

OFF TO ELBA!¹ THE LEGITIMACY OF SEX OFFENDER
RESIDENCE AND EMPLOYMENT RESTRICTIONS
BY: JOSEPH L. LESTER^{*}

There are times when politicians are hostages to the lusts of their constituents. They dare not oppose bills that, if defeated, would serve only to aggravate those who placed them into office.² Regardless of whether they actually favor the measures, the political risk is too great not to allow their constituents' passions to overrun their own common sense. As a consequence, laws are passed with little or no resistance.³ These laws can fundamentally alter the liberties and freedom of a few to satisfy the ignorant fear of the masses. As a result, laws that in theory appear to protect society, in practice only exacerbate the perceived problem. In situations like this, an independent judiciary must do what needs to be done. Because sometimes the desire of the majority overbears individual liberty, it is critical that the courts protect the legitimate interests of "the others."⁴ When such laws are passed and the political process is broken, it is necessary for the judicial branch to step forward and protect those who are politically impotent.⁵

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions. Politicians across the country will approve almost any measure that deals with sex offenders to appear strong on crime.⁶ Given that the sex offender lobby is neither large nor vocal, it will be up to the courts to protect the interests of this disenfranchised group.⁷

¹ Elba is the island Napoleon was exiled to until his attempt to retake the French Crown to which he was sent to St. Helena to live in exile the remaining six years of his life.

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² See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-530 (2001).

³ See e.g., In Georgia, 2006 H.B. 1059, which radically limited the areas that a sex offender could live and work passed the State Senate 52 to 1. Available at

<<http://www.legis.state.ga.us/legis/2005_06/sum/hb1059.htm>>; John Curran (Associated Press), *Sex-offender Zones Assailed*, PHILADELPHIA INQUIRER Aug. 22, 2005, (The town of Brick, New Jersey, included school bus stops in its list of locations an offender is prohibited from living 2,500 feet from. With more than 2,000 bus stops, the measure effectively bars offenders from living anywhere in the town. "It's pretty tough, if someone introduces an ordinance like this, to vote no," said Brick Mayor Joseph Scarpelli. "I know they'll probably have a case that tests all these ordinances, and there's a good possibility a lot will be thrown out as unconstitutional. But it makes a town feel that they care about their children.")

⁴ See <<<http://www.postcolonialweb.org/poldiscourse/themes/other.html>>>

⁵ See Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL RTS. J. 439, 495-496 (2004).

⁶ Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REGISTER AND TRIBUNE, Jan. 22, 2006. Quoting state Sen. Dick Deardon, Dem. "it will be difficult to change. 'No one wants a postcard to come out two weeks before the election saying they are lax on sex offenders.'" *Id.*

⁷ Relying on politicians to act against their constituents' wishes to benefit an unpopular minority is wishful thinking. "There is little legislative hay to be made in cultivating the multiple murderer vote." Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting). See also Todd Dorman, *Prosecutors: Dump Offender Rule*, QUAD-CITY TIMES, Jan. 24, 2006. (Prosecutors ask the court to do what the

This article does not dispute the idea that sex offenders should be dealt with harshly. But there has to be a time when enough is enough. The law should provide some opportunity for repentance.⁸ Individuals make mistakes, but they should be allowed an opportunity to change. Individuals like Lori Sue Collins, who after serving three years for having sex with a teenage boy, found God. Upon her release, she worked as the residence director at the Door of Hope, a halfway house for sex offenders.⁹ She believed her calling was to help others like her turn away from the sins of their past and live as productive members of society. But because the Door of Hope is located within 1,000 feet of a school bus stop, Lori had to quit her job and move because of residence and employment restrictions.¹⁰

This article will look at why sex offenders are treated differently than other criminal offenders. Sex offenders are subject to sanctions and prohibitions above and beyond what other criminal offenders must face. Next, the article will look at some of the residence and employment restrictions placed on sex offenders to determine if they are rationally related to any legitimate government interest without overbearing the sex offender's constitutional rights. Finally, the article will offer an alternate means of sex offense prevention that encourages sex offender assimilation back into society instead of further exclusion.

This article will focus on those individuals who have been classified as sex offenders and who have successfully completed their sentence, however long it may have been. This article does not deal with laws aimed at restricting the freedom of individuals released on probation or parole. Any type of supervised release is a contractual agreement between the individual and the state and any rights an individual wishes to waive to have some limited degree of freedom are within the individual's discretion and the state's prerogative to require. There is no such bargain for those who have completed their sentence. Society has an obligation to those who have paid their debt for the wrong committed to accept a convict's repentance.¹¹ There should be at least some opportunity for that individual to assimilate back into society. However, the residence and employment laws currently promulgated by twenty-four states and many other local communities around the country serve only to exile those who desire a second chance at

legislature cannot -- remove this law). *See also* Reynolds v. Sims, 377 U.S. 533 (1964) (standing for the proposition that the political process should be balance and fair to everyone providing "one person, one vote").

⁸ *See e.g.* State v. Chaney, 477 P.2d 441 (Alaska, 1970) "The primary goal of such legislation is an attempt to implement Alaska's constitutional mandate that penal administration shall be based on the principle of reformation and upon the need for protecting the public"; ALA CODE §13A-1-3(5) The purpose of the criminal code is "To insure the public safety by . . . the rehabilitation of those convicted." ALA CODE §13A-1-3(6) "To prevent the arbitrary or oppressive treatment of persons accused or convicted of offenses."

⁹ Whitaker et al., v. Purdue, et al., United States District Court, Northern District of Georgia, Complaint filed June 20, 2006, pg 16-18.

<<http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/LegalDocuments/HB1059_Complaint.pdf>>

¹⁰ *Id.*

¹¹ Provided that the offender has served his/her time and actually seeks to turn away from his/her previous deviant behavior.

life.¹² Instead of protecting society, these laws actually push individuals into antisocial behavior and likely back into trouble with the law. But besides simply being bad public policy, these laws are contrary to the ordered scheme of liberty that we hold so dear. As Justice McKenna so eloquently put it almost 100 years ago:

His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stonewalls, oppress as much by their continuity, and deprive of essential liberty.¹³

I. Who is a sex offender?

A lawbreaker is a sex offender if he or she is guilty of one of the many enumerated crimes that constitute a sex offense. The definition of what is a sex offense is set forth by statute and varies from state to state. In some states the list is short, while in others the list is extensive. The status of being a sex offender may not be limited to individuals with felony convictions. Even a class A misdemeanor conviction can result in being labeled a sex offender.¹⁴ For most states there is a three prong designation for

¹² There 19 states with residence restrictions, not a condition of probation/parole/supervision, in order of enactment or latest amendments. Delaware (July 25, 1995) (OD); Alabama (Sept. 1, 1999) (OD); Illinois (July 7, 2000) (OD, SVP); Louisiana (June 28, 2001) (SVP); Iowa (July 1, 2002) (OD); Arkansas (July 16, 2003) (RD+SVP); Ohio (July 31, 2003) (OD); Oklahoma (Nov. 1, 2003) (RD); Tennessee (June 8, 2004) (RD); Missouri (June 14, 2004) (OD); Florida (Oct. 1, 2004) (OD); Michigan (Jan. 1, 2006) (RD); Georgia (July 1, 2006) (RD); Idaho (July 1, 2006) (RD); Indiana (July 1, 2006) (RD); Mississippi (July 1, 2006) (RD); South Dakota (July 1, 2006) (RD); Virginia (July 1, 2006) (OD); Kentucky (July 12, 2006) (RD). The term in parentheses indicates whether the classification is Offense Driven (OD), Registration Driven (RD), or applies to Sexually Violent Predators (SVP). *See infra* Table 1 for citations. 8 states have a residence restriction as a condition of probation/parole/supervision: Arizona, ARIZ. REV. STAT. § 41-1604.07(F) (LexisNexis 2006); California, CAL. PENAL CODE § 3003(g) (West 2006); Florida, FLA. STAT. § 947.1405(7)(a)(2) (2006); FLA. STAT. § 948.30(1)(b) (2006); Indiana, IND. CODE ANN. § 11-13-3-4(g)(2)(B) (West 2006), IND. CODE ANN. § 35-38-2-2.2(2) (West 2006); Louisiana, LA. REV. STAT. ANN. § 15:538(D)(1)(c) (West 2006); Oregon, OR. REV. STAT. § 144.642(1)(a) (2006); Texas, TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2006); West Virginia, W. VA. CODE § 62-12-26(b)(1) (2006).

¹³ *Weems v. United States*, 217 U.S. 349, 366 (1910)

¹⁴ For example, In Illinois, where the residence restrictions is offense driven, one of the offenses is "indecent solicitation of an adult." 720 ILL. COMP. STAT. 5/11-9.3(c)(2.5). A person who arranges for a person 17 years of age or over to commit an act of sexual conduct with a person 13 or older but under 17 commits a Class A misdemeanor. 720 ILL. COMP. STAT 5/11-6.5. In Michigan, a second or subsequent conviction for indecent exposure subjects you to the residence restriction. MICH COMP. LAWS 28.722(e)(iii). Indecent exposure is a misdemeanor punishable by imprisonment up to 2 years, or a fine up to \$2,000, or both. MICH. COMP. LAWS 750.335a(2)(b). In Missouri, furnishing pornographic material to minors subjects you to the residence restriction. MO. CODE ANN. 566.147(1). Furnishing pornographic material to minors is a Class A misdemeanor. MO. CODE ANN. 573.040(2). Indecent exposure subjects you to the residence restriction in Oklahoma. OKLA. STAT. ANN. tit. 57, § 582(A). Although the crime is categorized as a felony, the punishment ranges from a fine of \$500 to \$20,000, imprisonment from 30 days to 10 years, or both. OKLA. STAT. ANN. tit. 21, § 1021(A). So, you could plead guilty, pay a \$500 fine, and be forced out of your home.

sex offender registration which subjects them to the residence and employment restrictions. A sex offender typically is a person convicted of a sexually violent offense, deemed a sexually violent predator, or convicted of a criminal offense against a victim who is a minor.¹⁵

The interesting aspect about this classification scheme as it relates to residence and employment restrictions is that for two of the three categories it does not matter whether the victim of the underlying crime is a child. So a person who is convicted of sex abuse against another adult is prohibited from living or working where children congregate as if he or she were a child molester. Focusing on the child victim is not clear enough either. Some states limit the status of "sex offender" to "child sex offender" in which case only crimes where the victim is a minor are considered.¹⁶ Crimes against adults are not used in that particular classification.¹⁷ For this classification, it does not matter if there is any sexual intent involved -- only that the victim of the crime is a child. For these restrictions to be rationally related to the interests of protecting children from sexual criminals, then the crimes which classify convicts as sex offenders should at a minimum include a sexual act and a child.¹⁸

Many people may think of sex offenders as "dirty old men prowling the streets," but with the wide spectrum of offenses that automatically lead to being classified as a sex offender, many times sex offenders are decent people who made a mistake.¹⁹ Take Wendy Whitaker, for example. At 17, she had consensual sexual relations with a 15-year-old boy.²⁰ Now 26, and without any other mark on her criminal record, she is a sex offender who is captured under Georgia's sex offender restrictions. Or Jay Hikes, who at the age of 19 had consensual sex with a 15-year-old girl in New Jersey.²¹ Now 36, married and with a small child, he too will be caught up in the broad net of sex offender residence and employment restrictions. Silly mistakes and actions that many people other

¹⁵ See *et al* GA. CODE ANN. § 42-1-12 (effective July 1, 2006); IOWA CODE ANN. § 692A.1 (West 2006).

¹⁶ See *e.g.* 720 ILL. COMP. STAT. § 5/11-9.3(c)(1), 5/11-9.3(c)(2.5) (A "child sex offender" is a person who, Has been charged with a sex offense or the attempt to commit an included sex offense, and (a) Is convicted, (b)Is found not guilty by reason of insanity, or (c) Is the subject of a finding not resulting in an acquittal at a hearing; or (d) Is certified as a sexually dangerous person, when any conduct giving rise to such certification is committed or attempted against a person less than 18 years of age.)

¹⁷ See *e.g.* 720 Ill. Comp. Stat. Sex offense means, 5/11-9.3(c)(2.5)

Child luring. Aiding and abetting child abduction. Indecent solicitation of a child. Indecent solicitation of an adult. Soliciting for a juvenile prostitution. Keeping a place of juvenile prostitution. Patronizing a juvenile prostitute. Juvenile pimping. Exploitation of a child. Child pornography. Predatory criminal sexual assault of a child. Ritualized abuse of a child. Criminal sexual assault (when victim under 18 years of age). Aggravated criminal sexual assault (when victim under 18 years of age). Aggravated criminal sexual abuse (when victim under 18 years of age). Criminal sexual abuse (when victim under 18 years of age). Kidnapping (when victim under 18 years of age and defendant not parent). Aggravated kidnapping (when victim under 18 years of age and defendant not parent). Unlawful restraint (when victim under 18 years of age and defendant not parent). Aggravated unlawful restraint (when victim under 18 years of age and defendant not parent). An attempt to commit any of the aforementioned offenses.

¹⁸ See *Raines v. State*, 805 So.2d 999 (Fla. App. 4th. 2001) (holding that inclusion of defendant in definition of "sexual offender," without concomitant sexual component, rendered sexual offender registration statute overinclusive in violation of equal protection).

¹⁹ Jenny Jarvie. *Suit Target's Georgia Sex Offender Law*. L.A. TIMES, July 2, 2006.

²⁰ Jenny Jarvie. *Suit Target's Georgia Sex Offender Law*. L.A. TIMES, July 2, 2006.

