring?*, 24 SEXUAL ABUSE 328, 332–33 (2012).

[70] *Id.* at 339.

[71] Joanne Savage & Casey Windsor, *Sex Offender Residence Restrictions and Sex Crimes Against Children: A Comprehensive Review*, 43 AGGRESSION & VIOLENT BEHAV. 13, 23 (2018).

of recidivism between 1990 and 2002.[72] The study found that "[n]ot one of the 224 sex offenses would likely have been deterred by a residency restrictions law" and concluded that a "statewide residency restrictions law would likely have, at best, only a marginal effect on sexual recidivism . . . [and] [r]ather than lowering sexual recidivism, housing restrictions may work against this goal by fostering conditions that exacerbate sex offenders' reintegration into society."[73]

Given the difficulties residency restrictions create for registrants, their lack of evidentiary support demonstrating public safety benefits is striking. Residency restrictions were never motivated by careful scientific inquiry, but rather political motivations to appear "tougher on crime."[74] Even the Supreme Court appears to have been (perhaps unwittingly) drawn into this trend. The data underlying part of their reasoning for upholding the restrictions can be traced back to an unsupported 1986 statistic given by a program counselor in the mass market magazine *Psychology Today*.[75] Despite thin justification, residency restrictions may remain popular among states because, despite their ineffectiveness, research suggests the public broadly supports them.[76]

Part I indicates that residency restrictions, despite their popularity, have limited benefits. Rather than promote public safety, in practice they punish people convicted of sex offenses after their release from prison. This Note does not argue that residency restrictions themselves are unconstitutional, despite their lack of scholarly support. However, as explained further in Part II, this Note argues that when those laws are interpreted in ways that force indigent people convicted of sex offenses to serve dead time incarceration because they are too poor to find approved housing, it is a violation of the Eighth Amendment.

II. THE EIGHTH AMENDMENT

Lawsuits challenging restrictions on people convicted of sex offenses often center on a variety of legal grounds, including procedure, equal

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[72] MINN. DEP'T OF CORR., *supra* note 52, at 8.

[73] *Id.* at 2–4.

[74] Frankel, *supra* note 26, at 297–98.

[75] Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 498–99 (2015) (quoting the magazine as stating that "[m]ost untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do"). The Supreme Court cited to a DOJ report listing the recidivism rate as 80%. *Id.* at 497–98. That report only provides the *Psychology Today* article as support for that assertion. *Id.*

[76] Pacheco & Barnes, *supra* note 52, at 427–28 (acknowledging that the study was "small" at 115 individuals).

protection, and the ban on ex post facto punishment.[77] Even when litigants invoke the Eighth Amendment, including in dead time cases, it is often just one of many claims that are alleged.[78] While these other claims are worthy of separate analysis, this Note focuses on the Eighth Amendment. Therefore, this Part offers a primer on Eighth Amendment jurisprudence. This Note argues that an Eighth Amendment analysis alone is sufficient to find that the schemes forcing indigent people convicted of sex offenses to remain in prison after completing their sentence are unconstitutional.

This Part proceeds by looking at the early history of the Eighth Amendment, tracing the Amendment's language back to its English origins. It then addresses how American courts adopted that history and language into their jurisprudence, including indications that banning cruel and unusual punishment was intended to avoid unequal punishment. Next, it introduces the foundational cases *Robinson v. California*[79] and *Powell v. Texas*,[80] in which the Supreme Court established that it is an Eighth Amendment violation to punish an individual because of their "status." After laying the groundwork, it then looks at other cases that opined that it is unconstitutional to punish individuals arbitrarily, including on the basis of race or poverty.

The focus then shifts from Supreme Court jurisprudence to recent cases from the Fourth and Ninth Circuit Courts of Appeals. Those cases show how the *Robinson* and *Powell* decisions' bar on status-based punishment under the Eighth Amendment is an active legal doctrine that has found modern applications by providing the basis for these circuit courts to invalidate laws that punished individuals because they were homeless.

A. History

The original purpose of the Eighth Amendment and guidance for applying it can be found in its history, a methodology that has been valued by the Supreme Court and provides continuing guidance.[81] The origins of the Eighth Amendment predate the First Congress by centuries, finding their

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[77] *See, e.g.*, Doe v. Miller, 405 F.3d 700, 708 (8th Cir. 2005) (challenging on grounds of substantive and procedural due process); Cordrey v. Prisoner Rev. Bd., 21 N.E.3d 423, 426 (Ill. 2014) (challenging on due process and equal protection grounds).

[78] *See, e.g.*, Barnes v. Jeffreys, 529 F. Supp. 3d 784, 787–88 (N.D. Ill. 2021) (challenging on Fourteenth and Eighth Amendment grounds).

[79] 370 U.S. 660 (1962).

[80] 392 U.S. 514 (1968) (plurality opinion).

[81] *See* Ingraham v. Wright, 430 U.S. 651, 659 (1977) ("In addressing the scope of the Eighth Amendment's prohibition of cruel and unusual punishment, this Court has found it useful to refer to '[t]raditional common-law concepts,' . . . and to the 'attitude[s] which our society has traditionally taken.'" (quoting Powell v. Texas, 392 U.S. 514, 531, 535 (1968))).

roots deep in English legal history.[82] Historians have traced the ideas contained within the Eighth Amendment to 1042, with their influence pointing to the Magna Carta.[83]

The English Bill of Rights of 1688 evinced this spirit into the phrase "cruell and unusuall" that was eventually ported by the First Congress into the American Bill of Rights.[84] Similar provisions found their way into Colonial America, with Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia all adopting some form of prohibition against "cruel and unusual" punishment into their state laws.[85] The language of the Eighth Amendment that was ratified as part of the Bill of Rights is nearly identical to the language that was put into the Virginia Declaration of Rights in 1776.[86] The only change between the latter and the former is the substitution of the affirmative "shall" for "ought."[87]

The historical context surrounding the development of prohibitions on cruel and unusual punishment has been interpreted in different ways. One school of thought considers it a response to the widening range of offenses that carried the death penalty.[88] Another viewpoint is that in an era in which capital offenses proliferated, the provision's original purpose was to prohibit punishments that were cruel and unusual by how they were assigned.[89] Legal scholars who draw this latter interpretation of the early history of cruel and unusual begin by synonymizing "unusual" with "illegal."[90] English common law was based on the core principle of precedent, whereby similar cases and parties were treated alike.[91] Characterizing this dedication to consistency, William Blackstone, after describing horrific punishments of the day, extolled that these "disgusting" consequences were only meted out by established law, rather than the "humor or discretion of the court."[92] An

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[82] *See* Stanley Mosk, *The Eighth Amendment Rediscovered*, 1 LOY. U. L. REV. 4, 5 (1968).

