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SEX OFFENDER RESIDENCY RESTRICTIONS ARE NOT “OK”: WHY OKLAHOMA NEEDS TO AMEND THE SEX OFFENDERS REGISTRATION ACT

Sex offenders are a serious threat to this country and most of their victims are children.¹ Upon release from prison, convicted sex offenders are more likely than other convicted felons to be rearrested for a sex crime.² It only makes sense that families do not want a convicted sex offender living next door, and legislators have responded by implementing “not-in-my-backyard”³ laws in an attempt to control where sex offenders can legally reside.⁴ Such legislation is growing rapidly at both the state and federal level,⁵ but in reality, this legislation provides “a false sense of security.”⁶ These laws have backfired, and instead of protecting the public, the laws cause sex offenders to go underground by either not registering or by providing fake addresses.⁷ The implementation of residency restrictions and prohibition against sex offenders residing within a certain distance of schools, child care facilities, parks, and other places children congregate,⁸ contributes to these registration problems.⁹

Oklahoma has followed the legislative trend of strengthening residence restrictions against sex offenders through a series of amendments to its Sex Offenders Registration Act. After expanding residence restrictions in 2006, many Oklahoma jurisdictions saw

1. *Conn. Dept. Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (citing *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality)); see also Lawrence A. Greenfeld, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* iii (U.S. Dept of Just. Feb. 1997) (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf>) (Self-reports from convicted sex offenders indicated two-thirds had victims under the age of 18, and 58 percent of those offenders indicated the victims were age 12 and under.); Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 2 tbl. 1 (U.S. Dept. of Just. Jul. 2000) (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf>) (Victims age 17 and under account for 66.9 percent of all sexual assaults.).

2. Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. Dept. of Just. 1–2, 24 tbl. 21 (Nov. 2003) (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>) (Within three years from release, 5.3 percent of sex offenders were rearrested for a sex crime, in comparison to only 1.3 percent of non-sex offenders; within three years from release, 3.5 percent of sex offenders were reconvicted.).

3. Jill Smolowe, *Not in My Backyard!* 144 *Time* 59 (Sept. 5, 1994).

4. Wendy Koch, *Sex-Offender Residency Laws Get Second Look*, *USA Today* 1A (Feb. 26, 2007) (available at http://www.usatoday.com/news/nation/2007-02-25-sex-offender-laws-cover_x.htm).

5. Alan Greenblatt, *Sex Offenders*, 16 *CQ Researcher* 721, 735 (Sept. 8, 2006).

6. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 *Iowa L. Rev.* 1, 19 (2006).

7. Koch, *supra* n. 4.

8. *Id.*; Marcus Nieto & David Jung, *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review* 17 tbl. 2 (Calif. Research Bureau Aug. 2006) (available at <http://www.library.ca.gov/crb/06/08/06-008.pdf>).

9. *Infra* pts. I(C) & IV (discussing a decrease in sex-offender registrations after restrictions were implemented).

an increase in the number of lost offenders.¹⁰ In 2007, the Oklahoma Legislature again amended the state's Sex Offenders Registration Act.¹¹ These amendments purportedly require the Department of Corrections to assess sex offenders on an individual basis by looking at various factors and then assigning sex offenders to one of three risk levels.¹² As implemented, however, the convicted offense is the sole determining factor in assigning risk levels and other, more important, factors are not taken into consideration.¹³

This Comment examines the 2007 amendments adding risk levels to Oklahoma's Sex Offenders Registration Act, the state's residency restrictions, and how the law can be improved. In particular, this Comment argues that in determining a registered sex offender's numeric risk level, Oklahoma should use individualized risk assessments that take into consideration multiple factors instead of relying solely on the offense. Based on these individualized assessments, Level One sex offenders should not be subjected to the residency restrictions because they pose a low danger to the community and are not likely to engage in further criminal sexual conduct. This Comment proceeds in five parts. Part I provides a history of how sex offender registration and notification laws and residency restrictions have evolved over time on both the federal level and the states' various implementations. Part II examines how the sex offender registration and notification laws have withstood challenges to the Supreme Court. Part III examines challenges to sex offender residency restrictions. Part IV looks at whether residency restrictions are effective in preventing future sex crimes. Finally, Part V argues that Oklahoma should use individualized risk assessments that consider multiple factors to increase the accuracy in determining a sex offender's risk level. The risk levels should then be tied to the residency restrictions and only those offenders that are truly a threat to the public should be subject to a residency restriction.

I. LEGISLATION TARGETING SEX OFFENDERS

Legislators do not want to appear soft on crime, particularly sex crimes.¹⁴ In response to fear and pressure from the media and the public, lawmakers quickly pass legislation without full consideration of the necessity and effectiveness of the new laws.¹⁵ Recently, the enactment of sex offender legislation is at a faster pace than ever before.¹⁶ Although well intentioned, some of the laws targeting sex offenders may

10. See e.g. Mick Hinton, *Fixing Sex-Offender Law May Give Senators Pause*, Tulsa World A-9, A-14 (May 16, 2007) (Tulsa saw a decrease in registration but an increase in caseload trying to find where offenders live.).

11. Okla. H. 1760, 51st Leg., 1st Sess. (Jan. 17, 2007) (available at http://webserver1.lsb.state.ok.us/2007-08HB/HB1760_int.rtf) (effective Nov. 1, 2007).

12. Okla. Stat. tit. 57, §§ 582.1, 582.5(C) (Supp. 2007).

13. *Infra* pt. V (discussing the statute and the screening tool selected by the risk assessment review committee).

14. See Greenblatt, *supra* n. 5, at 724 (Lawmakers "either vot[e] for the perverts or vot[e] for [their] constituen[ts].") (quoting Ga. St. Rep. John Lunsford); Hinton, *supra* n. 10, at A-14 (explaining that state legislators fear votes could be used against them in elections).

15. 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, 625 (2006).

16. Greenblatt, *supra* n. 5, at 735.

actually undermine public safety.¹⁷

A. *Registration and Notification Laws*

In 1947, California was the first state in the country to enact a sex offender registration statute.¹⁸ However, it was not until the 1990s, with national publicity from a handful of shocking kidnappings, sexual assaults, and murders resulting in federal legislation, that other states followed suit.¹⁹

On an October evening in 1989, 11-year-old Jacob Wetterling was riding his bike home from a convenience store in St. Joseph, Minnesota with his 10-year-old brother Trevor and their 11-year-old friend Aaron when a masked man carrying a gun approached.²⁰ The gunman ordered the boys to throw their bikes into a ditch and lie face down on the ground; the gunman proceeded to ask each boy his age.²¹ After the boys answered, the man ordered Trevor, and then Aaron, to run away without looking back and threatened to shoot them.²² As the boys ran towards the woods, they looked back and saw the gunman grab Jacob's arm.²³ When the boys reached the trees, they looked back again, but this time, Jacob and the gunman were gone, and Jacob has never been found.²⁴

Following Jacob's abduction, investigators discovered that, unknown to local law enforcement, there were halfway houses for sex offenders in the area.²⁵ Jacob's mother, Patty, became involved with the Governor's Task Force advocating for stronger sex offender registration requirements.²⁶ In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act²⁷ in memory of Jacob.²⁸ The Jacob Wetterling Act mandated all states to implement a sex offender registry within three years of its enactment.²⁹ The length of registration required ranges from a minimum of 10 years to a potential maximum period of registering for life for certain offenders.³⁰ Prior to the passage of this Act, only a handful of states required sex offenders to register, but today, all 50 states and the District of Columbia have sex

17. See *id.* at 724.

18. Cal. Dept. Just., *Sex Offender Registration and Exclusion Information*, <http://www.meganslaw.ca.gov/sexreg.aspx?lang=ENGLISH> (accessed May 23, 2009).

19. See Karen J. Terry, *Sexual Offenses and Offenders: Theory, Practice, and Policy* 183–84 (Thomson Wadsworth 2006); Karen J. Terry & John S. Furlong, *Sex Offender Registration and Community Notification* 1–2 (2d ed., Civic Research Inst. 2003).

20. Margaret C. Jasper, *Missing and Exploited Children: How to Protect Your Child* 11 (Oceana's Leg. Almanac Series: L. for Layperson, Oxford U. Press 2006); Jacob Wetterling Resource Ctr., *Jacob's Story*, <http://www.jwrc.org/who-we-are/history/jacob's-story.aspx> (accessed May 23, 2009).

21. Jacob Wetterling Resource Ctr., *supra* n. 20.

22. *Id.*

23. *Id.*

24. *Id.*

25. Bureau Just. Assistance, *Background Information on the Act and Its Amendments*, <http://www.ojp.usdoj.gov/BJA/what/2a2jwactbackground.html> (accessed May 23, 2009).

26. *Id.*

27. 42 U.S.C. § 14071 (2006).

28. Jasper, *supra* n. 20, at 12.

29. 42 U.S.C. § 14071(g)(1). States that fail to comply with the registration program lose 10 percent of their federal funding for law enforcement. 42 U.S.C. § 14071(g)(1)–(2).