²¹ Doug Nurse. *Many Feel Impact of New Sex Offender Law*. ATLANTA JOURNAL CONSTITUTION, July 6, 2006.

would not have had qualms about doing could earn individual the sex offender label.²² So, it is not just those who commit rape, incest and sex abuse who are branded a sex offender. There is a significant probability that individuals with little potential to re-offend are treated the same as those who actually are predators.²³

In the handful of states where there are sex offender employment and residence restrictions, sex offender status can be earned automatically with a conviction of a particular crime. In Alabama, for example, a conviction, even a nolo contendere plea, of the following will result in sex offender classification: Rape in the first or second degree; sodomy in the first or second degree; sexual torture; sex abuse in the first or second degree; enticing a child to enter a vehicle, room, house, office, or other place for immoral purposes; promoting prostitution in the first or second degree; violation of the Alabama Child Pornography Act; kidnapping of a minor, except by a parent, in the first or second degree; incest, when the offender is an adult and the victim is a minor; soliciting a child by computer for the purposes of committing a sexual act and transmitting obscene material to a child by computer; any solicitation, attempt, or conspiracy to commit any of the aforementioned offenses²⁴ and a conviction for any criminal sex offense when the victim was under the age of 12 and any offense involving child pornography.²⁵

Sex offender status is painted with a broad brush, marking more individuals than necessary. The label is one that should be avoided at all costs. As a result statutes that require automatic inclusion by those convicted of particular crimes will likely make convictions for those crimes more difficult to come by. As the time frame for potential punishment is extended, many individuals accused of such crimes will not be willing to accept a guilty plea regardless of the suggested punishment.²⁶ The status of being a sex offender is a long-term, even a lifetime, marking. Such a stigma should be very narrowly applied, if at all.

II. Why all the fuss over this crime?

Sex offenders are a special cast of criminals that excite the general public more than other run-of-the-mill criminals.²⁷ The combination of sex and violence makes for a

²² A sex offender could just be a person who committed a mischievous act such as mooning or streaking. *See generally*, Kaffie Sledge. *Labels May Mislead*, COLUMBUS LEDGER-ENQUIRER, June 29, 2006. "For instance, if reported, relieving oneself outdoors (behind a tree on the golf course or behind a building) could result in being charged with a sex offense. It's a misdemeanor if the witness is an adult; a felony if witnessed by a minor." *Id.*

²³ Sometimes innocent fun can be criminal. KUTV, 8-Year-Old Charged For Sexual Conduct With Sitter, July 28, 2005, Salt Lake City, Utah. (A 14-year-old female baby-sitter "dared" the 8-year-old boy, in a game of truth-or-dare, to touch her breasts, which he did. When he told his mother about it, she called the police and both the 8-year-old boy and the 14-year-old baby-sitter were charged with lewdness with a minor. The charges were later dropped.) *Available at* http://kutv.com/topstories/local_story_210004013.html

²⁴ ALA. CODE § 15-20-21(4).

²⁵ ALA. CODE § 15-20-21(5).

²⁶ Even an offer of probated sentence might be rejected as a matter of course if the sex offender label must attach. The less plea bargains the more trials. One might speculate that within a brief period of time the bulk of the criminal cases tried will be sex offenses.

²⁷ *See* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L. J. 829, 881-82 (2000) "Stories about crime involving children in particular tap into a complex of concerns about modern life. Indeed, it is noteworthy that so many of the moral panics of the nineties involved children in either a victim or an offender role (or in the case of drug use, both victim and offender)." *Id.*

story line that sells.²⁸ Readers and viewers are titillated by these often NC-17 rated stories. Throw a story line that includes children into the mix with sex and violence and you have a potential to create a lynch mob. Stories of just a few abused children can unite the public to demand change.²⁹ Media attention can blow a situation out of

²⁸ Popular television shows such as Law & Order: Special Victims Unit or Dateline NBC use sex stories to capture and audience.

²⁹ See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (July 27, 2006).

SEC. 2. IN RECOGNITION OF JOHN AND REVÉ WALSH ON THE OCCASION OF THE 25TH ANNIVERSARY OF ADAM WALSH'S ABDUCTION AND MURDER.

(a) ADAM WALSH'S ABDUCTION AND MURDER.--On July 27, 1981, in Hollywood, Florida, 6-year-old Adam Walsh was abducted at a mall. Two weeks later, some of Adam's remains were discovered in a canal more than 100 miles from his home.

SEC. 102. DECLARATION OF PURPOSE.

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders:

- (1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.
- (2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.
- (3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.
- (4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.
- (5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.
- (6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.
- (7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.
- (8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.
- (9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.
- (10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.
- (11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.
- (12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.
- (13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.
- (14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.
- (15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.
- (16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.
- (17) Samantha Runion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

proportion so that it appears that isolated events are really an epidemic.³⁰ The laws often reflect the plight of the particular child who precipitated the law by carrying their names, such as Kyle, Megan or Jessica.³¹

Crimes involving sex, especially when the victim is a child, are perceived as more heinous crimes because the degree of violation of our personal privacy and innocence. Victims of sex crimes rarely just walk away from the incident without some physical or emotional scarring. In fact, nearly one-third of all rape victims, regardless of age, suffer some sort of post-traumatic stress disorder.³²

Anger is easily stirred against those who commit sex crimes. Sex offenders are not even honored among thieves.³³ It is not uncommon for prisoners to execute jailhouse justice to those who commit sex crimes, especially if it involved a minor.³⁴ Up until June 2006, in Illinois, the sex offender classification included those who murder children. A child-murderer asked for and received a new separate classification because he did not

³⁰ For example, anytime there is a shark attack news coverage of such an event gives people a false perception that shark attacks are common. <<http://news.nationalgeographic.com/news/2004/01/0123_040123_tvgreatwhiteshark.html>>. When in reality the likelihood of being attacked by a shark is extremely rare. From 1670-2001 there were only 2,110 reported shark attacks worldwide. <<<http://www.sharkattackphotos.com/Images/Misc/attackmap.jpg>>> ; See also Sharp, CT (Letter to the Editor) *C'mon*, ST. LOUIS JOURNALISM REVIEW, Dec. 1, 2003, Vol. 34, Issue 262 "In November, KSDK (Channel 5) promoted a story about sex offenders living near school bus stops as if it had discovered a plague epidemic in St. Louis. I know that November is sweeps month, but this promo was ridiculous. . . It has to be at the top of the list of sensationalistic non-stories fabricated by Channel 5."

³¹ See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, Title XVII, § 170101 (Sept. 13, 1994). *Key Developments in Jacob Wetterling Disappearance*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE (August 2, 2006) (available at <http://www.startribune.com/462/story/592010.html>); Megan's Law, Pub. L. No. 104-145 (May 17, 1996). Named after Megan Nicole Kanka. Steinhamilton, L., *Megan's Law Interests Britain*, NEWARK STAR LEDGER (July 23, 2006) (available at <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-4/115362967774340.xml&coll=1>); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236 (Oct. 3, 1996); Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, Fla. HB 3327, ch. 98-64 (May 19, 1998). Hancock, D., *Kidnappers Are Seldom Strangers*, CBS News (June 19, 2002) (available at <http://www.cbsnews.com/stories/2002/06/19/national/main512745.shtml>); Jessica Lunsford Act, Fla. HB 1877, ch. 2005-28 (May 2, 2005). Fineout, G. & Klas, M., *Dead Kids are Campaign Fodder for Crist*, MIAMI HERALD (Aug. 3, 2006) (available at <http://www.miami.com/mld/miamiherald/news/15184792.htm>) Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (July 27, 2006). Santiago, R. & Demarzo, W., *New Law Marks Adam Walsh Case Anniversary*, MIAMI HERALD (July 27, 2006) (available at <http://www.miami.com/mld/miamiherald/news/15184792.htm>).

³² NATIONAL CENTER FOR VICTIMS OF CRIME. *Rape-Related Posttraumatic Stress Disorder*. <<<http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentAction=ViewProperties&DocumentID=32366&UrlToReturn=http%3a%2f%2fwww.ncvc.org%2fncvc%2fmain.aspx%3fdbName%3dAdvancedSearch>>>

³³ Sex offenders, especially child sex offenders, are treated poorly in prison. Among prisoners sex offenders are considered the lowest prisoners of all. See HUMAN RIGHTS WATCH, *No Escape: Male Rape in U.S. Prisons*. <<[³⁴ See HUMAN RIGHTS WATCH, *No Escape: Male Rape in U.S. Prisons*. <<\[Id.\]\(http://www.hrw.org/reports/2001/prison/report4.html#N_222_>> Explaining the targeting of prisoners convicted of sexually abusing minors, another inmate said: Inmates confined for sexual offenses, especially those against juvenile victims, are at the bottom of the pecking order and consequentially most often victimized. Because of their crime, the general population justifies using their weakness by labeling rape \)](http://www.hrw.org/reports/2001/prison/report4.html#N_222_>></p></div><div data-bbox=)

want to be labeled as a sex offender because of the stigma.³⁵ When abusing a child is considered worse than murdering a child, there is little doubt the term "sex offender" brands a deep mark.

Finally, there is a dangerousness myth that surrounds sex offenders.³⁶ Studies in the 1970s and 1980s that suggested sex offender recidivism was not affected by treatment led many to the conclusion that there was nothing that could be done to curb the deviant behavior.³⁷ Couple the misuse of research data with a media that sensationalizes sex crimes and sex offenders, and it is no wonder the public sentiment against sex offenders is so high.³⁸

III. Comparative recidivism rates

Contrary to popular public opinion, the recidivism rate for sex crimes is no worse than the recidivism rate for other crimes.³⁹ In fact, sex offense recidivism is extremely low compared to the recidivism for other crimes.⁴⁰ According to the Department of Justice's statistics of sex offender recidivism, 5.3 percent of sex offenders were rearrested for a sex offense within three years of their release.⁴¹ Forty-three percent of convicted sex offenders were arrested for all crimes during this same period, but the overwhelming majority of those arrests were for other non-sexual allegations.⁴² Also, using arrests as proof of behavior is misleading because those with a criminal record are often the first ones blamed for new criminal activity.

While a 24 percent recidivism rate might sound high, using it as a call to arms when most other crimes have a similar propensity or worse is fallacious. For example, 67 percent of drug convicts are rearrested within three years with a conviction rate of 47

³⁵ Jocelyn Black, *Illinois House and Senate Agree to Send 'Sex Offender Only' Bill*, MEDILL NEWS SERVICE, http://mesh.medill.northwestern.edu/mnschicago/archives/2006/04/sexoffdb_the_il.html (April 6, 2006). On June 27, 2006, the governor signed into law the Child Murderer and Violent Offender Against Youth Registration Act. The Act provides for the registration of persons who were previously registered as sex offenders under the Sex Offender Registration Act for the offenses of kidnapping, aggravated kidnapping, unlawful restraint, aggravated unlawful restraint, first degree murder, child abduction, and forcible detention when those offenses were committed against persons under 18 years of age. *See* HB 4193, Public Act 94-0945. State rep. John Fritchey (D-Chicago) introduced the bill in November 2005. He said that he was inspired, by a woman, whose son would have to register as a sex offender, even though his murder conviction didn't have anything to do with a sexual crime. "As a father, I know firsthand how terrifying the words 'sex offender' are to a parent and I have zero tolerance for those individuals," Rep. Fritchey said in a press release. "But we're essentially talking about truth in labeling here. We were attaching a very powerful and inaccurate stigma to someone whose transgression did not warrant it. He was essentially facing a second sentence for a crime he did not commit." *Id.*

³⁶ *See* <<<http://www.atsa.com/ppOffenderFacts.html>>>

³⁷ *Id.*

³⁸ *See* Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*. 87 IOWA L. REV. 563, 569 (2002).

³⁹ *See* Iowa Dep't of Human Rights Div. of Criminal and Juvenile Justice Planning and Statistical Analysis Center. *Iowa Sex Offender Registry and Recidivism* (Dec. 2000); Bureau of Justice Statistics. *Recidivism of Sex Offenders Released from Prison in 1994*, NCJ 198281, at 14, (Nov. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>. "The 43% re-arrest rate of the 9,691 released sex offenders was low by comparison." *Id.*

⁴⁰ *See* Bureau of Justice Statistics. *Recidivism of Sex Offenders Released from Prison in 1994*, NCJ 198281, (Nov. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

⁴¹ *Id.* at 2.

⁴² *Id.* at 14.

percent,⁴³ yet there is no restriction keeping drug offenders from living or working near schools. While most states have laws that enhance a drug crime if it takes place within a certain distance from a school, there is nothing to prevent drug offenders from living there after they are released.⁴⁴ Thus, sex offender employment and residence restrictions are either precursors of what is to come to all criminal offenders or a special sanction for only the sex offender.