[83] *See id.* at 6.

[84] ENG. BILL OF RTS. of 1688 ("That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.").

[85] Mosk, *supra* note 82, at 7.

[86] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); VA. DECLARATION OF RTS. of 1776 ("That excessive Bail ought not to be required, nor excessive fines imposed, nor cruel & unusual punishments inflicted.").

[87] VA. DECLARATION OF RTS. of 1776.

[88] *See* Mosk, *supra* note 82, at 5 (stating that King Henry VIII's reign was marked by an estimated 72,000 executions and by the time of the American Revolution over 200 offenses carried capital sentences).

[89] Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 122 (2004).

[90] *Id.*

[91] *Id.*

[92] 4 WILLIAM BLACKSTONE, COMMENTARIES 221–22 (Lonang Inst. ed. 2005).

unusual punishment rejected the core equality and stability needed for the fair moral application of punishment, and was thus considered "illegal" under the common law.[93] Cruel punishment went beyond the bounds established by the common law for dispensing punishment and inflicted greater harm on the defendant than what the common law dictated.[94]

Taken together, scholars suggest the original purpose of cruel and unusual centered on nondiscrimination, where the law treated like offenders equally.[95] Given its historical context, it is reasonable to presume that this understanding of the Eighth Amendment, or at least the general principles underlying it, was what the First Congress had in mind when they adopted the amendment with little comment.[96] This view has been supported and seen as relevant by Justice William O. Douglas,[97] considered by Justice Thurgood Marshall,[98] and acknowledged historically, although with doubts as to its relevance, by Justice Potter Stewart[99] and (with much comment) Justice Antonin Scalia.[100] Regardless of the ultimate weight one puts on the historical narrative, it was considered in many of the precedential Eighth Amendment cases and bears relevance to any interpretations of its provisions.

B. The Supreme Court and Eighth Amendment "Status"

It is certainly true that Eighth Amendment jurisprudence and attitudes within the American legal system have resulted in the expansion of the Eighth Amendment's meaning beyond understandings of the English Bill of

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[93] *See* Claus, *supra* note 89, at 122.

[94] *See id.*

[95] *See id.* at 121–22.

[96] *See id.* at 128, 132–33.

[97] Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) ("There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature . . . .").

[98] *Id.* at 318 (Marshall, J., concurring) ("This legislative history has led at least one legal historian to conclude 'that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties,' and not primarily a reaction to the torture of the High Commission, harsh sentences, or the assizes." (quoting Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 860 (1969))).

[99] *See* Gregg v. Georgia, 428 U.S. 153, 168–70 (1976) (plurality opinion) ("The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved. The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing 'tortures' and other 'barbarous' methods of punishment." (citations omitted)).

[100] *See* Harmelin v. Michigan, 501 U.S. 957, 975–76 (1991) ("Even if one assumes that the Founders knew the precise meaning of that English antecedent . . . a direct transplant of the English meaning to the soil of American constitutionalism would in any case have been impossible.").

Rights' similar text. However, since Justices have relied on the historical underpinnings of Blackstone and earlier historical evidence to inform the Eighth Amendment's meaning, the historical context of the law is relevant to a discussion on the Amendment's applicability to modern courts.

Historical context is particularly relevant in the context of the Eighth Amendment's prohibition of punishment based on status because the Supreme Court reached different interpretations in this area based on historical context. The late Justice Scalia believed the Eighth Amendment only applied in two circumstances. In his dissent from *Atkins v. Virginia*,[101] Justice Scalia asserted the Eighth Amendment only applied to

> "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," and modes of punishment that are inconsistent with modern "'standards of decency,'" as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures."[102]

Unlike the more rigid conception of the Eighth Amendment Justice Scalia promoted, the nondiscrimination view of the Eighth Amendment makes sense in light of the finding that punishment inflicted on a person due to his or her status is unconstitutional. The bar against punishment based on status is centered around the idea that punishment cannot be inflicted upon a person for a characteristic he or she does not control. It is drawn from the principle of proportionality, which was at the heart of the First Congress's likely understanding of the Eighth Amendment.[103]

Robinson v. California established the principle that punishment based on status violates the Eighth Amendment.[104] In that case, the defendant was convicted under a California statute that prescribed a minimum of "not less than 90 days . . . in the county jail" for being "addicted to the use of narcotics."[105] State police arrested the defendant for having scabs and what looked like needle marks on his arms. However, the appellant testified he had never used narcotics, and police admitted that he was neither intoxicated with narcotics at the time of his arrest nor did they see him use them.[106]

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[101] 536 U.S. 304 (2002) (Scalia, J., dissenting) (dissenting from the majority holding that executing a mentally handicapped person was barred under the Eighth Amendment as cruel and unusual punishment).

[102] *Id.* at 339–40 (citations omitted) (first quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986), and then quoting Penry v. Lynaugh, 492 U.S. 302, 330–31 (1989)).

[103] *See* Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring); Claus, *supra* note 89, at 121–22.

[104] 370 U.S. at 666.

[105] *Id.* at 660 n.1.

[106] *Id.* at 661–62.

Nevertheless, the trial judge instructed the jury to convict if they believed the appellant had the "condition or status" of being an addict, which subsequently led to a guilty verdict.[107]

Writing for the Court, Justice Stewart compared addiction to a disease.[108] In doing so, he posited that a state would not criminalize being afflicted by disease or mental illness.[109] The Court further asserted that under modern sensibilities, punishment based on disease was cruel and unusual as "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[110] As such, punishment for the status of being an addict was unconstitutional.[111]

Following *Robinson*, *Powell v. Texas* provided further clarification of the doctrine and the limitations of *Robinson*.[112] *Powell* arose after the defendant, a chronic alcoholic, was arrested, convicted, and fined for public intoxication.[113] The defendant appealed the decision, specifically citing the *Robinson* decision to argue that punishment based on his "disease" of alcoholism violated his Eighth Amendment rights.[114] Writing for a four-Justice plurality, Justice Marshall distinguished the case from *Robinson* and found that the conviction passed constitutional muster.[115] Because this was a conviction for *public* intoxication, he determined that punishment was directed at the conduct of being intoxicated in public, rather than the status of being an alcoholic.[116] He refused to expand the *Robinson* ruling to any conduct that was compulsory or involuntary, and instead focused on whether the appellant had been punished for an action, which the Eighth Amendment allows, or merely a status, which the Eighth Amendment does not allow.[117] In doing so, he clarified that *Robinson* did not stipulate a mens rea for each offense, but rather an actus reus.[118] This is the principle that Justice Hugo Black described in his concurrence as "pure status" crimes, a "situation where no conduct of any kind is involved."[119]

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[107] *Id.* at 662–63.