30. 42 U.S.C. § 14071(b)(6) (lifetime registration required for sexually violent predators, recidivists, and offenders who commit certain aggravated offenses).

offender registries.³¹

It soon became apparent that registration alone was inadequate protection. In 1994, Jesse Timmendequas, a twice-convicted pedophile and registered sex offender, lured his seven-year-old neighbor, Megan Kanka, into his home and raped and murdered her.³² Had Megan's parents known a sex offender lived across the street, they would have been more vigilant and could have taken greater precautions to protect her.³³ In 1996, in response to this tragedy, the impetus for further public protection and prevention of recidivism at the federal level resulted in legislators passing Megan's Law,³⁴ which amended the Jacob Wetterling Act and required all states to develop a community notification program by providing public access to sex offender information through the maintenance of sex offender websites.³⁵ Any community notification beyond the required internet sites is left to each state's discretion.³⁶

Although all states have implemented Megan's Law, the laws vary from state to state and there is little uniformity.³⁷ One of the differences between states is the type of offense triggering registration.³⁸ Some states require registration only if the offense involved a child victim; other states require registration only for convictions of a completed offense, while others require registration for a finding of not guilty by reason of insanity.³⁹ Another common difference is how the registration statutes apply to juvenile offenders.⁴⁰ Most states require juveniles to register, but there are many states that exempt juveniles from the registration requirement, and in other states, juveniles are required to register only if over a certain age.⁴¹

The number of offenders registered in each state also depends on whether the state applies the registration requirement retroactively, requiring offenders to register even if the offense was committed prior to the statute's enactment.⁴² Courts have consistently upheld retroactive registration requirements although a few have struck down retroactive notification statutes as unconstitutional on ex post facto grounds.⁴³ The trend, however, is for courts to uphold the retroactive notification statutes.⁴⁴ Another difference between

31. Terry & Furlong, *supra* n. 19, at 1-2; Natl. Ctr. for Missing & Exploited Children, *Sex-Offenders: History*, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3032 (accessed May 23, 2009).

32. Karen Terry & B.J. Cling, *Megan's Law: New Protections against Sex Abuse*, in *Sexualized Violence against Women and Children: A Psychology and Law Perspective* 245, 251 (B.J. Cling ed., Guilford Press 2004).

33. Jasper, *supra* n. 20, at 13.

34. See 42 U.S.C. § 14071(e).

35. Jasper, *supra* n. 20, at 13; Ntl. Ctr. for Missing & Exploited Children, *supra* n. 31. To search the national sex offender website, see U.S. Dept. Just., *Dru Sjodin National Sex Offender Public Website*, <http://www.nsopr.gov/> (accessed May 23, 2009). For a listing of each state's sex offender registry website, see FBI, *Crimes against Children, National/State Sex Offender Registry*, <http://www.fbi.gov/hq/cid/cac/registry.htm> (accessed May 23, 2009).

36. Ntl. Ctr. for Missing & Exploited Children, *supra* n. 31.

37. Terry, *supra* n. 19, at 184.

38. *Id.* at 184.

39. *Id.* at 184, 189.

40. *Id.* at 190-91.

41. *Id.* at 190.

42. Terry, *supra* n. 19, at 189.

43. Terry & Furlong, *supra* n. 19, at 1-21 to 1-22.

44. *Id.* at 1-22 to 1-23.

states is the length of time an offender is required to register; some states require lifetime registration for all offenders, and other states allow for removal from the registry after a period of time, typically a minimum of at least 10 years.⁴⁵

Another recent movement in sex offender legislation is to increase sentencing, impose mandatory minimums, and provide for more stringent monitoring of convicted sex offenders.⁴⁶ This legislation, commonly referred to as Jessica's Law,⁴⁷ was in response to the abduction, rape, and murder of 9-year-old Jessica Lunsford by a convicted sex offender.⁴⁸ In 2005, Florida was the first state to pass the Jessica Lunsford Act,⁴⁹ and 33 states have now enacted the same or similar versions.⁵⁰ In addition to increasing the length of sentences, some states now provide the death penalty for repeat offenders with child victims.⁵¹

Due to the significant differences between states, President George W. Bush signed the Adam Walsh Child Protection and Safety Act of 2006⁵² into law to help strengthen efforts to protect children from sexual predators.⁵³ Exactly 25 years earlier,⁵⁴ six-year-old Adam Walsh⁵⁵ was shopping with his mother in a Florida department store, and while she looked at lamps, he was abducted.⁵⁶ Over two weeks later, Adam's body was found, and his murder was finally solved in December 2008.⁵⁷

The Adam Walsh Act was designed to strengthen existing laws in four significant ways: first, it creates a national sex offender registry available to the public on the Internet;⁵⁸ second, it mandates stricter penalties for certain offenses;⁵⁹ third, it creates new taskforces to help protect children from sexual exploitation on the Internet;⁶⁰ and fourth, it creates a national child abuse registry and requires investigators to conduct background checks of adoptive and foster parents.⁶¹ States have three years to implement the changes or risk forfeiting 10 percent of federal law enforcement funding.⁶² Once all states are in compliance, there will be more uniformity in sex

45. *Id.* at I-10; Terry, *supra* n. 19, at 185-89.

46. Nieto & Jung, *supra* n. 8, at 12-13.

47. Greenblatt, *supra* n. 5, at 723.

48. *Id.*

49. 2005 Fla. Laws ch. 2005-28; Nieto & Jung, *supra* n. 8, at 12.

50. Jessica Marie Lunsford Found., <http://www.jmlfoundation.com> (accessed May 23, 2008).

51. Lori Robertson, *States Aim to Stop Sex Offenders: Will New Laws Keep Children Safe?* *Children's Beat* 6, 6 (Fall/Winter 2006).

52. Pub. L. No. 109-248, § 1, 120 Stat. 587, 587 (2006).

53. White House: Pres. George W. Bush, *Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006*, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-7.html> (July 2006) [hereinafter White House].

54. George W. Bush, Speech, *President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006* (Washington D.C., July 27, 2006) (available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>); Am.'s Most Wanted, *About John Walsh*, http://www.amw.com/about_amw/john_walsh.cfm (accessed May 23, 2009).

55. Adam's father, John Walsh, has become a victims' advocate and hosts the television show "America's Most Wanted." Am.'s Most Wanted, *supra* n. 54.

56. Jasper, *supra* n. 20, at 21.

57. *Id.*; Am.'s Most Wanted, *supra* n. 54.

58. 120 Stat. at 596; White House, *supra* n. 53.

59. 120 Stat. at 596-97; White House, *supra* n. 53.

60. 120 Stat. at 596-97; White House, *supra* n. 53.

61. 120 Stat. at 596-97; White House, *supra* n. 53.

62. 42 U.S.C. §§ 16924(a), 16925(a) (2006).

offender registries, with the hope that fewer sex offenders will slip through the cracks.⁶³

B. Sex Offender Classification

Most significantly, the Adam Walsh Act classifies sex offenders into three tiers, based on the severity and any recurrence of the offense(s), with tier III being the most serious.⁶⁴ The length of required registration as a sex offender correlates to the tier classification; a tier III offender is required to register for life, a tier II offender must register for 25 years, and a tier I offender must register for 15 years (with a possible reduction of five years if the offender maintains a clean record for 10 years).⁶⁵ The government's frequency of in person verification also depends on the corresponding tier: every three months for tier III offenders, every six months for tier II offenders, and once a year for tier I offenders.⁶⁶

Prior to the enactment of the Adam Walsh Act, many states already used a tiered-model of risk assessment for sex offenders.⁶⁷ The methods employed for assessing offender risk vary by state.⁶⁸ There are three possible approaches to assessing recidivism of sex offenders: pure actuarial assessments, adjusted actuarial assessments, and guided clinical judgments.⁶⁹ Actuarial assessments, which identify relevant risk factors and weigh those predictive factors to come up with an aggregate risk score and classification,⁷⁰ are the most frequently used⁷¹ and are the most accurate.⁷² Actuarial assessments typically look at static, stable factors that do not change over time.⁷³ Those factors include current and prior sexual offenses; victim-offender relationship; age, number, and gender of victims; and pattern of behavior.⁷⁴ A consideration of dynamic factors, such as problems with intimacy, social support, coping mechanisms, unstable lifestyles, impulse control, and substance abuse, increases the accuracy of risk

63. Ntl. Ctr. for Missing & Exploited Children, *supra* n. 31.

64. 42 U.S.C. § 16911 (2006). Tier III offenses include, or are comparable to or more severe than, aggravated sexual abuse or sexual abuse, abusive sexual conduct against a child under the age of 13, kidnapping of a minor (excluding those committed by parents or guardians), and repeat offenses committed by a Tier II offender. *Id.* at § 16911(4). Tier II offenses include, or are comparable to or more severe than, the following offenses, when committed against a minor: sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, or abusive sexual contact; or offenses that involve use of a minor in sexual performance, soliciting a minor for prostitution, or production or distribution of child pornography; or repeat offenses committed by a Tier I offender. *Id.* at § 16911(3). Tier I offenders are those other than a Tier II or Tier III offender. *Id.* at § 16911(2).