Data can be used to mislead. As often stated there are “lies, damn lies – and statistics.”⁴⁵ The data collected for sex offender recidivism could fit into all three categories. The Department of Justice is guilty of misleading the public with non-informative information. In its introduction and highlights section the report lists that “sex offenders are four times more likely to be arrested for of a new sex crime than non-sex offenders.”⁴⁶ Statistics make this true because only 1.3 percent of the non-sex offenders committed sex crimes.⁴⁷ Looking at the raw numbers, the actual incidences of sexual recidivism is much greater for the non-sex offenders than the sex offenders.⁴⁸ So, with all the focus on the convicted sex offenders we miss approximately 86.5 percent of the new sex crimes.⁴⁹

IV. Restrictions

With the belief that proximity leads to promiscuity, twenty-four states currently have some form of residence and/or employment restrictions for convicted sex offenders with other states, such as California looking to join the fray.⁵⁰ These restrictions may last for only the designated period of supervised release or apply for the remainder of an offender's life.⁵¹ Nineteen states have residence and/or employment restrictions that apply beyond the period of any probation or parole period.⁵² In some states these restrictions are permanent with no process or ability to remove the burden.⁵³ These restrictions have disastrous effects on convicted sex offenders who are trying to be decent

⁴³ Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* at 11, (2002) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

⁴⁴ See e.g. 18 Pa. C.S.A. §6314 (b) (3-4). “In addition to the mandatory minimum sentence set forth in subsection (a), the person shall be sentenced to an additional minimum sentence of at least two years total confinement, notwithstanding any other provision of this title or other statute to the contrary, if the person did any of the following: . . . 3) Committed the offense within 1,000 feet of the real property on which is located a public, private or parochial school or a college or university. (4) Committed the offense on a school bus or within 500 feet of a school bus stop.” *Id.*

⁴⁵ A quote from Mark Twain’s *Autobiography* (1924). Twain gives credit for the quote to Disraeli. See <<<http://www1c.btwebworld.com/quote-unquote/p0000149.htm>>>.

⁴⁶ Bureau of Justice Statistics, *Recidivism of Sex Offenders Released From Prison in 1994*, NCJ 198281, at 1, (Nov. 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/rsorp94.htm>.

⁴⁷ *Id.* 5.3 percent is four times more than 1.3 percent, but neither is very high.

⁴⁸ *Id.* 517 of 9,691 sex offenders were rearrested for a new sex crime within three years compared to 3,328 out of 262,420 non-sex offenders. *Id.*

⁴⁹ *Id.* Of the 3845 new sex crime arrests, 3,328 were from non-sex offenders. *Id.*

⁵⁰ See footnote 11; See also California Ballot Initiative Proposition 83 on the fall 2006 ballot.

⁵¹ See e.g. IDAHO CODE ANN. § 18-8310(1). (setting the restrictive period at 10 years) see also ALA. CODE § 15-20-33(a) (setting the restrictive period at life).

⁵² See *infra* note 11.

⁵³ For example, Iowa has no means for a sex offender subject to residence and employment restrictions to ever have those restrictions lifted. *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005) (finding that “there is no requirement that the State provide a process to establish an exemption from a legislative classification.”) citing *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003).

members of the community. Often they are forced to quit their jobs and move.⁵⁴ By having these restrictions a state's public policy demonstrates a preference for sex offenders to be unemployed and living in an "RV in old K-Mart parking lot" or in a "truck near the river" or "under the 7th street bridge."⁵⁵ With these laws, sex offenders are forced to live nomadic lives.

It is not uncommon to have laws that prevent activities from taking place within a certain distance of a school, church or residential area.⁵⁶ What is unique about these restrictions is the lack of any criminal desire required. These zoning restrictions do not involve a crime, as in the case with selling or possessing drugs or guns near schools.⁵⁷ In this case, the mere physical presence of a former sex offender is the offense. The thrust of the injustice in these laws is against those who have completed their sentence and are not released as parolees or probationers. It is these individuals who are ready to start their lives over; but with these residence and employment restrictions hanging over their heads, they will have a difficult time assimilating.

Residence

Nineteen states⁵⁸ and many other local communities have enacted residence restrictions on former sex offenders, prohibiting them from living a certain distance away from schools,⁵⁹ child-care facilities,⁶⁰ public swimming pools,⁶¹ public playgrounds,⁶² churches or any area where minors congregate, such as parks, arcades and even school bus stops.⁶³ Restrictions from living 500, 1,000, 1,500 or 2,000 feet from the above mentioned areas seems like a quick and simple fix to the perceived recidivism problem. However, this final solution actually solves nothing while presenting a host of new problems, the least of which is a violation of the individual's constitutional rights.

The residence restrictions are typically from property line to property line and not door-to-door, so the prohibited area is often larger than one might expect.⁶⁴ Communities that have restrictions of 2,000 feet essentially block out all of the urban areas as the

⁵⁴ Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?* 49 INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 168 (2005).

⁵⁵ These are actual responses by individuals forced to move and list their new address with their sex offender treatment providers in Iowa. *See*

<<http://www.dc.state.ks.us/SOHR/Twenty_Findings_on_Restrictions_for_Sex_Offenders.htm>>

⁵⁶ *See e.g.*, FLA. STAT. ANN. § 790.115(1)(Exhibiting a firearm or weapon within a 1,000 feet of a school); FLA. STAT. ANN. § 790.115(2)(b)(Possessing an electric weapon or device, destructive device, or other weapon on school property); FLA. STAT. ANN. § 790.115(2)(c)(Possessing firearm on school property).

⁵⁷ *See e.g.*, N.J. STAT. ANN. 2C:11-5 (Death by vehicular manslaughter is worse if the perpetrator was intoxicated and the victim was on school grounds)

⁵⁸ *See infra* table 1.

⁵⁹ *See e.g.*, ALA. CODE § 15-20-26(a).

⁶⁰ *Id.*

⁶¹ *See e.g.*, LA. REV. STAT. ANN. § 14:91.1(A)(2) (West 2006) (effective June 28, 2001).

⁶² *See e.g.*, KY. REV. STAT. ANN. § 17.495(1) (West 2006) (effective July 12, 2006).

⁶³ *See e.g.* FLA. STAT. ANN. § 947.1405(7)(a)(2). *See also infra* table 1.

⁶⁴ *See e.g.* In Georgia, the distance is measured from the property boundary of the sex offender's residence to the property boundary of the child care facility, school, or area where minors congregate, at their closest points. GA. CODE ANN. § 42-1-13(b). But in Kentucky, the measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence. KY. REV. STAT. ANN. § 17.495.

overlapping bubbles leave few if any reasonable places to reside.⁶⁵ A quick look at an urban area map will demonstrate how such restrictions severely limit housing options for sex offenders.⁶⁶ The purpose it seems is to drive sex offenders out of the community. Some legislators are even so brazen as to admit such intent.⁶⁷ Whether banishment is the purpose, it is the result.

Among the states that have residence restrictions, there is some discrepancy in determining which sex offenders qualify for residence restrictions. In Arkansas, Georgia, Indiana, Kentucky, Michigan, Oklahoma, South Dakota and Tennessee, the residence restrictions are registration driven. In other words, all individuals who have to register as sex offenders are subject to residence restrictions.⁶⁸ In Alabama, Illinois, Iowa, Missouri, and Ohio, the residence restrictions are offense driven, so the application is not as facially broad, but is still significant.⁶⁹ In Louisiana, the residence restrictions apply only to those classified as sexually violent predators. Arizona, California, Florida, Oregon, and Texas only have residence restrictions as part of probation or parole or some other form of supervised release.⁷⁰ Indiana has enacted a more broadly applicable restriction, but the previous law regarding parolees remains in effect.⁷¹

Washington and Nebraska are unique in that there is no overarching state mandate for residence and employment restrictions with the actual decision on restrictions left up to the local communities. The state does provide some guidance and limitations as to how far the communities can go. Washington imposed a residence restriction on sex offenders as a condition of community custody.⁷² The offender could not reside within 880 feet from the facilities or grounds of a public or private school.⁷³ In 2006, Washington established a committee to develop statewide standards for cities and towns to use when determining whether to impose residency restrictions on sex offenders.⁷⁴ Nebraska defers to and provides guidance for local communities that enact residency restrictions. State legislation signed into law on April 13, 2006, allows cities to prohibit a

⁶⁵ By reasonable I mean an affordable, safe living space. It is not reasonable to say that an individual has a theoretical option to move to a certain neighborhood when the cost of living space far outlays the individual's financial means. Likewise, it is not reasonable to force people to move into a "high crime area."

⁶⁶ *See app. 1*

⁶⁷ *See e.g.* Whitaker et al., v. Purdue, et al., United States District Court, Northern District of Georgia, Complaint filed June 20, 2006.

⁶⁸ In Arkansas, being subject to registration is just the first part of the analysis. A registrant will also have to be declared dangerous with a score of three or four on a four point scale. ARK. CODE ANN. § 5-14-128(a) (Michie 2006) (effective July 16, 2003).

⁶⁹ It would be possible for some a person to be classified as a sex offender for registration purposes but not subject to residence or employment restrictions -- like in Arkansas and Louisiana. While this is a variation in classification it can have the same effect if all the enumerated offenses that subject one to registration are also the same that apply to the residence and employment restrictions -- like in Alabama where all those that have to register are subject to the residence requirements. ALA. CODE §§ 15-20-26(a), 15-20-21(1) (2006) (effective Sept. 1, 1999).

⁷⁰ *See* ARIZ. REV. STAT. § 41-1604.07(F) (LexisNexis 2006), CAL. PENAL CODE § 3003(g) (West 2006), FLA. STAT. § 947.1405(7)(a)(2) (2006), OR. REV. STAT. § 144.642(1)(a) (2006), TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2006).

⁷¹ IND. CODE ANN. § 11-13-3-4(g)(2)(B) (West 2006),

⁷² WASH. REV. CODE § 9.94A.712(6)(a)(ii) (2006).

⁷³ WASH. REV. CODE § 9.94A.030(8). This provision expired July 1, 2006.

⁷⁴ *See* 2006 Wash. Senate Bill 6325.

high-risk sex offender whose victim was 18 years of age or younger from living within 500 feet of a school or child care facility.⁷⁵

States that do not have a formal statewide restriction may have local ordinances that from town to town vary in degree.⁷⁶ Logistically, communities, if left to their own devices, often take harsher stances against sex offenders to ensure that there is little or no available housing since the effect of not having such prohibitions will be felt in a smaller community. In such cases where only local ordinances exist, notice can be a problem.⁷⁷

Employment

Along with residence restrictions, several states and local communities have also enacted employment restrictions intended to keep sex offenders away from schools, daycare facilities, playgrounds, public swimming pools, video arcades, recreation centers or public athletic fields and the like.⁷⁸ Similar to the residence restrictions, this is employment zoning. Not only are sex offenders prohibited from working at these locations, but they are also prohibited from working near these locations.⁷⁹ Because most sex offenses against children are committed by individuals who have a prior relationship with their victims, there is a rational basis for keeping child offenders out of those relationship-building type jobs such as a teacher or counselor at a school.⁸⁰ But when the law places a barrier around schools and playgrounds that block off large sections of the community, the impact of this restriction for employment purposes is enormous and unnecessary.

Jobs that require workers to work at new locations on a regular basis such as plumbers, electricians, and construction are now off-limits to convicted sex offenders because of the risk of inadvertently entering the restricted zones. Downtown areas will be off-limits to prior offenders who are attorneys, accountants or other white-collar jobs. With just one daycare facility located on one floor of a high-rise building, an entire city block could be off-limits. For all practical purposes, sex offenders will be relegated to agricultural work on the outskirts of the community. If that is not feasible, then unemployment is the natural consequence of these restrictions.

As a matter of public policy, it is strange to prefer idleness over work. While unemployment is not the stated objective of these restrictions, it is often the result. Being productive is a key component to successful rehabilitation and in preventing recidivism.⁸¹ Employment plays a significant role in an individual's feeling of self-worth. Taking away a person's ability to work attacks that person's dignity. With no documented proof

⁷⁵ See Sexual Predator Residency Restriction Act, LB 1199, Sections 27 through 29. [I have more on this, including comments from the bill sponsor, in the master document].

⁷⁶ See e.g. Pamela A. MacLean, *Suit Tests Power of Sex Offender Bans, Six Cities Want to Copy Law; They Wait For Result*, 28 NAT'L L. J. 6, (col. 2) Oct. 3, 2005, News Seattle; Associated Press, *Cuero Wants to Require Sex Offenders to Post Yard Signs*, FORT WORTH STAR-TELEGRAM Jan. 6, 2006, News, State.

⁷⁷ WOI-TV, *Sex Offender's Wife Worries About Family Future*, Nov. 23, 2005, "The Story County attorney says his county first started drawing up maps about a month ago. Since then, they've changed it about twenty times. As of Monday, their map still isn't finalized. That leaves sex offenders who know they need to move, not knowing where they can go." Available at <http://www.woi-tv.com/Global/story.asp?S=4056859&nav=1LFX>.

⁷⁸ See table 3.

⁷⁹ See table 3.

⁸⁰ Center for Sex Offender Management, *Myths and Facts About Sex Offenders*, pg.1, Aug. 2000.

⁸¹ Center For Sex Offender Management, *Time to Work: Managing the Employment of Sex Offenders Under Community Supervision*, pg.1, Jan. 2002.

that working in proximity to children increases sex crimes, it is odd that courts have done nothing to stop governments from interfering with the essential right to earn a living. Unencumbered without a home or a job, a convicted sex offender is more at risk to re-offend. After all, what else has he got to do?

Not Banishment?