[108] *Id.* at 666.

[109] *Id.*

[110] *Id.* at 666–67.

[111] *Id.* at 667. In his concurrence, Justice Douglas applied the principle of proportionality to the case. After noting brutal punishments that have since been retired, he concluded that punishing sick people for being sick was unjustifiable. *See id.* at 676–77 (Douglas, J., concurring).

[112] Powell v. Texas, 392 U.S. 514, 532–33 (1968).

[113] *Id.* at 517.

[114] *Id.* at 517–21.

[115] *Id.* at 532.

[116] *Id.*

[117] *Id.* at 533.

[118] *See id.*

[119] *Id.* at 542 (Black, J., concurring).

Justice Byron White concurred in the result but presented his own interpretation of the Eighth Amendment. He immediately equated status, such as having the flu, with what follows from it, such as having a fever.[120] Under the facts of *Powell*, if an alcoholic could not be punished for their status of being an alcoholic, then it follows that they could not be punished for drinking alcohol.[121] Otherwise, punishment for the result of being an alcoholic, compulsive drinking, would be equal to punishment for being an alcoholic. He went so far as to suggest it would violate the Eighth Amendment for a homeless alcoholic who both could not avoid drinking and could not avoid being in public to be convicted under a law barring public intoxication, because it would amount to a ban on getting drunk, which is an action an alcoholic cannot be convicted for under *Robinson*.[122] This differs from Justice Marshall's interpretation, because it does not distinguish action from status, but allows that action following from status should be considered part of status. However, Justice White ultimately concurred with Justice Marshall's plurality in the result because the defendant "made no showing that he was unable to stay off the streets on the night in question" and so was unable to show that the Constitution had been violated.[123]

Powell and *Robinson* provide the foundation for barring punishment due to "status." *Powell* refined *Robinson*, making it clear that the Court viewed punishment of one's status, rather than one's actions, as unconstitutionally cruel and unusual. Following these decisions, the Court provided further clarification on its understanding of the Eighth Amendment's ban on punishment for status. In these decisions, Justices applied the Eighth Amendment to invalidate punishments they determined were derived from a defendant's race and poverty.[124]

Shortly after *Powell*, the Court decided *Furman v. Georgia*.[125] This case provided additional interpretations of the Eighth Amendment and

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[120] *Id.* at 548 (White, J., concurring in the judgment).

[121] *Id.* at 549.

[122] *Id.* at 551 ("For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.").

[123] *Id.* at 554.

[124] *See* Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

[125] *Furman*, 408 U.S. 238.

invalidated the death penalty as applied in Georgia.[126] The core of this reasoning, as indicated in *Gregg v. Georgia*, was that the use of the death penalty could not be applied "capriciously or arbitrarily."[127] Justice Stewart in *Furman* impliedly accepted that people given the death penalty were selected on the "capricious or arbitrary" basis of their race,[128] while Justices Douglas and Marshall explicitly identified the basis as both poverty and race.[129] While Justice Stewart's plurality opinion in *Gregg*, which reinstated the death penalty, skirts around whether race and poverty were the driving forces behind the capricious or arbitrary use of the death penalty, the opinion does not dispute that punishment on these grounds could be susceptible to Eighth Amendment scrutiny.[130] Rather, the opinion accepts a construction of the statute that avoids capricious or arbitrary application of the law, and in doing so, it endorses these concerns as falling within the purview of the Eighth Amendment, at least in as much as they are part of an arbitrary or capricious scheme.[131]

In later decisions, the Court further defined its treatment of the Eighth Amendment. While many of those discussions go beyond the scope of this Note, one relevant inquiry is what challenges can be brought under the Eighth Amendment. In *Ingraham v. Wright*, the Court presented three applications of the Eighth Amendment: "First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."[132] In support of the third point, the Court cited to *Robinson*, although it also acknowledged that this application of the Eighth Amendment is to be used "sparingly."[133] Following from these applications, the Court determined that the Eighth Amendment was intended to protect

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[126] *Id.* at 239–40.

[127] 428 U.S. at 206 (plurality opinion).

[128] *See Furman*, 408 U.S. at 310 (Stewart, J., concurring).

[129] *Id.* at 249–50 (Douglas, J., concurring); *id.* at 364–66 (Marshall, J., concurring).

[130] *See* 428 U.S. at 167, 172 (plurality opinion). It is admittedly unclear how Justice Stewart would react to poverty, as his concurrence in *Furman* indicated he felt race was the likely, albeit unproven, uniting characteristic among those who were sentenced to death. In neither case does he explicitly address the common characteristic of poverty.

[131] *Id.* at 188–95.

[132] 430 U.S. 651, 667 (1977) (citations omitted).

[133] *Id.*

those subject to criminal laws, and those challenging dead time incarceration have brought their claims primarily under the third prong.[134]

C. Modern Case Law Invalidating Poverty-Based Punishment Under the Eighth Amendment

As both *Robinson* and *Powell* focused on comparing addiction and mental illness to traditional forms of disease, it is unclear whether the Court will extend the Eighth Amendment's ban on status-based punishment beyond those concepts to include economic status, such as indigency or homelessness.[135] In *Powell*, Justice White brought economic status into consideration when he suggested that homeless alcoholics could not be convicted under the public intoxication statute, as it would punish them for an action that they could not be convicted of under the Eighth Amendment.[136] Justices Douglas and Marshall also acknowledged economic status in *Furman*, although that decision was superseded a mere four years later.[137] This Section looks at recent opinions from the Fourth and Ninth Circuits to summarize and analyze how appellate courts have considered punishments based on the status of poverty. It shows that *Robinson*'s ban on status-based punishment is still an active legal doctrine. This is necessary context for this Note's argument that forcing indigent people convicted of sex offenses to serve dead time incarceration because their indigency prevents them from securing approved housing is a violation of the Eighth Amendment.