65. *Id.* at § 16915.

66. 42 U.S.C. § 16916 (2006).

67. Terry, *supra* n. 19, at 191.

68. *Id.*

69. R. Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in *Protecting Society from Sexually Dangerous Offenders* 63, 66 (Bruce J. Winick & John Q. La Fond eds., Am. Psych. Assn. 2003).

70. *Id.*; Andrew J. Harris, *Risk Assessment and Sex Offender Community Supervision: A Context-Specific Framework*, 70 Fed. Probation 36, 38 (Sept. 2006).

71. Harris, *supra* n. 70, at 39.

72. *Id.*

73. Terry, *supra* n. 19, at 193; Hanson, *supra* n. 69, at 71; Harris, *supra* n. 70, at 38–39. There is at least one actuarial assessment, the SONAR (Sex Offender Needs Assessment Rating) that uses dynamic, rather than static, factors. *Id.* at 39.

74. See Hanson, *supra* n. 69, at 66 tbl. 3.1, 68 tbl. 3.2; Terry, *supra* n.19, at 191; Harris, *supra* n. 70, at 38.

assessments.⁷⁵ Adjusted actuarial assessments allow evaluators to adjust the risk assessment up or down based on external factors.⁷⁶ In the guided clinical judgment approach, professional evaluators form a general opinion of the offender’s potential risk of recidivism based on a series of empirically validated risk factors.⁷⁷ In contrast, the Adam Walsh Act does not require individualized risk assessments of sex offenders; classification of offenders is based solely on the type and recurrence of the offenses.⁷⁸

In 2007, the Oklahoma Legislature amended the state’s Sex Offenders Registration Act.⁷⁹ The new statutes require the Department of Corrections to assess and assign sex offenders to one of three risk levels prior to release from a correctional institution.⁸⁰ In the case of an offender who is not incarcerated but receives a suspended sentence or any probationary term, the court, instead of the Department of Corrections, must make a determination of the numeric risk level on the day of pronouncing the judgment and sentence.⁸¹ The numeric risk level is determined by using an objective sex offender screening tool⁸² that assigns points solely based on the convicted offense.⁸³ A rating of level three indicates the offender will likely continue to engage in criminal sexual conduct and poses a serious threat to the community.⁸⁴ Offenders with a rating level of two may continue engaging in criminal sexual conduct and pose a moderate threat to the community.⁸⁵ A rating of level one indicates the offender is not likely to re-offend and poses a low threat to the community.⁸⁶

In compliance with the Adam Walsh Act, Oklahoma’s numeric risk level assigned to each offender dictates the length of time the offender is required to register, which begins from the date of the sentence completion.⁸⁷ Habitual or aggravated sex offenders and Level Three offenders are required to register for life; Level Two offenders are required to register for 25 years; Level One offenders are required to register for 15 years (with the possibility of a five year reduction for maintaining a clean record).⁸⁸ The frequency of address verification is also dependent upon the risk level.⁸⁹

75. Hanson, *supra* n. 70, at 71.

76. *Id.* at 67.

77. *Id.* at 66.

78. 42 U.S.C. § 16911. *See also id.* at § 14071(a)(3)(C) (defining “sexually violent predator”).

79. Okla. H. 1760, 51st Leg., 1st Sess.

80. Okla. Stat. tit. 57, § 582.1.

81. *Id.* at § 582.2(B).

82. The Department of Corrections’ Risk Assessment Review Committee is responsible for developing or selecting the screening tool, monitoring the use of the tool, and, if necessary, revising and replacing the screening tool. *Id.* at § 582.5.

83. Okla. Dept. Corrects., *Sex Offender Registration Level Assignment Tool* (available at www.doc.state.ok.us/offtech/020307e.pdf). *But see* Okla. Stat. tit. 57, § 582.5(C) (the screening tool should assign points for various “factors,” with the convicted offense serving only as the minimum basis (emphasis added)).

84. Okla. Stat. tit. 57, § 582.5(C)(3).

85. *Id.* at § 582.5(C)(2).

86. *Id.* at § 582.5(C)(1).

87. *Id.* at § 583(C) (Supp. 2007).

88. *Id.* at § 583(C), (E). Prior to this amendment, habitual or aggravated sex offenders were required to register for life, and all other sex offenders were required to register for 10 years. Okla. Stat. tit. 57, §§ 583(C), 584(J) (Supp. 2006) (superseded Nov. 1, 2007).

89. Okla. Stat. tit. 57, § 584(A)(5) (Supp. 2007).

C. Residency Restrictions

In 1995, Florida became the first state to implement residence restrictions upon sex offenders.⁹⁰ Other states followed suit, and by the end of 1999, seven states had enacted residency restrictions.⁹¹ This trend continued to grow and today 27 states have implemented residency restrictions in various degrees.⁹² Sometimes referred to as “distance marker” laws,⁹³ the most common restrictions⁹⁴ were modeled after traditional nuisance codes⁹⁵ and prohibit sex offenders from residing within 500 feet, but more typically within 1,000 to 2,000 feet, of schools, child care facilities, parks, and other places children gather.⁹⁶

In the last few years, city and county governments also began implementing residency restrictions to create “sex offender free” communities.⁹⁷ Hundreds of municipalities now have their own sex offender residency restrictions⁹⁸ and in many cases, these restrictions are more severe than those at the state level.⁹⁹ Even private housing developers have begun forbidding registered sex offenders from living in certain neighborhoods.¹⁰⁰ The trend has become contagious as more states and communities attempt to discourage displaced sex offenders from moving into their areas.¹⁰¹ The domino effect is intentional, as lawmakers attempt to push the problem off onto other communities.¹⁰² Although the list of jurisdictions implementing residency restrictions

90. Jill S. Levenson, *Residence Restrictions and Their Impact on Sex Offender Reintegration, Rehabilitation, and Recidivism* 2 (2007) (available at www.csom.org/ref/residencerestrictions.pdf); Singleton, *supra* n. 15, at 609 n. 86.

91. Singleton, *supra* n. 15, at 607.

92. Koch, *supra* n. 4.

93. Meghan Stromberg, *Locked up, Then Locked out*, *Planning* 21, 23 (Jan. 2007); Nieto & Jung, *supra* n. 8, at 15.

94. In addition to “Distance Marker” laws, some states have “Child Safety Zone” restrictions that forbid sex offenders from loitering within a certain distance of where children congregate, such as day care centers, schools, bus stops, and playgrounds. Nieto & Jung, *supra* n. 8, at 15.

95. Stromberg, *supra* n. 93, at 23; *see also* Levenson, *supra* n. 90, at 2.

96. Koch, *supra* n. 4; Nieto & Jung, *supra* n. 8, at 17 tbl. 2. The restricted areas are usually measured property line to property line. Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 *Akron L. Rev.* 339, 352 (2007).

97. Nieto & Jung, *supra* n. 8, at 21–23; Singleton, *supra* n. 15, at 609.

98. Jill S. Levenson & David A. D’Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor’s New Clothes?* 18 *Crim. Just. Policy Rev.* 168, 172 (2007); Nieto & Jung, *supra* n. 8, at 3; Stromberg, *supra* n. 93, at 22.

99. *See e.g.* Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 *Just. Research & Policy* 59, 60 (2007) (ordinances increase restricted zones to 2,500 feet); Megan McCurdy, *Case Note*, *Doe v. Miller*, 38 *Urb. Law.* 360, 361 (ordinances extending restricted areas to include swimming pools, libraries, parks, and multi-recreational trails); Nieto & Jung, *supra* n. 8, at 21–23; Robert F. Worth, *Exiling Sex Offenders from Town: Questions about Legality and Effectiveness*, 155 *N.Y. Times B1* (Oct. 3, 2005) (sex offenders banned from public hurricane shelters).

100. Wendy Koch, *Developments Bar Sex Offenders*, *USA Today* 3A (Jun. 16, 2006) (available at http://www.usatoday.com/news/nation/2006-06-15-sex-offenders-barred_x.htm) (sex offenders barred from subdivision; if convicted while living in the neighborhood, the offender has to pay a \$1,500 per day fine); Levenson & D’Amora, *supra* n. 98, at 173.

