Comments

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How to Stop a Predator: The Rush to Enact Mandatory Sex Offender Residency Restrictions and Why States Should Abstain

Many parents are terrified to learn that a convicted sex offender is living amongst their children, perhaps just a few doors from their home. One need only view Dateline's popular investigative television series "To Catch a Predator" to learn of the public's fear of and fascination with sexual pedophiles.[1] Over the last few decades, every new year seems to bring another high-profile child-sex-offender case. In 1994, seven-year-old Megan Kanka was kidnapped, raped, and murdered by a convicted sex offender living across the street unbeknownst to her family.[2] In 2005, nine-year-old Jessica Lunsford was abducted from her bedroom and sexually assaulted by a convicted sex offender staying at his sister-in-law's home next door; she was found buried in a neighbor's yard three

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1 *See* Peter Johnson, *'Dateline' Roots Out Predators*, USA TODAY.COM, Feb. 15, 2006, http://www.usatoday.com/life/columnist/mediamix/2006-02-14-media-mix_x.htm.

2 BUREAU OF JUSTICE ASSISTANCE, MANAGING SEX OFFENDERS: CITIZENS SUPPORTING LAW ENFORCEMENT 3 (2005), http://www.policevolunteers.org/resources/pdf/cisomResourceGuide.pdf.

weeks later.[3] These types of heinous attacks bring anger and confusion, as the community wonders why more was not done to prevent known offenders from preying on our nation's youth. In response to the public outcry, Congress and state legislatures have enacted sex offender laws in an attempt to assuage the community's fears.[4]

In 2005 alone, state legislatures across the nation enacted more than 100 sex offender laws[5] in an attempt to manage and control their sex offender populations. More recently, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006, allowing law enforcement agencies better access to registry information to help them track sex offenders' movements.[6] As a result of these new legal measures, over half a million offenders are listed in mandatory state sex offender registries,[7] and each year there are 60,000 to 70,000 new arrests on charges of child sexual assault.[8] Given the magnitude of the problem, it is hardly surprising that few citizens are sympathetic toward sex offenders' constitutional rights.

A new trend in state legislation emerged as twenty-two states entered legally unsettled waters by enacting various residency restrictions for convicted sex offenders.[9] Legislators tout the

3 Associated Press, *Jury: Child-Killer Couey Should Get Death*, MSNBC.COM, Mar. 14, 2007, http://www.msnbc.msn.com/id/17615925/.

4 *See, e.g.*, Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C.A. § 14071(e) (West 2005)); Jessica Lunsford Act, 2005 Fla. Sess. Law Serv. Ch. 2005–28 (West) (codified as amended in scattered sections of Florida Statutes).

5 BUREAU OF JUSTICE ASSISTANCE, *supra* note 2, at 4.

6 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended at 42 U.S.C.A. § 16901 (West Supp 2007)).

7 BUREAU OF JUSTICE ASSISTANCE, *supra* note 2, at 1.

8 MARCUS NIETO & DAVID JUNG, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT: A LITERATURE REVIEW 1 (2006) *available at* http://www.library.ca.gov/crb/06/08/06-008.pdf.

9 *Id.* at 17 tbl.2 (ALA. CODE § 15-20-26(a) (Supp. 2006); ARK. CODE ANN. § 5-14-128(a) (West 2005 & Supp. 2007); CAL. WELF. & INST. CODE § 6608.5(f) (West Supp. 2007); FLA. STAT. ANN. § 947.1405(7)(a)(2) (West Supp. 2007); GA. CODE ANN. § 42-1-15 (Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/11-9.4(b-5) (West 2003 & Supp. 2007); IND. CODE ANN. § 11-13-3-4(g)(2)(A) (West 2004 & Supp. 2006); IOWA CODE ANN. § 692A.2A (West 2003 & Supp. 2007); KY. REV. STAT. ANN. § 17.495 (West 2006 & Supp. 2006); LA. REV. STAT. ANN. § 14:91.1 (2004 & Supp. 2007); LA. REV. STAT. ANN. § 15.538 (2005 & Supp. 2007); MICH. COMP. LAWS ANN. § 28.735 (West Supp. 2007); MINN. STAT. ANN. § 244.052 (West 2003 & Supp. 2007); MO. REV. STAT. ANN. § 589.417 (West 2003); N.M. STAT. ANN § 29-11A-5.1

need for such residency restrictions to reduce child sex offenders' opportunities for contact with potential victims.[10] However, courts disagree whether these new laws are constitutional, and research increasingly questions their utility. This Comment will first look at the primary legal questions facing the courts, examining various legal challenges to state residency restrictions and the limited research surrounding the efficacy of such restrictions. Next, this Comment will address the 2006 California ballot measure Proposition 83,[11] which serves as a practical case study of these new restrictions and their unsettled legal ramifications. Finally, this Comment will examine Oregon's nonmandatory residency restriction[12] and explain why it serves as the best model for achieving the goals of protecting our children, monitoring the sex offender population, and withstanding judicial review. Ultimately, this Comment will attempt to show that research on mandatory residency restrictions may affect the way future courts rule on these restrictions. This Comment will also attempt to persuade those presently in favor of mandatory residency restrictions that more flexible, nonmandatory restrictions will increase the likelihood of achieving their stated objectives.

I
OVERVIEW OF ENACTED RESIDENCY RESTRICTIONS

In 1995, Florida, Delaware, and Michigan became the first states to enact some form of sex offender residency restrictions.[13]

(West 2003 & Supp. 2006); OHIO REV. CODE ANN. § 2950.031(A) (West 2006); OKLA. STAT. tit. 57, § 590 (2005); OR. REV. STAT. § 144.642 (2005); S.D. CODIFIED LAWS § 22-24B-23 (2006); TENN. CODE ANN. § 40-39-211 (West Supp. 2007); TEX. GOV'T CODE ANN. § 508.187 (Vernon 2004 & Supp. 2006); WASH. REV. CODE ANN. §§ 9.94A.712, 9.95.425-430 (West 2003 & Supp 2007); W. VA. CODE ANN. § 62-12-26(b)(1) (West 2006)).

10 *See* David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 610 (2006).

11 Cal. Attorney Gen., Proposition 83 Official Title and Summary, http://voterguide.ss.ca.gov/props/prop83/prop83.html (last visited Aug. 21, 2007) (The Sexual Predator Punishment and Control Act: Jessica's Law) (qualified for California November 2006 ballot).

12 OR. REV. STAT. § 144.642 (2005); OR. ADMIN. R. 255-060-0009 (2005).

13 Singleton, *supra* note 10, at 607.

Today, twenty-two states have enacted residency restrictions.[14] Most commonly, these restrictions prohibit a designated class of sex offenders from permanently residing within 500 to 2500 feet of schools, daycares, or other places where children regularly congregate.[15] This section describes the common facial challenges to these restrictions, provides examples of various states' mandatory residency restrictions, and explains how courts have ruled on their constitutionality.