The Ninth Circuit recently issued two rulings that found that laws directed toward homeless individuals were unconstitutional under the Eighth

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[134] *Id.* at 668–71 (showing how the focus on criminal laws excluded the schoolchildren plaintiffs who challenged corporal punishment); *see, e.g.*, People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1053 (N.Y. 2020), *cert. denied*, 142 S. Ct. 914 (2022) ("Ortiz focuses on the third element [from *Ingraham*] . . . ."); Murphy v. Raoul, 380 F. Supp. 3d 731, 763 (N.D. Ill. 2019) ("This case implicates the third iteration elucidated above—the substantive limitations on what the government may criminalize and therefore punish."). Supreme Court jurisprudence is not clear on whether keeping a person in prison on dead time incarceration is "punishment" for the purposes of the Eighth Amendment. There are, nevertheless, indications that incarceration is punishment that would fall under the purview of the Eighth Amendment. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) (listing imprisonment as a traditional penalty under the state's punishment power). *But see* Allen v. Illinois, 478 U.S. 364, 372–74 (1986) (holding that civil confinement of people labeled as sex offenders was not punishment for Fifth Amendment purposes, although acknowledging that the case could be different if the plaintiffs had shown they were held in prison-like conditions).

[135] Tim Donaldson, *Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status*, 4 CONCORDIA L. REV. 1, 19 (2019).

[136] Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring in the judgment) (suggesting that the conviction in the immediate case was the act of drinking in public, but if a compulsive drinker did not have a private place to drink and thus could not control the act of drinking in public, then they could not be convicted under the statute).

[137] Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *id.* at 365–66 (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion).

Amendment. In *Martin v. City of Boise*, people who were homeless in Boise, Idaho challenged a local ordinance that made it illegal to "camp" in public places.[138] The plaintiffs alleged that the law violated their Eighth Amendment rights, as they were being punished for the status of being homeless.[139] This argument was analogous to that in *Robinson*. Looking to *Robinson* and *Powell*, the Ninth Circuit found that criminalizing sleeping outdoors when shelter was not available was indeed unconstitutional under the Eighth Amendment.[140] Focusing on Justice White's concurrence in *Powell*, the Ninth Circuit reasoned that "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."[141] The court reasoned that the status of being homeless and the acts that are unavoidable because of that condition are synonymous with each other.[142] If a homeless individual cannot be punished for the status of being homeless, then that same individual cannot be punished for the characteristics of that status that are out of their control, namely sleeping and otherwise living while being in public.[143] As such, the Ninth Circuit concluded both fell under the conception of status under the Eighth Amendment through *Robinson* and *Powell*.[144]

After the decision in *Martin*, individuals who were homeless in Grants Pass, Oregon filed a suit challenging a similar local law.[145] On a summary judgment motion, the district court enjoined the city's anti-sleeping and anti-camping laws. The city-defendant appealed on both procedural and substantive grounds.[146] On review, the Ninth Circuit first addressed the defendant's argument that the Eighth Amendment did not reach the law since it assessed civil penalties.[147] The Ninth Circuit rejected this argument because the civil penalties would convert to criminal trespass after enough violations. In doing so, the court reasoned that despite there being multiple

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[138] 920 F.3d 584, 603–04 (9th Cir. 2019).

[139] *Id.* at 606.

[140] *Id.* at 615–17. Much of the Ninth Circuit's reasoning followed their previous decision in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007). *See Martin*, 920 F.3d at 615. However, that decision was not precedent as the decision became moot after a settlement between the plaintiffs and defendants in that case. *See id.* at 604. Nevertheless, the substance of the court's reasoning and decision in *Martin* was drawn closely from that prior decision.

[141] *Id.* at 616 (quoting *Jones*, 444 F.3d at 1135).

[142] *Id.* at 616–17.

[143] *Id.* at 617 ("That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.").

[144] *See id.* at 616–17.

[145] *See* Johnson v. City of Grants Pass, 50 F.4th 787, 792 (9th Cir. 2022).

[146] *Id.* at 792–93.

[147] *Id.* at 806–07.

steps between civil penalties under the law and criminal punishment, it ultimately criminalized status.[148] The court then upheld *Martin* despite a challenge of a misreading by the dissent and reiterated the core principle of that decision, expressed through the court's narrowest interpretation from *Powell*, that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status."[149]

In sum, the Ninth Circuit held that the unavoidable effects of involuntary homelessness cannot be criminalized. The Fourth Circuit, sitting en banc, reached a similar result in *Manning v. Caldwell*.[150] The court provided more clarification as to whether the law was sufficiently criminal as to fall under the Eighth Amendment. In *Manning*, people who were homeless in Virginia challenged a statutory scheme that criminalized possession and attempted possession of alcohol and public intoxication by a class of individuals judicially determined to be "habitual drunkard[s]."[151] The court's Eighth Amendment analysis rested heavily on Justice White's concurrence in *Powell*.[152] The court determined that since Justice White's decision was the narrowest of the plurality, his reasoning should guide the court's decision.[153] The Fourth Circuit adopted the view that status includes the involuntary behavior of the defendant rather than distinguishing between act and status.[154] The court went on to state that even if this view was dicta in *Powell* it would nevertheless still be relevant guidance.[155] Further, the law would still be unconstitutional under *Robinson*, even if Justice White was fully ignored.[156] Additionally, the court clarified that while the Virginia law required a civil component before criminalization that made it more indirect than in *Robinson*, it was still an effective criminalization of addiction, and so was under the Eighth Amendment.[157] Importantly, the court explicitly noted that their holding was narrow and did not implicate conditions of supervised release, release from custody, or restrictions on people labeled as sex

[148] *Id.* at 808.

[149] *Id.* at 809–11. The dissent held the position that the majority misread a "bright-line rule" into *Martin* that sidestepped a requirement for individualized showing in *Martin* and disregarded individualized showing in *Powell*. *See id.* at 826–27 (Collins, J., dissenting).

[150] 930 F.3d 264, 283–84, 286 (4th Cir. 2019) (en banc).

[151] *Id.* at 268–69.

[152] *Id.* at 280–81. The Fourth Circuit also found the law was unconstitutionally vague. *See id.* at 271–78.

[153] *Id.* at 281–83.

[154] *See id.*

[155] *Id.* at 281.

[156] *Id.* at 282.

[157] *Id.* at 283.

offenders, such as registries.[158] However, despite the narrowness of the holding, the logic used could still be relevant to other challenges.

This Part's examination of Eighth Amendment jurisprudence regarding status-based punishment has provided necessary context for Part III, which will introduce how state and federal courts in Illinois and New York have addressed challenges to dead time incarceration brought by indigent people convicted of sex offenses. Part IV then applies the case law and jurisprudential background introduced in these Parts to argue that dead time incarceration violates the Eighth Amendment.