101. Levenson & D’Amora, *supra* n. 98, at 173.

102. *Id.*; Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 *Har. Civ. Rights-Civ. Libs. L. Rev.* 513, 516 (2007) (quoting Ga. State Rep. Jerry Keen, “[W]e don’t want these types of people staying in our state. . . . [W]e are going to send a message to [those types of people] that if you have a propensity to that crime perhaps you need to move to another state. . . . [T]hey just may want to live somewhere else And I don’t care where, as long as it’s not in Georgia.” (footnotes omitted)); Levenson, *supra* n. 90, at 2.

keeps growing, there are some that choose not to follow suit.¹⁰³ As will be discussed in Part IV, there are doubts as to the effectiveness of the statutes.¹⁰⁴

The differences found among jurisdictions implementing residency restrictions are similar to the differences found in comparing sex offender registration and notification statutes. The restrictions do not always apply to all registered sex offenders; several states exclude from the zones only high-risk, violent, or repeat offenders; offenders with child victims; or those on parole.¹⁰⁵ Juvenile offenders are also sometimes exempt from residency restrictions.¹⁰⁶ Some, but not all, of the laws provide exemptions for sex offenders who resided within the restricted areas prior to enactment.¹⁰⁷ However, most of those exemptions apply only to offenders who owned their homes within the restricted zones and not to renters or boarders.¹⁰⁸ The most restrictive residency restrictions prevent sex offenders from residing not only near schools, child care facilities, and parks, but include areas near community and recreational centers, places of worship, libraries, and bus stops.¹⁰⁹ As a result of these restrictions, sex offenders are excluded from the majority of available housing in many cities, and in some circumstances, entire towns are off-limits.¹¹⁰ Sex offenders who fail to comply with the residency restrictions can be convicted of a felony.¹¹¹

In 2003, Oklahoma followed the trend of implementing residency restrictions on sex offenders and forbade registered sex offenders from residing within 2,000 feet of any school or educational institution.¹¹² In 2006, Oklahoma expanded this restriction to forbid temporary and permanent residence of registered sex offenders within 2,000 feet of playgrounds, parks, and licensed child care facilities, in addition to schools and educational institutions.¹¹³ Problems with the new residency restrictions quickly became apparent, and as sex offenders were unable to find residences that complied with the restrictions,¹¹⁴ they went underground and fell off the registry completely by not registering their residences.¹¹⁵ Law enforcement expressed concern that it was more

103. Stromberg, *supra* n. 93, at 23.

104. *Id.* at 23–24.

105. Nieto & Jung, *supra* n. 8, at 16–17.

106. *Id.* at 16.

107. Greenblatt, *supra* n. 5, at 725; Nieto & Jung, *supra* n. 8, at 16.

108. See e.g. 720 Ill. Comp. Stat. 5/11-9.3(b-5) & 9.4(b-5) (2007); Okla. Stat. tit. 57, § 590(B) (Supp. 2007).

109. Jill S. Levenson, *Collateral Consequences of Sex Offender Residence Restrictions*, 21 Crim. Just. Stud. 153, 154 (2008) (citations omitted).

110. *Doe v. Miller*, 405 F.3d 700, 706 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); Stromberg, *supra* n. 93, at 25.

111. See e.g. Ala. Code § 15-20-26(h) (West 2005); Okla. Stat. tit. 57, § 590(D); Tenn. Code Ann § 40-39-211(f) (Lexis Supp. 2008).

112. Okla. Stat. tit. 57, § 590 (Supp. 2003) (superseded Jul. 1, 2006).

113. Okla. Stat. tit. 57, § 590 (Supp. 2006) (superseded Nov. 1, 2007).

114. In the two largest cities in Oklahoma, Oklahoma City and Tulsa, residences that comply with the restrictions are very difficult to find. Carrie Coppemoll, Bryan Dean & John David Sutter, *Sex Offenders Exiled*, Oklahoman 1A (Aug. 20, 2006) (in Oklahoma City, only 16 percent of addresses fall outside the restricted area); Shannon Muchmore, *Registration Law Backfire Forecast: Changes Likely to Persuade Sex Offenders to Ignore It, Police Fear*, Tulsa World A-1, A-1, A-6 (Jul. 7, 2006) (Approximately eight percent of Tulsa complies with the residency restrictions. However, the area actually available for residency is probably less because of industrial and high-rent areas.).

115. Nicole Marshall, *Law Driving Sex Offenders Underground, Police Say*, Tulsa World A-1, A-1 (May 14, 2007) (the number of registered sex offenders in Tulsa dropped from 540 to 372 in approximately two years).

important to know where offenders actually reside than to restrict offenders from certain areas because having fewer registered offenders makes it difficult to conduct a meaningful search of the sex offender database.¹¹⁶

Because of the state's experience with sex offenders dropping off the registry, the author of the 2007 bill amending Oklahoma's Sex Offenders Registration Act, Representative Gus Blackwell, sought to add language tying the tiered system to the residency restrictions.¹¹⁷ Despite the push from law enforcement,¹¹⁸ the bill, as enacted, did not address this problem and the statutory residency restrictions still apply to all registered sex offenders, regardless of the risk classification.¹¹⁹

II. CHALLENGES TO SEX OFFENDER REGISTRATION AND NOTIFICATION STATUTES

Offenders have challenged sex offender registration, notification, and residency restriction laws on multiple grounds, including double jeopardy,¹²⁰ equal protection,¹²¹ invasion of privacy,¹²² and cruel and unusual punishment.¹²³ But the primary challenges allege violations of the Due Process Clause,¹²⁴ which guarantees the right to life, liberty, and property, and violations of the Ex Post Facto Clause,¹²⁵ which prohibits retroactive punishment.¹²⁶ The United States Supreme Court has addressed and sustained challenges to states' registration and community notification laws on these grounds,¹²⁷ but has not yet considered the constitutionality of residency restrictions, having denied certiorari on the 2003 Eighth Circuit decision in *Doe v. Miller*.¹²⁸ The Supreme Court's decisions on sex offender registration and notification statutes provide a practical framework that other courts have extended and used in deciding challenges to residency restrictions.¹²⁹

116. *Id.* at A-4.

117. Jennifer Mock & Bryan Dean, *Tiered System Viewed for Sex Offender Law*, Oklahoman 6A (Apr. 22, 2007); Jennifer Mock, *State Seeking to Improve Offender Law*, Oklahoman 4A (May 16, 2007).

118. Mock & Dean, *supra* n. 117, at 6A.

119. Okla. Stat. tit. 57, § 590(A) (unlawful for "any" registered sex offender to reside, temporarily or permanently, within the 2,000 foot radius (emphasis added)).

120. *E.g. Femedeer v. Haun*, 227 F.3d 1244, 1254 (10th Cir. 2000) (Public disclosure is civil in nature and does not constitute punishment. Therefore, there is no double jeopardy violation.).

121. *E.g. A.A. v. State*, 895 A.2d 453, 463-64 (N.J. Super. App. Div. 2006) (The statute served a legitimate state interest and did not irrationally target offenders. Therefore, the statute withstood equal protection scrutiny).

122. *E.g. Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998) (The right to privacy only includes personal information and not the collection and dissemination of information already available to the public.).

123. *E.g. State v. Scott*, 961 P.2d 667, 676 (Kan. 1998) (Public access to information did not constitute cruel and unusual punishment, particularly when public access is a consequence of offender's own criminal acts.).

124. U.S. Const. amend. V, XIV, § 1.

125. *Id.* at art. I, §§ 9, cl. 3, 10, cl. 1.

126. The Supreme Court first identified laws that raise ex post facto concerns in *Calder v. Bull*, 3 U.S. 386, 390 (1798).

127. *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dept. Pub. Safety*, 538 U.S. 1.

128. 405 F.3d 700.

129. *See e.g. Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2128 (2007); *Miller*, 405 F.3d 700; *Graham v. Henry*, 2006 WL 2645130 (N.D. Okla. Sept. 14, 2006); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. 2005).

A. *Procedural Due Process*

In general, procedural due process refers to the process by which the government deprives a person of a life, liberty, or property interest.¹³⁰ When facing a loss of one of these protected interests, the minimum process due to an individual is notice of the action against him or her and the opportunity to address the action.¹³¹ In *Connecticut Department of Public Safety v. Doe*,¹³² Doe, a sex-offender, filed a class-action federal lawsuit under 42 U.S.C. § 1983¹³³ challenging Connecticut’s sex offender registry law,¹³⁴ but the Supreme Court found no procedural due process violation.¹³⁵ Doe claimed that the State deprived him of his reputation, allegedly a liberty interest, without notice or hearing, by making his status publicly available on the Internet, in violation of the Fourteenth Amendment’s Due Process Clause.¹³⁶ Connecticut’s Megan’s Law required individuals convicted of certain offenses to register as a sex offender and provided for community notification through a publicly accessible website,¹³⁷ without regard to the offender’s degree of current dangerousness.¹³⁸ The registration requirement was based solely on the fact of a previous conviction of specified offenses and not the risk of current dangerousness.¹³⁹

Doe asserted that he was not a dangerous sexual offender and claimed the registration and notification harmed his reputation, which is a protected liberty interest.¹⁴⁰ The State argued that the government had not deprived him of a liberty interest, relying on *Paul v. Davis*,¹⁴¹ where the Supreme Court held that mere injury to reputation does not constitute the deprivation of a liberty interest, even when defamatory.¹⁴² Doe further asserted that the state’s failure to provide him with a hearing to determine whether he was dangerous violated his procedural due process rights.¹⁴³ Without deciding whether Doe was deprived of a liberty interest, the Supreme Court

130. U.S. Const. amends. V, XIV, § 1.

131. *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (citing *Jt. Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

132. 538 U.S. 1.