The impetus for these not-in-my-backyard ordinances and laws is the perceived need to keep children away from sex offenders. After all, would any person, if given the choice, want a sex offender living next door? Once one community sets up such a law driving the sex offenders out of its community, it forces the neighboring community to act in kind to avoid becoming a haven for sex offenders.⁸² When a community or state adopts a 1,000-foot rule or greater, that community is effectively removing that individual from its community by its strategic zoning. By looking at a map with the 1,000-foot radius placed in for every school, there is very little room for sex offenders to live.⁸³ When daycare facilities, including residential homes that serve as a day care facility are added in, the possible living area is even smaller. For states like Georgia, that also add in places where children might congregate, all school bus stops and churches, then the map is completely covered.⁸⁴

Banishment, not protection, is the desired goal of these laws.⁸⁵ Georgia House Majority leader Jerry Keen, the chief sponsor of 2006 Georgia House Bill 1059, stated, "We want those people running away from Georgia. Given the toughest laws here, we think a lot of people could move to another state. If it becomes too onerous and too inconvenient, they just may want to live somewhere else. And I don't care where, as long as it's not Georgia."⁸⁶ The effect of this law in Georgia would be to send sex offenders scrambling to find housing and employment, regardless of how long they have lived in their current residence. That is the intent. Rep. Keen echoed his sentiments in the house chambers when he said, "If someone did something now to my grandchildren, I think you and I would have the same reaction to that. Those are the people we're targeting. Those are the people we are trying to get off the streets of this state, and those are the people that we are going to send a message to that if you have a propensity to that crime perhaps you need to move to another state."⁸⁷ If the law stands, Rep. Keen would get his wish. In Forsyth County, Georgia, 64 of 68 registered sex offenders would have to move -- most likely out of the county.⁸⁸ But the situation is even worse in neighboring counties. For instance, in DeKalb County, Georgia, a suburb of Atlanta, 466 of the 466 registered sex

⁸² See Mike Carlson, *Not In My City*, ORLANDO WEEKLY, Aug. 25, 2005.

⁸³ See app. 1.

⁸⁴ Act No. 571, Ga. Laws 2006 (HB 1059) codified at Ga. Code Ann § 42-1-15 (2006).

⁸⁵ Jason Garcia, *Legislator seeks statewide limiting where sex offenders can live*, SOUTH FLORIDA SUN-SENTINEL, Sept. 15, 2005 (quoting Rep. Susan Goldstein who introduced a bill in the Florida legislature to increase the residence restrictions from 1000 feet to 2500, the ultimate goal is to "get these people out of our neighborhoods and hopefully out of our state.") *Id.*

⁸⁶ Quote taken from Complaint filed in United States District Court for the Northern District of Georgia, June 20, 2006, Wendy Whitaker, et al. v. Sonny Perdue, et al. pg. 24 paragraph 56.

⁸⁷ See Statement by Representative Keen to Representative Roger Bruce during House debate on HB 1059, Feb. 2, 2006, House Internet Broadcasts,

<http://www.georgia.gov/00/article/0,2086,4802_6107103_47120020,00.html>

⁸⁸ Doug Nurse, *How Push May Lead to a Shove*. ATLANTA JOURNAL CONSTITUTION, July 6, 2006,

<http://www.ajc.com/search/content/auto/epaper/editions/today/northside_44ca1799913b127500d2.html>

offenders would have to move.⁸⁹ Pushed out of the urban areas, those affected are forced into the country or out of the state.

The real impetus of these bills is not on protecting children, but punishing former sex offenders once again.⁹⁰ In response to criticism of the residence restrictions in Kentucky, Kenton County Sheriff Chuck Korzenborn stated, "I don't care how inconvenient we make it for these guys. . . . Don't commit the crime and you won't have to do the time."⁹¹ These zoning laws are so onerous to comply with that it is just a matter of time before innocent people are locked up. Take the situation in the New Jersey townships of Jackson and Lakewood, where four months after adopting sex offender residency ordinances they still had not produced maps showing the "pedophile-free zones."⁹² "There will be a map generated, not so someone can say, 'Oh, that's not where I can live,'" said a Jackson police captain. "It's not a question of them knowing, but so we can know. If we want to charge them with the ordinance, *we* need the map."⁹³

If the real purpose was protection, then states that have adopted these programs would offer proof that this community purging actually does protect the community and its children. In fact, the states that have actually given thoughtful consideration to this proposal before voting on it have found that there is no correlation between residency and employment locale and recidivism. Colorado and Minnesota both did extensive research on the issue and found that if anything, this forced exile only exacerbates the problem it purports to solve.⁹⁴

This forced migration of a select group of former criminals is unprecedented. There were forced migrations of Indian Tribes in the 1830s⁹⁵ and of Japanese-Americans in the 1940s.⁹⁶ There have been times when suspect groups of people, such as foreign agents, Communists, and aliens were subject to monitoring and regulation.⁹⁷ It is unique

⁸⁹ Doug Nurse, *How Push May Lead to a Shove*. ATLANTA JOURNAL CONSTITUTION, July 6, 2006, <http://www.ajc.com/search/content/auto/epaper/editions/today/northside_44ca1799913b127500d2.html> Other metro Atlanta counties would have similar totals: In Cherokee County 90 of 95; Clayton County 190 of 220; Cobb County 204 of 208; Henry County 100 of 108; and Rockdale 29 of 29. *Id.*

⁹⁰ Joyce Blay, *Police Waiting for Maps to Enforce Residency Law*, TRI-TOWN NEWS, Sept. 22, 2005.

⁹¹ William Croyle, *Sex Offenders Put on Notice* CINCINNATI ENQUIRER August 14, 2006.

⁹² *Id.*

⁹³ *Id.* (emphasis added).

⁹⁴ See Colorado Dep't of Public Safety, *Report on Safety Issues Raised By Living Arrangements For and Locations of Sex Offenders in the Community*, (prepared for the Colorado State Judiciary Committees, Senate and House of Representatives) 2004, (finding no correlation between where sex offenders lived in comparison to where other criminals lived therefore, a residence restriction would not be a productive method to control recidivism) *available at*

http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf; Minnesota Dep't of Corrections, *Level Three Sex Offenders Residential Placement Issues*, (Report to the Legislature) 2003. (finding that the residence restrictions would force the state to provide housing for those displaced by such an act and that the cost of creating new housing would be too high along with a belief that residential restrictions would not enhance community safety) *available at*

[http://www.corr.state.mn.us/publications/legislative-reports/pdf/2004/Lvl%203%20SEX%20OFFENDERS%20report%202003%20\(revised%20-04\).pdf](http://www.corr.state.mn.us/publications/legislative-reports/pdf/2004/Lvl%203%20SEX%20OFFENDERS%20report%202003%20(revised%20-04).pdf)

⁹⁵ Pursuant to the Indian Removal Act *see* <http://ngeorgia.com/history/nghisttt.html>.

⁹⁶ Act of March 21, 1942, 56 Stat.173, 18 USCA 97a. *See also* *Korematsu v. United States* 323 U.S. 214 (1944).

⁹⁷ Michele L. Earl-Hubbard. *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*.90 NW. U. L. REV. 788, 815 fn.183. (1996).

for a law to force one class of individuals away from the general population as if they were contagious.⁹⁸ It is outrageous for any court to mischaracterize laws that require citizens living in a law-abiding manner to quit their jobs and uproot their families, taking them out of their chosen communities and forcing them into underdeveloped areas by not calling it what it is -- banishment.

V. Penalties For Being In the Zone

Violations of the residence or employment restrictions are much more than just a slap on the wrist. For most states the first violation is a felony.⁹⁹ In Alabama and Georgia, it is a severe felony with up to 30 years for one violation.¹⁰⁰ In many cases a violation of this prohibition is punished with greater severity than the crime that made the person a sexual offender to begin with.

Interestingly, for the most part there is no mens rea required to violate these restrictions. A sexual offender may be strictly liable for complying with these prohibitions.¹⁰¹ The basic problem with this is the fact that the prohibited areas are growing constantly. An individual may live or work outside a protected zone only to have a daycare facility pop up near the sex offender. In such a case, the sex offender would have little recourse and no knowledge of such an event.

What is really going on is that these regulations are a way to punish sex offenders twice for one criminal act. Feeling unsatisfied and impotent, states and local communities set legal traps for the convicted sex offenders to fall into so that they can incarcerate them again. It is just a matter of time before a sex offender who tries to remain in a community will violate these specially crafted restrictions.

VI. Unintended Consequences

There are unintended consequences of the residence and employment restrictions that may actually exacerbate the problem that the laws were intended to correct. Because these laws are often passed without much consideration as to the results of implementation, there have been many negatives consequences. The shortsightedness of these laws is that in their zeal to protect they give the sex offender little hope of redemption. "We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. . . . We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime."¹⁰² Coupled with the fact that these restrictions will not work and the negatives far exceed the positives. That is why the Iowa County Attorney's

⁹⁸ In an effort to curb prostitution, Richmond, Virginia, city officials want to make parts of the city off limits to particular individuals unless they lived, worked or worshipped in the area. Jim Nolan, *Zones Would Bar Prostitutes*, RICHMOND TIMES-DISPATCH Sept.11, 2006.

⁹⁹ Alabama, Arkansas, Georgia, Illinois, Indiana, Missouri, and Tennessee. See *infra* table 2.

¹⁰⁰ See *infra* table 2.

¹⁰¹ Offenders are strictly liable in Iowa, Kentucky, Louisiana, Michigan, Missouri, Ohio, and South Dakota. See *infra* table 2.

¹⁰² *Morrissey v. Brewer*, 443 F.2d 942, 953 (8th Cir. 1971) (en banc) (Lay, J., dissenting) *As cited* by Michael Duster, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711 (2005) (note).

Association has publicly called for the overturning of Iowa's 2,000 foot residence restriction.¹⁰³

By pushing sex offenders away from society, these laws can isolate sex offenders from their friends, co-workers and other support systems. Without support, the sex offender is left to fend off any deviant urges on his or her own. Without employment and residence displacement, a sex offender will face idle time, which is a factor in favor of recidivism.¹⁰⁴ Social science research indicates that "during the past 20 years, research on recidivism of the general criminal population identified a history of unstable employment as one of the factors that consistently is associated with criminal behavior."¹⁰⁵ As Kathleen Colebank, a supervisor for Kentucky's sex offender treatment program states, "With many of the people we treat, isolation played a role in them committing the offense and we risk replicating that."¹⁰⁶

In areas where residence restrictions exist, there are limited choices for housing for those classified as sex offenders. As a result, the likelihood exists that sex offenders will be concentrated in certain areas of town or certain areas just outside of town, if they can find any reasonable housing at all.¹⁰⁷ The market value of a neighborhood full of registered sex offenders would most likely be depressed much like an area of town deemed to be a "high crime area." Communities would then react against any concentration of sex offenders. For example, the small town of Ely, Iowa, a town without a single school or daycare center, passed local ordinances banning sex offenders from living near the city park, playground or library, which effectively eliminated all residential areas in the town.¹⁰⁸ "We felt a little vulnerable," said an Ely resident. "For a lot of towns like ours, we can become the only place available for sex offenders."¹⁰⁹ Fear then is the driving force.

Residence restrictions leave many offenders homeless. The coverage area is so large, especially in 2,000-foot areas, that there is limited housing available. In states or communities where multiple difficult-to-identify triggers exist, such as daycare facilities, school bus stops or places where children congregate, even a smaller prohibited area severely limits reasonable housing. Much of the permissible property is located in high-rent districts or in more rural areas where housing is limited.

The homeless problem creates an enforcement problem. Although offenders are required to provide a valid address when they register, it is not uncommon for an offender

¹⁰³ Iowa County Attorneys Association, Statement on Sex Offender Residency Restrictions in Iowa, Feb.14, 2006. Available at <<<http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Feb%2014%2006%20for%20website.pdf>>>

¹⁰⁴ Center For Sex Offender Management, *Time to Work: Managing the Employment of Sex Offenders Under Community Supervision*, pg.1, Jan. 2002.

¹⁰⁵ *Id.*, citing P. Gendreau, T. Little and C. Goggin, *A Meta-Analysis of the Predictors of Adult Criminal Recidivism: What Works*. 34 CRIMINOLOGY 575-607 (1996).

¹⁰⁶ William Croyle, *Sex Offenders Put on Notice*. CINCINNATI ENQUIRER August 14, 2006

¹⁰⁷ See e.g. map of Webster City, Iowa *supra* app. 1.

¹⁰⁸ Todd Dvorak, *Iowa Towns Rush to Bar Sex Offenders*, (Associated Press), BOSTON GLOBE (November 12, 2005).

¹⁰⁹ *Id.*

to have to move to comply with the residence law. Subsequent reporting is poor.¹¹⁰ In Iowa, for example, the number of missing sex offenders has more than doubled since the residence restrictions went into effect in September 2005.¹¹¹ Keeping up with the migration of sex offenders will be a full-time job for law enforcement.¹¹² Most do not have the money or the manpower to devote so much time to herding people out of town. Other states are losing track of their registered sex offenders, as well. Sex offenders simply do not bother to register anymore because it will only lead to an immediate arrest. In North Carolina, sex offenders are now missing in record numbers.¹¹³

Another unintended consequence would be the desire to create illegitimate sanctuaries. Local communities would actively increase the number of protected areas by increasing the number of public parks or lowering standards for residential daycare facilities. In some states, it is fairly easy to have one's home considered a child-care facility, which would entitle it to the protection zone. In Iowa, for instance, as the number of day care facilities increases it becomes more and more difficult to what locations are off-limits.¹¹⁴ While there is nothing inherently wrong with having a surplus of daycare facilities, the classification of many would be disingenuous. Similarly in states that include school bus stops as a prohibited area, there would be impetus for communities to artificially designate areas to zone off more of the community.¹¹⁵

Another enforcement problem is created by treating all sex offenders the same regardless of the nature of their offense. By treating all sex offenders the same, the number of individuals classified as a sex offender becomes too large to effectively manage. The number of sex offenders will grow at a pace much faster than the authorities can handle. Special units will need to be created that focus on the monitoring of sex offenders. State and local governments, already strapped for funds, are not equipped to handle all the work required by these restrictive ordinances.