III. CURRENT CASE LAW IN ILLINOIS AND NEW YORK

This Part summarizes and responds to district court rulings in Illinois and New York. It discusses challenges brought by indigent people convicted of sex offenses who have served their sentence and are otherwise entitled to release, but instead continue to be incarcerated on dead time due to the confluence of their homelessness, requirements under sex offender residency restrictions, and prison release policies and laws. This Note selects these states as a narrow focus because federal district courts in these jurisdictions recently decided cases brought by indigent people convicted of sex offenses facing dead time incarceration after not finding housing. Each reached vastly different results. Dead time incarceration is an active legal question, and neither the Second nor Seventh Circuits have decisively ruled on it. Finally, Justice Sotomayor's concurrence in the denial of certiorari of a recent New York case implied that dead time incarceration may be unconstitutional.[159] Coupled with growing academic and popular attention on the issue in both Illinois and New York,[160] this Note proposes a solution to dead time incarceration: the recognition of its unconstitutionality.

Section III.A first addresses Illinois, analyzing three challenges brought under 42 U.S.C § 1983 by indigent people convicted of sex offenses. Each case was adjudicated by Judge Kendall of the Northern District of Illinois. The Section summarizes the factual backgrounds and explains why the court ruled in the plaintiffs' favor.

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[158] *Id.* at 284.

[159] *See* Ortiz v. Breslin, 142 S. Ct. 914 (2022) (Sotomayor, J., statement respecting denial of certiorari)

[160] *See, e.g.*, Frankel, *supra* note 26, at 283–85; Adam Liptak, *Their Time Served, Sex Offenders Are Kept in Prison in 'Cruel Catch-22,'* N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/us/supreme-court-sex-offenders.html [https://perma.cc/9GUU-CPZN]; Max Green, *Federal Judge Finds Illinois Rules on Sex Offenders Unconstitutional*, WBEZ CHI. (Apr. 1, 2019, 6:36 PM), https://www.wbez.org/stories/federal-judge-finds-illinois-rules-on-sex-offenders-unconstitutional/fdea1372-1b00-44b1-b0e6-2501bc082378 [https://perma.cc/2PUB-ULVL].

Then, Section III.B shifts the focus to New York decisions that reached contrary conclusions. Section III.B first presents the unique rights homeless people possess under New York City local laws. Then, the Section introduces the factual backgrounds for the cases and analyzes how and why the New York courts ruled in favor of the government parties, and how those courts distinguished the cases addressed in previous Parts.

A. Illinois

Both state and federal courts in Illinois have addressed challenges to dead time incarceration yet have reached different results. The Illinois Supreme Court resolved a case involving dead time incarceration in *Cordrey v. Prisoner Review Board*, but did so on procedural grounds.[161] The Northern District of Illinois has, on two occasions, determined on motion for summary judgment that it is unconstitutional for the state to continue to incarcerate indigent people convicted of sex offenses who have completed their sentence, but have not been released due to their inability to find and secure an appropriate residence.[162]

In the third and most recent case, the court denied the government's motion to dismiss and granted the plaintiffs' motion for a preliminary injunction to enjoin IDOC's host site policy as it applied to party members who were not included in previous classes.[163] In each of the three cases, Judge Kendall acknowledged an Eighth Amendment violation.

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[161] 21 N.E.3d 423 (Ill. 2014). The Illinois Supreme Court was presented with a writ of mandamus requesting the "violating at the door" legal fiction be deemed unconstitutional on due process and equal protection grounds, as it treated indigent incarcerated people differently than those with more resources and led to them experiencing dead time incarceration. *Id.* at 430. Violating at the door is

> a legal fiction wherein it is imagined that the offender is released from custody, placed on MSR, but when he leaves the institution he is in violation of his supervision terms and he is immediately placed back in custody. In reality, the offender simply remains incarcerated until a MSR prerequisite is satisfied. This can continue until either (1) the term of MSR expires, or (2) the prerequisite is satisfied.

Id. at 426 (quoting Armato v. Grounds, 944 F. Supp. 2d 627, 631 n.3 (C.D. Ill. 2013)). The petitioner in *Cordrey* brought this action under the original jurisdiction of the court, which required the petitioner to "establish a clear right to mandamus" and was limited to questions of law, because "[i]f factual questions are present, mandamus is inappropriate and this court will not assume jurisdiction." *Id.* at 428. While the petitioner argued that their claim was a matter of law that met this burden, the court disagreed, stating, "[W]e find factual questions predominate in this case." *Id.* at 431. Because the court required evidence it was not presented with to support the allegation that indigent people convicted of sex offenses were treated differently than those with more resources, the court held that mandamus was not appropriate and did not grant them jurisdiction in this matter, so they denied the writ, but not before suggesting that the issue may best be handled by the legislature rather than the courts. *Id.* at 432–33. The Illinois Supreme Court has not subsequently taken up a similar case with full findings.

[162] *See* Murphy v. Raoul, 380 F. Supp. 3d 731, 738 (N.D. Ill. 2019); Barnes v. Jeffreys, 529 F. Supp. 3d 784, 787–88 (N.D. Ill. 2021).

[163] Stone v. Jeffreys, No. 21 C 5616, 2022 WL 4596379 (N.D. Ill. Aug. 30, 2022).

Although the reasoning is largely consistent across the three cases, they were each brought by different classes of affected individuals and addressed different questions of law. The first case, *Murphy v. Raoul*, was brought by a class of indigent people convicted of sex offenses who were sentenced to indeterminate periods of MSR.[164] Although they had completed the duration of their primary sentence, they remained in IDOC custody until they could meet the conditions of MSR, which included residing at an IDOC-approved residence.[165] The class members' MSR periods were indefinite (the named plaintiff had a sentenced MSR of three years to life) and under Illinois law, petitioning for removal of the conditions of MSR was only possible after three years of living outside of custody.[166] Because dead time spent in prison on MSR does not credit to those three years, the sentences of class members who could not secure approved housing was effectively converted to one of life *after* they had already completed their full primary sentence.[167]

The second case, *Barnes v. Jeffreys*, directly challenged the "One-Per-Address Statute," which mandated that only one person convicted of sex offenses was allowed to reside at a given address.[168] Under the interpretation of this rule adopted by IDOC, it was effectively impossible for large numbers of indigent people convicted of sex offenses to find eligible housing, as it eliminated homeless shelters, group homes, and trailer parks that already housed even one registrant.[169]

The third case, *Stone v. Jeffreys*, is brought by a class of all indigent people convicted of sex offenses who remain incarcerated on dead time because they are not able to secure IDOC approved housing.[170] The case largely mirrors *Murphy*, although the class is broader as it includes people

[164] 380 F. Supp. 3d at 743–48, 754 (summarizing the plaintiffs by individual bringing suit and tracing their treatment to their status as indigent and homeless).