133. Section 1983 allows individuals to sue, in federal court, for a state’s violation of his or her protected civil rights. 42 U.S.C. § 1983 (2006).

134. *Conn. Dept. Pub. Safety*, 538 U.S. at 6.

135. *Id.* at 4.

136. *Id.* at 6 (quoting *Doe v. Dept. Pub. Safety ex rel. Lee*, 271 F.3d 38, 45–46 (2d Cir. 2001)).

137. The website included a disclaimer to the public stating the main purpose of the website was to make information available and that there had been no determination of dangerousness of any individual listed, but individuals were included “solely by virtue of their conviction record and state law.” *Conn. Dept. Pub. Safety*, 538 U.S. at 5 (quoting *Dept. Pub. Safety ex rel. Lee*, 271 F.3d at 44).

138. *Conn. Dept. Pub. Safety*, 538 U.S. at 4–5, 7 (citing Conn. Gen. Stat. §§ 54-251, 54-252, 54-254, 54-257, 54-258 (2001)).

139. *Id.*

140. *Id.* at 6.

141. 424 U.S. 693, 701 (1976) (“The words ‘liberty’ and ‘property’ . . . do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While [the Court has] . . . pointed out the frequently drastic effect of the ‘stigma’ which may result from defamation by the government in a variety of contexts, this . . . does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.”).

142. *Conn. Dept. Pub. Safety*, 538 U.S. at 6–7 (citing *Paul*, 424 U.S. 693).

143. *Id.* at 6.

found no violation because even if Doe was deprived of a liberty interest, procedural due process does not entitle an individual to a hearing to establish an immaterial fact under state law.¹⁴⁴ Whether or not Doe was currently dangerous was irrelevant to the statute, and therefore, he was not entitled to a hearing to determine that fact.¹⁴⁵

B. Substantive Due Process

The substantive due process component of the Fifth and Fourteenth Amendments “protects fundamental rights that are so ‘implicit in the concept of ordered liberty’ that ‘neither liberty nor justice would exist if they were sacrificed.’”¹⁴⁶ Unless “narrowly tailored to serve a compelling . . . interest,” the government cannot infringe upon individuals’ liberty interests, regardless of the process provided.¹⁴⁷ The first step in a substantive due process inquiry is to determine the nature of the individual right asserted.¹⁴⁸ If a fundamental right is not involved, a statute need only survive a “rational basis” analysis, which requires only a reasonable fit between the government’s purpose and the chosen means.¹⁴⁹ Alternatively, if a fundamental right is implicated, the court must apply a “strict scrutiny” analysis and determine if the government action is narrowly tailored.¹⁵⁰

Doe failed to raise a challenge on substantive due process grounds and sought relief solely on the alleged procedural component of the Fourteenth Amendment.¹⁵¹ Because the question was not properly before the Supreme Court, it did not decide whether the statute violated substantive due process principles.¹⁵² However, in dicta, the Court indicated a challenge could be successful by proving that the substantive rule of law conflicts with a provision of the Federal Constitution.¹⁵³ Although the Supreme Court did not have to decide whether the sex offender registry statute violated any substantive due process rights,¹⁵⁴ other courts have had to address this issue.¹⁵⁵ These courts have consistently held that the statutes do not infringe upon any fundamental rights,¹⁵⁶ including the rights to privacy,¹⁵⁷ housing,¹⁵⁸ employment,¹⁵⁹ and family

144. *Id.* at 7.

145. *Id.*

146. *Doe v. Moore*, 410 F.3d 1337, 1342 (11th Cir. 2005) (quoting *Palko v. Conn.*, 302 U.S. 319, 325, 326 (1937); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994)).

147. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citations omitted).

148. *Id.* at 302 (citations omitted).

149. *Wash. v. Glucksberg*, 521 U.S. 702, 722 (1997); *U.S. v. Carlton*, 512 U.S. 26, 35 (1994); *Reno*, 507 U.S. at 305.

150. *E.g. Reno*, 507 U.S. at 302; *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Conn.*, 381 U.S. 479, 503–04 (1965) (quoting *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

151. *Conn. Dept. Pub. Safety*, 538 U.S. at 8.

152. *Id.*

153. *Id.* at 7.

154. *Id.* at 8.

155. *See e.g. Moore*, 410 F.3d at 1339; *Paul P. v. Verniero*, 170 F.3d 396, 404–05 (3d Cir. 1999); *Cutshall v. Sundquist*, 193 F.3d 466, 469 (6th Cir. 1999); *Doe v. Tandeske*, 361 F.3d 594, 596 (9th Cir. 2004); *Russell*, 124 F.3d at 1094.

156. *E.g. Tandeske*, 361 F.3d at 597 (“persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements”).

157. *E.g. Russell*, 124 F.3d at 1094 (finding no violation of the right to privacy because the information that was collected and disseminated was already available to the public).

158. *See e.g. Moore*, 410 F.3d at 1343, 1345 (offenders’ assertion that the statute interfered with the ability

relationships.¹⁶⁰

C. *Ex Post Facto Application of Law*

The Ex Post Facto Clause prohibits the government from both retroactively imposing punishment for an act that was not a crime when it was committed and from imposing more punishment for a crime than was allowed by law at the time it was committed.¹⁶¹ The Ex Post Facto Clause applies exclusively to statutes that are penal in nature.¹⁶² To determine if a statute is penal or civil in nature, the courts look first at the language of the statute to determine whether the legislature intended the statute to be civil or criminal.¹⁶³ Courts will ordinarily defer to the legislature’s express intent to create a civil statute unless there is the “clearest proof” that the statute is punitive in purpose or effect.¹⁶⁴

The Supreme Court upheld a challenge to Alaska’s Sex Offender Registration Act on ex post facto grounds.¹⁶⁵ The Act provided for retroactive application of registration and community notification for certain offenders physically in the state.¹⁶⁶ The Supreme Court held that the retroactive application of the Act did not violate the Ex Post Facto Clause because the law was non-punitive.¹⁶⁷ In reaching this decision, the Court first applied statutory construction to ascertain whether the state legislature intended to establish civil or criminal proceedings¹⁶⁸ and found that the legislature’s intent was to create civil and non-punitive proceedings.¹⁶⁹ The Court reached this decision by placing emphasis on the Act’s purpose to protect the public from sex offenders; placement of the Act in the state’s Health, Safety, and Housing Code and not within the criminal code; and lack of safeguards associated with criminal procedures.¹⁷⁰

Having determined the legislature’s intent was to create a civil regime, the Court still had to analyze whether the scheme was “so punitive in either purpose or effect as to negate [the legislature’s] intention.”¹⁷¹ The Court examined the regulation using five of the seven factors¹⁷² previously established in *Kennedy v. Mendoza-Martinez*,¹⁷³ which, while not exhaustive or dispositive, are “useful guideposts” for determining if a civil law

to find and/or keep housing).

159. *E.g. Cutshall*, 193 F.3d at 479–80 (rejecting plaintiff’s assertion that the statute deprives him of a right to employment because the statute did not interfere with registrants’ ability to seek and obtain employment).

160. *E.g. Paul P.*, 170 F.3d at 405 (any indirect effect on registrants’ family relationships did not “restrict . . . freedom of action with respect to [registrants’] families”).

161. *Dobbert v. Fla.*, 432 U.S. 282, 292 (1977) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925)).

162. *Kan. v. Hendricks*, 521 U.S. 346, 370 (1997) (citation omitted).

163. *Id.* at 361.

164. *Id.* (quoting *U.S. v. Ward*, 448 U.S. 242, 249 (1980)).

165. *Smith*, 538 U.S. at 106.

166. *Id.* at 90 (citing 1994 Alaska Sess. Laws ch. 41 § 12(a); Alaska Stat. § 12.63.010(a)–(b) (Lexis 2000)).

167. *Id.* at 105–06.

168. *Id.* at 92.

169. *Id.* at 96.

170. *Smith*, 538 U.S. at 93–96.

171. *Id.* at 92 (quoting *Hendricks*, 521 U.S. at 361).

172. The remaining two factors, “whether the [sanction] comes into play . . . on a finding of scienter and whether the behavior to which it applies is already a crime,” were not relevant to the facts of the case. *Id.* at 105.