These restrictions displace not only individuals, but also their families.¹¹⁶ The impact of relocating is not just felt by the offender because the whole family unit must move. A family may have to find new friends, attend new schools and find new places to worship. Some families are faced with a difficult decision because of the reduction in the

¹¹⁰ Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*. DES MOINES REGISTER AND TRIBUNE, Jan. 22, 2006.

<<[>>](http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20060122/NEWS01/601220332/1002)

¹¹¹ *Id.*

¹¹² See Stephen Gurr, *Forsyth Sheriff Paxton Testifies in Federal Hearing*. FORSYTH COUNTY NEWS, July 12, 2006. Quoting Charlene Giles an investigator for the Houston County (Georgia) Sheriff's Office, "It's going to be a never-ending job, never-ending." *Id.*

¹¹³ Fred Kelly and Franco Ordoñez, *Authorities Find Gaps in Sex-Offender Tracking*. CHARLOTTE OBSERVER, Jun. 11, 2006, News. "Authorities have lost track of at least 22 convicted sex offenders in Mecklenburg County and hundreds more across the Carolinas." *Id.*

¹¹⁴ According to the Iowa Department of Human Resources between 2002 and 2003, the first year of the residence restrictions, there were 1,921 new listings on the list of 7,172 facilities statewide. *Doe v. Miller*, 298 F. Supp. 2d 844, 849 (S.D. Iowa 2004), rev'd 405 F.3d 700 (8th Cir. 2005); See also *infra* note 77, WOI-TV, *Sex Offender's Wife Worries About Family Future*, Nov. 23, 2005.

¹¹⁵ Press Release Southern Center for Human Rights, Aug. 15, 2006 (Consent Order Agreed to after Bulloch County Georgia school boards designates 1,700 school bus stops in Bulloch county). Available at http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/PressReleases/press_lawsuitHB1059_BullochConsent.htm

¹¹⁶ ATLANTA JOURNAL-CONSTITUTION, July 28, 2006, at (40 families will be displaced once the Columbia County, Georgia, establishes where bus stops are officially located.)

quality of life in staying together some may choose to remain without the offending family member.

Finally, by establishing these residence and employment restrictions a community is merely passing its perceived problem on to the next town. One by one, communities are adopting laws -- not to handle a perceived current problem with local sex offenders -- but as a defense mechanism to prevent displaced offenders from other areas from settling in their community. In Orange Beach Alabama, residents not satisfied with the Alabama's 2000 foot restriction passed an ordinance that increases the prohibited zones to four miles.¹¹⁷ As community after community forbids offenders from residing in their midst, sex offenders are left to wander the earth in search of acceptance.

VII. Constitutionality of These Restrictions

With the U.S. Supreme Court's denial of certiorari in *Doe v. Miller*, the Court currently tacitly permits residence and employment restrictions.¹¹⁸ The key aspect in determining the constitutionality of these restrictions lies in whether the Court views these restrictions as civil or criminal. The Court in *Smith v. Doe* upheld the sex offender registrations as civil and regulatory because they did not prohibit the sex offender from doing anything, it merely required them to do something that is not uncommon.¹¹⁹ Under the Alaska statutory scheme, sex offenders just had to register themselves, much like any other person would a motor vehicle. If a vehicle is moved from one jurisdiction to another, the owner is required to update that registration. Having to register as a sex offender does not prevent a sex offender from moving.¹²⁰ Surprisingly, most courts that have had opportunity to weigh in on this issue have upheld residence and employment restrictions as constitutionality.¹²¹ The U.S. Supreme Court has not fully examined the constitutionality of residence and employment restrictions but does suggest that there are limits to the restrictions placed on sex offenders who have served their time.¹²²

A. Ex Post Facto Laws

In general, ex post facto laws are laws passed after a particular event has occurred to make the previous activity illegal.¹²³ A prohibition against ex post facto laws is found in the United States Constitution¹²⁴ and serves as a foundational principle for our ordered

¹¹⁷ Ryan Dezember, *City Tightens Sex Abuser Restrictions*, MOBILE REGISTER, Sept. 8, 2005.

¹¹⁸ *John Doe I v. Miller*, 126 S.Ct. 757 (Nov 28, 2005).

¹¹⁹ 538 U.S. 84 (2003) (holding Alaska's Sex Offender Registration Act was not unconstitutional and not violative of the ex post facto clause.)

¹²⁰ Sex offenders often cannot move without first obtaining permission from both the local law enforcement and the proposed new law enforcement. See e.g. FLA. STAT. § 775.21(6)(i-j).

¹²¹ See *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005); *Iowa v. Seering*, 701 N.W.2d 655 (Iowa 2005); *Denson v. Georgia*, 600 S.E.2d 645 (Ga. Ct. App. 2004) (holding residence restrictions were not unconstitutional ex post facto law as applied to plaintiff); *Illinois v. Leroy*, 828 N.E.2d 769 (Ill. App. 5th Dist. 2005) (holding residence restriction not unconstitutional).

¹²² *Smith v. Doe*, 538 U.S. 84, 100 (2003).

¹²³ See *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Lynce v. Mathis*, 519 U.S. 433 (1997); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-325 (1905); *In re Medley*, 134 U.S. 160, 171 (1890); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). See also Wayne A. Logan, "Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439 (2004).

¹²⁴ U.S. CONST. art. I § 9, cl. 3.

scheme of liberty.¹²⁵ The United States Constitution also prohibits states from enacting such laws.¹²⁶ Ex post facto laws are often considered void.¹²⁷

In its first *Ex Post Facto Clause* case, the Supreme Court described four ways a legislature could run afoul of it.¹²⁸ Justice Chase wrote:

- 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.¹²⁹

"[B]ut the restriction not to pass any ex post facto law, was to secure the person of the subject from injury, or punishment, in consequence of such law."¹³⁰

For a law to be ex post facto, it must also "disadvantage the offender affected by it."¹³¹ There is no requirement that it hinder any particular right. In fact, "[i]t need not impair a 'vested right.' Even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the *Ex Post Facto Clause* if it is both retrospective and more onerous than the law in effect on the date of the offense."¹³² For example, a change in state law that altered how "good time credit" was calculated for inmates was an ex post facto violation even though there is no constitutional right to "good time credit."¹³³

Determining if a statute violates the *Ex Post Facto Clause* hinges on the purpose of the law. If the legislature meant to impose punishment, then the statute violates the Ex Post Facto Clause if it punishes previous activity.¹³⁴ If the intention was to establish "civil proceedings" by enacting a regulatory scheme that is civil and non-punitive, then the court must look at the effect of the law.¹³⁵

The first step in the analysis is to ascertain the legislative intent. Courts give the legislature the benefit of the doubt in determining intent, especially if there is an explicitly stated intent within the statute.¹³⁶ A high standard of proof is required to overcome even a superficial statement of intent. The U.S. Supreme Court reaffirmed in *Smith*, "only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty."¹³⁷ Various courts have taken

¹²⁵ See *Carmell v. Texas*, 529 U.S. 513 (2000).

¹²⁶ U.S. CONST. art. I, § 10, cl. 1.

¹²⁷ See generally 16A C.J.S. Constitutional Law § 584

¹²⁸ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

¹²⁹ *Calder* at 390-391.

¹³⁰ *Id.* at 390.

¹³¹ *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

¹³² *Weaver v. Graham*, 450 U.S. 24 (1981).

¹³³ See *Weaver v. Graham*, 450 U.S. 24 (1981).

¹³⁴ *Smith v. Doe*, 538 U.S. 84, 85 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the statute's intent is to punish, then the Ex Post Facto Clause will be violated if the now unlawful act occurred prior to the adoption of the law. See *Id.*

¹³⁵ *Smith v. Doe*, at 85; *Kansas v. Hendricks*, at 361.

¹³⁶ *Id.*

¹³⁷ *Smith v. Doe*, at 85. See also *United States v. Ward*, 448 U.S. 242, 248-249 (1980).

great pains to find a civil intent. For instance, the placement and naming of an act is given more weight if it claims to be civil and is found in the civil code.¹³⁸ The lack of any identification or its placement in the criminal code is often treated as having little probative value.¹³⁹ Regardless of the label or placement of a restriction, the inquiry does not end at this point.

In examining the legislative intent, it is important to see the lengths the legislature went in analyzing the alleged problem. The courts must be sensitive to the fact that there may not be legitimate debate and discussion on sex offender restrictions because of the lack of real representation by the effected class: convicted sex offenders.¹⁴⁰ The few states that have taken the time to see if residence or employment restrictions would actually work did not enact such provisions.¹⁴¹ Most legislative bodies act in haste with one goal in mind: removing sex offenders from the community.¹⁴² The Supreme Court has said that the “failure to consider, or to use, alternative and less harsh methods to achieve a non-punitive objective can help to show that legislature’s ‘purpose was to punish.’”¹⁴³

Next a court must look at the practical effects of the restrictions and decide if these restrictions are regulatory or punitive.¹⁴⁴ A hardship placed on an individual is not enough to make a restriction punitive. For instance, just because a restriction might cause the community to distrust a sex offender, it will not be punitive unless it encourages an act of retribution against the sex offender.¹⁴⁵ As a result, sex offender registrations are not considered punitive,¹⁴⁶ nor is civil commitment for sexually violent predators.¹⁴⁷

The Court in *Kennedy v. Mendoza-Martinez* set forth seven factors to assist in determining if a statute's restrictions constitute actual punishment.¹⁴⁸ These factors are not exhaustive but are helpful. The court will balance the factors, which at times, contradict each other. They include: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment: retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned.¹⁴⁹

The civil/criminal analysis under *Mendoza-Martinez* tends to be result oriented. Because there is no true test or measuring stick to distinguish the two, courts seem to

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ There is a disenfranchisement issue that should provide courts with a reason to view skeptically any facial designation of civil as opposed to criminal.

¹⁴¹ Colorado and Minnesota both passed on the issue after extensive studies. *See infra* note 94.

¹⁴² AJC, July 28, School board acts the same day. Not typical of a school board.

¹⁴³ *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) *as cited in* *Kansas v. Hendricks* at 388 (dissent).

¹⁴⁴ *See* *Hawker v. People of New York*, 170 U.S. 189 (1898) (A court will look at the substance of the law and not at its form in determining whether it is *ex post facto*).

¹⁴⁵ *See* *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999) overruled on other grounds by *Doe v. State*, Dept. of Public Safety, 92 P.3d 398 (Alaska 2004).

¹⁴⁶ *Smith v. Doe*, 538 U.S. 84 (2003).

¹⁴⁷ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

¹⁴⁸ 372 U.S. 144, 168-169 (1963).

¹⁴⁹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

weigh the factors according to the preferred outcome. How else could the court construe confinement for those considered dangerous to be civil and not criminal, preventive and not punitive, when the result of the restraints are exactly the same?¹⁵⁰ As residence and employment restrictions proliferate the landscape, court should eventually reach the point at which these restrictions are considered punishment and not regulation.¹⁵¹

There are several important factual distinctions that distinguish residence and employment restrictions from the two previous sanctions which were deemed regulatory: sex offender registration and civil commitment. Residence and employment restrictions place an affirmative burden on several fundamental liberty interests -- where to live, work, raise a family and even travel. The freedom to live a law-abiding life in the manner of one's own choosing should not be terminated by a criminal conviction. More importantly, it should not be a result of conviction. Unlike registration requirements, these restrictions are a new and unexpected restraint on sex offenders' lives.¹⁵² The ramifications of not being able to live and work where you choose is not a product of the crime; it is a product of the legislation.

Residence and employment restrictions are not like registration requirements because residence and employment restrictions actually impose a physical restraint on the sex offender. The court in *Smith v. Doe* found that Alaska's registration law was not punitive because "the Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability of restraint."¹⁵³ The court even goes on to say that "the Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences."¹⁵⁴ Thus, the *Smith* Court implies that a residence or employment restriction might be improper.

The *Smith* Court does note that particular employment prohibitions can be legitimate civil sanctions. For example, the court has authorized the forbidding participation in the banking industry,¹⁵⁵ working as a union official¹⁵⁶ or revocation of a medical license.¹⁵⁷ But these restrictions are case specific and are related to the underlying deviant behavior that resulted in such a sanction. Restrictions that prohibit working within a certain distance of a school or church have no particular correlation to the previous employment of the sex offender or the relationship, if any, of the employment to the criminal offense.

These restrictions are an inverted detention. In prison, offenders are confined to a small space while society continues around it. Under these residence and employment schemes, the walls are built around society and the offender is forced to live confined

¹⁵⁰ See Michael Louis Corrado, *Sex Offenders, Unlawful Combatants and Preventive Detention*, 84 N.C. L. REV. 77 (2005); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L. J. 1 (2005).

¹⁵¹ See e.g. *Doe v. Miller*, 298 F.Supp 2d 884 (S.D. Iowa 2004), rev'd, 405 F.3d 700 (8th Cir. 2005).

¹⁵² *Smith v. Doe*, 538 U.S. 84, 101 (2003). "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.*

¹⁵³ *Smith v. Doe*, 538 U.S. 84, 100 (2003).

¹⁵⁴ *Id.*

¹⁵⁵ *Hudson v. United States*, 522 U.S. 93 (1997).

¹⁵⁶ *De Veau v. Braisted*, 363 U.S. 144 (1960).