[165] *See id.*

[166] *Id.* at 739, 743.

[167] *Id.* at 737, 739.

[168] 529 F. Supp. 3d 784, 787 (N.D. Ill. 2021).

[169] *See id.* at 788.

[170] No. 21 C 5616, 2022 WL 4596379, at *1 (N.D. Ill. Aug. 30, 2022).

with a definite MSR term.[171] Thus, Stone represents the broadest challenge to dead time incarceration, and as an active case, the most recent challenge.[172]

Because it was the first case brought, *Murphy* fully details Judge Kendall's basis for ruling in favor of the plaintiffs. The subsequent cases largely follow suit. In *Murphy*, the court cited the Ninth Circuit's decision in *Martin v. Boise* and found that the Eighth Amendment bars punishment based on involuntary conduct in addition to status.[173] The court considered several statutory residency restrictions and IDOC policies that limited access to housing for people convicted of sex offenses.[174] It determined that "for someone who is homeless, it is virtually impossible to comply with the IDOC's application of the host site requirement."[175] From this, the court reasoned that the failure by indigent people who had been convicted of sex offenses to secure housing was not voluntary conduct, but rather involuntary and inseparable from their status as effectively homeless individuals.[176]

The court also found that, consistent with Seventh Circuit precedent, prolonged incarceration was punishment for the purposes of the Eighth Amendment, rejecting the defendants' argument to the contrary.[177] As such, forcing indigent people convicted of sex offenses to serve dead time because they could not find IDOC-approved housing was held unconstitutional under

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[171] Order Amending the Class Certification at 1, Stone v. Jeffreys, No. 21 CV 5616, 2022 WL 4596379 (N.D. Ill. Feb. 6, 2023) (defining the class as "[a]ll individuals currently or in the future detained in the Illinois Department of Corrections who are required to register as sex offenders pursuant to the Sex Offender Registration Act (730 ILCS 150), have completed their sentences of incarceration, and are entitled to release from prison onto MSR for a determinate period of time, but remain detained or imprisoned because they are unable to secure an approved host site at which to live while on MSR").

[172] After Judge Kendall's decisions to deny the defendant's motion to dismiss and grant the plaintiff's motion for preliminary injunction in the Northern District of Illinois, the case was appealed to the Seventh Circuit Court of Appeals. *See* Stone v. Jeffreys, No. 22-2733, 2023 WL 2658354, at *1 (7th Cir. Mar. 20, 2023). The appeal has since been voluntarily dismissed and the case returned to the Northern District of Illinois. *Id.* As it is an active legal issue, the case could change subsequent to publishing.

[173] Murphy v. Raoul, 380 F. Supp. 3d 731, 763 (N.D. Ill. 2019).

[174] These regulations and policies included a "statute that prohibits one sex offender from residing in the same 'condominium complex or apartment complex' as another offender"; IDOC procedures that limited access to housing, including that "IDOC does not permit any sex offender to use a homeless shelter as his or her host site"; and external factors, such as that "[t]here are no halfway houses or transitional housing facilities in Illinois that will accept an individual convicted of a sex offense." *Id.* at 741–42.

[175] *Id.* at 764. In the testimony quoted in the court's decision, an IDOC official admitted as much. *Id.* ("Q: Is it possible for a sex offender with an indeterminate MSR term who, A, does not have money to pay for his own housing, and, B, does not have family or friends on the outside who can pay for his housing [whether by living with them or paying for separate accommodations] to ever get out of the Illinois Department of Corrections? A: Never say never, but, . . . using those criteria, no.").

[176] *Id.*

[177] *Id.*

the Eighth Amendment.[178] Although *Barnes* addressed the "One-Per-Address Statute" and *Stone*'s class is broader than the one in *Murphy*, the court again ruled in favor of the plaintiffs' Eighth Amendment claims on substantially similar reasoning.[179]

As a result of its disposition in *Murphy*, the court entered a permanent injunction that demanded IDOC develop a plan to release class members who were serving dead time because they could not meet the host site requirement.[180] In response, IDOC changed policies that had limited potential housing options and granted class members access to transitional housing, treatment, and career training programs.[181] Following *Barnes*, the court issued an injunction permanently enjoining IDOC from applying the "one person per address" requirement, which increased eligible housing for indigent people convicted of sex offenses.[182] Most recently, IDOC agreed to grant access to transitional housing to members of the *Stone* class.[183] These measures have led IDOC to secure housing for at least 240 members of the *Stone* class.[184] However, despite these positive steps, plaintiffs have recently alleged ongoing systemic issues in securing housing for all class members and requested permanent injunctive relief.[185] While the long-term future of these programs is uncertain, they have provided hundreds of indigent people

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[178] *Id.* at 765.

[179] *See* Barnes v. Jeffreys, 529 F. Supp. 3d 784, 794–95 (N.D. Ill. 2021); Stone v. Jeffreys, No. 21 C 5616, 2022 WL 4596379, at *1, *4 (N.D. Ill. Aug. 30, 2022).

[180] Permanent Injunction Order at 2, *Murphy*, 380 F. Supp. 3d 731 (No. 16 C 11471).

[181] *See* Defendants' Compliance Plan at 3, *Murphy*, 380 F. Supp. 3d 731 (No. 16 CV 11471).

[182] Permanent Injunction Order at 2, *Barnes*, 529 F. Supp. 3d 784 (No. 20-cv-2137).

[183] Defendant's Status Report at 1, Stone v. Jeffreys, No. 21 CV 5616, 2022 WL 4596379 (N.D. Ill. Apr. 5, 2023) ("[T]he Department has developed and expanded the Intensive Community Reintegration Program ('ICRP') to provide free transitional housing to members of the *Murphy* class and the *Stone* class.").

[184] *Id.*

[185] The plaintiffs allege that

> the Department of Corrections continues to violate class members' constitutional rights in at least three ways: (1) it does not timely release members of the class whose Mandatory Supervised Release ('MSR') periods are resumed by the Prisoner Review Board ('PRB'); (2) it reimprisons persons on MSR in the community if they lose their housing; and (3) it extends the imprisonment of class members with physical or mental impairments because of a lack of accessible housing.