173. 372 U.S. 144 (1963).

is punitive in purpose or effect.¹⁷⁴ Those factors look at whether the regulation: (1) has traditionally or historically been regarded as punishment; (2) promotes the traditional aims of punishment; (3) imposes an affirmative disability or restraint; (4) has a rational connection to a non-punitive purpose; or (5) is excessive with respect to the non-punitive purpose.¹⁷⁵

In regards to the first factor, the Court rejected the argument that registration and notification statutes resemble shaming punishments used during the colonial period.¹⁷⁶ The Court distinguished these statutes, as colonial shaming often included a corporal component, or at a minimum, “involved more than the dissemination of information.”¹⁷⁷ The Court emphasized the criminal justice system’s tradition of open and public indictments, trials, and sentencing as essential to maintaining public respect, protecting the rights of the accused, and ensuring respect for the system.¹⁷⁸ The Court pointed out that any negative stigma associated with registration and notification under Megan’s Law “results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.”¹⁷⁹ The statute’s purpose was not to cause humiliation but to inform the public for its own safety.¹⁸⁰ Second, although Megan’s Law may deter future crimes, and deterrence is one of the traditional aims of punishment, the mere presence of a deterrent effect does not render the law as criminal in nature.¹⁸¹

Third, the Court found that the law did not impose an affirmative disability or restraint.¹⁸² There was no physical restraint, and the offenders were not restrained from pursuing activities, jobs, or residences.¹⁸³ In contrast to probation and supervised release, the offenders were not under supervision and were free to move and live and work anywhere they wished; their only obligation was to comply with the reporting requirement.¹⁸⁴

Fourth, Alaska’s Megan’s Law was determined to have a legitimate and non-punitive purpose, and alerting the public to the risk of sex offenders in the community was rationally related to its purpose of promoting and ensuring public safety.¹⁸⁵ And fifth, finding that the appropriate question to ask in inquiring whether the regulation is excessive is whether the regulatory means chosen are reasonable and not whether the legislature made the best choice, the Court found that the law was reasonable and not excessive in regards to its purpose.¹⁸⁶ The Court determined that the legislative intent

174. *Smith*, 538 U.S. at 97 (quoting *Hudson v. U.S.*, 522 U.S. 93, 99 (1997)).

175. *Id.*

176. *Id.* at 97–98.

177. *Id.* at 98.

178. *Id.* at 99.

179. *Smith*, 538 U.S. at 98.

180. *Id.* at 99.

181. *Id.* at 102 (many laws may “deter crime without imposing punishment,” and “[t]o hold that the mere presence of a deterrent purpose renders [the law] “criminal” . . . would severely undermine the Government’s ability to [regulate]” (quoting *Hudson*, 522 U.S. at 105)).

182. *Id.* at 100.

183. *Id.*

184. *Smith*, 538 U.S. at 101.

185. *Id.* at 102–03.

186. *Id.* at 105.

was to establish a civil regulatory scheme, and because it was not shown by the clearest proof that the effects of the law negate that intent, the Court found the retroactive application of Alaska’s Megan’s Law was non-punitive and, therefore, did not violate the Ex Post Facto Clause.¹⁸⁷

III. CHALLENGES TO RESIDENCY RESTRICTIONS

By applying the same framework the Supreme Court used in analyzing sex offender registration and notification statutes, other courts have upheld the constitutionality of sex offender residency restrictions.¹⁸⁸ For example, the States’ residency restrictions in both Iowa and Arkansas were challenged and upheld on appeal to the respective States’ Supreme Courts and, on appeal, to the Eight Circuit Court of Appeals.¹⁸⁹ An Oklahoma court also used this analysis in denying a temporary injunction motion to prevent the application of the residency restriction.¹⁹⁰ This section will examine how the Eighth Circuit, the highest federal court to address challenges to sex offender residency restrictions,¹⁹¹ as well as how state supreme¹⁹² and appellate¹⁹³ courts, have applied the Supreme Court’s analysis to residency restrictions.

A. *Due Process*

Despite differences in the States’ statutes, the Eight Circuit found no procedural due process violation in both *Miller*¹⁹⁴ and *Weems v. Little Rock Police Department*.¹⁹⁵ Applying the Supreme Court’s reasoning in *Connecticut Department of Public Safety v. Doe*,¹⁹⁶ the court held that due process did not entitle the offenders to a hearing in Iowa because the State’s statute applied the residency restrictions to all sex offenders, regardless of estimates of future dangerousness.¹⁹⁷ The Arkansas statute, however, did couple sex offenders’ risk assessments to the residency restrictions,¹⁹⁸ entitling the offenders to procedural protections.¹⁹⁹ But without deciding whether the risk assessment and resulting residency restriction deprive sex offenders of a protected liberty interest, the court concluded that the procedures used by Arkansas provided adequate due process.²⁰⁰ The court reached this conclusion by weighing three factors: first, “the private interest affected by the [government’s] actions”; second, the risk of erroneous

187. *Id.* at 105–06.

188. *E.g. Leroy*, 828 N.E.2d 769.

189. *Weems*, 453 F.3d at 1019–20; *Miller*, 405 F.3d 700; *Ark. Dept. Corrects. v. Bailey*, 247 S.W.3d 851, 862 (Ark. 2007); *Seering*, 701 N.W.2d at 670.

190. *Graham*, 2006 WL 2645130 at **6–7 (motion sustained because offender failed to show a likelihood of success on the merits of the constitutional challenge).

191. *E.g. Weems*, 453 F.3d 1010; *Miller*, 405 F.3d 700.

192. *E.g. Bailey*, 247 S.W.3d 851; *Seering*, 701 N.W.2d 655.

193. *E.g. Leroy*, 828 N.E.2d 769.

194. 405 F.3d at 709.

195. 453 F.3d at 1019–20.

196. 538 U.S. 1.

197. *Miller*, 405 F.3d at 709.

198. *Weems*, 453 F.3d at 1013 (citing Ark. Code Ann. § 5-14-128(a) (Lexis 2003)) (residency restrictions applied only to “Level 3 ‘high risk offenders’ and Level 4 ‘sexually violent predators’”).

199. *Id.* at 1019.

200. *Id.* at 1017–1018.

determinations through the procedure used and the probable value of additional procedural safeguards; and third, the government's interest, including "fiscal and administrative burdens" that additional procedures would entail.²⁰¹

In Arkansas, a Sex Offender Assessment Committee oversees an examination team that assigns risk levels to the sex offenders.²⁰² This team determines risk by reviewing records and historical data, engaging in psychological testing and evaluation, engaging in actuarial analysis based on objective criteria, and interviewing the individual offender.²⁰³ The team usually follows the actuarial prediction model but does have some flexibility to increase or decrease the risk level based on special circumstances not accounted for in the model.²⁰⁴ If an adjustment is warranted, it is "fully documented and . . . is subject to review by the . . . Committee."²⁰⁵ During this process, the sex offender has an opportunity to be heard during the interview and has access to most of the records maintained by the team.²⁰⁶ Although the offender is not entitled to judicial review until after the notification and residency restrictions are in effect, the court found that the combination of procedures provided prior to the risk assignment and procedures available after the assignment provided sufficient due process protection.²⁰⁷ The offenders' interest in avoiding an erroneous risk assessment was adequately protected by providing reasonable procedures and was adequately balanced against the government's interest in protecting children from sex offenders.²⁰⁸

Sex offenders have also lost challenges to residency restrictions on substantive due process grounds.²⁰⁹ The offenders alleged the residency restrictions infringed upon their fundamental rights, including the right to privacy and choice in family matters, the right to interstate and intrastate travel, and the right to live where they want.²¹⁰ Regarding the right to choice in family matters, courts have found that the residency restrictions do not implicate a fundamental right because they do "not 'operate directly on the family relationship.'"²¹¹ Although the statutes restrict offenders from living in specific areas, the statutes do not restrict with *whom* the offenders may live.²¹² Because a fundamental right was not implicated, the statutes were reviewed using a rational basis standard and not a heightened strict scrutiny standard.²¹³ By applying this standard, the courts have found that the government has a legitimate interest in protecting children from sex

201. *Id.* at 1018 (citing *Mathews*, 424 U.S. at 335).

202. *Id.*

203. *Weems*, 453 F.3d at 1018.

204. *Id.*

205. *Id.* (citation omitted).

206. *Id.*

207. *Id.* at 1019.

208. *Weems*, 453 F.3d at 1019.

209. *E.g. id.* at 1015; *Miller*, 405 F.3d at 710–16; *Bailey*, 247 S.W.3d 852; *Seering*, 701 N.W.2d at 665; *Leroy*, 828 N.E.2d at 777.

210. *E.g. Weems*, 453 F.3d at 1014; *Miller*, 405 F.3d at 709.

211. *Weems*, 453 F.3d at 1015 (quoting *Miller*, 405 F.3d at 710); *accord e.g. Seering*, 701 N.W.2d at 664; *Leroy*, 828 N.E.2d at 776–77.

212. *E.g. Weems*, 453 F.3d at 1015; *Miller*, 405 F.3d at 710; *Seering*, 701 N.W.2d at 664–65; *Leroy*, 828 N.E.2d at 776.

