

# Comments

## IRREGULAR PASSION: THE UNCONSTITUTIONALITY AND INEFFICACY OF SEX OFFENDER RESIDENCY LAWS<sup>†</sup>

*Sarah E. Agudo\**

*“[C]ertain duties must be observed even towards those at whose hands you may have received unjust treatment. There is a limit to revenge and to punishment.”<sup>‡</sup>*

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<sup>†</sup> “[T]here are particular moments in public affairs when the people, stimulated by some *irregular passion* . . . may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to . . . suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?” THE FEDERALIST NO. 63, at 382–83 (James Madison) (Clinton Rossiter ed., 2003) (emphasis added).

\* J.D. Candidate, Northwestern University School of Law, 2008; M.P.P. Candidate, Harvard University John F. Kennedy School of Government, 2008; B.S., Cornell University, 2004. I am extremely grateful to Professor Thomas Geraghty, Sarah Geraghty, Ian Papendick, Lucy Stroup, and my family for their patience and dedication in helping me create and edit this Comment. Additionally, I would like to thank Professor Ronen Avraham, Alison Buckley, Abby Mollen, Kevin Agnew, and Christine Skoczylas for their thorough and insightful suggestions. Finally, I am thankful to Stefan for his constant support.

<sup>‡</sup> MARCUS TULLIUS CICERO, ON DUTIES I.33 (M.T. Griffin & E.M. Atkins eds., Cambridge Univ. Press 1991).

## INTRODUCTION

Sex offenders are among the most hated members of our society. They commit heinous crimes, often against our most vulnerable citizens, and there is a commonly held perception that they are frequent recidivists who are resistant to rehabilitation. Justified or not, society has developed a heightened intolerance for sex criminals.<sup>1</sup>

In recent years, laws protecting society from these offenders have grown increasingly broad; the restrictions have become more severe and applicable to more people.<sup>2</sup> Residency laws, which dictate where sex offenders can live upon release from prison or while on parole, exemplify this trend. Twenty-two states in the United States currently have some form of residency law that restricts where sex offenders can live.<sup>3</sup> For example, many states prohibit sex offenders from living within 1000–2500 feet of schools, bus stops, or daycare centers.<sup>4</sup>

Today, public outrage and political risk-aversion have driven these laws to the outer boundaries of constitutionality. Some states, such as Georgia, may have already crossed that line.<sup>5</sup> With no decisions from the

<sup>1</sup> Contrary to sex offenders' reputation as recidivists, the U.S. Department of Justice has determined that sex offenders are actually rearrested at a lower rate than other offenders, with rearrest rates of forty-three percent and sixty-eight percent, respectively. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDERS STATISTICS: RECIDIVISM, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Sept. 11, 2007) (scroll down to "Recidivism") [hereinafter CRIMINAL OFFENDER STATISTICS]. Courts themselves have erroneously stated that sex offenders reoffend at exceptionally high rates. See, e.g., *Smith v. Doe*, 538 U.S. 84, 103 (2003) (Kennedy, J., concurring) ("The risk of recidivism posed by sex offenders is 'frightening and high.'" (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002))); *Doe v. Miller*, 405 F.3d 700, 707–08 (8th Cir. 2005), cert. denied, 546 U.S. 1034 (2005) (acknowledging the state's claim that there are "very high rates of re-offense for sex offenders who had offended against children"). For commentary on the inaccurate public perceptions regarding sex offenders, see Tom Teepen, *Making Politics Out of Sex Crimes Helps No One*, THE LUFKIN DAILY NEWS, Nov. 3, 2006, available at [http://www.lufkindailynews.com/news/content/shared/news/stories/2006/11/TEEPEN\\_COLUMN\\_1103\\_COX.html](http://www.lufkindailynews.com/news/content/shared/news/stories/2006/11/TEEPEN_COLUMN_1103_COX.html). Nonetheless, sex offenders are about four times more likely than non-sex offenders to be arrested in the future for committing a sex crime. See CRIMINAL OFFENDER STATISTICS, *supra*.

<sup>2</sup> See, e.g., Sexual Predator Punishment and Control Act: Jessica's Law, CAL. PENAL CODE § 3003.5 (West Supp. 2007) (increasing penalties for sex offenders, for example, by prohibiting them from living within 2000 feet of a school or park).

<sup>3</sup> MARCUS NIETO & DAVID JUNG, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 3 (2006).

<sup>4</sup> *Doe v. Miller*, 298 F. Supp. 2d 844, 848 n.2 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005), cert. denied, 546 U.S. 1034 (2005) (listing varying residency restrictions in twelve states).

<sup>5</sup> See GA. CODE ANN. § 42-1-15 (2006) (prohibiting sex offenders from living within 1000 feet of any childcare facility, church, school, public or private park, recreation facility, playground, skating rink, neighborhood center, gymnasium, school bus stop, or public or community pool, as defined in GA. CODE ANN. § 42-1-12, and punishing violations of this law with a minimum of ten years in prison). As this Comment was being finalized for publication, the Georgia Supreme Court overturned this sex offender law in the context of a takings challenge. The court held that the law constituted an uncompensated taking because the appellant was being forced to move after a childcare facility was built within 1000 feet of his home. The decision hinged on the fact that the childcare facility moved "to the of-

United States Supreme Court and only two from federal courts of appeals regarding the constitutionality of these statutes,<sup>6</sup> district courts are being flooded with cases that present questions of first impression.<sup>7</sup> These courts must decide how far the Constitution permits the states to go to separate potential reoffenders from their potential victims.<sup>8</sup> Some of the most recent laws are the harshest,<sup>9</sup> and class action lawsuits brought in the name of sex offenders are springing up throughout the country.<sup>10</sup> It is likely that these recent expansions of sex offender legislation and the ensuing litigation over their constitutionality will prompt a Supreme Court decision establishing the limit on states' control over their released offenders.<sup>11</sup>

Research on the effectiveness of residency laws is scarce. However, a few studies suggest that residency restrictions have no impact on sex offense recidivism.<sup>12</sup> A study conducted by the Virginia Criminal Sentencing Commission found that parolee employment was correlated with lower recidivism rates,<sup>13</sup> which suggests that residency laws that indirectly diminish employment opportunities will *increase* offense rates among paroled sex of-

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fender," as opposed to the offender moving into a restricted area. *Mann v. Ga. Dep't. of Corr.*, No. S07A1043, 2007 Ga. Lexis 849 (Ga. Nov. 21, 2007). Although takings claims are not discussed further in this Comment, their viability as challenges to residency laws is noteworthy.

<sup>6</sup> *Miller*, 405 F.3d 700; *Doe v. Lafayette*, 377 F.3d 757 (7th Cir. 2004).

<sup>7</sup> *See, e.g., Doe v. Baker*, No. 1:05-CV-2265 TWT, 2006 U.S. Dist. LEXIS 67925 (N.D. Ga. Apr. 5, 2006) (challenging a state statute that prohibits sex offenders from living within 1000 feet of any child-care facility, school, or area where minors congregate); *Brown v. Michigan City*, No. 3:02 CV 572 RM, 2005 WL 2281502 (N.D. Ind. Sept. 19, 2005) (challenging a city resolution that prohibits sex offenders from entering public parks); *Coston v. Petro*, 398 F. Supp. 2d 878, 880 (S.D. Ohio 2005) (challenging a state statute that prohibits sex offenders from living within 1000 feet of a school).

<sup>8</sup> In some cases, courts are granting injunctive relief from removal under the residency laws until a decision has been made as to their constitutionality. *See, e.g., Doe v. Schwarzenegger*, No. C-06-6968 JSW (N.D. Cal. Nov. 8, 2006) (granting temporary restraining order against enforcement of Cal. Penal Code § 3003.5, but later dismissing case for lack of standing); *see also Court Stops Forcible Relocation of 8 Sex Offenders, Class Action Status Requested for More Than 10,000 Felons*, ATLANTA J. CONST., June 26, 2006, at A1.

<sup>9</sup> *See generally* GA. CODE ANN. § 42-1-15; IOWA CODE §§ 692A.1, 692A.2 (West 2003 & Supp. 2007); OHIO REV. CODE ANN. § 2950.031 (West 2006).

<sup>10</sup> Class action suits are brought pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The classes in residency law challenges are generally defined as all persons who have registered under the state act as sex offenders, or must so register in the future, and who are harmed by the act's residency, working, and loitering provisions. *See, e.g., Amended Complaint at 30-31, Whitaker v. Perdue*, No. 4:06-CV-140-CC (N.D. Ga. July 7, 2006).

<sup>11</sup> A Supreme Court decision is likely due to the number of cases being litigated on numerous constitutional grounds. *See supra* notes 6-7.

<sup>12</sup> *See* Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 INT'L. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 168 (2005); *see also* COLORADO DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004) [hereinafter COLORADO SAFETY REPORT].

<sup>13</sup> VIRGINIA CRIMINAL SENTENCING COMMISSION, ASSESSING RISK AMONG SEX OFFENDERS IN VIRGINIA 8 (2001), [http://www.vcsc.state.va.us/sex\\_off\\_report.pdf](http://www.vcsc.state.va.us/sex_off_report.pdf).

fenders. Protecting the public from sex offenders is unquestionably important, but states should not sacrifice civil liberties in favor of unproven methods of control.

Reasonable and constitutionally acceptable residency laws may well exist.<sup>14</sup> The aim of this Comment is not to call for the abolition of all residency laws, but rather to promote a cogent dialogue regarding the upper bounds of their effectiveness and constitutionality in order to provide a framework for future legislation. Although, in many areas of law, democratic processes can adequately safeguard those bounds, the public outrage against sex offenders threatens to chill the usual political protections and justifies careful judicial oversight.

Part I examines existing and potential constitutional challenges to various state residency laws. Using four different claims as examples, this Part examines recent decisions from lower federal courts and analyzes their merits. The four constitutional bases for claims are the Due Process Clause, the Ex Post Facto Clause, the right against self-incrimination, and the individual right to travel.

Part II discusses the policy concerns and considerations of creating or expanding sex offender residency laws. To illustrate the ineffectiveness of broad laws, this Part includes a projection of costs incurred by their enactment and enforcement; analogies that illustrate their scope and implications; and alternative approaches to dealing with the problem of repeat sex offenders. This Part shows that, in addition to being unconstitutional, broad residency laws are also imprudent policy decisions because they fail to further the goal of preventing sex crimes.

Part III examines the political causes and ramifications of the residency laws and explains the need for a Supreme Court decision establishing the constitutional limit of residency laws. It also argues that government entities involved in sex crime prevention actually will favor narrow laws that allow for more focused, effective, and fair enforcement of the residency restrictions. Lastly, this Part examines the role that the Constitution should play in controlling politically driven legislation and protecting society from its own passions.

The Comment concludes that non-tailored residency laws are unconstitutional. These same laws are also unwise and ineffective in terms of their stated goals, rendering them poor policy decisions. Given their ineffectiveness and the threat they pose to fundamental rights, this Part argues that it is important that courts assess the laws rigorously and without bias, particularly because the political outlash against sex offenders is immense, irrational, and hard for legislators to reverse. Until courts correctly deem these

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<sup>14</sup> States with relatively narrow laws that may be both effective and constitutional include Washington, where “high-risk offenders” cannot live within 880 feet of schools or daycare centers, WASH. REV. CODE § 9.94A.030 (West 2005), and New York, where serious offenders cannot enter school grounds or facilities caring for children, N.Y. PENAL LAW § 65.10(4-a) (McKinney Supp. 2007).

non-tailored residency laws unconstitutional, both the rights of sex offenders and the safety of their potential victims will be at risk due to the crippling political outrage surrounding the issue.