¹⁵⁷ *Hawker v. New York*, 170 U.S. 189 (1898).

outside them.¹⁵⁸ Essentially towns become gated communities with severe punishments for trespassers. The issue boils down to the greater of two motives. Do these invisible walls protect society or punish the offender, or both? If the objective is to incapacitate the sex offenders so that they cannot re-offend, then that is a form of punishment.¹⁵⁹

Unlike civil commitment, which provides some effort at rehabilitation through counseling and psychological treatment, residence and employment restrictions have no benefit to the sex offender.¹⁶⁰ These restrictions are for the protection of the public by removing these “dangerous” individuals. There is no evidence that these restrictions will cure a sex offender of his or her deviant actions. In his dissent in *Hendricks*, Justice Breyer states, “The *Allen* Court's focus upon treatment, as a kind of touchstone helping to distinguish civil from punitive purposes, is not surprising, for one would expect a non-punitive statutory scheme to confine, not simply in order to protect, but also in order to cure.”¹⁶¹ There needs to be some benefit to all interested parties: the state and the convicted offender. Protecting society alone is not enough. Especially since there is no proof that these restrictions will even protect society.

Most of the residence and employment zoning restrictions apply only to a special class of individuals: those who have previously committed a sexual offense.¹⁶² The civil commitment contemplated in *Hendricks* involved offenders who had also been adjudged to be dangerous. The Supreme Court has found that “an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate non-punitive governmental objective.”¹⁶³ What is often missing from sex offender residence and employment restrictions is a finding of dangerousness with the individual offenders. The legislative trend is for residence restrictions to apply to all who are required to register with no finding of dangerousness.¹⁶⁴ For example, Arkansas and Louisiana apply these restrictions only on those found to be sexually violent predators.¹⁶⁵ This overbroad classification does not take into account the life situation of its victims and creates

¹⁵⁸ See Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593 (2000) “To a significant extent, the laws serve 'a kind of waste management function,' a massive corrections experiment taking place beyond prison walls.” *Id.*

¹⁵⁹ 4 W. Blackstone, Commentaries *11-*12 (An objective of criminal law is to “depriv[e] the party injuring of the power to do future mischief.”) *As quoted in* *Kansas v. Hendricks*, 321 U.S. 346, 379 (1997)(Breyer, J., dissenting opinion) *See also* *United States v. Brown*, 381 U.S. 437, 458 (“Punishment serves several purposes: retribution, rehabilitation, deterrent – and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment”) *Id.* *See also* Herbert Packer, “The Limits of the Criminal Sanction” Stanford University Press, 1968.

¹⁶⁰ *Allen v. Illinois*, 478 U.S. 364, 369 (1986); *See also* *Kansas v. Hendrick*, 521 U.S. 346, 381 (Justice Breyer, in his dissent, suggests that withholding or delaying treatment until the end or near the end of the prison sentence, so that further detention is required, is a scheme that looks punitive.)

¹⁶¹ *Kansas v. Hendricks* at 382 (dissenting opinion).

¹⁶² *Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781 (found that a tax on marijuana was “conditioned on the commission of a crime” “is ‘significant of [its] penal and prohibitory intent’”) citation omitted); *as cited in* *Kansas v. Hendricks*, 521 U.S. 346, 380 (1980) (Breyer, J., dissent)

¹⁶³ *Kansas v. Hendricks*, at 363.

¹⁶⁴ Six (Michigan, Idaho, Indiana, Mississippi, South Dakota and Kentucky) of the Seven (Virginia) states that created new post-sentence residence in 2006 were registration driven. Three (Georgia, Oklahoma, Tennessee) of the four (Missouri) additional states that amended their previous laws to increase the restrictions in 2006 were also registration driven. *See table 1.*

¹⁶⁵ *See* ARK. CODE ANN. § 5-14-128(a) (Michie 2006) (effective July 16, 2003); LA. REV. STAT. ANN. § 14:91.1(A)(2) (West 2006) (effective June 28, 2001).

unjustified havoc. For example, an 80-year-old Lexington, Kentucky, resident living in a nursing home, where he is treated for dementia and heart ailments, will have to move to the nearest nursing home facility that satisfies Kentucky's new harsher residence restrictions -- two hours away.¹⁶⁶ These restrictions treat all sex offenders the same regardless if the offense was a misdemeanor or felony, a first or subsequent offense, a predatory act or temporary lapse in judgment. The desire of these restrictions is to keep the handful of truly deviant predators away from children, but its application is overbearing and punitive on the vast majority of sex offenders.

Finally, violation of a true regulatory scheme results in a fine or injunction but certainly does not carry a possible thirty-year prison term. Thirty years is a significant criminal sanction available for only the most heinous crimes. With these laws in effect, those classified as sex offenders live their lives in fear that they may inadvertently, and with no malicious intent, violate this law and basically throw away the rest of their lives. These restrictions are significant restraints equal to and perhaps even greater than the punishment received for the underlying offense. There is a severe impact on those who have served their time but languish under the status of being a sex offender. Individuals who have paid their debt are now required to pay more. Subsequent punishments are clear violations of the Ex Post Facto Clause.

B. Other Constitutional Claims

There is no more fundamental American right than the right to own property and earn a livelihood.¹⁶⁷ That right is guaranteed by the Fifth and Fourteenth Amendments, which require due process before these interests can be taken away. The tension is between a state's alleged exercise of its police power in the interest of the general welfare and the process by which individuals lose their individual liberty. A state's police power does not give it unlimited power over individual liberty. As Justice Harlan stated, "the police power cannot be put forward as an excuse for oppressive and unjust legislation"¹⁶⁸ When a state is exercising its police power there must be a balance between the public and private interests involved in order for the regulations to be reasonable.¹⁶⁹

Sex offender residence and employment restrictions may violate other constitutional provisions, but analysis of those claims is typically hindered by the predicate determination that the restrictions are civil in nature. For instance, if a court finds the proceedings and actions civil in nature, then the Fifth Amendment against self-incrimination right does not attach.¹⁷⁰ Similarly, if the court refuses to call sanctions punishment, then the constitutional scrutiny is greatly diminished.¹⁷¹

¹⁶⁶ Andrew Wolfson, *Sex Offenders Fight Residence Rules*, LOUISVILLE COURIER-JOURNAL, Sept. 21, 2006, News.

¹⁶⁷ *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.*

¹⁶⁸ *Lochner v. New York*, 198 U.S. 45, 66 (1905) (dissenting opinion, Justice Harlan).

¹⁶⁹ *Com., Dept. of Transp. v. Longo*, 510 A.2d 832, 834 (Pa. 1986).

¹⁷⁰ *See Allen v. Illinois*, 478 U.S. 364 (1986).

¹⁷¹ *See Galvan v. Press*, 347 U.S. 522, 531 (1954) (finding that deportation is not punishment and therefore not contrary to the Ex Post Facto Clause).

A finding that a law is civil in nature effectively thwarts most constitutional claims. Likewise, a determination that the restrictions are actually punishment will result in multiple constitutional violations. Regardless of the number of constitutional deficiencies, a court need only find one constitutional violation to make an act unconstitutional.

Other constitutional claims are available, but will not be discussed in this article. They include the following: Violation of substantive due process under the 14th Amendment by restricting the right to own a home in location of one's own choosing,¹⁷² by violating the right to work¹⁷³ and the right to travel;¹⁷⁴ Violation of Equal Protection Clause of the 14th Amendment by treating sex offenders different than all other citizens;¹⁷⁵ Violation of the Cruel and Unusual Punishment Clause of the 8th Amendment;¹⁷⁶ Violation of the Double Jeopardy Clause;¹⁷⁷ Violation of the Fifth Amendment right against self-incrimination.¹⁷⁸

VIII. The Court Does Have its Breaking Point

Even though most of the previous case law has sanctified sex offender residence and employment restrictions, there does seem to be a point where the U.S. Supreme Court will say enough is enough. In his dissent in *Hendricks*, Justice Kennedy warns that activities such as civil commitment for sex offenders would cross the line if "[it] were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil

¹⁷² See *Belle Terre v. Boraas*, 416 U.S. 1 (1974). Zoning ordinances that have the effect of restricting the number of unrelated persons who may live together in a residential zone are not violative of Fourteenth Amendment equal protection. So long as the zoning ordinance bears a rational relationship to a permissible state objective, it is constitutional. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that a housing ordinance limiting occupancy of a dwelling unit to a narrow definition of "family" violated Due Process).

¹⁷³ See e.g. *Wilson v. Loew's Inc.*, 355 U.S. 597, 599 (1958) (There is a "fundamental right to work").

¹⁷⁴ See *United States v. Guest*, 383 U.S. 745, 757 (1966). See also *Saenz v. Roe* 526 U.S. 489, 498 (1999).

¹⁷⁵ See e.g. *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594 (2006) (Treating people differently violates equal protection)

¹⁷⁶ These restrictions are often disproportionate to the crime in degree and scope as to make them unconstitutional. A person convicted of a misdemeanor expects to receive a punishment that last less than a year. Likewise a person convicted of a felony expects that the maximum amount of time his liberty would be restricted would be the statutorily established sentencing limits. It was never contemplated that a misdemeanor conviction would, some ten years after the final disposition, create a new debilitating restraint on his or her liberty. It is cruel and unusual punishment for a strict liability crime to carry a severe sanction such as a prison sentence of 10 or more years. It is fundamentally unfair to imprison someone for a technical violation when there is no evil intent. Scholars have noted a shift in public opinion regarding strict liability crimes. See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 380 (2003); Carol. S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Divide*, 85 GEO. L. J. 775 (1997). Yet that is precisely what the residence and employment restrictions do.

¹⁷⁷ A new restraint on liberty after being released from prison should be considered a second punishment for the same criminal action. See e.g. *Hudson v. United States*, 522 U.S. 93, 101-102 (1997).

¹⁷⁸ Every state has some form of registration for sex offenders. Variations exist on the frequency and the amount of information required depending on the state and the level/classification of the offender. All registrations require that the offender provide a current residence. It is possible that in the process of following the law and registering as a sex offender, that an individual may be unknowingly incriminating himself if the address listed is within a prohibited area.

commitment is justified, our precedents would not suffice to validate it.”¹⁷⁹ Perhaps it will start with a willingness to take down a statute that is imprecise in its understanding and application, such as in Georgia. In July 2006, the addition of school bus stops to the list of places a sex offender cannot live or work within 1,000 feet was deemed too imprecise because there was no formal declaration of a school bus stop.¹⁸⁰ Or perhaps the Court will conclude that the classification of sex offenders is too large to precisely indicate future dangerousness. As legislative bodies continue to push sex offenders out, by adding prohibited places or enlarging the zones around the prohibited places, reason will win out over passion as the punitive intent of these laws becomes even more evident.

IX. A Better Solution

Merely keeping convicted sex offenders away from particular areas does nothing to keep them away from children or any other potential victims. A key aspect of most sex offenses is that the assailant and the victim often have a relationship with each other before the violation occurs. The stranger danger for sex crimes is actually very low. Whatever danger is posed, it is probably best handled by educating children how to act.¹⁸¹ And if there is a desire to separate children from child sexual offenders, then laws that hinder relationship building, such as prohibiting a child sex offender from working at a daycare or school, would be narrowly tailored, less restrictive and more effective.

A better solution to the problem would be to discontinue the process exiling the convicted sex offenders from the general population once they have paid their debt to society. If society is so certain that sex offenders have not paid enough, then perhaps the incarceration time should increase. At a minimum, some sort of rehabilitation and treatment should be used throughout the confinement period so that society could better trust that the person leaving the penitentiary is changed from the one who entered. Preventing offenders from being able to reasonably assimilate back into the general population does not serve any legitimate purpose other than making politicians feel like they are tough on crime.

Instead of simply hoping that incarceration for any length of time will rehabilitate a sex offender, a more prudent approach would be to provide some comprehensive counseling while incarcerated, so that whenever a sex offender is released we can put our faith in the belief that they will not re-offend instead of setting up arbitrary barriers that debilitate any hope of assimilation. Alternatively, sex offenders could spend the last portion of their sentence in a sex offender halfway house where they could receive the counseling and assistance needed to rejoin society and overcome any deviant urges.¹⁸² It is presumptively unfair to punish someone for the status crime of being a sex offender rather than for the underlying crime that made them a sex offender to begin with. Giving first-time offenders probation with little or no jail time but sentencing them to a felony when they fail to move from a house they have lived in for the past 10 years without

¹⁷⁹ *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (concurring opinion).

¹⁸⁰ Jill Young Miller, *Sex Offender Law Muddled*, ATLANTA JOURNAL-CONSTITUTION, July 26, 2006 at A1, A9.

¹⁸¹ A greater danger for children may come from internet chat-room stalkers. Some of NBC Dateline’s most popular shows involve catching child predators. Residence and Employment restrictions would not solve this problem at all. Except by keeping some sex offenders unemployed it gives them more time to chat.

¹⁸² For example in Minneapolis, Minnesota, Alpha Human Services offers an Adult Residential Program specifically designed for repeat sexual offenders. See www.alphaservices.org for more information.

incident does not cure any problem. It is merely a means by which sex offenders can be punished a second time for their crime without running afoul of any double jeopardy claims.

If it can be proven that a particular amount of time is necessary to rehabilitate, then that amount of time should be the minimum time required to be spent by all noteworthy sex offenders. Releasing individuals before they are competent to control their anti-social desires and creating a massive system to monitor and track them until the inevitable day occurs when they re-offend is not in society's best interest. Once a person has served his full sentence his debt to society is paid. He or she now owes society nothing for his past actions -- only the promise to live debt-free henceforth. If the current punishment is not sufficient, then it must be increased so that society will receive its payment upfront, not after the fact. Residence and employment restrictions re-punish those who do not deserve additional punishment. That practice is contrary to our ordered scheme of liberty and must cease. The time has come for the courts to protect the interests of this helpless group and end this practice.