A. Primary Facial Challenges to Residency Restrictions

Although they are a politically unpopular group, sex offenders have rights that are protected by the Constitution. However, courts and legal scholars have difficulty identifying these rights and balancing them with a state's legitimate interest in protecting its community. While a sex offender could assert a number of as-applied challenges against a mandatory residency restriction, the first hurdle any statute must clear is to be found constitutional on its face. In general, those opposing residency restrictions assert three types of facial constitutional challenges: ex post facto challenges, challenges on substantive or procedural due process grounds, and challenges based on whether the restriction is rationally related to a legitimate state interest.[16]

First, the ex post facto challenge argues that residency restrictions are punitive rather than regulatory in nature, and thus create a problem of double jeopardy for offenders whose convictions are already final. The Constitution expressly forbids states from enacting ex post facto laws, which include any law that increases punishment after a crime has been committed.[17] The purpose of the Ex Post Facto Clause was to "restrain[] arbitrary and potentially vindictive legislation."[18] In ruling to uphold Alaska's sex offender registration and notification law in

14 NIETO & JUNG, *supra* note 8, at 17 tbl.2.

15 *Id.* at 15.

16 *Id.* at 43.

17 U.S. CONST. art. I, § 10, cl. 1; *see also* Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 727–39 (2005); Bret R. Hobson, Note, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children*, 40 GA. L. REV. 961, 978–87, 990–92 (2006).

18 Weaver v. Graham, 450 U.S. 24, 29 (1981); *accord* Duster, *supra* note 17, at 727.

Smith v. Doe,[19] the Supreme Court established a framework to determine if a law violates the Ex Post Facto Clause. The five relevant factors to consider include: (1) whether the restriction has historically been regarded as a punishment, (2) whether the restriction imposes an affirmative disability or restraint, (3) whether the restriction promotes the traditional aims of punishment, namely retribution and deterrence, (4) whether the restriction has a rational connection to a nonpunitive purpose, and (5) whether the restriction is excessive with respect to this purpose.[20]

Second, a residency restriction may face a substantive and procedural due process challenge.[21] These arguments are based on an individual's right to travel freely from state to state, to live in one's home, to live privately with one's family, and to receive an individual risk assessment.[22] Sex offenders raise these due process challenges in an attempt to force courts to apply the strict scrutiny standard of review, rather than the highly deferential rational basis standard.[23]

Finally, even if the residency restriction does not infringe on a constitutional right, it may be unconstitutional if it is not rationally related to a legitimate state interest.[24] Under this deferential standard, "the party challenging the statute must demonstrate that the classification bears no rational relationship to any legitimate legislative purpose or governmental objective, or that the classification is unreasonable, arbitrary or capricious."[25] Given the high deference afforded to a legislature, some scholars have termed this test a "toothless standard."[26] Accordingly, no party has yet been successful in overturning a

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19 538 U.S. 84, 97 (2003) (citing the framework established in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

20 *Smith*, 538 U.S. at 97. For a detailed analysis of each factor, see Hobson, *supra* note 17, at 981–85.

21 *See* Duster, *supra* note 17, at 744–68; Hobson, *supra* note 17, at 971–78, 987–90.

22 *See* NIETO & JUNG, *supra* note 8, at 43.

23 *See* Hobson, *supra* note 17, at 972.

24 *See generally* Singleton, *supra* note 10, at 617–22.

25 *Id.* at 618.

26 *Id.* (citing David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 33 ("For the most part, rational basis review has been notoriously toothless.")).

residency restriction by challenging the state's rational basis for enacting the measure.[27]

Those opposing mandatory residency restrictions regularly assert these three facial challenges. For example, as discussed below, state and federal courts in Iowa, Georgia, Illinois, and Ohio have considered all three challenges while ruling on the constitutionality of residency restrictions. A review of the most notable cases from these states will illustrate the current law concerning mandatory residency restrictions.

B. Mandatory Residency Restrictions in Court

1. Iowa

The legal debate over the constitutionality of mandatory residency restrictions surfaced following the *Doe v. Miller* case in Iowa, which was challenged in the U.S. district court and the Eighth Circuit Court of Appeals.[28] In 2002, the Iowa legislature enacted a law that prohibited all convicted sex offenders whose offenses involved minors from living within 2000 feet of a school or daycare center.[29] This law applied to any sex offender establishing a new residence within the restricted area after the law was enacted on July 1, 2002.[30] The measure affected a significant number of offenders; as of December 1, 2003, there were over 5000 registered sex offenders in Iowa, and 83 percent of their victims were minors.[31] The plaintiffs filed a class action suit, and the U.S. district court ruled that the residency restriction was unconstitutional on a number of grounds.[32] The district court held that the restriction posed an ex post facto problem, as it mandated additional punishment for convicted offenders.[33] The court held that under practical application of

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27 *See* Singleton, *supra* note 10, at 618.

28 Doe v. Miller (*Miller I*) , 298 F. Supp. 2d 844 (S.D. Iowa 2004); *rev'd*, Doe v. Miller (*Miller II*), 405 F.3d 700 (8th Cir. 2005); *cert. denied*, 126 S. Ct. 757 (2005). Although not discussed in this Comment, the law was challenged and treated similarly in state court. *See* State v. Seering, No. CRIM AGIN006718, 2003 WL 21738894 (Iowa Dist. Ct. Apr. 20, 2003); *rev'd*, 701 N.W.2d 655 (Iowa 2005).

29 IOWA CODE ANN. § 692A.2A (West 2003).

30 *Id.*

31 *Miller I*, 298 F. Supp. 2d at 852.

32 *Id.* at 880.

33 *Id.* at 866–71.

the law, "some sex offenders end up remaining in prison beyond their parole dates, choosing between living with their families or complying with the Act, going homeless or breaking the law, or simply leaving the State because no community has a legal space for them."[34] This form of banishment constituted additional punishment that was not regulatory in nature.[35] Furthermore, the Act violated sex offenders' substantive due process rights.[36] Citing numerous Supreme Court cases on an individual's fundamental rights, the district court held that the Act deprived the plaintiffs of their "right to personal choice regarding family matters"[37] and their right to travel freely from one state to another.[38] In addition, the court found that the Act violated procedural due process rights by failing to require an individual risk assessment for each offender,[39] and represented cruel and unusual punishment under the Eighth Amendment.[40]

The Eighth Circuit Court of Appeals overturned the district court's decision on every ground challenged.[41] Citing the framework applied by the Supreme Court in *Smith v. Doe*,[42] the majority of the Eighth Circuit found the legislative intent regulatory in nature and held that the law was not "'so punitive either in purpose or effect as to negate' the State's nonpunitive intent."[43] Furthermore, the court unanimously held that the Constitution asserts no substantive due process right to "live where you want."[44] The law neither restricted a sex offender "from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility,"[45] nor "directly regulated the family relationship or prevent[ed] any family member from residing with a sex offender in a residence that is

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34 *Id.* at 869.

35 *Id.* at 871.

36 *Id.* at 872.

37 *Id.*

38 *Id.* at 874–75.

39 *Id.* at 876–77.

40 *Id.* at 879–80.

41 *Miller II*, 405 F.3d 700, 705 (8th Cir. 2005).

42 538 U.S. 84, 92 (2003).

43 *Miller II*, 405 F.3d at 718 (quoting *Smith*, 538 U.S. at 92).

44 *Id.* at 714.