#### I. THE CONSTITUTIONAL LIMITS OF SEX OFFENDER RESIDENCY LAWS

Sex offender residency laws restrict where sex offenders can live, usually by prohibiting them from moving within a designated radius of particular areas, for example, schools, churches, or bus stops.<sup>15</sup> The relative strictness of different states' residency laws can vary along two important axes: the number of people to whom they apply and the relative restrictiveness of their requirements. The states can tailor the breadth of their residency laws by adjusting various factors, including the offender's age, type of offense, number of past offenses, or date of last conviction. The laws can also be made more restrictive by applying them to more areas, expanding the zones around those areas in which habitation is prohibited, preventing employment in certain types of jobs, and restricting ability to enter—rather than just the ability to reside in—certain areas. Variations of these factors make residency laws “broad” or “narrow” in relation to each other.

A hypothetical example of a narrow law is one that applies only to violent sex offenders, such as rapists or child molesters, who have been convicted or released from prison within the last ten years and that prohibits these offenders from living within one hundred feet of a school.<sup>16</sup> A broad law, by contrast, is one that applies to every person ever convicted of a sex-related crime, such as underage sex, consensual sodomy, or prostitution, regardless of age or date of conviction, and that prohibits the person from living within 3000 feet of a school, bus stop, religious gathering place, nursing home, hospital, swimming pool, or beach.<sup>17</sup> Certain restrictions embodied in residency laws may be unconstitutional *per se*, while others may only become unlawful once they are expanded in one of the ways discussed above. This Part describes some of the claims that could be, and are being,<sup>18</sup> used to challenge the constitutionality of state and city sex offender residency laws.<sup>19</sup> It analyzes each of these select claims, as a federal court would, and suggests an appropriate resolution for each one.

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<sup>15</sup> See GA. CODE ANN. § 42-1-15 (2006).

<sup>16</sup> For examples of narrow laws that have been enacted in various states, see *supra* note 14.

<sup>17</sup> I created these “broad” and “narrow” categorizations to allow for easier discussion and illustration within this Comment. To my knowledge, the terms are not used in sex-offender legislation, litigation, or discourse. However, the ideas that they embody are frequently at issue in those arenas.

<sup>18</sup> See *supra* note 6 (listing federal circuit court cases regarding the constitutionality of residency laws); see also *supra* note 7 (listing examples of federal district court cases regarding the constitutionality of residency laws).

<sup>19</sup> This list of potential claims to residency laws is not exhaustive. Other possibilities not discussed here include violations of equal protection, freedom of association, the Takings Clause, the Free Exercise Clause, and the Religious Land Use and Institutionalized Persons Act (42 U.S.C. §§ 2000cc-2000cc-5 (2000)). Many of these claims have already been brought in federal courts. *E.g.*, *Whitaker v.*

### A. Due Process

The discussion of constitutional challenges to residency law begins with the Due Process Clause because it provides the strongest challenge in terms of both the likelihood of success and the number of offenders to whom it applies.

1. *Background of Due Process.*—The Fourteenth Amendment of the Constitution requires that no person shall “be deprived of life, liberty, or property without due process of law.”<sup>20</sup> Despite the unquestioned importance of the due process guarantee, defining due process is notoriously troublesome.<sup>21</sup> The Clause protects individuals from sanctions that are “downright irrational.”<sup>22</sup> In addition to guaranteeing fair procedural process, the Due Process Clause contains a substantive component that protects certain liberty interests from government deprivation, regardless of the procedures provided.<sup>23</sup>

2. *Analysis of a Procedural Due Process Claim.*—In determining what process the state must provide to deprive an individual of his life, liberty, or property, courts consider three factors: first, the private interest involved; second, the risk of erroneous deprivation of that interest and the probable value of additional safeguards; and, third, the state’s interest in maintaining its procedure.<sup>24</sup> Most importantly, what process is due is not absolute; it varies with the severity of the restriction imposed.<sup>25</sup>

Residency restrictions implicate numerous private liberty interests. The first is the right to establish a home.<sup>26</sup> This interest is all but eviscerated by severe restrictions—a violation that has been depicted vividly in recent news images and stories of sex offenders unable to find housing that

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Perdue, No. 4:06-CV-140-CC (N.D. Ga. July 7, 2006) (challenging GA. CODE ANN. § 42-1-15 (2006) as violative of substantive and procedural due process, the Ex Post Facto Clause, the Religious Land Use and Institutionalized Persons Act, the Free Exercise Clause and the freedom of association, the Takings Clause, the right to inter- and intrastate travel, and the Eighth Amendment’s prohibition against cruel and unusual punishment).

<sup>20</sup> U.S. CONST. amend. XIV. The Fifth Amendment places an identical limit on the powers of the federal government. U.S. CONST. amend. V.

<sup>21</sup> The problem of defining due process has been recognized throughout history. *See Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37 (1928) (“The . . . due process of law clause[] is not susceptible of exact delimitation. No definite rule in respect of [it], which automatically will solve the question in specific instances, can be formulated.”); *Green v. Frazier*, 253 U.S. 233, 238 (1920) (“What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise.” (citation omitted)).

<sup>22</sup> *Hudson v. United States*, 522 U.S. 93, 103 (1997).

<sup>23</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997).

<sup>24</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>25</sup> *Id.* at 341.

<sup>26</sup> *See Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

conforms to states' residency laws. In Iowa, twenty-six registered sex offenders live in twenty-four rooms at the Ced-Rel Motel, while others are forced to sleep in the streets or in the cabs of their trucks.<sup>27</sup> In Florida, five sex offenders have been required to live indefinitely under a bridge with no electricity, heat, or clean water.<sup>28</sup> Other liberty interests that broad residency laws impinge upon are the right to privacy,<sup>29</sup> the right to travel,<sup>30</sup> and the right to pursue a chosen profession without unreasonable interference from the government.<sup>31</sup> These rights are implicated when the residency laws are so severe that they force the offender to move to destitute or remote locations. This relocation threatens or eliminates the offender's ability to maintain a family, uphold a job, and move about the state and country.

Generally, residency laws have no procedural component that governs their application.<sup>32</sup> The value of additional procedural safeguards, such as risk-assessment<sup>33</sup> or opportunities for appeal, is therefore very high. When sex offenders submit their information for registration and tracking purposes, they are automatically subjected to residency restrictions.<sup>34</sup> There is no independent residency law process that provides sex offenders with information about the restrictions or an opportunity to challenge the restrictions' applicability. Therefore, at most, the residency laws piggyback on the procedural components of registration laws. However, the procedural components of registration laws are not necessarily sufficient to provide the constitutionally required process for residency laws. Registration laws, unlike residency laws, impose minimal liberty restrictions on sex offenders—they only require that the released offender report his or her current address and notify the local government if he or she moves from that ad-

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<sup>27</sup> Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

<sup>28</sup> John Zarrella & Patrick Oppmann, *Florida Housing Sex Offenders Under Bridge*, Apr. 6, 2007, CNN.COM, <http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/index.html>.

<sup>29</sup> See *Boyd v. United States*, 116 U.S. 616, 630 (1886) (establishing that the Fourth and Fifth Amendments protect against all governmental invasions "of the sanctity of a man's home and the privacies of life"); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that marriage is a relationship that lies "within the zone of privacy created by several fundamental constitutional guarantees" and is thus protected from "unnecessarily broad" governmental invasions).

<sup>30</sup> See *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 901–02 (1986) (holding that there is a constitutional freedom to enter and reside in any state). For a discussion of how broad residency laws can violate travel rights, see *supra* Part I.D.

<sup>31</sup> See *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . .").

<sup>32</sup> See, e.g., GA. CODE ANN. § 42-1-15 (2006).

<sup>33</sup> See *infra* Part II.B.2.

<sup>34</sup> Registration laws (often called "Megan's Laws") require sex offenders to report their current addresses to government agencies. See, e.g., CAL. PENAL CODE §§ 290–94 (West 2007); 730 ILL. COMP. STAT. 150/1–150/12 (West 1997).

dress.<sup>35</sup> Because registration laws do not severely hinder personal liberties, the Due Process Clause would require far less rigorous procedures than it would require for laws that greatly restrict liberties, such as residency laws.<sup>36</sup>

For example, a state law that prohibited all people who have ever had a traffic violation from living within 1000 feet of any road would be unconstitutional. The constitutionally required procedure for issuing and recording traffic tickets is minimal because the standard legal consequences are not highly punitive or restrictive.<sup>37</sup> This procedure is sufficient to satisfy due process requirements in the context of traffic violations. However, if those same individuals—“traffic offenders”—are subjected to the tangentially related but far harsher restriction on where they can live, the minimal process afforded to them when they received their traffic tickets is no longer sufficient. Similarly, the process afforded to those individuals before subjecting them to residency laws is negligible and disproportionate relative to the severe liberty restraints that the laws impose.<sup>38</sup>

The risk of erroneous deprivation of sex offenders’ liberty interests is high given the minimal protective procedures in place. Additional procedural safeguards would reduce the risk of erroneous deprivation and, although the state has a high interest in public safety, the fact that broad residency laws are ineffective at preventing sex crimes renders the state’s interest in enacting them negligible. Thus, without additional process, residency laws violate the procedural due process guarantees of the Fifth and Fourteenth Amendments of the Constitution.

3. *Analysis of a Substantive Due Process Claim.*—In addition to these procedural violations, broad residency laws violate substantive due process. The proper test for determining whether a government regulation offends the Substantive Due Process Clause depends on whether the regulation implicates a fundamental right.<sup>39</sup> If so, courts employ a “strict scrutiny” test.<sup>40</sup> Under this test, a court determines whether the regulation advances a compelling state interest and whether the regulation is “narrowly

<sup>35</sup> See *supra* note 34.

<sup>36</sup> See *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>37</sup> The consequences of receiving a traffic ticket are generally sanctions such as small fines or points on one’s record. They also normally include an opportunity to contest the ticket in court.

<sup>38</sup> See *Nebbia*, 291 U.S. 502.

<sup>39</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (describing fundamental rights as those that are “deeply rooted in the Nation’s history,” rooted in the “traditions and conscience of our people,” and “implicit in the concept of ordered liberty” (internal citations omitted)).

<sup>40</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 503–04 (1965) (“The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do . . . require ‘strict scrutiny,’ and ‘must be viewed in the light of less drastic means for achieving the same basic purpose.’” (citations omitted)); see also *Reno v. Flores*, 507 U.S. 292, 302 (1993) (applying strict scrutiny to a substantive due process claim); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to an equal protection claim).



tailored” such that it is the least restrictive method available to effectuate that interest.<sup>41</sup> If no fundamental right is involved, courts engage in a “rational basis” analysis.<sup>42</sup> In rational basis review, a court determines whether the state acted in pursuit of a permissible objective and, if so, whether the means it adopted were reasonably related to accomplishing that objective.<sup>43</sup> The next Subpart examines how these tests apply to sex crime laws.

*a. Strict scrutiny test.*—Broad residency laws implicate fundamental rights, including the right to establish a home, the right to travel, the right to privacy, and the right to pursue a chosen profession without unreasonable interference from the government.<sup>44</sup> There are numerous ways that these rights may be implicated in individual cases. For example, an offender may be forced to quit his job in order to move hundreds of miles to the nearest legal residence. Another offender may be forced to choose between uprooting her entire family and separating it. The implication of these fundamental rights warrants the application of the more rigorous strict scrutiny test. This test requires a state to prove that imposing residency restrictions furthers a compelling state interest and that the means used to achieve that interest are narrowly tailored to address only the specific interest at stake.<sup>45</sup> Part II shows that broad residency laws would not pass this test because there are many narrower (and more effective) ways to protect the public from repeat sex offenders.<sup>46</sup> Even though protecting the public is a compelling state interest,<sup>47</sup> overly inclusive or severe residency laws are not narrowly tailored to achieve that interest. Under this test, they are therefore unconstitutional. Nonetheless, courts may choose to apply a rational basis rather than a strict scrutiny analysis, discussed below.<sup>48</sup>

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<sup>41</sup> *Reno*, 507 U.S. at 301–02.

<sup>42</sup> *Glucksberg*, 521 U.S. at 728.

<sup>43</sup> *Id.* at 735 (holding that the state’s interests were important, legitimate, and reasonably promoted by the challenged law).