Plaintiffs' Motion for a Permanent Injunction, Stone v. Hughes, No. 21 CV 5616, 2022 WL 4596379 (N.D. Ill. Aug. 23, 2023). The defendant replied to the plaintiffs' motion by arguing that there is not an ongoing constitutional violation, the plaintiffs have not shown irreparable harm, and a permanent injunction is not in the public interest, and so the court should deny the plaintiffs' motion. *See* Defendant's Response to Plaintiffs' Motion for Permanent Injunction, Stone v. Hughes, No. 21 CV 5616, 2022 WL 4596379 (N.D. Ill. Oct. 6, 2023). The plaintiffs replied to the defendant's response by again asserting the need for a permanent injunction. Plaintiffs' Reply in Support of their Motion for a Permanent Injunction, Stone v. Hughes, No. 21 CV 5616, 2022 WL 4596379 (N.D. Ill. Nov. 9, 2023). There has not yet been a disposition on the motion by the court.

with the same opportunity to serve MSR outside of prison that is enjoyed by wealthier people who can afford to secure their own IDOC approved housing.

B. New York

Courts in New York have addressed similar scenarios. There are two notable cases with nearly identical facts. The New York Court of Appeals adjudicated the first challenge,[186] and the U.S. District Court for the Eastern District of New York adjudicated the other.[187] Because the latter case borrows from the reasoning in the former, discussion of both is relevant.

As a preliminary matter, it is important to recognize that there are competing rights at stake here due to New York City's provision of unique housing rights. Under a 1981 consent decree, New York City has the obligation to house any qualifying person in temporary shelter.[188] While courts have acknowledged additional difficulties with placing people convicted of sex offenses in temporary housing,[189] both courts[190] and the legislature[191] have indicated a preference for placement within a person's home community. For many people, that is New York City.

These competing regimes of restrictions on people convicted of sex offenses, a right to housing for homeless New Yorkers, and policy preferences for registrants to be placed in their home community means the shortage of SARA compliant housing in New York City affects many individuals, even if there is compliant housing in other areas of New York State. As a result, it is more appropriate to look at the housing situation in New York City for a comparison to statewide compliant housing shortages in other states, such as Illinois, rather than to draw the comparison by looking at New York State as a whole.

The most relevant case brought by New York indigent people convicted of sex offenses who were subject to dead time incarceration is *People ex rel.*

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[186] People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041 (N.Y. 2020), *cert. denied*, 142 S. Ct. 914 (2022).

[187] Miller v. Smith, No. 21-CV-2949, 2021 WL 4222981 (E.D.N.Y. Sept. 16, 2021), *reconsideration denied*, No. 21-CV-2949, 2021 WL 5416624 (E.D.N.Y. Nov. 18, 2021).

[188] *See* Callahan v. Carey, 909 N.E.2d 1229, 1230 (N.Y. 2009) (quoting relevant portion of the 1981 consent decree: "[T]he City defendants shall provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter").

[189] *See* Gonzalez v. Annucci, 117 N.E.3d 795, 802 n.5 (N.Y. 2018).

[190] *See Johnson*, 163 N.E.3d at 1054.

[191] *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 352.36 (listing "accessibility to family members, friends or other supportive services" among the factors social services should consider when placing a homeless person convicted of sex offenses).

Johnson v. Superintendent, Adirondack Correctional Facility, which was resolved by the New York Court of Appeals.[192] In *Johnson*, a plaintiff had been sentenced to ten years imprisonment followed by a period of five years on post-release supervision (PRS).[193] He completed his entire sentence and sought to live in New York City, but his initial housing request was denied for not being compliant with SARA.[194] He was then transferred to an RTF within Fishkill Correctional Facility to serve his PRS period and placed on a waiting list to be released into the New York City Department of Homeless Services system. He was ultimately released months after filing suit.[195]

The facts in *Miller v. Smith* are strikingly similar. The plaintiff completed his sentence.[196] Then, after his initial housing request was denied, he was transferred to an RTF located within Green Haven Correctional Facility while waiting for a bed in a SARA compliant shelter to become available.[197] The plaintiff in each case alleged this scheme violated their Eighth Amendment rights.[198]

In both cases, the courts found no violation of the Eighth Amendment. In *Johnson*, assuming, though not holding, that the reasoning expressed by the Ninth Circuit in *Martin* was correct, the New York Court of Appeals did not find an Eighth Amendment violation.[199] To the court, this situation was not punishment for status, but rather shows "a broader set of social circumstances in which sex offender and society alike prefer that the offender remain in his city of long-time prior residence, especially if he must rely on local social services departments for shelter housing, and not relocate simply because SARA-compliant housing is plentiful elsewhere."[200]

Additionally, rather than punishment, the court stated the use of the RTF was required by the unavailability of compliant beds.[201] In a much shorter decision, Judge Joanna Seybert for the Eastern District of New York in *Miller* relied heavily on *Johnson* and quickly determined that there was

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[192] 163 N.E.3d 1041.

[193] *Id.* at 1046. This case consolidated appeals from *People ex rel. Ortiz v. Breslin*, 123 N.Y.S.3d 608 (N.Y. App. Div. 2020), and *People ex rel. Johnson v. Superintendent, Adirondack Correctional Facility*, 106 N.Y.S.3d 408 (N.Y. App. Div. 2019). *Johnson*, 163 N.E.3d at 1041. Only Ortiz preserved an Eighth Amendment claim, so his appeal is the one referenced in this Note. *Id.* at 1053.

[194] *Johnson*, 163 N.E.3d at 1047. SARA defines New York's residency restrictions for people convicted of sex offenses.

[195] *See id.* at 1046–47.

[196] No. 21-CV-2949, 2021 WL 4222981, at *1 (E.D.N.Y. Sept. 16, 2021).

[197] *Id.*

[198] *Id.*; *Johnson*, 163 N.E.3d at 1053.

[199] *Johnson*, 163 N.E.3d at 1054.

[200] *Id.*

[201] *Id.* at 1055.

no Eighth Amendment violation.[202] While *Johnson* was later denied certiorari by the Supreme Court, Justice Sotomayor indicated in her statement respecting the denial of certiorari her disapproval of the decision in that case. She suggested there were constitutional concerns and encouraged New York to change its policies.[203]

IV. THE APPLICATION OF THE EIGHTH AMENDMENT

This Part develops how a court should address the factual scenarios given in the Illinois and New York cases. This admittedly agrees with much of the reasoning of the decisions out of Illinois, and this Part builds on Judge Kendall's reasoning. In doing so, it rejects the rationale of the New York courts. This argument is a blueprint that could be applied by any state or federal court resolving lawsuits brought by indigent people convicted of sex offenses who are forced to serve dead time due to their inability to find approved housing.