45 *Id.* at 713.

consistent with the statute."[46] Finally, there was no procedural due process violation, as once the state draws a legislative classification without a potential exemption, performing an individual risk assessment is unnecessary.[47] Since the state had not infringed upon a constitutional right, the court found that it had a rational basis for "regulating the residency of sex offenders . . . to protect the health and safety of the citizens of Iowa."[48] To support its finding that the statute was rationally related to a legitimate state interest, the court noted that twelve other states had enacted residency restrictions for similar reasons.[49]

2. Georgia

Iowa is not the only state to experience a facial challenge to its residency restriction. In 2003, Georgia easily passed what State Representative Jerry Keen called "the toughest law in the country" in response to the arrest of Jessica Lunsford's murderer in Georgia.[50] The statute prohibited sex offenders from living, working, or loitering within 1000 feet of places where children congregate, including schools, churches, parks, gyms, swimming pools, or school bus stops.[51] Keen stated: "Yes, it's an inconvenience, some folks will have to move on. . . . But if you weigh that argument against the overall impact, which is the safety of children, most folks would agree this is a good thing."[52] Georgia was the first state to include the bus stop provision in its restriction, severely limiting the available areas where a sex offender could reside; there were approximately 10,000 registered sex offenders in the state and over 150,000 school bus stops.[53] In DeKalb County alone, located in suburban Atlanta,

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46 *Id.* at 711.

47 *Id.* at 709.

48 *Id.* at 704–05.

49 *Id.* at 714 n.4.

50 Jenny Jarvie, *Georgia Sex Offender Rule Causes Stir*, SEATTLE TIMES, July 3, 2006, *available at* http://seattletimes.nwsource.com/html/nationworld/2003101190_offender03 .html.

51 GA. CODE ANN. § 42-1-15 (Supp. 2006); *see* also GA. CODE ANN. § 41-1-12(a)(3) (Supp. 2006) (provides definition of "area where minors congregate").

52 Jarvie, *supra* note 50.

53 *Id.*

the bus stop provision would force all 490 registered sex offenders to move out of the county.[54]

Civil rights groups challenged the bus stop provision in federal court, where District Court Judge Clarence Cooper issued a temporary restraining order against the bus stop provision.[55] In his ruling, Judge Cooper stated that he understood the state's interest in protecting the public, but concluded, "the Court cannot approve of doing so in a manner that offends the Constitution."[56] However, Judge Cooper reluctantly lifted the restraining order on July 25, 2006, because the statute required a local school board to formally designate each bus stop, and none had done so at the time of the ruling.[57] Moreover, Judge Cooper expressly noted that by lifting the restraining order he did not address the overall constitutionality of the law.[58] The lawsuit challenging the law's constitutionality is still pending.[59] However, a federal district court and a state court of appeals have previously upheld less restrictive versions of the state's residency restrictions enacted prior to the latest amended version.[60]

3. Illinois

Illinois's version of a mandatory residency restriction was upheld by a state court of appeals in *People v. Leroy*.[61] Under the Illinois Criminal Code, "It is unlawful for a child sex offender to knowingly reside within 500 feet of a playground . . . or a facility providing programs or services exclusively directed toward persons under 18 years of age."[62] However, sex offenders are exempted from this law if they purchased their

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54 *Id.*

55 Whitaker v. Perdue, No. 4:06-CV-0140-CC (N.D. Ga. June 27, 2006).

56 *Id.* at *3.

57 *See* Whitaker v. Perdue, No. 4:06-CV-0140-CC, at *3–5 (N.D. Ga. July 25, 2006).

58 *Id.* at *5.

59 Associated Press, *Judge Drops Ban on Sex Offenders Living near Bus Stops in Georgia*, ACCESSNORTHGA.COM, July 27, 2006, http://www.accessnorthga.com/news/ap_newfullstory.asp?ID=78151.

60 *See* Doe v. Baker, No. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006); Denson v. State, 600 S.E.2d 645 (Ga. Ct. App. 2004).

61 828 N.E.2d 769 (Ill. App. Ct. 2005).

62 720 ILL. COMP. STAT. ANN. 5/11-9.4(b-5) (West Supp. 2007).

homes prior to the effective date of the amended restriction.[63] Among other challenges, the plaintiff in *Leroy* argued that the residency restriction violated his substantive due process right to live with his mother, whose house was located within 500 feet of a school.[64] The court disagreed, holding that the statute did not restrict with whom a sex offender may live, and that instead "it merely restrict[s] *where*, geographically, a child sex offender may live."[65] Since no substantive due process right was violated, the court applied the rational basis test.[66] Notably, the court recognized that no research supported the efficacy of a residency restriction, but nonetheless found a conceivable basis for finding the statute rationally related to a legitimate state interest:

> Although the record is bare of any statistics or research correlating residency distance with sex offenses, we conclude that it is reasonable to believe that a law that prohibits child sex offenders from living within 500 feet of a school will reduce the amount of incidental contact child sex offenders have with the children attending that school and that consequently the opportunity for the child sex offenders to commit new sex offenses against those children will be reduced as well.[67]

Moreover, the court reasoned that since Illinois's 500-foot requirement was less restrictive than those of twelve other states, the statute was reasonable in relation to the state's interest.[68] The court also rejected an ex post facto challenge,[69] distinguishing the statute from the banishment effect found in *Miller I*,[70] a procedural due process challenge,[71] and an Eighth Amendment cruel and unusual punishment challenge.[72]

4. Ohio

Finally, although the plaintiffs ultimately lacked standing to bring a claim, a district court in Ohio rejected the claim that the

63 *Id.*

64 *Leroy*, 828 N.E.2d at 776.

65 *Id.* (emphasis added).

66 *Id.*

67 *Id.* at 777.

68 *Id.* at 778.

69 *Id.* at 782.

70 *Id.* at 780.

71 *Id.* at 778.

72 *Id.* at 784.

Ohio residency restriction constituted a criminal statute for standing purposes.[73] However, the court noted that its ruling would likely foreshadow an ex post facto challenge.[74] Section 2950.031 of the Ohio Code "forbids registered sex offenders from establishing a residence or occupying a residential premises that is located within 1,000 feet of a school premises."[75] As in *Miller II*, the court applied the Supreme Court's *Smith v. Doe* test[76] to determine if the statute was punitive in nature.[77] The most important factors in the test are whether there is a "rational connection between the statute and a nonpunitive purpose."[78] In finding the statute to be civil in nature, the court concluded that although there may be better alternatives than a mandatory residency restriction, "[t]he Court does not sit to judge whether the legislature has made the best possible choice in attempting to protect children from sex offenders."[79]

Thus, courts in Iowa, Georgia, Illinois, and Ohio have considered all three facial challenges to the constitutionality of their sex offender residency restrictions. Except for *Miller I*, all the courts found that the mandatory residency restrictions withstood constitutional review. However, as discussed below, no clear consensus exists among courts today, and new research about the effectiveness of residency restrictions could change the way courts approach these decisions.

II
RESEARCH CONCERNING THE EFFECTIVENESS OF RESIDENCY RESTRICTIONS

In addition to the constitutional concerns about residency restrictions, many critics argue that the research does not support enacting these new laws. First, critics argue that statistics fail to support the need for or the efficacy of the restrictions. Second, several states actively oppose the restrictions based on their own research. These concerns, as well

73 Coston v. Petro, 398 F. Supp. 2d 878, 885 (S.D. Ohio 2005).

74 *Id.* at 885 n.1.