<sup>44</sup> *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“[T]he liberty . . . guaranteed [by the Fourteenth Amendment] . . . 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 . . . as essential to the orderly pursuit of happiness by free men.” (citations omitted)).

<sup>45</sup> *See Reno*, 507 U.S. at 302; *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold*, 381 U.S. at 485.

<sup>46</sup> For a discussion of these alternatives, see *supra* Part II.B.1–2.

<sup>47</sup> *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.” (citation omitted)).

<sup>48</sup> Higher scrutiny than rational basis may also be justified because, in laws relating to sex offenders, the operation of ordinary political processes is curtailed to the offenders’ detriment. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (listing cases in which higher scrutiny was found necessary due to limited access to the political process). Sex offenders, like most felons, are a minority, are subject to prejudice, and are often permanently stripped of their right to vote. This leaves them unable to protect themselves through democratic processes. *See McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (“When brought beneath [the] axe [of disenfranchisement], the

*b. Rational basis test.*—Even if a court decides that the rights restricted by residency laws are not fundamental, broad residency laws intended to prevent sex crimes would not even pass rational basis scrutiny because the means they adopt are not reasonably related<sup>49</sup> to the goals they pursue. This Comment argues that in order for a law to pass the rational basis test, it must, at a minimum, promote its goals more than frustrate them. A law that hurts rather than furthers its own stated goals is fundamentally an irrational one.

There are two possible and related criticisms of the rational basis inquiry set forth here. First, courts' rational basis analyses tend to be highly deferential to the state and not as exacting as what is called for here. Thus, the notion that courts should strike laws that are irrational—or not reasonably related to their stated goals—may in reality be more formalistic than functional. This Section suggests how courts should apply the rational basis test in this context, not necessarily how courts do or will apply it given the history of the test's jurisprudence.

Second, this Section argues that courts should be responsible for weighing the costs and benefits of residency laws to determine their constitutionality. This may seem improper because the determination of costs and benefits is historically the province of the democratic branches. However, the argument here is not that a court should engage in its own fact-gathering and weighing, but rather that it should determine whether the law enacted by the state, based on the state's own fact-gathering and weighing, is rational in terms of the law's stated goals and results. In simplified terms, if a state legislature found that a law impaired rather than furthered a stated goal but enacted or allowed the law to remain on the books nonetheless,<sup>50</sup> a court should strike the law as irrational and violative of substantive due process. This position is further justified when, as with residency laws, the integrity of the democratic process is weakened.<sup>51</sup>

Understanding the costs and benefits of a law is crucial to determining its rationality. The benefits of broad residency laws<sup>52</sup> are two-fold. At one level, the communities benefit from knowing that they do not have sex of-

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disenfranchised is severed from the body politic and condemned to the lowest form of citizenship . . . while others choose the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly; rather, only when the circumstances and the law clearly direct.”).

<sup>49</sup> *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996) (“Where the claimed right is not fundamental, the governmental regulation need only be reasonably related to a legitimate state objective.”).

<sup>50</sup> This seems to be the case with the enactment of broad, ineffective residency laws. Such seemingly irrational behavior may be explained by political pressures, bureaucratic lag time, and inaccurate information.

<sup>51</sup> See *supra* note 48; *infra* notes 82 & 198.

<sup>52</sup> Narrow residency laws would likely survive rational basis analysis.

fenders living within certain protected areas.<sup>53</sup> This provides senses of security and agency,<sup>54</sup> which are intangible benefits.<sup>55</sup> Theoretically, the second benefit of residency laws is that they prevent some sex offenses from occurring. However, as discussed above, empirical evidence is beginning to demonstrate that the laws do not in fact prevent sex crimes. These findings not only undermine the stated purpose of these laws to reduce sex crimes, but also render false the sense of security provided by the laws.

These benefits come with monetary, psychological, and ethical costs.<sup>56</sup> The obvious costs include those associated with identifying, monitoring, arresting, prosecuting, and imprisoning sex offenders who violate broad residency laws. There are also other less obvious social costs. Perhaps the most compelling of these costs is that police resources will be spread thin by voluminous monitoring obligations, leaving fewer resources to monitor effectively the truly dangerous sex offenders, such as rapists and child molesters. Other costs include the loss of labor from sex offenders who are prevented from working and the cost of forcing families to split into separate houses or repeatedly relocate. Additionally, communities incur other subtle costs by disenfranchising a substantial sector of their population.<sup>57</sup> Feelings of disenfranchisement, rejection, hatred, and neglect negatively affect the mental states of those individuals forced to live on the fringes of society.<sup>58</sup> This large-scale rejection often causes the sex offender to harbor reciprocal feelings towards society, sometimes to the point where the offender's feelings of civic responsibility—including the duty to follow

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<sup>53</sup> This assumes that all sex offenders obey the residency law and comply with registration requirements, but that is not necessarily the case. The communities, however, may still benefit from the false sense of security they receive from thinking that sex offenders no longer live near their children's schools, their bus stops, or other protected areas.

<sup>54</sup> Both relate to the perception that the community is taking action against sex crimes, regardless of the actual effectiveness of the action.

<sup>55</sup> See, e.g., President William J. Clinton, The President's Radio Address (Aug. 24, 2006) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=53230>) (referring to community notification laws as a way to "give . . . parents peace of mind"); but see Stuart A. Scheingold et al., *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State's Community Protection Act*, 28 L. & SOC'Y REV. 729, 757 (1994) ("The jury is still out on whether community notification gives us peace of mind and more competent police work or whether it simply leads to vigilante overreaction.").

<sup>56</sup> For a thorough overview of the collateral consequences of sex offender residency laws, see JILL S. LEVENSON, *SEX OFFENDER RESIDENCE RESTRICTIONS: A REPORT TO THE FLORIDA LEGISLATURE* (2005), [http://www.nacdl.org/sl\\_docs.nsf/issues/sexoffender\\_attachments/\\$FILE/Levinson\\_FL.pdf](http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/$FILE/Levinson_FL.pdf).

<sup>57</sup> For a discussion of how disenfranchisement may affect those subject to residency laws, see *infra* Part II.A.

<sup>58</sup> These and other collateral consequences of reentry are discussed in Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006).

laws—dissipate.<sup>59</sup> When people are denied the rights of citizens, some may feel like they have proportionally fewer duties of citizenship.<sup>60</sup>

Forcing sex offenders to move to remote areas creates additional social costs by decreasing access to mental health, behavioral treatment, and educational opportunities. These costs are especially troubling because they threaten to negate the benefits of forcing them to move in the first place. If certain sex offenders benefit (i.e., become less likely to recidivate) from treatment<sup>61</sup> and educational opportunities, then denying these sex offenders such opportunities increases the likelihood of reoffense in the future.<sup>62</sup> As sex offenders are forced farther and farther from densely populated areas, and are required to find housing from an increasingly small number of options that comply with residency restrictions, they are more likely to become homeless and transient.<sup>63</sup> Homelessness and transience increase the risks of psychological and treatment problems,<sup>64</sup> and also increase the costs of monitoring and tracking the sex offenders.

If imposing residency laws incurred no costs and were effective in preventing crime, then it would be rational for states to enact severe, broad laws and enforce them against every person who may commit a sex crime in the future.<sup>65</sup> However, significant costs do exist, and therefore zero crime is not socially ideal.<sup>66</sup> In other words, having some crime is not undesirable

<sup>59</sup> See generally *id.*

<sup>60</sup> See generally *id.*

<sup>61</sup> Although there are questions as to the efficacy of treatment for all sex offenders, research suggests that many offenders do significantly improve through treatment. See generally W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10 (1994).

<sup>62</sup> Imagine a person with a past conviction for pedophilia who lives within 3000 feet of a church, but who is attending daily therapy sessions at a nearby mental health facility. (Pedophilia is a mental disorder with specific diagnostic criteria. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.2 (4th ed.) (2000)). A state enacts a law that makes his proximity to the church illegal, and he is forced to move far from the urban area in which he now resides. The closest place in which he can live in conformity with the residency law is three hours from the nearest mental health facility that could treat his mental illness. If preventing him from accessing his mental health services is more likely to result in reoffense than permitting him to live within 3000 feet of a church, then the residency law is actually counterproductive and increases the potential harm to the citizens of the state in which it was passed. This outcome is supported by empirical data. One Colorado study, for example, found that sex offenders with “positive support systems” in their lives were significantly less likely to reoffend than those who did not have those support systems. COLORADO SAFETY REPORT, *supra* note 12, at 31–32. Moreover, the same study suggested that enforcing residency restrictions might not deter sex offenders from reoffending. *Id.* at 4.

<sup>63</sup> See MINN. DEP’T OF CORR., 2003 REPORT TO THE LEGISLATURE, LEVEL THREE SEX OFFENDERS: RESIDENTIAL PLACEMENT ISSUES 10 (2003).

<sup>64</sup> See generally Pinard & Thompson, *supra* note 58.

<sup>65</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180–85 (1968) (describing model for finding an optimal, equilibrium level of punishment in which the optimal quantity of prevention and punishment is inversely correlated to the respective costs).

<sup>66</sup> *Id.*

because the cost to society of preventing all crime is greater than the benefit of being free from all crime. At some point, the marginal cost of preventing a crime is greater than the marginal benefit of its prevention;<sup>67</sup> thus, it is not worth attempting to prevent its commission.<sup>68</sup> The costs are especially high when a state enacts very broad residency requirements such that virtually every sex offender living within that state is in violation of the law.<sup>69</sup> For example, Georgia passed a law that prohibits sex offenders from living within 1000 feet of any area where children might congregate.<sup>70</sup> In the resulting Georgia class action,<sup>71</sup> twelve sheriffs or sheriff's deputies from different counties testified that nearly every single sex offender in their county would be evicted under the new law and that the offenders had little prospect of finding a new residence in their county.<sup>72</sup> A mapmaker testifying as an expert witness confirmed that the same is true about other counties in Georgia, suggesting that there is nowhere in the entire state for sex offend-

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<sup>67</sup> The marginal value of a good is “what one more unit of a good is worth to you in terms of other goods.” DAVID D. FRIEDMAN, *PRICE THEORY: AN INTERMEDIATE TEXT* 86 (2d ed. 1990). In order to illustrate how this applies to laws, imagine that the laws are made harsher in discrete increments. For example, Town *A* wants to pass a residency law. It could choose to prohibit offenders from living within 500, 1000, or 1500 feet of a church. Also imagine that, aside from sex offenses, there is only one other type of crime in Town *A*—robbery. The marginal value of making a residency law harsher would be how much it is worth to society to increase the radius of the prohibited area from, say, 1000 to 1500 feet in terms of the number of prevented robberies that are foregone because law enforcement efforts are directed at sex offenses rather than robberies. In reality the dimensions are much more complex because there are almost infinite types of laws, crimes, and expenditures. This, combined with the fact that laws are not really discrete (they vary along many different axes), makes exact calculation of marginal value nearly impossible. However, exact calculation is neither necessary nor desired; the important point is that for every law imposed there is a marginal value. Further, this marginal value declines as laws become harsher.

<sup>68</sup> For an illustration of this point, consider speed limits. Controlling speeds has costs and benefits. The benefits are fewer accidents. The costs are that it will take longer for people to get where they want to go. If the goal was to prevent all driving accidents, and the costs of speed limits were ignored, then the limit would be low, e.g., 10 mph. If costs were completely ignored, driving would be prohibited all together. This does not occur, which indicates that the costs of speed limits (delays in getting places) are weighed against the benefits (fewer accidents) until an equilibrium is reached. That equilibrium determines the speed limit, and it lies somewhere between the maximum (no speed limit at all) and the minimum (no driving at all). The same analysis applies to preventing crime.

<sup>69</sup> See, e.g., GA. CODE ANN. § 42-1-15 (2006).

<sup>70</sup> *Id.*

<sup>71</sup> Amended Complaint, *supra* note 10, at 30–31.