213. *E.g. Weems*, 453 F.3d at 1015; *Miller*, 405 F.3d at 710; *Seering*, 701 N.W.2d at 663; *Leroy*, 828 N.E.2d at 776.

offenders, and the statutes are rationally related to pursuing that purpose.²¹⁴

The Eighth Circuit also used the rational basis standard in sustaining challenges to the residency restrictions based on the right to interstate and intrastate travel.²¹⁵ The sex offenders argued that the right to interstate travel was implicated by deterring out-of-state convicted sex offenders from migrating into another state.²¹⁶ The court did not find merit in this argument because the statute did not erect an actual barrier to interstate travel and continued to allow "free ingress and egress to and from" the state.²¹⁷ Nor did the statute discriminate by treating residents differently from nonresidents.²¹⁸ Although some sex offenders may be deterred from traveling into the state, the court found that this was insufficient to implicate the fundamental right to interstate travel.²¹⁹ Without deciding whether there is a fundamental right to intrastate travel, the court held that the right, even if recognized, was not implicated for the same reasons that the right to interstate travel was not implicated.²²⁰

The Supreme Court has not recognized a fundamental right to live where you want and has cautioned against extending protection to an unenumerated asserted right or liberty interest.²²¹ Therefore, the offenders' challenge to residency restrictions on this ground does not require strict scrutiny but involves the rational basis standard.²²² Using this standard, the courts find that the government's interest in protecting children is rationally promoted by the residency restrictions.²²³

B. *Ex Post Facto*

By using the framework set out by the Supreme Court in *Smith v. Doe*,²²⁴ courts have sustained ex post facto challenges to the constitutionality of sex offender residency restrictions;²²⁵ dissents, however, commonly disagree and find that the statutes are violative of the Ex Post Facto Clause.²²⁶ The courts must first determine whether the legislature intended to create civil or punitive proceedings.²²⁷ If the legislative intent was to establish criminal punishment, then the statute is an ex post facto law.²²⁸ But if the legislative intent was to create civil and non-punitive proceedings, the courts must then determine whether the statute is nonetheless "so punitive either in purpose or effect

214. *E.g. Weems*, 453 F.3d at 1015.

215. *Id.* at 1016–17; *Miller*, 405 F.3d at 712–13.

216. *Miller*, 405 F.3d at 711.

217. *Id.* at 712 (quoting *Saenz v. Roe*, 526 U.S. 489, 501 (1999)).

218. *Id.*

219. *Id.*

220. *Id.* at 713; *Weems*, 453 F.3d at 1014–15.

221. *E.g. Miller*, 405 F.3d at 713–14 (citing *Glucksberg*, 521 U.S. at 720).

222. *Id.* at 724; *Seering*, 701 N.W.2d at 665.

223. *Miller*, 405 F.3d at 716; *Seering*, 701 N.W.2d at 665.

224. 538 U.S. 84.

225. *E.g. Weems*, 453 F.3d at 1017; *Miller*, 405 F.3d at 722–23; *Seering*, 701 N.W.2d at 669; *Leroy*, 828 N.E.2d at 782.

226. *E.g. Miller*, 405 F.3d at 723 (Melloy, J., concurring in part and dissenting in part); *Seering*, 701 N.W.2d at 671 (Wiggins, J., & Lavorato, C.J., concurring in part and dissenting in part); *Leroy*, 828 N.E.2d at 785 (Kuehn, J., dissenting).

227. *E.g. Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361).

228. *Id.*

as to negate [the stated] intention.”²²⁹ When examining sex offender residency restrictions, courts have consistently found that the legislative intent is clearly to create a civil regulatory measure.²³⁰ The legislative intent of these statutes is to protect the public from sex offenders, and the residency restrictions are incidental to the government’s authority to protect public health and safety.²³¹ To determine whether the statute is nonetheless punitive in purpose or effect, courts apply the same factors the Supreme Court applied in examining sex offender registration and notification statutes in *Smith*.²³² whether the statute has traditionally or historically been regarded as punishment; promotes the traditional aims of punishment; imposes an affirmative disability or restraint; has a rational connection to a non-punitive purpose; or is excessive with respect to the non-punitive purpose.²³³ Furthermore, “only the clearest proof” can overcome the legislative intent and change an intended civil scheme into a criminal penalty.²³⁴

Regarding the first factor, offenders have argued that the residency restrictions resemble banishment, which has historically been regarded as punishment.²³⁵ Traditional banishment required offenders to leave their original community and because of their tarnished reputation, they were not easily admitted into a new one.²³⁶ The banishment could last either for life or for a specified period of time.²³⁷ In *Miller*,²³⁸ while acknowledging that banishment entails an extreme form of residency restriction, the Eighth Circuit distinguished traditional banishment from the sex offender residency restrictions.²³⁹ The court reasoned that unlike traditional banishment, the offenders are not completely expelled from the community; they are only restricted in where they may reside.²⁴⁰ The court also pointed out that many offenders would not be required to change residences because the state statute grandfathered in offenders with residences established prior to the effective date.²⁴¹ Also relevant to the court, sex offender residency restrictions are a relatively new and unique trend, which suggests the statute does not involve traditional punishment.²⁴²

The dissent in *Miller* agreed the residency restrictions were not the same as traditional banishment but believed this factor weighed towards finding the law punitive because it sufficiently resembled banishment.²⁴³ The dissent relied on the district

229. *Id.* (quoting *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248–49)).

230. *Weems*, 453 F.3d at 1017; *Miller*, 405 F.3d at 719; *Leroy*, 828 N.E.2d at 779.

231. *E.g. Miller*, 405 F.3d at 718 (citation omitted).

232. 538 U.S. at 97.

233. *E.g. Miller*, 405 F.3d at 719; *Seering*, 701 N.W.2d at 667; *Leroy*, 828 N.E.2d at 780.

234. *Smith*, 538 U.S. at 92 (quoting *Hudson*, 522 U.S. at 100 (citations omitted)).

235. *E.g. Miller*, 405 F.3d at 719; *Seering*, 701 N.W.2d at 667.

236. *Smith*, 538 U.S. at 98 (citing Thomas Blomberg & Karol Lucken, *American Penology: A History of Control* 30–31 (Aldine de Gruyter 2000)).

237. *Miller*, 405 F.3d at 719 (quoting *U.S. v. Ju Toy*, 198 U.S. 253, 269–70 (1905) (Brewer & Peckham, JJ., dissenting)).

238. 405 F.3d 700.

239. *Id.* at 719.

240. *Id.*; accord *Seering*, 701 N.W.2d at 667 (determining that the statute is not banishment because the restrictions only apply to residency, and “offenders . . . are free to engage in most community activities”).

241. *Miller*, 405 F.3d at 719.

242. *Id.* at 720 (citations omitted).

243. *Id.* at 724–25 (Melloy, J., concurring in part and dissenting in part).

court's factual findings and pointed out that the restrictions effectively banned sex offenders from living in many communities.²⁴⁴ In large communities, the only areas available to offenders were industrial, expensive developments, or on the outskirts of town with limited housing options.²⁴⁵ In smaller communities, the entire town could be in the restricted area.²⁴⁶ Therefore, the dissent found the problems in finding housing effectively resulted in banishment from most of the state's cities and larger towns.²⁴⁷

Two dissenting justices on the Iowa Supreme Court also found the residency restrictions were tantamount to banishment in *State v. Seering*.²⁴⁸ The dissent distinguished the Supreme Court's finding that registration and notification are not equivalent to banishment or shaming²⁴⁹ because the residency restrictions place additional and onerous obligations on sex offenders.²⁵⁰ The dissenting justices thought the restrictions were equivalent to banishment by marking the offenders as people to be shunned and resulting in community ostracism.²⁵¹

Second, courts examine whether the law promotes the traditional aims of punishment, typically deterrence and retribution.²⁵² Although the residency restrictions may have a deterrent and retributive effect, the Eighth Circuit found that this was insufficient to render the statute as punishment.²⁵³ Relying on the Supreme Court's finding that many laws may have a deterrent effect without imposing punishment,²⁵⁴ the court emphasized the purpose of the restriction was not to deter offenders from committing sex crimes, but to "reduce the likelihood of reoffense by limiting [potential] temptation" and opportunity.²⁵⁵ Likewise, any potential retributive effect is reasonably related to the risk of recidivism and the legislative purpose of protecting public safety.²⁵⁶

The third factor to "consider is whether the law 'imposes an affirmative disability or restraint.'"²⁵⁷ The Eighth Circuit found that the residency restrictions are more disabling than the sex offender registration and notification laws that withstood the Supreme Court's analysis.²⁵⁸ However, they are less disabling than the civil commitment of certain sex offenders,²⁵⁹ which has been upheld by the Supreme Court.²⁶⁰ The court found that the degree of restraint utilized must be weighed against

244. *Id.* at 724.

245. *Id.*

246. *Miller*, 405 F.3d at 724 (Melloy, J., concurring in part and dissenting in part).

247. *Id.*

248. 701 N.W.2d at 671-72 (Wiggins, J., & Lavorato, C.J., concurring in part and dissenting in part).

249. *Id.* at 671 (distinguishing *Smith*, 538 U.S. 84).

250. *Id.*

251. *Id.* at 672.

252. *Miller*, 405 F.3d at 720 (citing *Smith*, 538 U.S. at 102).

253. *Id.*

254. *Smith*, 538 U.S. at 102.

255. *Miller*, 405 F.3d at 720; *accord Leroy*, 828 N.E.2d at 781 (citing *Dept. Revenue Mont. v. Kurth Ranch*, 511 U.S. 767, 780 (1994)) ("even an obvious deterrent purpose does not necessarily make a law punitive").