75 *Id.* at 880.

76 538 U.S. 84, 93 (2003).

77 *Coston*, 398 F. Supp. 2d at 885.

78 *Id.* at 886 (citing *Smith*, 538 U.S. at 102–03).

79 *Id.* (citing *Smith*, 538 U.S. at 105).

as research indicating that the restrictions produce unintended consequences, raise potential legal ramifications concerning previous state and federal court decisions.

A. Statistics Fail to Support the Enactment of Mandatory Residency Restrictions

Darcey Baker, Board Member of Oregon's Department of Parole and Post-Prison Supervision, states that many sex offender residency restrictions are no more than "knee-jerk reactions to high-profile cases."[80] In response to highly publicized violent abductions and murders committed by convicted sex offenders, a misconception exists that sex offenders have higher rates of recidivism than other criminal offenders. Therefore, many believe that states are justified in imposing harsher limitations on their freedoms. However, one of the largest and most recognized studies on this issue, based on over 20,000 sex offenders, found recidivism rates of only 18.9 percent for rapists and 12.7 percent for child molesters.[81] In comparison, a United States Department of Justice study of fifteen states found that over 67 percent of prisoners released in 1994 were rearrested within three years.[82] More specifically, the study found that 53.4 percent of property offenders, 47 percent of drug offenders, and 39.9 percent of violent offenders were reconvicted of the same offense within three years.[83]

Despite these numbers, supporters of residency restrictions rightly maintain that, given the nature of a sex offense involving a minor, any repeat offense is unacceptable. However, there remains little, if any, real or empirical research showing that residency restrictions reduce the risk of reoffending.[84] One

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80 Telephone Interview with Darcey Baker, Board Member, Oregon Board of Parole and Post-Prison Supervision, in Eugene, Or. (Feb. 5, 2007) [hereinafter Baker].

81 TIM BYNUM ET AL., CTR. FOR SEX OFFENDER MGMT, RECIDIVISM OF SEX OFFENDERS (2001), http://www.csom.org/pubs/recidsexof.html.

82 Eileen Fry-Bowers, *Controversy and Consequence in California: Choosing Between Children and the Constitution*, 25 WHITTIER L. REV. 889, 909 (2004) (citing BUREAU OF J. STATISTICS, REENTRY TRENDS IN THE U.S.: RECIDIVISM (2002), http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm).

83 *Id.* (citing BUREAU OF J. STATISTICS, REENTRY TRENDS IN THE U.S.: RECIDIVISM (2002), http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm).

84 *See* Jill S. Levenson, *Sex Offender Residence Restrictions*, *in* SEX OFFENDER LAW REPORT (Civil Research Institute 2005), *available at* http://www.nacdl.org/

Arkansas study reported that 48 percent of child molesters lived near schools, daycare centers, or parks.[85] Although the authors speculated that repeat offenders are more likely to live in places where children congregate, this study could not prove a link between sex offender housing and recidivism.[86] Conversely, a Minnesota study found that there was no causal relationship between a school's proximity to an offender's residence and the likelihood of the offender committing another sex offense for the most serious sex offenders who were released between 1997 and 1999.[87] As a New York Times editorial opined, "[j]ust as it would feel foolish to forbid muggers to live near A.T.M.s, it is hard to imagine how a 1,000-foot buffer zone around a bus stop, say, would keep a determined pedophile at bay."[88]

Moreover, the need for residency restrictions rests on the myth of "stranger danger," since much of the public believes the majority of sex offenses are committed by unknown perpetrators.[89] In fact, a 1997 study by the Department of Justice found that only 7 percent of reported sex offenses involving children were committed by strangers.[90] Approximately 40 percent of sexual assaults occur in the victim's own home, and another 20 percent occur in the home of a friend, neighbor or relative.[91]

Perhaps more troubling than the risk that residency restrictions will prove ineffective are the negative, unintended consequences of such measures. These restrictions create a shortage of housing options for sex offenders, forcing them to move to rural areas with few employment opportunities and

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sl_docs.nsf/issues/sexoffender_attachments/$FILE/civic%20research%20institute%201105%20-%202.pdf.

85 NIETO & JUNG, *supra* note 8, at 19 (citing J.T. Walker et. al., *The Geographic Link Between Sex Offenders and Potential Victims: A Routine Activities Approach*, JUSTICE RESEARCH AND POLICY, Fall 2001, at 15).

86 NIETO & JUNG, *supra* note 8, at 19.

87 MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES 9 (2003).

88 Editorial, *Sex Offenders in Exile*, N.Y. TIMES, Dec. 30, 2006, http://www.nytimes.com/2006/12/30/opinion/30sat1.html?ex=1325134800&en=f5d41ffaa6709904&ei=5088&partner=rssnyt&emc=rss.

89 *See* Levenson, *supra* note 84, at *4.

90 *Id.*

91 *Id.*

displacing them from their familial support systems.[92] As Jill Levenson, author of a nationally recognized study on sex offenders, concluded, "disrupting offenders' stability and social bonds is unlikely to be in the public's best interest if it exacerbates the psychosocial stressors that can contribute to reoffending."[93] In addition, residency restrictions place enormous demands on law enforcement officers, whose resources have already been limited by stringent federal reporting and notification laws. Notably, less than a year after the *Miller II* opinion, the Iowa County Attorneys Association issued a statement urging the repeal of the newly enacted residency restriction.[94] Citing research showing that the 2000-foot residency restriction was ineffective, the Association stated that the law "does not provide the protection that was originally intended and that the cost of enforcing the requirement and the unintended effects on families of offenders warrant replacing the restriction with more effective protective measures."[95]

B. States Opposing Mandatory Residency Restrictions

Colorado and Minnesota have been the most vocal states in rejecting mandatory residency restrictions and the most receptive to the limited research on the topic. In 2004, the Colorado Department of Public Safety concluded, "[p]lacing restrictions on the location of correctionally supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism."[96] After reviewing the actions of sex offenders on parole for a period of fifteen months, Colorado found that the number of offenders living near schools and childcare centers who reoffended was no greater than offenders living elsewhere. Instead, Colorado found that sex offenders

92 *Id.* at *5.

93 *Id.* at *6.

94 IOWA COUNTY ATTORNEYS ASS'N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (2006), www.cacj.org/PDF/2006/Statement%20on%20Sex%20Offender%20Residency%20Restrictions.pdf.

95 *Id.*

96 OFFICE OF DOMESTIC VIOLENCE AND SEX OFFENDER MGMT, COLO. DEP'T OF SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004) *available at* http://dcj.state.co.us/ors/pdf/docs/FullSLAFinal.pdf.

living in "Shared Living Arrangements" or in a residence with a positive support system were less likely to reoffend.[97] Similarly, Minnesota allows a parole officer to determine where a sex offender may live, and proximity to schools is just one of the many restrictions the officer considers.[98] The Minnesota Department of Corrections expressly recommended against enacting mandatory residency restrictions:

> Having such restrictions in the cities of Minneapolis and St. Paul would likely force level three offenders to move to more rural areas that would not contain nearby schools and parks but would pose other problems, such as a high concentration of offenders with no ties to the community; isolation; lack of work, education, and treatment options; and an increase in the distance traveled by agents who supervise offenders.[99]

In support of this determination, the department noted that no evidence points to the efficacy of mandatory residency restrictions and that there had not been a single case of a level three offender reoffending at a nearby school.[100] Thus, Colorado and Minnesota are the two most vocal states of the many that either oppose enacting or have yet to enact mandatory residency restrictions for sex offenders.