<sup>72</sup> Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction at 23, 37–38, 50, 62, 85, 132, 141, 147–48, 159–60, Whitaker v. Perdue, No. 4:06-CV-140-CC (N.D. Ga. July 11, 2006) (the number of sex offenders required to move in each county were: Forsyth, 60/60; Cobb, 196/200; Bibb, 222/230; DeKalb, 490/490; Gwinnett, 277/278; Cherokee, 88/95; Houston, 132/136; Newton, 125/127); see also Mann v. Ga. Dep't. of Corr., No. S07A1043, 2007 Ga. LEXIS 849, at \*5 (Ga. Nov. 21, 2007) (“[S]ex offenders face the possibility of being repeatedly uprooted and forced to abandon homes in order to comply with the restrictions [of Georgia's residency law].”).

ers to live legally.<sup>73</sup> Georgia is a good example of a state in which the costs of residency laws are so high as to outweigh the benefits.

It is irrational to impose a law where the costs outweigh the benefits; therefore a law cannot survive even the most deferential rational basis analysis at the point where this disequilibrium occurs.<sup>74</sup> Given that the Supreme Court will likely be called on to assess the constitutionality of residency laws in the near future,<sup>75</sup> it is imperative that the true costs and benefits of residency laws, in their various manifestations in different states, be collected and made available for such analysis.<sup>76</sup>

To give another illustration of the importance of measuring costs (in addition to the Georgia law discussed above), consider the consequences of a hypothetical residency law that applies to anyone who has ever been convicted of a sex-related offense, rather than only to those who have been convicted of sex crimes that involved violence or minors.<sup>77</sup> These laws could conceivably include not only rapists and child molesters, but also teenagers who have had underage sex, consensual sodomists, topless female sunbathers,<sup>78</sup> and sex offenders who have become disabled such that they pose no risk to society.

If any of those persons covered by the expanded law would have been more likely to reoffend if permitted to live in a restricted area, the prevention of those potential crimes would be a benefit of the expansion. The glaring question is, however, whether the expansion of the law would actually have that effect, especially when no logical connection exists between the forbidden areas and the types of crimes previously committed. For example, living near a daycare center will not induce a woman convicted for topless sunbathing to commit crimes against children, and living near an

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<sup>73</sup> Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction, *supra* note 72, at 23, 37–38, 50, 62, 85, 132, 141, 147–48, 159–60.

<sup>74</sup> *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (permitting extensions of the exclusionary rule only when the benefits of additional protection outweigh the social costs of having the evidence).

<sup>75</sup> It is possible that the Supreme Court would decide to apply a strict scrutiny rather than rational basis standard. However, because this Comment demonstrates that even the broadest residency laws would fail a rational basis test, considering the possibility of a higher standard is unnecessary.

<sup>76</sup> Exact numbers may be impossible or impractical to obtain, but the implication is not that courts should arm themselves with calculators and add costs and benefits as lawyers recite numbers to them. Rather, decisionmakers, courts and legislators alike, must be aware that their decisions should not be based on solely the magnitude of societal benefit. It is false to assume that increasing benefits is always better; legislation that produces great benefits may produce even greater costs. Such unbalanced legislation is irrational. Keeping this in mind will lead to more responsible, fair, realistic, and constitutionally sound decisions.

<sup>77</sup> For an example of such a broadly applicable law, see GA. CODE ANN. § 42-1-15 (2006), which applies to all sexual offenders as defined in GA. CODE ANN. § 42-1-12.

<sup>78</sup> Some cities in California, for example, prohibit women from publicly bearing their chests. The women convicted for violating those laws are listed on sex offender registries. *See* Robert Salladay, *Woman Promotes the Right to Go Topless*, L.A. TIMES, Jan. 22, 2005, at B1.

elementary school will not induce a convicted rapist to commit crimes against children when his original offense did not involve minors.

As residency laws expand to cover more people, they become less logically related to their original purposes. On the cost side, the expansion of the laws undermines their effectiveness in helping law enforcement detect the people who actually pose a threat by diluting limited police resources within communities.<sup>79</sup>

The superfluous hardship imposed on thousands of people who pose no danger to the general public suggests that the broad laws are severely over-inclusive<sup>80</sup> and are motivated by a desire to exclude sex offenders generally, rather than to achieve an overall decrease in sex crimes.<sup>81</sup> All of these factors suggest that broad residency laws are irrational and, therefore, would not withstand even the most deferential substantive due process test. Courts faced with residency law challenges should conduct similar analyses as those conducted here, and, if they reach the same result, deem the laws to be in violation of the substantive due process rights found in the Fifth and Fourteenth Amendments.<sup>82</sup>

### B. *Ex Post Facto*

If a court is unwilling to confront a due process claim, a sex offender who was convicted before the residency law in his or her state was passed may have an *ex post facto* claim as well.

1. *Background of the Ex Post Facto Clause.*—Sex offender residency laws threaten to impose unconstitutional *ex post facto* punishment.<sup>83</sup> The *Ex Post Facto Clause* prohibits retroactive application of criminal laws, including an increase in punishment beyond what was prescribed when the crime was committed.<sup>84</sup> This prohibition is absolute.<sup>85</sup> Particularly relevant to sex offender residency laws is the purpose behind the *ex post facto* protection: to prevent the legislature from abusing its authority by enacting arbitrary or vindictive legislation retroactively applicable to disfavored

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<sup>79</sup> Alternatively, if police forces were increased, the extra expenditure would be a cost that would need to be included in the analysis. See Becker, *supra* note 65, at 180–85.

<sup>80</sup> See discussion *infra* Part II.A.

<sup>81</sup> See discussion *infra* Part II.B.

<sup>82</sup> The Supreme Court has historically been reluctant to strike legislation under the rational basis standard of the Due Process Clause. However, as this Comment suggests throughout, there are many reasons why sex offenders make good candidates for this seldom used but indispensable protection. See *supra* note 48. Also, the unique rapid proliferation and expansion of residency laws across the country despite such laws' inefficacy suggest that the political process, for various reasons, is not equipped to adequately protect the rights of sex offenders. See *supra* notes 1 & 48 and accompanying text and *infra* note 198 and accompanying text.

<sup>83</sup> U.S. CONST. art. I, § 9, cl. 3 & § 10, cl. 1.

<sup>84</sup> See Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1491–92 (1975).

<sup>85</sup> *Id.* at 1501.

groups.<sup>86</sup> When laws are not criminal or penal in character, they generally fall outside of the scope of ex post facto protection.<sup>87</sup> However, even when a law is not punitive on its face, it may still be so punitive in effect as to violate the Ex Post Facto Clause.<sup>88</sup> In other words, legislatures cannot circumvent the Ex Post Facto Clause by disguising criminal penalties in civil form.<sup>89</sup>

In *Smith v. Doe*, the Supreme Court reviewed an ex post facto challenge to an Alaska sex offender registration statute.<sup>90</sup> *Smith* established that, in order to determine whether a statute is punitive and therefore exacts retroactive punishment, courts are to consider four factors: first, whether the sanctions imposed by the law have been traditionally regarded as punishment; second, whether the statute promotes the traditional aims of punishment; third, whether it imposes an affirmative disability or restraint; and fourth, whether it has a rational connection to a non-punitive purpose, and whether it is excessive in relation to that purpose.<sup>91</sup> The next Section applies this framework to residency laws, as challenged by sex offenders who were convicted before the laws' enactments.

2. *Analysis of an Ex Post Facto Claim.*—Some laws restricting the actions of released sex offenders have already survived ex post facto challenges. For example, the Supreme Court has approved the post-release civil commitment of certain sex offenders over multiple constitutional challenges, including an ex post facto challenge.<sup>92</sup> Additionally, sex offender registration laws, which require offenders to report their addresses and other information to authorities upon release, have generally withstood ex post facto challenges,<sup>93</sup> though not without significant dissent in other courts.<sup>94</sup>

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<sup>86</sup> See *State v. Cook*, 700 N.E.2d 570, 580 (1998).

<sup>87</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997).

<sup>88</sup> *Id.* at 361 (recognizing that “a civil label is not always dispositive” (quoting *Allen v. Illinois*, 478 U.S. 364, 369 (1986))); see also *Smith v. Doe*, 538 U.S. 84, 92 (2003) (“If . . . the intention [of the legislature] was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is ‘so punitive either in purpose or effect as to negate [the state’s] intention’ to deem it ‘civil.’” (citing *Hendricks*, 521 U.S. at 361) (internal punctuation omitted)).

<sup>89</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952) (“[Prior] cases [finding a civil law violated the Ex Post Facto Clause] proceeded from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise.” (citation omitted)).

<sup>90</sup> *Smith*, 538 U.S. 84.

<sup>91</sup> *Id.* at 97.

<sup>92</sup> *Hendricks*, 521 U.S. 346.

<sup>93</sup> See, e.g., *E.B. v. Verniero*, 119 F.3d 1077, 1092–1105 (3d Cir. 1997); *W.P. v. Poritz*, 931 F. Supp. 1199, 1203–09 (D.N.J. 1996); *Doe v. Div. of Prob. & Corr. Alternatives*, 654 N.Y.S.2d 268, 270–71 (N.Y. Sup. Ct. 1997).

<sup>94</sup> See, e.g., *Doe v. Gregoire*, 960 F. Supp. 1478, 1486–87 (W.D. Wash. 1997) (holding that public notification provisions are punitive and violate the Ex Post Facto Clause when applied to offenders convicted of crimes which predate the Washington Act); *State v. Myers*, 923 P.2d 1024, 1043 (Kan. 1996), cert. denied, 521 U.S. 1118 (1997) (holding that a law permitting unrestricted public access to a sex offender registry violated the constitutional prohibition against ex post facto laws because it made “more



Residency laws have also been challenged on ex post facto grounds.<sup>95</sup> Remarkably, all federal courts presented with these challenges to date have held that the punitive effects of residency laws alleged by the plaintiffs did not violate the Ex Post Facto Clause.<sup>96</sup>

Because residency laws are among the most invasive restrictions imposed on sex offenders after they have completed their sentences, it is imperative that their constitutionality be carefully scrutinized. A close examination of the case law, however, reveals that the courts that have already ruled on ex post facto challenges to residency laws did not apply the *Smith* factors neutrally in an attempt to discern which way they cut, but rather applied these factors in a way that stretched their meanings.<sup>97</sup> In determining whether the residency laws' effects were so harmful as to render them punitive despite contrary intent,<sup>98</sup> the courts have shied away from recognizing the laws' punitive effects and have failed to apply the *Smith* balancing test objectively.

Under *Smith*, courts must first consider whether the challenged residency law imposes actions or restrictions upon the plaintiff that are traditional forms of punishment.<sup>99</sup> There is a strong argument that forbidding offenders to live within certain areas is banishment, which is a traditional form of punishment,<sup>100</sup> particularly when vast areas, and sometimes virtually an entire state (e.g., Georgia), are rendered off-limits by the law.<sup>101</sup> These residency laws aim to remove offenders from communities and therefore exact a traditional form of punishment against them.<sup>102</sup>

In opposing a challenge to its law, a state may have one colorable argument, but it is not compelling. The state may argue that its residency law

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burdensome the punishment for a crime after its commission"). Note, however, that these cases turned on the release of information to the public, not just to the authorities.

<sup>95</sup> See, e.g., *Doe v. Miller*, 405 F.3d 700, 718–22 (8th Cir. 2005); *Doe v. Baker*, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at \*7–17 (N.D. Ga. Apr. 5, 2006). The remainder of this Part uses these two decisions to illustrate the ex post facto claim because they are representative of the types of inquiries conducted by all federal courts presented with this challenge.

<sup>96</sup> See, e.g., *Baker*, 2006 U.S. Dist. LEXIS 67925, at \*18.

<sup>97</sup> Perhaps this is because courts are subject to some of the same political pressures as legislators. See *infra* Part III.

<sup>98</sup> See *Smith v. Doe*, 538 U.S. 84, 97 (2003).