There is no arguing the fact that sex crimes are terrible. But so are lots of different crimes. Everyone makes mistakes.¹⁸³ It seems that for this broad spectrum of crimes there is a one-strike-and-you're-out policy. With recidivism so low and the likelihood of repentance high, it is a shame that people like Lori Sue Collins are treated as lepers. The good in her is ignored as she is cast out, away from society and forced into a nomadic existence by a twenty-first century lynch mob. If there is no redemption possible for sex offenders, then why not act accordingly and lock them up forever or execute them. If not, no matter how much we hate the sin, we have to reach out to the sinner. We must offer sex offenders real hope, because without hope, an individual will act without conscience; then everyone loses.

¹⁸³ "For all have sinned and fall short of the Glory of God" Romans 3:23 (New American Standard).

TABLE 1 – SEX OFFENDER RESIDENCE PROHIBITED ZONES

State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Alabama	Persons convicted of a “criminal sex offense” ¹⁸⁴	Within 2,000 feet of any school or child care facility ¹⁸⁵	Life ¹⁸⁶	No
Arkansas	Persons required to register as a sex offender AND who are assigned risk level 3 (high) or 4 (SVP) ¹⁸⁷	Within 2,000 feet of any elementary or secondary school or daycare facility ¹⁸⁸	15 years to life ¹⁸⁹	Yes ¹⁹⁰
Delaware	Persons convicted of certain sex offenses involving a child under 16 ¹⁹¹	Within 500 feet of the property of any school ¹⁹²	Life ¹⁹³	No
Florida	Persons convicted of certain sex offenses involving a child under 16 ¹⁹⁴	Within 1,000 feet of any school, day care center, park, or playground ¹⁹⁵	Life ¹⁹⁶	No
Georgia	Persons required to register as a sex offender ¹⁹⁷	Within 1,000 feet of any child care facility, church, school, or area where minors congregate ¹⁹⁸	10 years to life ¹⁹⁹	Yes ²⁰⁰

¹⁸⁴ ALA. CODE §§ 15-20-26(a), 15-20-21(1) (2006) (effective Sept. 1, 1999).

¹⁸⁵ ALA. CODE § 15-20-26(a).

¹⁸⁶ ALA. CODE § 15-20-33(a).

¹⁸⁷ ARK. CODE ANN. § 5-14-128(a) (Michie 2006) (effective July 16, 2003).

¹⁸⁸ *Id.*

¹⁸⁹ ARK. CODE ANN. § 12-12-919(a), (b)(1).

¹⁹⁰ ARK. CODE ANN. §§ 12-12-917(h), 919(b)(1), 922(b)(1)(a). A sex offender may request an administrative review challenging the level 3 or 4 risk assignment, request a risk reassessment every five years, and petition a court for release from registration requirements after 15 years. By lowering the risk classification to level 1 or 2, or obtaining release from registration requirements, a sex offender will no longer be subject to the residence restriction.

¹⁹¹ DEL. CODE ANN. tit. 11, § 1112(b)(4) (2006) (effective July 25, 1995).

¹⁹² DEL. CODE ANN. tit. 11, § 1112(a)(1).

¹⁹³ The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

¹⁹⁴ FLA. STAT. § 794.065(1) (2006) (effective Oct. 1, 2004).

¹⁹⁵ *Id.*

¹⁹⁶ The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

¹⁹⁷ GA. CODE ANN. § 42-1-15(a) (2006) (effective July 1, 2006).

¹⁹⁸ *Id.* Georgia’s sex offender residency prohibition was amended in 2006 to 1) make it a crime to loiter within the prohibited zone, 2) include “churches” among the restricted areas, and 3) add school bus stops and public/community swimming pools to the definition of “area where minors congregate.” See Act No. 571, 2006 Ga. Laws (HB 1059).

¹⁹⁹ GA. CODE ANN. § 42-1-12(g).

²⁰⁰ *Id.* Effective July 1, 2006, sexual offenders may petition a court for release from registration requirements after 10 years. If successful, the offender will no longer be subject to the residence restriction.

TABLE 1 – SEX OFFENDER RESIDENCE PROHIBITED ZONES
(CONTINUED)

State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Idaho	Persons required to register as a sex offender ²⁰¹	Within 500 feet of the property on which a school is located ²⁰²	10 years to life ²⁰³	Yes ²⁰⁴
Illinois	Persons convicted of a child sex offense, or certified as a sexually dangerous person whose victim was under 18 ²⁰⁵	Within 500 feet of any school that persons under the age of 18 attend ²⁰⁶	Life ²⁰⁷	No ²⁰⁸
Indiana	Persons required to register as a sex offender who are 1) sexually violent predators, or 2) have been convicted of certain offenses involving a minor ²⁰⁹	Within 1,000 feet of school property, a youth program center, or public park ²¹⁰	10 years to life ²¹¹	Yes ²¹²
Iowa	Persons who have committed a criminal, aggravated, sexually violent, or other offense involving a minor ²¹³	Within 2,000 feet of an elementary or secondary school or child care facility ²¹⁴	Life ²¹⁵	No

²⁰¹ IDAHO CODE ANN. § 18-8329(1) (2006) (effective July 1, 2006).

²⁰² IDAHO CODE ANN. § 18-8329(1)(d).

²⁰³ IDAHO CODE ANN. § 18-8310(1).

²⁰⁴ *Id.* Sex offenders who are not required to register for life may petition a court for release from registration requirements after 10 years, and, if successful, will no longer be subject to the residence restriction.

²⁰⁵ 720 ILL. COMP. STAT. 5/11-9.3(b-5), (c)(1) (2006) (effective July 7, 2000).

²⁰⁶ 720 ILL. COMP. STAT. 5/11-9.3(b-5).

²⁰⁷ The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

²⁰⁸ A “sexually dangerous person” may appeal the designation. 725 ILL. COMP. STAT. 205/9. But, even if successful, the offender will remain subject to the residence prohibition if his/her underlying conviction is a qualifying child sex offense.

²⁰⁹ IND. CODE ANN. § 35-42-4-11(a) (West 2006) (effective July 1, 2006).

²¹⁰ IND. CODE ANN. § 35-42-4-11(c).

²¹¹ IND. CODE ANN. § 11-8-8-19.

²¹² *Id.* The duty to register, and consequently the residence restriction, terminates after 10 years for certain offenders. A sexually violent predator may petition a court to have the SVP status removed 10 years after the initial classification. IND. CODE ANN. § 35-38-1-7.5(g).

²¹³ IOWA CODE ANN. § 692A.2A(1), (2) (West 2006) (effective July 1, 2002).

²¹⁴ IOWA CODE ANN. § 692A.2A(2).

²¹⁵ The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

TABLE 1 – SEX OFFENDER RESIDENCE PROHIBITED ZONES
(CONTINUED)

State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Kentucky	Persons required to register as a sex offender ²¹⁶	Within 1,000 feet of a school, preschool, public playground, or day care facility ²¹⁷	20 years to life ²¹⁸	Yes ²¹⁹
Louisiana	Sexually violent predators ²²⁰	Within 1,000 feet of any elementary or secondary school, day care, playground, youth center, public swimming pool, or free standing video arcade ²²¹	Life ²²²	No ²²³
Michigan	Persons required to register as a sex offender ²²⁴	Within 1,000 feet of school property ²²⁵	10 years to life ²²⁶	Yes ²²⁷
Mississippi	Persons required to register as a sex offender ²²⁸	Within 1,500 feet of any elementary or secondary school or child care facility ²²⁹	10 years to life ²³⁰	Yes ²³¹
Missouri	Persons convicted of certain sex offenses ²³²	Within 1,000 feet of any school or childcare facility ²³³	Life ²³⁴	No

²¹⁶ KY. REV. STAT. ANN. § 17.495(1) (West 2006) (effective July 12, 2006).

²¹⁷ *Id.*

²¹⁸ KY. REV. STAT. ANN. § 17.520(2)(a), (3).

²¹⁹ *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the residence restriction, after 20 years.

²²⁰ LA. REV. STAT. ANN. § 14:91.1(A)(2) (West 2006) (effective June 28, 2001).

²²¹ *Id.*

²²² The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

²²³ See LA. REV. STAT. ANN. § 15:542.1 (containing no provision for reconsideration of the SVP classification after the sentencing court makes the initial determination). Section 2 of Acts 1999, No. 594 repealed paragraph (B)(4) of this section which allowed the defendant to petition the sentencing court annually for review of the SVP designation.

²²⁴ MICH. COMP. LAWS § 28.735(1) (2006) (effective Jan. 1, 2006).

²²⁵ MICH. COMP. LAWS §§ 28.735(1), 733(f).

²²⁶ MICH. COMP. LAWS § 28.725(6), (7).

²²⁷ *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the residence restriction, after 10 to 25 years.

²²⁸ MISS. CODE ANN. § 45-33-25(4)(a) (2006) (effective July 1, 2006).

²²⁹ *Id.*

²³⁰ MISS. CODE ANN. § 45-33-47(2)(a).

²³¹ *Id.* Sex offenders who are not required to register for life may petition a court for release from registration requirements after 10 years, and, if successful, will no longer be subject to the residence restriction.

²³² MO. ANN. STAT. § 566.147(1) (West 2006) (effective June 14, 2004).

²³³ *Id.*

²³⁴ The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

TABLE 1 – SEX OFFENDER RESIDENCE PROHIBITED ZONES
(CONTINUED)

State	Residence prohibition applies to:	What is the prohibited zone?	How long is an offender subject to the restriction?	Possibility of release?
Ohio	Persons convicted of a sexually oriented offense or child-victim oriented offense ²³⁵	Within 1,000 feet of any school premises ²³⁶	Life ²³⁷	No
Oklahoma	Persons registered as a sex offender ²³⁸	Within 2,000 feet of any school, educational institution, park, playground, or childcare facility ²³⁹	10 years to life ²⁴⁰	Yes ²⁴¹
South Dakota	Persons required to register as a sex offender ²⁴²	Within 500 feet of any school, public park, playground, or public pool ²⁴³	10 years to life ²⁴⁴	Yes ²⁴⁵
Tennessee	Persons required to register as a sex offender whose victim was a minor ²⁴⁶	Within 1,000 feet of any school, day care/child care facility, public park, playground, recreation center, or athletic field ²⁴⁷	10 years to life ²⁴⁸	Yes ²⁴⁹
Virginia	Adults convicted of certain sex offenses where the offender is more than 3 years older than the victim ²⁵⁰	Within 500 feet of the premises of a child day center, or primary, secondary, or high school ²⁵¹	Life ²⁵²	No

²³⁵ OHIO REV. CODE ANN. § 2950.031(A) (West 2006) (effective July 31, 2003).

²³⁶ *Id.*

²³⁷ The statute places no limit on the period of time an offender is subject to the residence prohibition, thus the restriction lasts indefinitely.

²³⁸ OKLA. STAT. ANN. tit. 57, § 590 (West 2006) (effective Nov. 1, 2003).

²³⁹ *Id.*

²⁴⁰ OKLA. STAT. ANN. tit. 57, §§ 583(C), 584(J).

²⁴¹ *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the residence restriction, after 10 years.

²⁴² S.D. CODIFIED LAWS § 22-24B-23 (2006) (effective July 1, 2006).

²⁴³ S.D. CODIFIED LAWS §§ 22-24B-23, 22-24B-22(1).

²⁴⁴ S.D. CODIFIED LAWS §§ 22-24B-27.

²⁴⁵ *Id.* A sex offender may petition a court 10 years after conviction for release from the residency restriction.

²⁴⁶ TENN. CODE ANN. § 40-39-211(a) (2006) (effective June 8, 2004).

²⁴⁷ *Id.*

²⁴⁸ TENN. CODE ANN. § 40-39-207(a), (f)(1).

²⁴⁹ TENN. CODE ANN. § 40-39-207(c). Sex offenders who are not required to register for life may petition the Tennessee Bureau of Investigation for release from registration requirements after 10 years, and, if successful, will no longer be subject to the residence restriction.

²⁵⁰ VA. CODE ANN. § 18.2-370.3(A) (2006) (effective July 1, 2006).

²⁵¹ *Id.*

²⁵² *Id.* The offender “shall be forever prohibited from residing” within the prohibited zone.

TABLE 2 – PENALTIES FOR RESIDING WITHIN PROHIBITED ZONE

State	Felony/Misdemeanor	Punishment - 1st Violation	Punishment -2nd or Subsequent Violations	Mental Element
Alabama	Class C felony ²⁵³	Imprisonment, 1 to 10 years ²⁵⁴	Same	Knowingly ²⁵⁵
Arkansas	Class D felony ²⁵⁶	Imprisonment, up to 6 years ²⁵⁷	Same	Knowingly ²⁵⁸
Delaware	Class G felony ²⁵⁹	Imprisonment, up to 2 years ²⁶⁰	Same	Strict Liability ²⁶¹
Florida	First degree misdemeanor or third degree felony depending on the degree of punishment for the qualifying sex offense ²⁶²	Misdemeanor, imprisonment up to 1 year; felony, imprisonment up to 5 years ²⁶³	Same	Strict Liability ²⁶⁴
Georgia ²⁶⁵	Felony	Imprisonment, 10 to 30 years	Same	Knowingly
Idaho	Misdemeanor ²⁶⁶	Imprisonment, up to 6 months, fine up to \$1,000, or both ²⁶⁷	Same	Strict Liability ²⁶⁸
Illinois	Class 4 felony ²⁶⁹	Imprisonment, 1 to 3 years ²⁷⁰	Same	Knowingly ²⁷¹
Indiana	Class D felony ²⁷²	Imprisonment, 6 months to 3 years, and fine not more than \$10,000 ²⁷³	Same	Knowingly, intentionally ²⁷⁴

²⁵³ ALA. CODE § 15-20-26(h) (2006).