C. Legal Effect of Research

In addition to questioning the effectiveness of residency restrictions, research increasingly raises legal questions about *Miller II*, the most authoritative decision to date, as well as many other state and federal court rulings. First, the research suggests that mandatory residency restrictions are more punitive than regulatory in nature, and thus may violate the Ex Post Facto Clause. If no research shows that these restrictions reduce the number of repeat offenses, one must question what the laws are actually regulating. Therefore, even if the legislature intends the law to be regulatory in nature, as the Eighth Circuit concluded,

97 *Id.* at 36–37.

98 MINN. DEP'T OF CORR., *supra* note 87, at 2.

99 *Id.* at 9.

100 *Id.* Note, however, that the Eighth Circuit disregarded this study in *Miller II*, stating, "this solitary case study—which involved only thirteen reoffenders released from prison between 1997 and 1999—does not make irrational the decision of the Iowa General Assembly and the Governor of Iowa to reach a different predictive judgment for Iowa." *Miller II*, 405 F.3d 700, 715 (8th Cir. 2005).

the actual punitive effect may override the legislature's nonpunitive intent.[101] For example, Georgia's bus stop provision is so restrictive that its sponsors have openly touted it as a banishment law.[102] If statistics prove that these measures have no effect on reducing the number of sex offenses involving minors, the overall effect of the law could be regarded as more punitive than regulatory. Moreover, it is well documented that the public does not wish to live near sex offenders,[103] suggesting that legislatures are simply responding to public wishes by issuing more punitive measures. However, "'only the clearest proof'" will allow a court to overturn a law on ex post facto grounds when a legislature enacts a measure with regulatory intent.[104] Therefore, those evaluating residency restrictions need more time to determine with certainty whether the laws are effective in reducing the number of repeat offenses.

Second, while the research does not question the findings of the Eighth Circuit on substantive and procedural due process claims, it does question whether legislatures have a rational basis for enacting residency restrictions. When a court finds no violation of a due process right, it will apply the rational basis test. In response, the State will argue that a residency restriction is intended to protect the health and safety of children. While the rational basis test is highly deferential,[105] increasing research indicates that there may not be even a rational basis for enacting a mandatory residency restriction.[106] If a court accepts the

101 *See generally* Hobson, *supra* note 17, at 990–92.

102 As the lead sponsor, Jerry Keen, stated in a speech to senators, "[c]andidly, senators, [registered sex offenders] will in many cases have to move to another state." Scott Henry, *Life in the Shadows*, CREATIVE LOAFING ATLANTA, July 19, 2006, http://atlanta.creativeloafing.com/gyrobase/Content?oid=oid%3A98753.

103 One study found that when a sex offender moves into a neighborhood, home values within a tenth of a mile drop an average of 4 percent. Leigh L. Linden & Jonah E. Rockoff, *There Goes the Neighborhood? Estimates of the Impact of Crime Risk on Property Values from Megan's Laws* (33 Nat'l Bureau of Econ. Research, Working Paper No. 12253, 2006).

104 *Miller II*, 405 F.3d at 718 (quoting Smith v. Doe, 538 U.S. 84, 92 (2003)).

105 *See, e.g.,* Coston v. Petro, 398 F. Supp. 2d 878, 886 (S.D. Ohio 2005); People v. Leroy, 828 N.E.2d 769, 777 (Ill. App. Ct. 2005).

106 *See* Singleton, *supra* note 10, at 615 (arguing the merits of a more meaningful rational basis review for residency restrictions). Professor Singleton goes on to argue that since these laws are "obviously based on fear and prejudice," they are "entitled no deference from the courts." *Id.* at 628 (discussing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); and Romer v. Evans, 517 U.S. 620 (1996)).

findings of the Minnesota study,[107] for example, forcing sex offenders underground and away from community management actually places children in greater danger. The *Leroy* court was able to uphold the restriction because the legislature was "reasonable" in determining that the law reduced the "opportunity for the child sex offenders to commit new sex offenses."[108] The *Miller II* court was able to dismiss the Minnesota study because it was an isolated and limited study.[109] However, if more comprehensive and universally recognized research emerges to confirm what Minnesota has already learned, courts facing decisions similar to *Miller II*, *Leroy,* and *Coston* will be forced to reevaluate the effects of these restrictions, even while affording wide deference to legislatures under the rational basis test.

III
CALIFORNIA'S PROPOSITION 83—A CASE STUDY

California is currently in the middle of this debate, as opposing groups argue over the constitutionality and effectiveness of a newly enacted mandatory residency restriction. As the latest state embroiled in this debate, California's experience serves as a valuable case study to reveal the recurring issues surrounding these restrictions. In November 2006, California voters overwhelmingly approved Proposition 83 with 70.5 percent of the vote.[110] Among other provisions, Proposition 83 prohibits *any* registered sex offender from residing within 2000 feet of any school or park where children regularly gather.[111] The law amends California's previous residency restriction, which barred parolees convicted of specified sex offenses against a child from residing within one-quarter or one-half mile of a school.[112]

[107] *See* MINN. DEP'T OF CORR., *supra* note 87, at 11.

[108] *Leroy*, 828 N.E.2d at 777.

[109] *Miller II*, 405 F.3d at 714.

[110] Cal. Sec'y of State, State Ballot Measures, http://vote.ss.ca.gov/Returns/prop/00.htm (last visited Aug. 21, 2007).

[111] Cal. Attorney Gen., *supra* note 11.

[112] *See* Proposition 83 Analysis by the Legislative Analyst, http://voterguide.ss.ca.gov/props/prop83/analysis83.html (last visited August 21, 2007) [hereinafter Proposition 83 Analysis]; *see also* CAL. WELF. & INST. CODE § 6608.5 (West Supp. 2007) (providing a minimum distance of a quarter mile).

A. Events Prior to the November 2006 Election

Prior to the November election, local newspapers reported on the various opinions toward Proposition 83.[113] Becky Warren, a spokeswoman for *Yes on 83*, commented, "[t]he bottom line is that parents don't want to have their children going to school next to a child molester."[114] The bill's lead sponsors proclaimed that the 2000-foot restriction was necessary because it is the normal distance that children can walk to school on their own.[115] However, some of those in law enforcement, the group in charge of implementing the restriction, vehemently opposed the measure.[116] Not only would the implementation and enforcement costs of the measure escalate to more than $100 million per year within the first decade, but the measure would also turn entire cities into virtual "Predator Free Zones."[117] For example, all registered sex offenders would be prohibited from residing in San Jose, except for an industrial stretch along Monterey Highway and a wealthy neighborhood near the Almaden Country Club.[118] As police Sgt. Ron Helder of San Jose stated, "[t]his is less about protecting children than politics."[119] Echoing these sentiments, Sgt. Blayn Persiani of Santa Clara argued: "The intent of this law is good . . . [b]ut the resources needed to enforce it? They aren't there."[120]

In the summer leading up to the election, Research Specialist Marcus Nieto and Professor David Jung prepared a memorandum discussing the ramifications of the proposed Proposition 83 at the request of Assembly Member Mark Leno, Chair of the State Public Safety Committee.[121] The detailed analysis reviewed other states' residency restrictions, and included a brief examination of the limited existing research, the

113 *See, e.g.,* Sean Webby, *Restrictions Will Drive Offenders Underground, Measure's Foes Say*, SAN JOSE MERCURY NEWS, Sept. 27, 2006, http://www.mercurynews.com/mld/mercurynews/news/politics/elections/15618828.htm.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 NIETO & JUNG, *supra* note 8.