<sup>99</sup> *Id.* at 97–98.

<sup>100</sup> Under the Transportation Act of 1718, Great Britain systematically sentenced criminals to banishment to the Colonies. 1717, 4 Geo. 1, c. XI.

<sup>101</sup> See *supra* note 72 and accompanying text. Although not explicitly forbidden from living within certain states or communities, sex offenders are banned in effect because the radii around the restricted areas are so big that they overlap and leave no legal place for the offender to live.

<sup>102</sup> For a similar argument made by the plaintiff in *Baker*, see *Doe v. Baker*, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at \*11 (N.D. Ga. Apr. 5, 2006). In fact, the *Baker* court itself acknowledged that residency restrictions may be analogous to banishment. It noted that “a more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem . . .” *Id.* at \*12.

does not effectively banish the sex offender because the law does not prevent him from “accessing . . . restricted areas at any time of the day for any purpose other than establishing residence.”<sup>103</sup> State legislatures are likely driven by the belief that, once subjected to residency laws, an offender will not enter the protected area because he or she lives far away from it. Although the prohibition imposed by residency laws is technically different from forms of banishment that are absolute bars to entry, the spirit of residency laws is identical to that at the heart of banishment laws: they aim to remove the subjects of the laws from the areas that the laws have been enacted to protect.<sup>104</sup> Thus, expansive residency laws exact the traditional punishment of banishment on sex offenders and therefore satisfy the first *Smith* consideration in determining whether laws are impermissibly punitive in violation of ex post facto guarantees.

*Smith* also advises courts to consider whether residency laws promote the traditional aims of punishment.<sup>105</sup> These laws are intended to deter, incapacitate, and, less blatantly, to provide retribution, all of which are traditional aims of punishment.<sup>106</sup> Although they may have other goals, such as protecting the public, they nonetheless promote those traditional aims of punishment.<sup>107</sup> Courts that have reviewed the constitutionality of these laws, however, have myopically focused on the public safety goal and have failed to recognize that residency laws promote punitive goals as well.

The third *Smith* factor addresses whether the challenged law causes “affirmative disability or restraint” on a plaintiff.<sup>108</sup> Courts thus far have

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<sup>103</sup> *Id.* at \*11. The *Baker* court argued that residency laws do not result in banishment because they only restrict where an offender can live, but do not affect his or her ability to enter any area at any time. This is an ironic conclusion for a court to make about a residency law because it suggests that the intent of the law is undermined. It admits that sex offenders still have virtually unrestricted access to these areas from which, ostensibly, the offenders need to be kept away.

<sup>104</sup> The *Baker* court developed a second, less colorable justification for not analogizing residency laws to banishment. It held that “the fairly recent origin of these types of sex offender statutes suggests that they do not involve a traditional means of punishment.” *Id.* The court provided no further insight, so it is unclear how the newness of a statute relates to whether or not it involves a recognized form of punishment. However, if the same civil statute had called for sex offenders to be *imprisoned* in the interest of public safety, regardless of the final determination as to constitutionality, the court would not have claimed that the statute did not exact a traditional form of punishment simply because it was a new statute. Effectively, this already takes place under sexually violent predator civil commitment statutes. These statutes were ultimately deemed not to violate the Ex Post Facto Clause, but the court did not claim that the sanctions they imposed were not a traditional form of punishment. See *Kansas v. Hendricks*, 521 U.S. 346, 370–71 (1997).

<sup>105</sup> *Smith v. Doe*, 538 U.S. 84, 97–99 (2003).

<sup>106</sup> Retribution and deterrence were explicitly listed as traditional aims of punishment in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), the case from which *Smith* derived its framework. *Smith*, 538 U.S. at 97.

<sup>107</sup> The *Baker* court effectively declined to acknowledge this factor. It held that, regardless of whether the law acted to deter or exact retribution, which are traditional aims of punishment, it was nonetheless consistent with a regulatory purpose. *Baker*, 2006 U.S. Dist. LEXIS 67925, at \*13.

<sup>108</sup> *Smith*, 538 U.S. at 99–102.

failed to apply this factor correctly to residency laws. For example, in their analyses, both the *Miller* and *Baker* courts offered logically suspect reasoning. Both held that, because the affirmative restraint imposed on sex offenders by the residency laws is less than that imposed by civil commitment,<sup>109</sup> the threshold for this factor is not met.<sup>110</sup> However, the *Baker* court itself acknowledged that courts must assess a statute in relation to its *own* purpose.<sup>111</sup> What is permissible, in ex post facto terms, to protect the public from the mentally ill, violent sexual predators who qualify for civil commitment has no bearing on what is permissible to protect the public from other registered sex offenders (who are presumably less of a danger to society than those the state chooses to commit).<sup>112</sup> In other words, the danger posed by specific offenders should dictate the proper boundaries of residency laws.<sup>113</sup>

As both the *Miller* and the *Baker* courts acknowledged, residency laws undeniably affirmatively disable and restrain those individuals subject to the laws.<sup>114</sup> The only legitimate dispute regards the severity of that disability or restraint, and the value of imposing that restraint compared to the value of the interests served. For certain non-dangerous offenders or extremely broad laws, or both, the affirmative disability or restraint will be severe enough to meet this factor.

Finally, courts must evaluate whether residency laws rationally and reasonably relate to a non-punitive purpose. According to the *Smith* court, this is the most significant factor, and one that is highly deferential to the states.<sup>115</sup> Narrowly tailored residency laws may survive scrutiny under this

<sup>109</sup> In their references to civil commitment, the *Miller* and *Baker* courts rely on *Kansas v. Hendricks*, in which the Supreme Court held that civil commitment of mentally ill, violent sex offenders does not constitute ex post facto punishment. See *Hendricks*, 521 U.S. at 370–71.

<sup>110</sup> Specifically, the *Miller* court held that the affirmative restraint of the residency law did not meet the threshold for punitiveness because “[t]he residency restriction is certainly less disabling . . . than the civil commitment scheme at issue in *Hendricks*, which permitted complete confinement of affected persons.” *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005). The *Baker* court followed suit, holding that “this disability is nowhere near as significant as the involuntary commitment approved in *Hendricks*.” *Baker*, 2006 U.S. Dist. LEXIS 67925, at \*14.

<sup>111</sup> *Baker*, 2006 U.S. Dist. LEXIS 67925, at \*16.

<sup>112</sup> This is particularly evident if considered anecdotally: the reasoning of the *Miller* and *Baker* courts would justify subjecting two teenagers who engaged in consensual underage sex to the same disability or restraint as a schizophrenic serial rapist who would be eligible for the civil commitment at issue in *Hendricks*.

<sup>113</sup> The *Miller* court also held that “this factor ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a non-punitive purpose.” *Miller*, 405 F.3d at 721. Denying the validity of one factor by saying that another factor has merit is nonsensical and undermines the purpose of having a multiple-prong test such as that established in *Smith*.

<sup>114</sup> See *Miller*, 405 F.3d at 720–21; *Baker*, 2006 U.S. Dist. LEXIS 67925, at \*13–14.

<sup>115</sup> *Smith v. Doe*, 538 U.S. 84, 93, 97–99 (2003); *Baker*, 2006 U.S. Dist. LEXIS 67925, at \*15. The *Baker* court’s analysis of this fundamental step lacks depth and should not be used as a model for future cases attempting to assess punitiveness. The court found that “[p]rohibiting a sex offender from living near a school or daycare center is certainly an appropriate step in achieving the ultimate goal of protect-

test, but it is questionable whether broad residency laws can ever satisfy a rational basis requirement.<sup>116</sup> Moreover, even if these laws were found to be rational ways of addressing a legitimate public concern, the means used in broad laws are excessive in relation to that purpose<sup>117</sup> for the reasons discussed throughout this Comment.<sup>118</sup> Thus, although narrow residency laws may satisfy this fourth factor, broad laws would fail the test, weighing heavily in favor of a finding that an ex post facto violation has occurred.

In sum, three out of the four *Smith* factors strongly counsel towards a finding that residency laws, particularly the most restrictive ones, are punitive in effect and, when applied to offenders convicted prior to the residency laws' enactment, violate the Ex Post Facto Clause of the Constitution. The fourth "rational connection" factor may be satisfied by narrowly tailored laws, but, as described above,<sup>119</sup> some residency laws are so expansive that they are irrational and excessive in light of their stated goals. In those cases, the laws are punitive and, therefore, unconstitutional. To hold otherwise would allow legislatures to circumvent ex post facto protection for sex offenders by unjustly disguising criminal penalties in civil form.<sup>120</sup>

### C. Self-Incrimination

As discussed above, residency laws threaten both ex post facto and due process rights. When residency laws are enforced simultaneously with registration laws, the self-incrimination doctrine of the Fifth Amendment provides additional protection for sex offenders against residency laws.

*I. Background of Self-Incrimination.*—The Fifth Amendment of the Constitution provides that no person shall "be compelled in any criminal case to be a witness against himself."<sup>121</sup> The privilege against self-incrimination applies when a person is confronted with a "substantial and real hazard of subjecting [oneself] to criminal liability."<sup>122</sup> The privilege applies only to testimony about crimes that were already committed or are in the process of being committed at the time the testimony is given.<sup>123</sup> The

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ing children." *Baker*, 2006 U.S. Dist. LEXIS 67925, at \*16. This holding is problematic. First, the assumption that keeping all sex offenders, regardless of their past criminal activity, away from children will protect children is not necessarily true; in fact, tying up so many resources in enforcement of expansive laws may actually decrease states' ability to protect minors. See discussion *infra* Part I. Second, the court's claim neglects to satisfy the "non-excessive" requirement of the rule.

<sup>116</sup> See *supra* Part I.A.3.b.

<sup>117</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

<sup>118</sup> See *supra* Part I.A.3.b; *infra* Part II.

<sup>119</sup> See *supra* Part I.A.

<sup>120</sup> See *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952).

<sup>121</sup> U.S. CONST. amend. V.

<sup>122</sup> *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980).

<sup>123</sup> *United States v. Harvey*, 869 F.2d 1439, 1446 (11th Cir. 1989).

next Subsection shows that some residency laws force sex offenders to incriminate themselves in violation of their constitutional rights.

2. *Analysis of a Self-Incrimination Claim.*—The residency laws in isolation—independent of their interaction and combined effect with other laws—would not violate the constitutional right against self-incrimination.<sup>124</sup> However, the residency laws implicate a self-incrimination right when they work in concert with sex offender registration laws. The otherwise constitutional registration laws require a sex offender to disclose his address; thus if he lives within an area impermissible under the residency laws, the state essentially requires him to give incriminating testimony against himself. The registration laws, then, require him to admit that he is in violation of the residency laws and thus subject him to the criminal sanction provided by the residency laws for non-compliant residency—a constitutionally impermissible result.

In *United States v. Ansani*, the Northern District of Illinois was faced with an analogous situation in the context of business transactions.<sup>125</sup> The court held that a statute requiring a person to report his past business transactions to the government, and the government's imposition of criminal penalties for his failure to do so, violated the Fifth Amendment.<sup>126</sup> It found that when a person is forced to report an unlawful transaction, that person is forced to incriminate himself.<sup>127</sup> Similarly, when residency laws make certain addresses off-limits to sex offenders, compelled address registration will violate the Fifth Amendment rights of offenders living at those off-limits addresses.<sup>128</sup>

The Supreme Court has clarified that “the protection of the privilege reaches an accused’s communications, whatever form they might take, and the *compulsion of responses which are also communications*, for example, compliance with a subpoena to produce one’s papers.”<sup>129</sup> Thus, the disclosure of one’s address is a protected communication. Mandatory registration is a “*compulsion of responses which are also communications*”;<sup>130</sup> when those communications force sex offenders who are violating the residency

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<sup>124</sup> First, residency laws are civil, not criminal, and therefore do not invoke Fifth Amendment protection on self-incrimination grounds. See *Apfelbaum*, 445 U.S. at 125 (“[T]he privilege does not extend to consequences of a noncriminal nature . . .”). Second, they do not require the sex offender to incriminate himself or herself in any way.