Considering the history of the Eighth Amendment, the Supreme Court's Eighth Amendment jurisprudence, and current guidance from circuit courts, continuing to incarcerate indigent people convicted of sex offenses who have completed their sentence due to the fact that they cannot secure approved housing is unconstitutional under the Eighth Amendment. This argument does not rest on a challenge to the individual's treatment as a person who was convicted of sex offenses. Rather, it rests on his or her treatment as a person who is indigent.[204] Whereas someone who has the financial means to find an eligible residence in areas that are outside the restricted areas are released, the indigent and homeless are forced to remain in prison.[205]

This claim fits naturally within the history and law of the Eighth Amendment. Dead time incarceration is not unlike schemes in seventeenth-century England through which excessive fines resulted in perpetual imprisonment.[206] This comparison directly invokes the nondiscrimination conception of cruel and unusual punishment that hearkens back to the term's original meaning as applied in the English Bill of Rights of 1688. Avoiding situations such as this is consonant with the purpose of that provision, at least for the English, behind banning cruel and unusual punishment. But this claim

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[202] *Miller*, 2021 WL 4222981, at *9.

[203] Ortiz v. Breslin, 142 S. Ct. 914 (2022) (Sotomayor, J., statement respecting denial of certiorari).

[204] Although an argument could be made that at least some sex offenses are the result of mental illnesses that compare favorably to *Robinson*, those arguments are outside of the scope of this Note.

[205] It is acknowledged that if the facts were different, i.e., if *both* indigent and wealthy are unable to find housing, then it would warrant a different analysis. However, this was not addressed by either the New York or Illinois courts. Likewise, this Note will not address that alternative scenario.

[206] *See* Claus, *supra* note 89, at 123.

also captures modern concerns of those like Justice Douglas, who contend that punishment inflicted disparately on the basis of wealth is "unusual" under the Eighth Amendment.[207] When people are forced to remain in prison because they do not possess the financial means to leave, such punishment is logically both cruel and unusual.

That dead time incarceration violates the Eighth Amendment is even clearer when grounding it in the Court's decisions in *Robinson* and *Powell*. Those cases support the proposition that continued incarceration of indigent people convicted of sex offenses on dead time because they cannot secure eligible housing violates the Eighth Amendment. The narrowest, and thus most relevant, reading of *Powell* is from Justice White. Justice White posited the unconstitutionality of punishing compulsive alcoholics who are intoxicated in public because they have nowhere else to go. This suggests punishing someone for the unavoidable results of their status is unconstitutional. The Fourth and Ninth Circuits have adopted this interpretation of the Eighth Amendment. As expressed in *Johnson*, the Ninth Circuit's principle derived from *Powell* and expressed in *Martin* "is that the government cannot prosecute homeless people for sleeping in public if there 'is a greater number of homeless individuals in [a jurisdiction] than the number of available' shelter spaces."[208]

This is similar to when indigent people convicted of sex offenses face extended incarceration because they cannot find approved housing. While the residency restrictions make it difficult for people convicted of sex offenses to find approved housing, when the government's response is to continue to incarcerate those people on dead time, they are ultimately imprisoning them because there are not enough eligible beds that are available. And though the residency scheme may not be illegal in and of itself, when dead time incarceration becomes unavoidable due to shortages of housing available to registrants, like in modern-day New York[209] and (until recent changes) Illinois,[210] the residency requirements violate the Eighth Amendment by inflicting punishment on people for merely existing.

While the Ninth Circuit relies on an interpretation of Justice White's opinion in *Powell*, there is nevertheless an argument that dead time incarceration would still be unconstitutional even under the plurality and

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[207] Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

[208] Johnson v. City of Grants Pass, 50 F.4th 787, 795 (9th Cir. 2022) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007)).

[209] Gonzalez v. Annucci, 117 N.E.3d 795, 800 (N.Y. 2018) (indicating that there is a "dearth" of compliant housing for registrants in New York City).

[210] *See* Murphy v. Raoul, 380 F. Supp. 3d 731, 764 ("[F]or someone who is homeless, it is virtually impossible to comply with the IDOC's application of the host site requirement.").

concurrence's limitation of applying *Robinson*'s ban on status-based punishment to "pure status crimes" that do not consider unavoidable actions.[211] Unlike the Ninth Circuit, which invalidated laws that directly punished actions such as having a blanket while sleeping, the scenario at hand punishes individuals for merely existing. So, what is the actus reus? At most, the "action" is an omission.

Because dead time incarceration is the only way they can avoid existing in a restricted area, indigent people convicted of sex offenses are forced to remain in prison after their sentence has ended. This distinguishes them from the appellant in *Powell* who had a home to live in and instead was drunk in public. Rather, it draws a close comparison to the defendant in *Robinson*, who was convicted for being a drug addict existing in the world. Because of their poverty, indigent people convicted of sex offenses are forced to exist illegally without non-carceral alternatives available to them. Their imprisonment hinges on their economic status, as non-indigent people convicted of sex offenses are granted the luxury of physically navigating the world that the indigent cannot afford. In that way, just as the defendant in *Robinson*, indigent people convicted of sex offenses who are subject to dead time incarceration are punished for their status, in this case being poor. Such a reality in which indigent people convicted of sex offenses are forced into legal impossibility raises deep constitutional concerns that courts should recognize as contrary to the Eighth Amendment.

CONCLUSION

Dead time incarceration forces indigent people convicted of sex offenses to sit in prison long after they have served their time. An indigent person who is convicted of the exact same crime and is given an identical sentence as a wealthier person could spend several additional months or even years behind bars than a wealthier person who can secure approved housing. Punishing someone because they bear the status of poverty is cruel and unusual under the Eighth Amendment. While recent gains have been made to limit this practice in Illinois, there are still people in New York who are reeling under the weight of dead time incarceration. This practice must end. This Note provides the framework for courts, advocates, and academics to analyze this Eighth Amendment issue and provide relief for incarcerated people who stay in prison when they should be released. Only then will all people be afforded their full protections under the Constitution.

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[211] Powell v. Texas, 392 U.S. 514, 533 (1968) (plurality opinion) ("The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, . . . [or] has committed some actus reus."); *id.* at 542 (Black, J., concurring) ("Pure status crimes[] involv[e] no conduct whatever . . . .").