Miller opinions from Iowa and other judicial opinions, and possible legal ramifications of Proposition 83.[122] Most notably, the authors commented that the bill was overinclusive, as it applied to *all* sex offenders, not just sex offenders whose offenses involved minors.[123] Since the Iowa statute in *Miller II* only applied to sex offenses involving a minor, the Eighth Circuit's decision would be even less persuasive authority as applied to Proposition 83.[124] Moreover, previous California appellate decisions imply that the state constitution may be more protective of a person's right to choose a residence as part of the right to intrastate travel than the U.S. Constitution.[125] By infringing on a substantive due process right, Proposition 83 may trigger strict scrutiny upon judicial review, a more stringent test than the rational basis test applied in *Miller II*. For Proposition 83 to be valid, then, a court would have to find that although it applied to all sex offenders, Proposition 83 was narrowly tailored to achieve the state's compelling interest in protecting minors.[126] The authors concluded that it would be "extremely difficult to predict whether a statute restricting the residency of registered sex offenders who have never offended against a minor would be found constitutional by the Ninth Circuit."[127]

B. Proposition 83 in Court

Despite the opposition to Proposition 83 and the possible legal challenges surrounding it, the voters easily passed the ballot measure in the November election. Just hours after the measure passed, opponents filed suit in San Francisco in *Doe v. Schwarzenegger*.[128] The next day, U.S. District Judge Susan Illston issued a temporary restraining order against Proposition 83's residency restriction provision until the court decided the constitutionality of the provision.[129] Judge Illston's decision was

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122 *Id.*

123 *Id.*

124 *See id.* at 44–45.

125 *Id.* at 44.

126 *See id.*

127 *Id.* at 45.

128 No. 06-6968 (N.D. Cal. Nov. 8, 2006); *see also* Jenifer Warren, *Judge Blocks Part of Sex Offender Law*, L.A. TIMES.COM, Nov. 9, 2006, http://www.latimes.com/news/local/politics/cal/la110806jessicaslaw,0,7781880.story?coll=la-home-headlines.

129 Warren, *supra* note 128.

significant because a judge only grants a temporary restraining order when she believes that the plaintiff will prevail. Attorneys for the plaintiff, "John Doe," argued before the court that the residency restriction violated the Ex Post Facto Clause and the plaintiff's substantive due process right by forcing offenders to move from their homes without notice.[130] Judge Illston agreed, stating that "John Doe" had been "a law-abiding and productive member of his community" and would suffer "irreparable harm" if the residency restriction were implemented.[131] The governor's office issued a statement pledging to vehemently fight the lawsuit so "implementation of this vital measure can go forward to protect Californians against the lewd acts of convicted felons."[132]

Further legal questions surrounding Proposition 83 emerged during hearings and briefs filed in the San Francisco lawsuit. It was unclear whether the law was to apply retroactively or only to offenders convicted subsequent to the passing of the bill, since Proposition 83 was silent on this issue.[133] Although Sen. George Runner, a sponsor of the measure, never intended the residency restriction to apply to the 85,000 registered sex offenders already living in California, the State Department of Corrections and Rehabilitation started sending notices to registered sex offenders warning they might be required to move if they currently lived within 2000 feet of a school or park.[134] Additionally, opponents of Proposition 83 had argued against it based on the belief that current sex offenders would be required to move.[135]

U.S. District Judge Jeffrey White, the presiding judge in the San Francisco lawsuit, sought clarification from the Attorney General's office on this issue. In preliminary briefs, the Attorney General's office stated that the residency restriction was not retroactive.[136] However, in a subsequent hearing, Deputy Attorney General Teri Block told Judge White that

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130 *See id.*

131 *Id.*

132 *Id.*

133 *See* Proposition 83 Analysis, *supra* note 112.

134 *See* Warren, *supra* note 128.

135 Prop83.org, Stories from Sex Offenders, http://prop83.org/stories.html, (last visited August 8, 2007).

136 Associated Press, *Judge Extends Restraining Order Halting Prop. 83*, CBS5.COM, Nov. 27, 2006, http://cbs5.com/politics/local_story_331150037.html.

registered sex offenders who currently reside within a prohibited zone could remain in their homes, but would be required to comply with the new residency restriction if they moved, regardless of the date of their conviction.[137] Judge White felt "a little bit ambushed" because the Attorney General was adopting "a completely new and different position than set forth in their papers."[138] Creating further legal uncertainty, U.S. District Judge Lawrence Karlton ruled on February 9, 2007, in another lawsuit challenging Proposition 83, that the residency restriction would not apply retroactively to those already registered as sex offenders.[139] However, Judge Karlton left for a future case whether the law would apply to sex offenders who were not registered because they were serving time in prison at the time of the law's passage.[140] On February 23, 2007, Judge White, echoing Judge Karlton's ruling, dismissed the San Francisco lawsuit by ruling that "John Doe" lacked standing to bring suit, as Proposition 83 could not be applied retroactively and therefore was not enforceable against the plaintiff.[141] As a spokesman for the Attorney General's office summarized the current state of the law, "[e]veryone now agrees this law is prospective, but what's missing is a definitive legal decision on exactly who gets swept up by it."[142] Given that about 350 sex offenders who were in prison at the time Proposition 83 passed are up for parole each month, the law's implementation remains uncertain.[143] Currently, "most law enforcement agencies around the state are in a holding pattern in terms of how they should proceed."[144] Nevertheless, Governor Schwarzenegger released an illusory statement following Judge White's decision, declaring, "[t]his ruling allows my administration to continue implementing the will of the people as expressed in this landmark initiative, and to continue protecting our children from

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137 *Id.*

138 *Id.*

139 Doe v. Schwarzenegger, 476 F. Supp. 2d 1178, 1178 (E.D. Cal. 2007).

140 *Id.* at 1179 n.1.

141 Jennifer Warren, *Prop. 83 Rulings Leave a Grey Area*, L.A. TIMES, Feb. 24, 2007, at B-1.

142 *Id.*

143 *See id.*

144 *Id.*

sex offenders."[145] However, until a court decides the constitutionality of the measure, and until the state determines who is subject to the law, Proposition 83 will fail to achieve any of its purported objectives.