<sup>125</sup> 138 F. Supp. 451 (N.D. Ill. 1955).

<sup>126</sup> *Id.* at 454.

<sup>127</sup> *Id.*

<sup>128</sup> In states like Georgia, the residency law is so broad that virtually every sex offender who continues to live within the state necessarily violates it. See *supra* note 72 and accompanying text. Every registered sex offender is therefore forced to incriminate himself (and be subject to criminal prosecution) in violation of the Fifth Amendment.

<sup>129</sup> *Schmerber v. California*, 384 U.S. 757, 763–64 (1966) (emphasis added).

<sup>130</sup> *Id.* at 764.

laws to incriminate themselves, the mandatory registration consequently violates of the Fifth Amendment privilege against self-incrimination.

A defendant-state may rely on *Fisher v. United States* to argue that requiring offenders to register, even when doing so requires them to incriminate themselves under residency laws, does not violate the privilege against self-incrimination.<sup>131</sup> *Fisher* presented the question whether the Internal Revenue Service's summons to an attorney to produce tax documents with the potential to incriminate his client violated the client's Fifth Amendment privilege.<sup>132</sup> The similarity to residency law claims, a defendant may argue, is that registration requires the offender to produce information that is incriminatory. In *Fisher*, however, the Court found that attorney compliance with the summons did not violate the privilege against self-incrimination because a third party (the attorney), not the client, caused the incrimination.<sup>133</sup> Put simply, the client was not incriminating himself; therefore there could be no self-incrimination claim. In residency law cases, offenders living in prohibited areas are forced to incriminate *themselves* by registering; thus *Fisher*-like defenses are not applicable.

The privilege against self-incrimination can be waived,<sup>134</sup> but only if done voluntarily, knowingly, intelligently, and with a full understanding of the potential consequences of waiving the right.<sup>135</sup> Thus, curing the Fifth Amendment problem resulting from combined residency and registration requirements for sex offenders would require either repealing one law or including a provision in the registration law that permits opting out of the registration.<sup>136</sup> The second option would result in all rational sex offenders opting out of the registration program and becoming largely untraceable, which is undesirable and contrary to goals of public safety.

If a court finds that the combination of the registration and residency laws in a state violates the privilege against self-incrimination, it may be that the state cannot simply narrow the scope of the residency law as a cure. The only constitutional solution in light of the privilege against self-incrimination may be for the state to repeal either the residency or the regis-

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<sup>131</sup> 425 U.S. 391 (1976).

<sup>132</sup> *Id.* at 393.

<sup>133</sup> *Id.* at 397 (“The taxpayer’s privilege under [the Fifth Amendment] is not violated by enforcement of the summonses . . . because enforcement against a taxpayer’s lawyer would not ‘compel’ the taxpayer to do anything—and certainly would not compel him to be a ‘witness’ against himself.”). See also *Couch v. United States*, 409 U.S. 322, 329 (1973) (failing to find a Fifth Amendment violation because “the ingredient of personal compulsion against the accused [was] lacking”).

<sup>134</sup> See *Smith v. State*, 337 U.S. 137, 150 (1949).

<sup>135</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>136</sup> The act of opting out could not later be used by the government as an inference of guilt. See generally *Griffin v. California*, 380 U.S. 609, 615 (1965) (“We . . . hold that the Fifth Amendment . . . forbids . . . comment by the prosecution on the accused’s silence . . . that such silence is evidence of guilt.”).

tration law<sup>137</sup> and seek an alternative and constitutional way to deal with sex offenders.<sup>138</sup> In fact, given the ineffectiveness of residency laws, keeping the registration law—perhaps combined with risk-assessment and enhanced monitoring—and repealing the residency law may cure the constitutional tension and provide a more effective means of sex crime control.

#### D. Right to Inter/Intrastate Travel

1. *Background of Inter/Intrastate Travel.*—The Constitution guarantees a right to interstate travel,<sup>139</sup> specifically, the right to travel from one state to any other state for the purpose of engaging in “lawful commerce, trade, or business without molestation.”<sup>140</sup> This right is fundamental and subject to strict scrutiny.<sup>141</sup> Numerous state and federal courts have considered, and disagreed upon, whether the Constitution also guarantees a right to intrastate travel.<sup>142</sup> The Supreme Court has not yet spoken on the issue. A reasonable reading of the Constitution and an in-depth analysis of case law, however, suggest that the Supreme Court will inevitably recognize the intrastate right as a logical extension of the right to interstate travel.<sup>143</sup> If an intrastate travel right does exist, the following analysis demonstrates how residency laws infringe upon it. If not, the reasoning can still apply to interstate travel restrictions, albeit to a lesser extent simply because interstate travel is less common.

Numerous circuit courts have already found that a right to intrastate travel exists.<sup>144</sup> For example, in *King v. New Rochelle Municipal Housing*

<sup>137</sup> This Comment argues generally that tailoring broad residency laws would cure most of the constitutional problems inherent in them. However, in light of this potential constitutional challenge, where the right is inviolable, “minimizing” unconstitutionality is not an option. If this is the grounds upon which residency laws are found unconstitutional, states would be forced to repeal one or both of the residency or registration laws.

<sup>138</sup> See *infra* Part II.B.

<sup>139</sup> *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); see also *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 901–02 (1986); *Jones v. Helms*, 452 U.S. 412, 417–18 (1981).

<sup>140</sup> See *Soto-Lopez*, 476 U.S. at 901–02 (holding that there is a constitutional freedom to enter and reside in any state).

<sup>141</sup> See *In re United States ex rel. Mo. State High Sch. Activities Ass’n*, 682 F.2d 147, 151 (8th Cir. 1982).

<sup>142</sup> See, e.g., *Townes v. City of St. Louis*, 949 F. Supp. 731, 734–35 (E.D. Mo. 1996), *aff’d per curiam*, 112 F.3d 514 (8th Cir. 1997) (not finding a right to intrastate travel and recognizing a split between the First, Second, and Third Circuits (which found such a right) and the Fifth, Sixth, and Seventh Circuits (which did not find such a right)).

<sup>143</sup> See generally Andrew C. Porter, Comment, *Towards a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820 (1992) (providing a thorough analysis of the interstate travel doctrine and concluding that the right to intrastate travel must also exist).

<sup>144</sup> See, e.g., *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971); *Cole v. Hous. Auth.*, 435 F.2d 807 (1st Cir. 1970). But see *Wardwell v. Bd. of Educ.*, 529 F.2d 625 (6th Cir. 1976) (finding no right to intrastate travel); *Ahern v. Mur-*

*Authority*, the Second Circuit held that “[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.”<sup>145</sup> Similarly, in *Lutz v. City of York*, the Third Circuit held that an unenumerated right to intrastate travel emanated from the substantive due process guarantee.<sup>146</sup>

2. *Analysis of an Inter/Intrastate Travel Claim.*—In *Doe v. Miller*, the Eighth Circuit held that the Constitution does not provide for a right to “live where you want.”<sup>147</sup> In that case, the plaintiffs challenged an Iowa statute that prohibited sex offenders from living within 2000 feet of areas where children congregate.<sup>148</sup> Recognizing the well-established right to interstate travel, the court found that restricting the ability to reside in a particular place is distinct from restricting the right to interstate travel.<sup>149</sup> Because, in general, the residency law prohibited only living in, not entering, certain areas, the court explained, the right to travel was not implicated by the residency law.<sup>150</sup>

The *Miller* decision needs to be reexamined. Restricting where a person may live, especially in an expansive manner that virtually forbids residence in all urban areas,<sup>151</sup> inhibits travel significantly. The place where one resides directly affects how easily, and in what manner, one can travel. Assume, for example, that a state passed a law prohibiting sex offenders from living within 1000 feet of a bus stop.<sup>152</sup> Bus stops are placed along roads frequently enough that, if a sex offender were to comply with the residency law, the only place where he or she could legally live is 400 miles from the nearest airport, public transportation stop, or car rental agency. Although perhaps still possible, travel would become significantly harder for the affected citizen than for others, to the extent that the resulting hardship on his liberty to travel freely would be so great as to render exercise of that constitutional right infeasible and null.

A state does have the power to restrict rights in ways that are necessary and proper for the protection of its people.<sup>153</sup> Thus a colorable response by

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phy, 457 F.2d 363 (7th Cir. 1972) (holding that the Supreme Court’s denial of certiorari “for want of a substantial federal question” in a similar case implied that there is no right to intrastate travel).

<sup>145</sup> 442 F.2d at 648.

<sup>146</sup> 899 F.2d at 256.

<sup>147</sup> 405 F.3d 700, 714 (8th Cir. 2005).

<sup>148</sup> *Id.* at 715.

<sup>149</sup> *Id.* at 712–13.

<sup>150</sup> *Id.*

<sup>151</sup> In some states, literally the entire state is restricted for sex offenders. See Transcript of Hearing on Plaintiffs’ Motion for Preliminary Injunction, *supra* note 72, at 23, 37–38, 50, 62, 85, 132, 141, 147–48, 159–60.

<sup>152</sup> See, e.g., GA. CODE ANN. § 42-1-15(a) (2006).

<sup>153</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact descrip-



a state to an inter- or intrastate travel claim brought by a sex offender would be to recognize that the residency law restricts travel, but nonetheless justify the restriction in the name of police power. Although denying that a residency law restricts the right to travel simply because it does not prohibit the right to travel is unpersuasive, a state may still argue that restricting travel through a residency law is constitutionally permissible in the name of public safety. However, a determination by the legislature “as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.”<sup>154</sup> In the case of a broad residency law that severely restricts the ability to travel, the state’s interest in public safety—especially in light of evidence that residency laws do not prevent sex crimes—is not great enough to justify infringing upon the right to travel.

These constitutional analyses suggest that residency laws, especially in their broadest forms, are unconstitutional on numerous grounds. The next Part investigates what effects invalidating these laws would have on public safety and determines that, not only are they unconstitutional, but they are also ineffective. This determination provides additional justification for their modification or removal.

## II. POLICY CONCERNS AND CONSIDERATIONS

Public fear and outrage dominate the politics of residency law decisionmaking.<sup>155</sup> Because of these forces, and the laws’ relative recency, governments and courts have not yet thoroughly analyzed the effects of residency laws. States have moved residency legislation forward without the statistical foundation that is commonplace in the lawmaking process for less inflammatory issues.<sup>156</sup> Some communities, however, sensibly have chosen to consult statistical information before enacting residency laws.<sup>157</sup> These communities have rejected proposed residency legislation based on the results of such statistical studies.<sup>158</sup> For example, one town in Kentucky, which had been considering a residency law, consulted studies conducted in

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tion and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.”), *overruled on other grounds by* *Ferguson v. Skrupa*, 372 U.S. 726, 729–31 (1963).

<sup>154</sup> *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

<sup>155</sup> A recent Gallup poll found that 66% of people surveyed were “very concerned” about sex offenders, whereas only 52% were as concerned about violent crime, and 32% about terrorism. *The Greatest Fear: The JonBenet Ramsey Case*, *ECONOMIST*, Aug. 26, 2006, at 25.

<sup>156</sup> For instance, in some situations, cost-benefit analyses *must* be done in order to receive funding or approval. See *Unfunded Mandates Reform Act of 1995*, 2 U.S.C. § 1501 (2000).

<sup>157</sup> NIETO & JUNG, *supra* note 3, at 18.

<sup>158</sup> *Id.* at 25.

Minnesota and Colorado, where such restrictions were already in place.<sup>159</sup> Upon finding that the laws in those two states led to an increase in the number of sex offenders who failed to register, the Kentucky town decided not to enact the law.<sup>160</sup> A similar sentiment was expressed in a newspaper article from Denver, Colorado, describing the city's reasoning for rejecting a residency law:

We do not become a safer society by adopting a one-size-fits-all strategy toward sex offenders. We vary the treatment, the levels of supervision and the length of sentences because we recognize that different types of sex offenses and different psychological profiles of offenders justify different levels of supervision, treatment or incarceration.<sup>161</sup>

This type of critical examination and refusal to employ an ineffective response, despite popular pressure to respond to social fear, should serve as a model for communities faced with residency law proposals in the future.