²⁵⁴ ALA. CODE § 13A-5-6(a)(3).

²⁵⁵ ALA. CODE § 15-20-26(h).

²⁵⁶ ARK. CODE ANN. § 5-14-128(d) (Michie 2006).

²⁵⁷ ARK. CODE ANN. § 5-4-401(a)(5).

²⁵⁸ ARK. CODE ANN. § 5-14-128(d).

²⁵⁹ DEL. CODE ANN. tit. 11, § 1112(a)(1) (2006).

²⁶⁰ DEL. CODE ANN. tit. 11, § 4205(b)(7).

²⁶¹ The statute contains no culpability requirement, so strict liability is inferred.

²⁶² FLA. STAT. § 794.065(1) (2006).

²⁶³ FLA. STAT. § 775.082(3)(d), (4)(a).

²⁶⁴ The statute contains no culpability requirement, so strict liability is inferred.

²⁶⁵ GA. CODE ANN. § 42-1-15(d) (2006).

²⁶⁶ IDAHO CODE ANN. § 18-8329(1) (2006).

²⁶⁷ IDAHO CODE ANN. § 18-113(1).

²⁶⁸ The statute contains no culpability requirement, so strict liability is inferred.

²⁶⁹ 720 ILL. COMP. STAT. 5/11-9.3(d) (2006).

²⁷⁰ 730 ILL. COMP. STAT. 5/5-8-1(a)(7).

²⁷¹ 720 ILL. COMP. STAT. 5/11-9.3(b-5).

²⁷² IND. CODE ANN. § 35-42-4-11 (West 2006).

²⁷³ IND. CODE ANN. § 35-50-2-7(a).

²⁷⁴ IND. CODE ANN. § 35-42-4-11.

TABLE 2 – PENALTIES FOR RESIDING WITHIN PROHIBITED ZONE
(CONTINUED)

State	Felony/Misdemeanor	Punishment - 1st Violation	Punishment - 2nd or Subsequent Violations	Mental Element
Iowa	Aggravated misdemeanor ²⁷⁵	Imprisonment, up to 2 years, and fine of \$500 to \$5,000 ²⁷⁶	Same	Strict Liability ²⁷⁷
Kentucky	First violation is a Class A misdemeanor. Second or subsequent violation is a Class D felony. ²⁷⁸	Imprisonment, up to 1 year ²⁷⁹	Imprisonment, 1 to 5 years ²⁸⁰	Strict Liability ²⁸¹
Louisiana ²⁸²	Misdemeanor	Imprisonment, up to 6 months, fine not to exceed \$1,000, or both	Same	Strict Liability ²⁸³
Michigan ²⁸⁴	First violation is a misdemeanor. Second or subsequent violation is a felony.	Imprisonment up to 1 year, \$1,000 fine, or both	Imprisonment up to 2 years, \$2,000 fine, or both	Strict Liability ²⁸⁵
Mississippi ²⁸⁶	Felony	Imprisonment up to 5 years, fine up to \$5,000, or both	Same	Strict Liability ²⁸⁷
Missouri	First violation is a class D felony. Second or subsequent violation is a class B felony. ²⁸⁸	Imprisonment, up to 4 years ²⁸⁹	Imprisonment, 5 to 15 years ²⁹⁰	Strict Liability ²⁹¹

²⁷⁵ IOWA CODE ANN. § 692A.2A(3) (West 2006).

²⁷⁶ IOWA CODE ANN. § 903.1(2).

²⁷⁷ The statute contains no culpability requirement, so strict liability is inferred.

²⁷⁸ KY. REV. STAT. ANN. § 17.495(3) (West 2006).

²⁷⁹ KY. REV. STAT. ANN. § 532.090(1).

²⁸⁰ KY. REV. STAT. ANN. § 532.060(2)(d).

²⁸¹ The statute contains no culpability requirement, so strict liability is inferred.

²⁸² LA. REV. STAT. ANN. § 14:91.1(E) (West 2006).

²⁸³ The statute contains no culpability requirement, so strict liability is inferred.

²⁸⁴ MICH. COMP. LAWS § 28.735(2)(a), (b) (2006).

²⁸⁵ The statute contains no culpability requirement, so strict liability is inferred.

²⁸⁶ MISS. CODE ANN. § 45-33-33(2) (2006).

²⁸⁷ The statute contains no culpability requirement, so strict liability is inferred.

²⁸⁸ MO. ANN. STAT. § 566.147(4) (West 2006).

²⁸⁹ MO. ANN. STAT. § 558.011(1).

²⁹⁰ *Id.*

²⁹¹ The statute contains no culpability requirement, so strict liability is inferred.

TABLE 2 – PENALTIES FOR RESIDING WITHIN PROHIBITED ZONE
(CONTINUED)

State	Felony/Misdemeanor	Punishment - 1st Violation	Punishment - 2nd or Subsequent Violations	Mental Element
Ohio ²⁹²	A person who violates the prohibition is subject to an action for injunctive relief	Injunction	Injunction	Strict Liability ²⁹³
Oklahoma ²⁹⁴	Misdemeanor	Fine not to exceed \$3,000	One year in county jail in addition to the fine	Willfully, intentionally
South Dakota	First violation is a class 6 felony; subsequent violations are class 5 felonies ²⁹⁵	Imprisonment for 2 years, or fine of \$4,000, or both ²⁹⁶	Imprisonment for 5 years. Optional fine of \$10,000. ²⁹⁷	Strict Liability ²⁹⁸
Tennessee	Class E felony ²⁹⁹	Imprisonment, 1 to 6 years ³⁰⁰	Same	Knowingly ³⁰¹
Virginia	Class 6 felony ³⁰²	Imprisonment, 1 to 5 years; or, jail up to 12 months and fine up to \$2,500 ³⁰³	Same	Knowingly ³⁰⁴

²⁹² OHIO REV. CODE ANN. § 2950.031(B) (West 2006).

²⁹³ The statute contains no culpability requirement, so strict liability is inferred.

²⁹⁴ OKLA. STAT. ANN. tit. 57, § 590 (West 2006).

²⁹⁵ S.D. CODIFIED LAWS § 22-24B-23 (2006).

²⁹⁶ S.D. CODIFIED LAWS § 22-6-1(9).

²⁹⁷ S.D. CODIFIED LAWS § 22-6-1(8).

²⁹⁸ The statute contains no culpability requirement, so strict liability is inferred.

²⁹⁹ TENN. CODE ANN. § 40-39-211(e) (2006).

³⁰⁰ TENN. CODE ANN. § 40-35-112.

³⁰¹ TENN. CODE ANN. § 40-39-211(a).

³⁰² VA. CODE ANN. § 18.2-370.3(A) (2006).

³⁰³ VA. CODE ANN. § 18.2-10(f).

³⁰⁴ VA. CODE ANN. § 18.2-370.3(A).

TABLE 3 – SEX OFFENDER EMPLOYMENT RESTRICTIONS

State	Employment prohibition applies to:	Where is the offender prohibited from working?	How long is an offender subject to the restriction?	Possibility of release?
Alabama	Persons convicted of a “criminal sex offense” ³⁰⁵	Within 2,000 feet of any school or child care facility ³⁰⁶	Life ³⁰⁷	No
Alabama	Persons convicted of a criminal sex offense <i>involving a child</i> ³⁰⁸	Within 500 feet of any school, child care facility, park, athletic field or facility, or other business or facility having a principal purpose of caring for, educating, or entertaining minors ³⁰⁹	Life ³¹⁰	No
Florida	Sexual predators ³¹¹	At any business, school, day care center, park, playground, or other place where children regularly congregate ³¹²	30 years to life ³¹³	Yes ³¹⁴
Georgia	Persons required to register as a sex offender ³¹⁵	Within 1,000 feet of any child care facility, school, or church ³¹⁶	10 years to life ³¹⁷	Yes ³¹⁸
Georgia	Sexually dangerous predators ³¹⁹	Within 1,000 feet of an area where minors congregate ³²⁰	Life ³²¹	No

³⁰⁵ ALA. CODE §§ 15-20-26(a), 15-20-21(1) (2006).

³⁰⁶ ALA. CODE § 15-20-26(a).

³⁰⁷ ALA. CODE § 15-20-33(a).

³⁰⁸ ALA. CODE §§ 15-20-26(g), 15-20-21(1).

³⁰⁹ ALA. CODE §§ 15-20-26(g).

³¹⁰ ALA. CODE § 15-20-33(a).

³¹¹ FLA. STAT. § 775.21(10)(b) (2006).

³¹² *Id.*

³¹³ FLA. STAT. § 775.21(6)(l).

³¹⁴ *Id.* A sexual predator may petition a court for removal of the sexual predator designation 30 years after release.

³¹⁵ GA. CODE ANN. § 42-1-15(b)(1) (2006) (effective July 1, 2006).

³¹⁶ *Id.*

³¹⁷ GA. CODE ANN. § 42-1-12(g).

³¹⁸ *Id.* Effective July 1, 2006, sexual offenders may petition a court for release from registration requirements after 10 years. If successful, the offender will no longer be subject to the employment restriction.

³¹⁹ GA. CODE ANN. § 42-1-15(b)(2) (effective July 1, 2006).

³²⁰ *Id.* “Area where minors congregate” includes: public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public/community swimming pools. GA. CODE ANN. § 42-1-12(a)(3).

³²¹ *See* GA. CODE ANN. § 42-1-14 (effective July 1, 2006) (containing no provisions for reconsideration of the “sexually dangerous predator” designation after the initial determination is final).

TABLE 3 – SEX OFFENDER EMPLOYMENT RESTRICTIONS
(CONTINUED)

State	Employment prohibition applies to:	Where is the offender prohibited from working?	How long is an offender subject to the restriction?	Possibility of release?
Idaho	Persons required to register as a sex offender ³²²	At a day care center, group day care facility, or family day care home ³²³	10 years to life ³²⁴	Yes ³²⁵
Indiana	Sexually violent predators ³²⁶	On school property, at youth program centers, or public parks ³²⁷	10 years to life ³²⁸	Yes ³²⁹
Michigan	Persons required to register as a sex offender ³³⁰	Within 1,000 feet of school property ³³¹	10 years to life ³³²	Yes ³³³
Michigan	Persons convicted of a “listed [sex] offense” ³³⁴	By a school or allowed to work under contract in a school ³³⁵	N/A	N/A
Oklahoma	Registered sex offenders ³³⁶	To work with or provide services to children or work on school premises ³³⁷	10 years to life ³³⁸	Yes ³³⁹

³²² IDAHO CODE ANN. § 18-8327(1) (2006).

³²³ *Id.*

³²⁴ IDAHO CODE ANN. § 18-8310(1).

³²⁵ After 10 years, a sex offender may 1) if not required to register for life, petition a court for release from registration requirements, and 2) petition a court for relief from the employment prohibition. IDAHO CODE ANN. §§ 18-8310(1), 18-8328. If successful with either petition, the offender will no longer be subject to the employment restriction.

³²⁶ IND. CODE ANN. § 35-42-4-10(b) (West 2006) (effective July 1, 2006).

³²⁷ *Id.*

³²⁸ IND. CODE ANN. § 35-38-1-7.5(g).

³²⁹ *Id.* A sexually violent predator may petition a court to have the SVP status removed 10 years after the initial classification.

³³⁰ MICH. COMP. LAWS § 28.734(1)(a) (2006).

³³¹ MICH. COMP. LAWS §§ 28.734(1)(a), 28.733(f).

³³² MICH. COMP. LAWS § 28.725(6), (7).

³³³ *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the employment restriction, after 10 to 25 years.

³³⁴ MICH. COMP. LAWS § 380.1230a(10).

³³⁵ *Id.* Interestingly, the statute gives discretion to the school board to approve the hiring of a non-sex felon, but not a sex offender.

³³⁶ OKLA. STAT. ANN. tit. 57, § 589(A) (West 2006).

³³⁷ *Id.*

³³⁸ OKLA. STAT. ANN. tit. 57, §§ 583(C), 584(J).

³³⁹ *Id.* Sex offenders who are not required to register for life are automatically released from registration requirements, and consequently the employment restriction, after 10 years.

TABLE 3 – SEX OFFENDER EMPLOYMENT RESTRICTIONS
(CONTINUED)

State	Employment prohibition applies to:	Where is the offender prohibited from working?	How long is an offender subject to the restriction?	Possibility of release?
Tennessee	Persons required to register as a sex offender whose victim was a minor ³⁴⁰	Within 1,000 feet of any school, day care/child care facility, public park, playground, recreation center, or athletic field ³⁴¹	10 years to life ³⁴²	Yes ³⁴³
Virginia	Adults convicted of certain sex offenses where the offender is more than 3 years older than the victim ³⁴⁴	On public or private elementary or secondary school or child day care center property ³⁴⁵	Life ³⁴⁶	No

³⁴⁰ TENN. CODE ANN. § 40-39-211(a) (2006).

³⁴¹ *Id.*

³⁴² TENN. CODE ANN. § 40-39-207(a), (f)(1).

³⁴³ TENN. CODE ANN. § 40-39-207(c). Sex offenders who are not required to register for life may petition the Tennessee Bureau of Investigation for release from registration requirements after 10 years, and, if successful, will no longer be subject to the employment restriction.

³⁴⁴ VA. CODE ANN. § 18.2-370.4(A) (2006) (effective July 1, 2006).

³⁴⁵ *Id.*

³⁴⁶ *Id.* The offender “shall be forever prohibited from working” in the prohibited area.

Appendix 1: http://www.webstercity.com/departments/police_dept/692a.2a_map.asp