C. Lessons from Proposition 83

Proposition 83 is a useful example of the legal challenges states face when attempting to implement mandatory residency restrictions. While the drafters of Proposition 83 may have intended to ensure the safety of children, it is also clear that the measure was primarily politically crafted to respond to the public's fears. In drafting the residency restriction, the authors blindly followed the popular trend of state legislatures across the country without considering whether the new law would withstand judicial review, whether the state had the resources to enforce such a law, or whether existing research supported the measure. Proposition 83 highlights the legal uncertainty surrounding the constitutionality of residency restrictions, as various state and federal courts weigh in on the debate. It is already clear that state courts, U.S. District Courts, and the Eighth Circuit Court of Appeals cannot agree on whether a residency restriction violates the Ex Post Facto Clause of the Constitution. California is no exception, as both judges ruling on Proposition 83 expressed caution on the constitutionality of the measure. As time passes and states experiment with different forms of mandatory residency restrictions, scholarly research increasingly opposes these measures,[146] as do law enforcement officials who are responsible for implementing the resource-draining restriction.[147] Yet the public continues to support harsher limitations on sex offenders' freedoms. This issue will certainly reach many more federal courts of appeal in the near future, but ultimately will remain unclear until the Supreme Court rules on the topic.

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145 *Id.*

146 *See, e.g.,* Levenson, *supra* note 84.

147 *See, e.g.,* IOWA COUNTY ATTORNEYS ASS'N, *supra* note 94.

IV
OREGON'S NONMANDATORY RESIDENCY RESTRICTION—A BETTER MODEL?

While California struggles to resolve issues surrounding Proposition 83, its northern neighbor, Oregon, has enacted a more flexible sex offender residency restriction while avoiding the media attention seen elsewhere. As previously mentioned, twenty-two states have enacted some form of residency restrictions. Eighteen of these residency restrictions are mandatory and apply uniformly to a classified group of sex offenders.[148] However, Minnesota, Oregon, and Texas have taken a different approach by allowing a parole board to determine whether residency restrictions apply to individual convicted sex offenders released on parole.[149] This section will examine Oregon's nonmandatory residency restriction, explaining why it serves as a more effective model to achieve the goals of protecting our children, reducing rates of recidivism, and withstanding judicial review.

Oregon has a sizeable sex offender population, with over 12,000 registered offenders.[150] In fact, Oregon has the second-highest number of registered sex offenders per 100,000 people in the entire country.[151] Approximately one-third of all Oregon inmates are currently incarcerated for a sex crime or have a sex crime in their criminal history.[152]

A. Oregon's Residency Restriction

Oregon's residency restriction is unique in that the law merely states a process to determine where a sex offender may reside following release from prison. ORS 144.642 states the general principle "against allowing a sex offender to reside near

148 NIETO & JUNG, *supra* note 8, at 17 tbl.2.

149 *See* MINN. STAT. ANN. § 244.052 (West 2003 & Supp. 2007); OR. REV. STAT. § 144.642 (2005); TEX. GOV'T CODE ANN. § 508.187 (Vernon 2004).

150 Or. State Police, Sex Offender Registration About Us, http://www.oregon.gov/OSP/SOR/about_us.shtml (last visited August 5, 2007).

151 Ellen Perlman, *Where Will Sex Offenders Live?*, GOVERNING MAGAZINE, June 2006, *available at* http://66.23.131.98/archive/2006/jun/sex.txt.

152 *See* Or. Dep't of Corr., Inmate Population Profile for 8/1/2007, http://www.oregon.gov/DOC/RESRCH/docs/inmate_profile.pdf (last visited Aug. 9, 2007).

locations where children are the primary occupants or users."[153] However, the law authorizes the Department of Corrections, in consultation with the State Board of Parole and Post-Prison Supervision, to develop a matrix to determine the permanent residence of a sex offender.[154] As authorized, the Department of Corrections enacted OAR 255-060-0009, Residence Requirements for Certain Sex Offenders Upon Release from Custody:

> (1) A sex offender classified as a sexually violent dangerous offender (ORS 137.765) or a predatory sex offender (ORS 181.765) may not reside near locations where children are the primary occupants or users.
> (2) This prohibition applies to permanent housing and not to transitional housing. For purposes of this rule, transitional housing means housing intended to be occupied by a sexually violent dangerous offender or a predatory sex offender for 45 days or less immediately after release from custody.[155]

However, after stating these general principles, the Department of Corrections allows for exceptions in certain circumstances. OAR 255-060-0009(3) states:

> (3) Exceptions to this prohibition may be made by the supervising parole/probation officer if it is determined that there is sufficient information to support this placement in terms of public safety and the rehabilitation of the offender. In making this determination, the following factors must be considered:
>
> (a) Other residential placement options pose a higher risk to the community, or
> (b) An enhanced support system that endorses supervision goals and community safety efforts is available at this residence, or
> (c) Enhanced supervision monitoring will be in place (e.g. electronic supervision, curfew, live-in-care provider, along with community notification), or
> (d) This residence includes 24-hour case management, or
> (e) The offender is being released from prison unexpectedly and more suitable housing will be arranged as soon as possible. If any of these factors apply to the offender and the residence under review, an exception to the permanent residence prohibition may be allowed.[156]

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153 OR. REV. STAT. § 144.642(a).

154 § 144.642.

155 OR. ADMIN. R. 255-060-0009(1)–(2) (2005).

156 OR. ADMIN. R. 255-060-0009(3).

In addition, a superceding law to the residency restriction requires all offenders on parole, regardless of their offense, to "reside for the first six months in the county where the inmate resided at the time of the offense that resulted in the imprisonment."[157] Like the residency restriction, exceptions apply under certain circumstances.[158]

Darcey Baker, Board Member on the Board of Parole and Post-Prison Supervision, was a key author in drafting section 144.642 of the Oregon Code. Ms. Baker was previously a parole officer in Clackamas County for twenty-five years and is involved with the Oregon Sex Offender Supervision Network.[159] In her current capacity, she approves every residency restriction placed on a sex offender upon release from prison.[160] In crafting the language of the residency restriction, Ms. Baker emphasized that the authors specifically made the prohibition against residing *near* where children gather to afford the parole officer wide discretion.[161] Ms. Baker recounted a specific case that influenced the drafting of ORS 144.642, where a sex offender resided in a home near a school and church.[162] Although the community was enraged by the placement, the sex offender would have been homeless otherwise and perhaps would have fled elsewhere to find housing.[163] Knowing the offender's location, law enforcement officers could effectively monitor his actions.[164] As Ms. Baker stated, although this was not the ideal living arrangement, the alternative "would be more dangerous to the community."[165]

Conversely, in a recent case, a sex offender desired to live in a trailer on a two-plus acre lot, where the property dropped off into a wooded area that backed up into a new subdivision and

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157 OR. REV. STAT. § 144.270(5)(a); *accord* OR. REV. STAT. § 144.102(6)(a); OR. ADMIN. R. 255-070-0003(1).

158 OR. REV. STAT. § 144.102(6); OR. REV. STAT. § 144.270(5); OR. ADMIN. R. 255-070-0003(3).

159 Oregon.gov, Board of Parole and Post-Prison Supervision Board Members, http://www.oregon.gov/BOPPPS/members.shtml (last visited Aug. 8, 2007).