Once statistics relating to sex offenses are gathered and trends identified, economic and social models can assist in understanding the interplay between them.<sup>162</sup> In turn, a more realistic look at the efficacy of residency laws may promote the development of alternative, more appropriate approaches to the problem of sex offender recidivism. Examples of broad residency laws are discussed below to demonstrate the potential manifestations of non-rational laws and their consequences.

#### *A. As Applied: A Need for Fairness and Line-Drawing*

Examples abound of excessive and counterproductive applications of broad state residency laws.<sup>163</sup> Such laws impose enormous burdens upon people who pose little to no danger to society.<sup>164</sup> These laws have been applied to aged, immobile nursing home patients who were convicted of crimes decades earlier.<sup>165</sup> They have even been applied to the mother of a fifteen-year-old daughter after the daughter, unbeknownst to the mother, had sex in the mother's house with her like-aged boyfriend.<sup>166</sup> On a case-by-case level, these applications are frightening, unfair, and unjustifiable. Their wide breadth provides insufficient notice to people who never could have contemplated such measures being taken against them.<sup>167</sup> These con-

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (quoting Larry Pozner, Colorado Voices, *Denver Restrictions Unfair to Sex Offenders*, DENVER POST, Feb. 12, 2006).

<sup>162</sup> *See supra* Part I.A.3.

<sup>163</sup> *See, e.g.*, GA. CODE ANN. § 42-1-15 (2006); IOWA CODE §§ 692A.1, 692A.2 (West 2003 & Supp. 2007); OHIO REV. CODE ANN. § 2950.031 (West 2006).

<sup>164</sup> *See* Amended Complaint, *supra* note 10, at 2.

<sup>165</sup> *Id.* at 25–26.

<sup>166</sup> *Id.* at 10.

<sup>167</sup> *See* discussion of due process claims *supra* Part I.A.

sequences beg an examination of the fairness of passing such overinclusive laws.

Leaving aside these anecdotal instances of unfairness, the possibility of expanding the use of residency laws into other contexts raises line-drawing concerns. Most significantly, given the unrestrained expansion of sex offender laws in recent years, there is a danger that any precedent set in upholding them could be used to justify the creation of similar laws for other crimes and disfavored behavior. In fact, proposals to enact residency laws for non-sexual offenses may be looming in the legal horizon.<sup>168</sup> If federal courts continue to approve residency laws uncritically, then the language within those decisions could be used to defend the expansion of residency laws to other offenses, like murder.<sup>169</sup>

One rationale behind residency laws is to distance sex offenders from their potential victims in the name of public safety. Without any modification, this same rationale opens the door to the enactment of laws subjecting all people convicted of violent crimes to residency restrictions. The only difference is one of degree, in that far more people commit non-sex-related violent crimes than sex-related ones.<sup>170</sup> Thus, the danger of extending residency laws to cover millions of people becomes imminent. This highlights the urgent need for a Supreme Court decision regarding the constitutionality of residency laws. It also provides further incentive to investigate alternative approaches to minimizing recidivism of sex offenders.

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<sup>168</sup> Some states have already begun to expand what were traditionally sex offender restrictions to include other crimes. For example, Illinois has enacted the Child Murderer and Violent Offender Against Youth Registration Act (Child Murder Act), which requires persons previously convicted of crimes against youth to make their addresses and personal data publicly available. 730 ILL. COMP. STAT. 154/1–154/10 (2006). Illinois also has a Methamphetamine Manufacturer Registry Act, 730 ILL. COMP. STAT. 180/1–180/10 (2006), and an Arsonist Registration Act, 730 ILL. COMP. STAT. 148/1–148/10 (2006).

<sup>169</sup> For example, in *Doe v. Miller*, the court discussed the plaintiff's procedural due process claim against a residency law. 405 F.3d 700, 708 (8th Cir. 2005). When the plaintiff claimed that the statute was impermissibly vague because, in certain circumstances, sex offenders could be prosecuted despite their best efforts to comply, the court rejected the claim because "[a] sex offender subject to prosecution under those circumstances may seek to establish a violation of due process through a challenge to enforcement of the statute as applied to [his] specific case." *Id.* at 708. However, only a few sentences later in the opinion, the plaintiff claimed that the lack of individualized hearings violated procedural due process. *Id.* at 709. The court responded that "the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process." *Id.* Thus, the court acknowledged that the law may have been unconstitutional as applied to certain offenders, yet it upheld the statute even though it offered no opportunity for those individuals to avoid prosecution. This type of tenuous reasoning and broad language does not provide enough protection against blanket approval of residency law challenges in other courts.

<sup>170</sup> CRIMINAL OFFENDER STATISTICS, *supra* note 1.

*B. Decrying “NIMBY” and a Look at Alternative Approaches*<sup>171</sup>

Relocating sex offenders within a state does not protect society from sex crimes. Communities without children or other vulnerable individuals simply do not exist, and any place to which sex offenders are moved will have “potential victims.” As a result, residency laws are more like a game of hot potato than a sustainable approach to decreasing sex crimes. The laws are a legislative form of “not in my backyard” that shifts the problem, but does not eradicate it.<sup>172</sup> As one Florida city council member said, “[i]f we can get these people out of our community, it’s not that these crimes won’t happen . . . . It’s just that they won’t happen in my community.”<sup>173</sup>

Alternative ways to address recidivism by sex offenders are more appropriate. The alternatives may be qualitatively different—for example, new sentencing schemes or rehabilitation—or quantitatively different—for example, more focused applications of residency restrictions. The development of residency laws has exposed some important information that aids in assessing these alternatives: first, our society demands harsh treatment of sex offenders, and second, as a group, sex offenders do not pose the threat of reoffense that their reputation suggests.<sup>174</sup>

*1. Punitive and Judicial Alternatives.*—One solution that responds to both of these points is to increase the criminal punishment for the worst sex offenses by, for example, requiring longer prison terms. This solution addresses the problem of public safety and retribution in a more straightforward and, therefore, precise way. It also decreases the rate of release of sex offenders back into the community, which should mute the NIMBY reflex and lessen the force of public fears caused by the perception that sex offenders are on the loose. Although not the focus of this Comment, increasing criminal punishments is often ineffective in reducing recidivism, and states should only do so after prudent and critical deliberation.<sup>175</sup> However, this alternative method of addressing the problem provides a useful contrast against which to analyze residency laws, and thus warrants a brief discussion.

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<sup>171</sup> Someone motivated by “NIMBY” rationale is defined as “someone who objects to siting something in their own neighborhood but does not object to it being sited elsewhere; an acronym for not in my backyard.” Dictionary.com, <http://dictionary.reference.com/browse/NIMBY> (last visited Oct. 6, 2007).

<sup>172</sup> “Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good.” THE FEDERALIST NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>173</sup> John-Thor Dahlburg, *Limits on Sex Offenders Spread in Florida*, L.A. TIMES, July 5, 2005, at A13 (quoting Christopher J. Shipley).

<sup>174</sup> See Teepen, *supra* note 1; see also CRIMINAL OFFENDER STATISTICS, *supra* note 1.

<sup>175</sup> See, e.g., John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL’Y 189 (2005).

Society's conception of the egregiousness of a crime should be one determinant of the severity of penalties for that crime.<sup>176</sup> The current illogical and somewhat desperate attempts to purge sex offenders from our communities might be the result of a disparity between current criminal penalties for sex crimes and those that the public would like to see.<sup>177</sup> If a public desire for greater punishment is the real impetus behind the residency laws, then the solution does not appropriately address the problem. Cloaking the punitive nature of residency laws in formalistic interpretations of the terms "civil" and "public safety" may succeed in upholding the laws in court, but it will not result in fewer sex crimes.<sup>178</sup> Because the focus of this Comment is curing the constitutional problems that sex offender residency laws present, replacing them with increased criminal penalties is one possible solution. However, whether that is a wise policy decision is unclear and, many say, doubtful.<sup>179</sup>

Another suggested alternative is the creation of specialized treatment courts for sex offenders.<sup>180</sup> These courts would introduce an alternative to the existing dichotomous choices of holding sex offenders in prison or releasing them into the community.<sup>181</sup> Although there are currently no reentry courts for sex offenders, the reentry model has been used with success for other types of offenders.<sup>182</sup> Drug courts are one common example of the re-

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<sup>176</sup> This theory is often referred to as "retributivist" or "just deserts." See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (discussing the role of criminal laws in fulfilling deontological moral mandates as well as utilitarian needs).

<sup>177</sup> "[E]very deviation from a desert distribution can incrementally undercut the criminal law's moral credibility, which in turn can undercut its ability to help in the creation and internalization of norms . . ." *Id.* at 478. This discrepancy and resulting desire to impose punishment outside of the penal system is comparable to the theoretical underpinnings of vigilante, or private, justice. See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975) (using an economic model to explain the existence of extra-governmental systems of punishment).

<sup>178</sup> In *Kansas v. Hendricks*, the Supreme Court considered the constitutionality of a sex offender civil commitment law. 521 U.S. 346 (1997). In its determination of whether the statute was civil or punitive in nature, it held that "[w]here the State has 'disavowed any punitive intent' [and provided other procedural safeguards], we cannot say that it acted with punitive intent. . . . Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both *Hendricks*' double jeopardy and *ex post facto* claims." *Id.* at 368–69 (citation omitted). Disavowing punitive intent is not sufficient when the state's actions speak louder than its words.

<sup>179</sup> See, e.g., Darley, *supra* note 175; Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1589–97 (2003).

<sup>180</sup> See John Q. La Fond & Bruce J. Winick, *Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*, 34 SETON HALL L. REV. 1173 (2004).

<sup>181</sup> *Id.* at 1187.

<sup>182</sup> For more information on other types of reentry courts, see OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, REENTRY COURTS: MANAGING THE TRANSITION FROM PRISON TO COMMUNITY (1999), available at <http://www.ncjrs.gov/pdffiles1/ojp/sl000389.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STRATEGIES FOR COURT COLLABORATION WITH SERVICE COMMUNITIES (2002), available at <http://www.ncjrs.gov/pdffiles1/bja/196945.pdf>; Arthur J. Lurigio et al., *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184 (2001).

entry model.<sup>183</sup> The courts take a “collaborative, interdisciplinary approach to rehabilitation and problem solving in which the judge plays a leading role” by creating treatment plans and monitoring compliance.<sup>184</sup> This model should be implemented immediately as an attempt to remedy the constitutional problems of the current residency laws.

2. *Risk-Assessment*.—Another alternative to broad residency laws is to narrow the laws through comprehensive risk-assessment coupled with a more focused application of the laws.<sup>185</sup> Sex offenders, as a group, are not homogenous, and researchers have isolated certain factors associated with recidivism that can be used to distinguish offenders.<sup>186</sup> For instance, studies have identified the most frequent recidivists as people who molest young boys or rape adult women.<sup>187</sup> These findings can be used to predict the likelihood that specific offenders will commit other sexual offenses.<sup>188</sup> Thus, sex offenders could be classified by their potential for dangerousness and subjected to appropriately restrictive residency laws. The most restrictive laws could then be enforced against the most dangerous offenders; this would free up more resources to provide a more comprehensive prevention plan that would include monitoring, tracking, treatment, and enforcement.

Some states require that the state correctional commissioner assign risk designations to all sex offenders.<sup>189</sup> The designations are based on factors such as the offender’s age, relationship to the victim, prior history and prior offenses, access to treatment, and level of social support.<sup>190</sup> The nature of the crime and characteristics of the victim (e.g., age) are also considered.<sup>191</sup> Classifying sex offenders according to their probability of reoffense renders residency laws more narrowly tailored to the goal of preventing reoffense. If offenders are ranked into three tiers, a lower tier might include teenagers

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<sup>183</sup> See generally JAMES L. NOLAN JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001).

<sup>184</sup> La Fond & Winick, *supra* note 180, at 1193.

<sup>185</sup> See NIETO & JUNG, *supra* note 3, at 27, for a detailed explanation of the various approaches to and results of comprehensive risk assessment of the sex offender population.

<sup>186</sup> R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL’Y & L. 50, 67–68 (1998) (noting the growing use of actuarial scales to evaluate sex offenders’ risk of recidivism).

<sup>187</sup> See, e.g., CRIMINAL OFFENDER STATISTICS, *supra* note 1 (indicating that sex offenders are rearrested at a lower rate than other offenders, with rearrest rates of 43% and 68%, respectively); Robert A. Prentky et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635, 650–54 (1997) (noting heightened rates of recidivism over time for child molesters and rapists); David Van Biema, *A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters*, TIME, Sept. 9, 1996, at 60 (noting that experts believe child molesters have recidivism rate as high as 65%).

<sup>188</sup> Hanson, *supra* note 186, at 67–68.

<sup>189</sup> See, e.g., MINN. STAT. ANN. § 244.052 (West 2003).

<sup>190</sup> NIETO & JUNG, *supra* note 3, at 27.

<sup>191</sup> *Id.*

who were convicted for having consensual underage sex, and the highest tier would be reserved for repeat violent offenders.<sup>192</sup>

This classification system has many benefits. First, sex offenders who are unlikely to reoffend would not suffer unnecessary embarrassment or hardship. Second, police could more effectively focus their limited resources on monitoring high-risk offenders thoroughly, rather than diluting those resources across a broad and heterogeneous population. Third, the overall costs, discussed above,<sup>193</sup> would be lower because there would be far fewer offenders subject to monitoring and a more streamlined monitoring process for those who are.

The next Part dissects the political and criminal processes leading up to residency law enactment and enforcement. Given the disconnect between political pressure to amplify residency laws and the ineffectiveness and unconstitutionality of doing so, the legislative branch may be unable to protect the threatened rights without the mandates of federal courts.

### III. STAKEHOLDER INTERESTS AND POLITICAL MOTIVATIONS

Sex offenders are only one group of many who hold a stake in the creation of residency laws. Apart from the offenders and their (potential) victims, the existence of these laws—and especially, the broadness of their reach—significantly affects politicians, police officers, and prosecutors.<sup>194</sup> While the constitutionality of these laws is unsettled,<sup>195</sup> these anti-crime groups likely will favor a clear limit from the Supreme Court that allows them to enforce and prosecute legislation in a way that feasibly and realistically manages the problem. Given that each of these anti-crime groups tends to be on the prosecuting side of the law, intuition suggests that they will favor the broadest laws possible because such laws provide for harsh punishment to offenders. However, if free from political and special-interest pressure, most anti-crime groups would actually prefer that the laws be narrowed. A Seattle police detective, for example, once stated that residency laws chase sex offenders “from one jurisdiction to another. [They create] a lot more homeless sex offenders, which makes it a lot harder for us to keep track of them. [The laws] do not work, in fact, [they] exacerbate[] the problem.”<sup>196</sup> An Iowa sheriff described the difficulty of keeping track of sex offenders who are forced to move, saying, “[w]e went from knowing where about 90[%] of them were. . . . [to] know[ing] where 50 to 55[%] of

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<sup>192</sup> See, e.g., MINN. STAT. ANN. § 244.052.

<sup>193</sup> See *supra* Part I.A.

<sup>194</sup> These various groups will be collectively referred to as “anti-crime groups” in this Comment.

<sup>195</sup> See discussion of recent constitutional challenges *supra* notes 6–7 and accompanying text.

<sup>196</sup> NIETO & JUNG, *supra* note 3, at 24 (citing *Sex Offender Task Force Wants Tougher Registration Laws*, CHANNEL 4 KOMO STAFF & NEWS SERVICE, Dec. 27, 2005, <http://www.komotv.com>).

them are now . . . [T]he law created an atmosphere [where] these individuals can't find a place to live."<sup>197</sup>

If the Supreme Court were to determine the point past which residency laws become unconstitutional, anti-crime groups could no longer be held responsible in the eyes of the public for failing to make the laws increasingly harsh, thus allowing them to engage in more rational prevention of sex crimes. In other words, they would have a “hands tied” response that could protect them from experiencing political backlash for not bowing to what has become irrational public passion.

The public would benefit from this protection against its own passions as well.<sup>198</sup> Indeed, protection against irrational passions is one of the most valuable roles that our Constitution can play.<sup>199</sup> A clear, unambiguous Supreme Court decision would remove the political incentive to race to the bottom;<sup>200</sup> that is, it would eliminate the need for lawmakers to support irrationally harsh legislation against sex offenders in order to curry favor with voters.<sup>201</sup> Legislators could then focus on improving the efficacy of the laws within constitutional boundaries, and law enforcement officers could focus on the people who are legitimate threats to society rather than those who pose no danger.

#### CONCLUSION

This Comment illustrates the difficult social tension between the need to secure rights for people who society despises and the need to protect society from those despised members' potentially dangerous behavior.

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<sup>197</sup> *Id.* (citing Sea Stachura, *The Consequences of Zoning Sex Offenders*, MINN. PUB. RADIO, Apr. 25, 2006, <http://www.minnesota.publicradio.org>) (some alterations in original).

<sup>198</sup> See THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 2003). Regulating the passions of the people improves, not hinders, their ability to govern themselves. See *id.* (“The *passions*, . . . not the *reason*, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.”).

<sup>199</sup> James Madison warned of “factions,” which he defined as “a number of citizens . . . united and actuated by some common impulse of passion . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 2003). The Federalists recognized that “[t]o secure the public good and private rights against the danger of such a faction . . . is then the great object [of the Constitution].” *Id.* at 75.

<sup>200</sup> The concept of racing to the bottom was first introduced into legal thought by Justice Brandeis in *Liggett Co. v. Lee*, where he described the phenomenon of states competing for corporations by liberalizing their restrictive laws. 288 U.S. 517, 558–59 (1933). Here it refers to legislators competing for votes by promising to be the harshest on sex offenders.

<sup>201</sup> See, e.g., Michelle P. Jerusalem, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's “Right” to Know*, 48 VAND. L. REV. 219, 246 (1995) (“People want to know if a released sex offender is moving into their community; they have let legislators know that this is what they want with loud voices. Legislators, in turn, give them what they want. However, in doing so, an analysis of appropriate policy goals seems to have been forgotten.”).



The U.S. Department of Justice estimates that there were 92,455 forcible rapes in the United States in 2006.<sup>202</sup> One of every seven victims of reported sexual assault is under the age of six.<sup>203</sup> These large numbers indicate equally large problems. In juxtaposition, the same report estimates that only seven percent of sexual assaults on children were committed by strangers to the victim.<sup>204</sup> Residency laws, even in their most effective and reasonable manifestations, only target a miniscule segment of the sex offender population. The effect of residency laws on overall crime, including non-sexual offenses, is even smaller. Extending residency laws to apply to offenders who do not commit the most heinous sex crimes undermines the efficacy of the laws against those offenders who do. There are 614,006 registered sex offenders in the United States,<sup>205</sup> and, as the classification broadens, that number will only grow. Exaggerating the necessary bounds of the laws beyond any reasonable safety rationale wastes resources that could be better used in a more targeted manner. States need to differentiate between offender risk levels. They should also tailor laws with respect to the type of places restricted and the distances that residences must be located away from those places. Outrageously broad laws provide nothing but a false sense of safety.

Residency laws that are too broad defeat their own purpose of protecting the public. They waste police resources and marginalize individuals convicted of even minor offenses, subjecting them to laws aimed at preventing them from committing acts that they are unlikely to commit. Residency laws also become prohibitively costly.<sup>206</sup> Thus, at a certain point, residency laws are irrational and violate numerous constitutional guarantees. These constitutional questions and challenges are multiplying throughout district and circuit courts,<sup>207</sup> and the Supreme Court will likely affirm or dispel the predictions asserted here within a relatively short time.

When registration laws are already in place, passing a residency law is repugnant to the right against self-incrimination.<sup>208</sup> If courts find that this tension cannot be remedied by narrowing the residency laws because of the

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<sup>202</sup> See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2006: FORCIBLE RAPE 1 (Sept. 2007), available at <http://www.fbi.gov/ucr/cius2006/documents/forciblerapemain.pdf>.

<sup>203</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 & t.1 (July 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf>.

<sup>204</sup> *Id.* at 10 & t.6.

<sup>205</sup> Parents for Megan's Law: Nationwide Registries & Links, <http://www.parentsformeganslaw.com/html/links.lasso> (last visited Oct. 6, 2007).

<sup>206</sup> See *supra* Part I.A.3.b.

<sup>207</sup> See, e.g., *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (holding that a residency law does not violate the Ex Post Facto Clause of the Constitution); see also *Doe v. Baker*, No. 1:05-CV-2265 TWT, 2006 U.S. Dist. LEXIS 67925 (N.D. Ga. Apr. 5, 2006); *Coston v. Petro*, 398 F. Supp. 2d 878 (S.D. Ohio 2005).

<sup>208</sup> See U.S. CONST. amend. V (no person can be "compelled . . . to be a witness against himself").

inviolability of the privilege,<sup>209</sup> a good solution would be to repeal the residency laws and enhance the registration laws through monitoring and risk-assessment.

Although ex post facto challenges brought to date have failed in lower federal courts, a critical analysis by the Supreme Court will produce a different result. Under the *Smith* factors used to assess punitiveness,<sup>210</sup> it seems that broad residency laws that inflict significant hardship on sex offenders amount to a second and unconstitutional criminal punishment despite their facially civil nature.<sup>211</sup>

Broad residency laws also violate the right to inter- and intrastate travel.<sup>212</sup> Although no right to reside wherever one chooses has ever been declared, restrictions on where a person may live unquestionably affect that person's ability to travel. Because the right to travel is subject to strict scrutiny,<sup>213</sup> residency laws that oppress that right must be narrowly tailored to achieve their intended goals.

Finally, broad residency laws violate both procedural and substantive due process rights. Current residency laws do not have procedural components that put sex offenders on notice or afford them an opportunity to be heard. Further, the laws do not pass even the most deferential substantive due process test because, as discussed throughout this Comment, the broad imposition of the laws is irrational in a number of ways.<sup>214</sup>

Although analysis of relevant constitutional precedent is important to predictions of how the Supreme Court will eventually decide, the central premise of this Comment should not be lost. States must protect all citizens' rights to the greatest extent possible, especially—not except—the rights of minorities or those otherwise marginalized by society. Placing limits on laws that aim to punish sex offenders in no way condones sex offenses or ignores the problem. Rather, it imparts constitutionality, and thereby rationality, to an issue that has become a political and media runaway.

The hope is that the Supreme Court will recognize that, at some point, residency laws can become so expansive as to offend the Constitution in numerous ways. A precise and critical decision is particularly necessary because residency laws express moral, value-laden beliefs on sensitive, personal issues that are difficult for the political system to approach objec-

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<sup>209</sup> Many of the other rights discussed in this Comment, for example, the right to due process, are violable in that they may be impinged if the state has sufficient interest in doing so. For those rights, narrowing the laws is a legitimate method of curing their unconstitutionality.

<sup>210</sup> See *Smith v. Doe*, 538 U.S. 84 (2003).

<sup>211</sup> See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (describing how some civil statutes may be so punitive as to render them equivalent to criminal punishment); see also *Smith*, 538 U.S. 84.

<sup>212</sup> See *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 901–02 (1986) (holding that there is a constitutional freedom to enter and reside in any state).

<sup>213</sup> *In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147 (8th Cir. 1982).

<sup>214</sup> See *supra* Part I.A.

tively. This is not an argument for circumventing the democratic process; it is an argument for requiring states to adhere to the Constitution despite motivations to do otherwise.