160 Baker, *supra* note 80.

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

was not separated by a fence.[166] Since this was an area where children might play, the parole officer determined that the residence was not appropriate for a sex offender.[167] Had the law merely prohibited a sex offender from living within 2000 feet of a school or church, this offender would have been able to reside at a potentially inappropriate location.[168] The purposeful vagueness of the law provides the parole officer with the necessary discretion to determine the most appropriate residence for each sex offender, benefiting the community and the offender alike.[169]

In describing the process of determining the residency restriction, Ms. Baker explained that the State Board of Parole and Post-Prison Supervision begins to review a sex offender's case 120 days prior to release.[170] At this time, the offender may request his or her preferred place of residence.[171] The assigned parole officer has thirty days to conduct an investigation following the matrix outlined in OAR 255-060-0009.[172] Thirty days prior to the sex offender's release, the parole officer must make a determination.[173] While most sex offenders are not represented by an attorney at this time, they may send a letter for administration review to contest the parole officer's determination.[174]

Summarizing the effectiveness of Oregon's residency restriction, Ms. Baker stated that the policy "forces us to look at the individual offender, which is always better than a blanket policy."[175] Instead of enacting mandatory residency restrictions, Ms. Baker believes the best policy is to reintegrate the sex offender back into the community.[176] Sex offenders will always exist, so the state must enact a policy to "effectively manage the

166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*

population . . . [because] the scariest sex offenders are the ones I don't know about."[177]

B. Benefits of Oregon's Model

Although Oregon's residency requirement has not faced a constitutional challenge, Oregon's model offers many advantages making it more likely to withstand judicial review. First, the primary challenge to residency restrictions is typically the ex post facto challenge, where the plaintiffs argue that the measure is more punitive in nature than regulatory.[178] Under this challenge, Oregon's residency restriction is readily distinguishable from the Iowa statute and Proposition 83 in California. While Oregon's law states the general prohibition that a sex offender may not live near places where children congregate, it allows exceptions to this rule. This difference shows that the state does not treat all sex offenders alike, as the parole officer looks at each offender individually to see if there are overriding factors allowing an offender to live in a generally prohibited area. The distinction allows the state to argue that the purpose and actual effect of the residency restriction is to find the most appropriate residence for a high-risk offender in a way that also protects the community. Furthermore, there is no blanket "banishment" effect as in other states, as ORS 144.270(5) supercedes the residency restriction by requiring that counties accept the sex offender back into their community. In addition, the residency restriction only applies to permanent housing, so sex offenders are not forced to stay in prison longer than their sentences require due to an inability to find permitted housing, as was the case in *Miller I*.[179]

Second, a substantive due process argument would also likely fail, because the exceptions to Oregon's general prohibition make it impossible for sex offenders to argue that the state has infringed on their right to intrastate travel or their right to live with their families. In fact, one of the exceptions specifically contemplates that the sex offender may live with an "enhanced

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177 *Id.*

178 *See Miller I*, 298 F. Supp. 2d 844, 866 (S.D. Iowa 2004); *Miller II*, 405 F.3d 700, 718 (8th Cir. 2005).

179 *See* OR. ADMIN. R. 255-060-0009(2) (2005).

support system."[180] Similarly, a procedural due process claim would likely fail, unlike in *Miller I*, as each offender is given an individual risk assessment. If the offender poses no risk to children, the parole officer will more readily exercise one of the exceptions to the general residency prohibition.

Finally, if a court finds no infringement of a constitutional right, Oregon will most likely be able to prove that the state's residency restriction is rationally related to its legitimate interest in protecting the community. Both the complex matrix the state uses and the thorough investigation completed by each parole officer show that the state has not adopted a blanket policy applying to all sex offenders. The individual process for each offender demonstrates that Oregon has conducted the necessary research to find the most appropriate place in the community to protect the safety of its children.

In addition to likely withstanding judicial review, Oregon's residency restriction should be commended for its incorporation of the latest research on controlling sex offender populations. Not only does the process respect the constitutional rights of each offender through an individual assessment, it also strives for the primary goal of protecting children. Instead of passing yet another NIMBY (not-in-my-backyard) law, Oregon forces its counties to effectively manage their sex offender populations. Instead of pushing a sex offender underground, away from the eye of law enforcement, Oregon has created a system that encourages a sex offender to register and remain monitored.

C. Deficiencies of Oregon's Model

Despite the comprehensive research incorporated into Oregon's sex offender residency restriction, the approach is still vulnerable to criticism. While Oregon's model most likely will survive the three common facial challenges, as discussed above, it could face a number of as-applied and procedural due process challenges that do not pertain to mandatory restrictions.

Most notably, the discretion given to parole officers in providing individual risk assessments for offenders opens the door to increasing as-applied challenges.[181] Allowing one sex

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[180] OR. ADMIN. R. 255-060-0009(3)(b).

[181] This Comment has largely focused on facial challenges to residency restrictions. However, both mandatory and nonmandatory residency restrictions

offender to live in a generally prohibited area due to mitigating factors sets a precedent for future sex offenders coming off parole. While the Oregon statute expressly lists factors to consider in determining where a sex offender may live, the statute defers to the parole officer in deciding how much weight to give each factor. The statute does not appear to provide any procedural safeguards to protect against potentially harmful individual discretion. As a result, this model runs the risk of treating sex offenders in a disparate fashion, depending on the underlying preferences of each parole officer. Given the lack of uniformity, the courts may be forced to review the vague instructions given parole officers and determine whether sex offenders are afforded sufficient notice of the repercussions of their actions.

In addition, the case-by-case determination in the Oregon model raises questions about the procedural due process afforded each offender. The only way an offender can challenge a parole officer's determination of an appropriate residential location is by writing a letter for administrative review. During this informal process, which is not articulated in the statute, most offenders are not represented by an attorney. Since there is no explicit legal process for review besides filing a complaint, Oregon's model may be, in effect, no better than a mandatory restriction. Ultimately, as states experiment with differing forms of residency restrictions over time, a comprehensive comparative analysis will determine whether Oregon's model is in fact the model to emulate.

CONCLUSION

As states rush to pass mandatory residency restrictions prohibiting registered sex offenders from living in designated areas, increasing research suggests that such blanket policies are ineffective in reaching their desired objectives and may even have negative consequences. Although various courts from Georgia to California have weighed in on the constitutionality of these laws, no consensus has emerged. The Supreme Court has

could be subject to numerous as-applied challenges. The point here is that Oregon's nonmandatory restriction is perhaps more ripe to potential as-applied challenges than mandatory restrictions.

declined to address this issue,[182] although the *Smith v. Doe*[183] decision may help predict how the Court would rule.[184] Given the conservative ideology of the majority of the Court for the foreseeable future, it will likely determine that the measure is not punitive in nature, thus denying the primary ex post facto challenge.

Regardless of whether a mandatory residency restriction is constitutional, states should avoid the legal uncertainty and resist the temptation to pass legislation driven solely by the fears of our society. Instead, states should act in a more rational manner by listening to the experts in the field and those who are responsible for enforcing the measures and should pursue the most effective method of reducing rates of recidivism. Oregon is an example of a state that has proceeded in such a fashion. If these measures are really about protecting the children, our elected officials should act in the children's best interest.

182 *Doe v. Miller*, 126 S. Ct. 757 (2005).

183 538 U.S. 84 (2003).

184 Justice Kennedy, writing for the majority, held that Alaska's sex offender registration requirements did not pose an ex post facto problem. *Id.* at 105–06. Justice Souter concurred only with the judgment, *id.* at 107–10, while Justices Stevens, Ginsberg, and Breyer dissented, *id.* at 110–17.