256. *Miller*, 405 F.3d at 720; *accord Leroy*, 828 N.E.2d at 781 (no evidence the restriction was designed as a form of retribution, and it has a reasonable relationship to the goal of protecting children from offenders).

257. *Miller*, 405 F.3d at 720 (quoting *Smith*, 538 U.S. at 100).

258. *Id.* at 721 (citation omitted).

259. *Id.*

260. *Hendricks*, 521 U.S. at 363 (citing *U.S. v. Salerno*, 481 U.S. 739, 746 (1987) (Although the civil commitment of offenders does involve an affirmative restraint, the mere fact of detention does not necessarily

the other relevant factors, including whether the law is rationally related to the legislative purpose and whether the law is excessive in respect to that purpose.²⁶¹

The dissent disagreed and distinguished the residency restrictions from the sex offender registration and notification laws by pointing out the Supreme Court found it significant in its analysis that the sex offenders could freely change residences.²⁶² In distinguishing probation or supervised release from the sex offender registration, the Supreme Court did emphasize that sex offenders could move, live, and work where they want without supervision.²⁶³ The residency restrictions could be upheld using this same analysis, however. Offenders subjected to the residency restrictions are still free to move and work as other citizens and do not have to seek permission to do so; they are only restricted from residing within certain areas.²⁶⁴ Also similar to registration requirements, failure to comply with the statutory residency restriction may result in criminal prosecution, but that prosecution is a separate proceeding from the original offense.²⁶⁵

The most significant factor in determining whether a law's effects are punitive is whether the law has a rational connection to the non-punitive purpose.²⁶⁶ A law is "not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance."²⁶⁷ Using this undemanding standard, the Eighth Circuit easily reached the conclusion that the legislative objective of protecting children from the risk posed by repeat offenders was rationally related to the residency restrictions.²⁶⁸

The final factor in this *ex post facto* analysis is whether the law is excessive in relation to the non-punitive purpose.²⁶⁹ Even when the residency restrictions apply to all statutory sex offenders without any individualized assessment of risk, courts have consistently held that the restrictions are not excessive.²⁷⁰ Relying on Supreme Court precedent, the Eighth Circuit held that the government is not obligated to provide for individualized determinations and can make reasonable categorical judgments that convicted offenders may be subject to certain regulatory consequences.²⁷¹ The Supreme Court has held that even without individualized determinations, convicted felons can be subjected to non-punitive regulations, including being prohibited from practicing medicine, serving as officers or agents of a union, and registering as a sex offender.²⁷²

mean the government imposed punishment.). The government has a legitimate non-punitive objective in restraining mentally ill individuals who pose a danger to the public. *Id.* (citation omitted).

261. *Miller*, 405 F.3d at 721 (citations omitted).

262. *Id.* at 725 (Melloy, J., concurring in part and dissenting in part) (citing *Smith*, 538 U.S. at 100).

263. *Smith*, 538 U.S. at 101.

264. *See id.* (Although offenders must inform authorities of a change, they do not have to seek permission to do so.). *See also e.g.* Okla. Stat. tit. 57, § 584(D) (offenders must provide *notification* at least three business days prior to changing addresses (emphasis added)).

265. *See Smith*, 538 U.S. at 101–02. *See also e.g.* Okla. Stat. tit. 57, § 590(D) (willful violation of residency restriction is a felony).

266. *Miller*, 405 F.3d at 721 (citing *Smith*, 538 U.S. at 102).

267. *Smith*, 538 U.S. at 103.

268. *Miller*, 405 F.3d at 721; *see also Leroy*, 828 N.E.2d at 777 (reasonable to conclude children would be protected by restricting offenders from residing in close proximity).

269. *Smith*, 538 U.S. at 97.

270. *Miller*, 405 F.3d at 722; *Seering*, 701 N.W.2d at 668; *Leroy*, 828 N.E.2d at 782.

271. *Miller*, 405 F.3d at 721 (citing *Smith*, 538 U.S. at 103).

272. *Id.* at 721–22 (citing *Hawker v. N.Y.*, 170 U.S. 189, 197 (1898); *De Veau v. Braisted*, 363 U.S. 144, 160

The risk of sex offenders re-offending is higher than average,²⁷³ and it is difficult to predict which measures are most likely to prevent recidivism.²⁷⁴ Therefore, the Eighth Circuit found the residency restrictions were not excessive in relation to their purpose of protecting children.²⁷⁵ And when the residency restrictions are based on individualized risk assessments, the statute is on even stronger constitutional grounds, and it decreases the likelihood of the court finding the residency restrictions excessive.²⁷⁶

IV. EFFECTIVENESS OF RESIDENCY RESTRICTIONS

There are over 660,000 registered sex offenders in the United States²⁷⁷ and at least 100,000 of these offenders are noncompliant.²⁷⁸ "When an offender is off the radar, then the existing compliance, treatment, and monitoring options will have no effect,"²⁷⁹ and the public will be endangered. Knowing where the convicted sex offenders live, even if it is in close proximity to a school or daycare, is better than not knowing where to find them.²⁸⁰

Preventing children from being kidnapped and assaulted and reducing sex offenders' access to children are the most popular rationales put forth in support of residency restrictions.²⁸¹ National publicity of horrendous crimes prompted swift legislation named after victims of child abductions.²⁸² However, strangers to the victim do not commit the majority of sexual offenses, particularly when the victim is a child.²⁸³ Family members or acquaintances attack the vast majority of victims,²⁸⁴ not strangers sitting across the street from schools and playgrounds.²⁸⁵ As a result, the residency restrictions will have little, if any, impact on most of these victims.²⁸⁶ The restrictions

(1960); *Smith*, 538 U.S. at 106).

273. *Smith*, 538 U.S. at 103 (citing *McKune*, 536 U.S. at 33–34 (citation omitted)); *Miller*, 405 F.3d at 722.

274. *Miller*, 405 F.3d at 722. Expert testimony indicated that reducing the frequency of contact between offenders and children could reduce temptation and opportunity to re-offend. *Id.*

275. *Id.* at 722–23; see also *Seering*, 701 N.W.2d at 668 (risk that offenders might re-offend is balanced against the imprecise nature of protecting children).

276. *Weems*, 453 F.3d at 1017.

277. Ntl. Ctr. for Missing & Exploited Children, *Registered Sex Offenders in the U.S.*, http://www.missingkids.com/en_US/documents/sex-offender-map.pdf (map showing number of registered offenders in each state) (Dec. 15, 2008).

278. Ntl. Ctr. for Missing & Exploited Children, *First U.S. Marshals Begin Specialized Training in Hunt for 100,000 Missing Sex Offenders*, http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=31106 (Mar. 20, 2007).

279. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 Wash. U. L. Rev. 101, 144 (2007).

280. See *id.*; Nieto & Jung, *supra* n. 8, at 24.

281. Singleton, *supra* n. 15, at 610.

282. As discussed *supra* pt. I(A), the Jacob Wetterling Act, Megan's Law, Jessica's Law, and Adam Walsh Act. See also 42 U.S.C. § 16901 (2006) (recognizing 17 named victims).

283. Greenfeld, *supra* n. 1, at 4 (approximately 75 percent of rapes and sexual assaults involve offenders known to the victim); Snyder, *supra* n. 1, at 10 tbl. 6 (only seven percent of child victims were assaulted by a stranger, and only 27.3 percent of adult victims were assaulted by a stranger); Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* 33 (U.S. Dept. Justice, Off. Just. Programs, Off. Juv. Just. & Delinquency Prevention 2006) (only five percent of sexual assaults are committed by a stranger).

284. Snyder, *supra* n. 1, at 10.

285. Greenblatt, *supra* n. 5, at 725 (in most sexual assault cases, schools, parks, and playgrounds are not a factor).

286. Minn. Dept. Corrects., *Residential Proximity & Sex Offense Recidivism in Minnesota* 25 (2007)

reflect a false assumption that residential proximity to children increases the risk of recidivism.²⁸⁷ Residency restrictions will prevent very few offenders from re-offending.²⁸⁸ Research suggests that in most cases, an offender's ability to establish a relationship with a child is more important than where the offender lives, and the restrictions do nothing to prevent family members and acquaintances from building and exploiting a child's trust.²⁸⁹ The restrictions do not prevent offenders from driving across town,²⁹⁰ and if an offender is determined to re-offend, the restrictions will have no effect.²⁹¹

Not only may the residence restrictions be ineffective, but they may be counterproductive and increase recidivism.²⁹² Shortages of housing options that comply with the residence restrictions effectively push the offenders either into "sex offender ghettos"²⁹³ or into isolated rural areas and away from larger communities with supportive and necessary resources, including employment options and mental health treatment.²⁹⁴ Taking away housing, employment, and treatment options can create financial and emotional stress and lead to increased instability.²⁹⁵ These additional stressors are dynamic risk factors frequently associated with sex offender recidivism.²⁹⁶ In addition to limited access to resources, the restrictions prohibit offenders from returning to their homes and living with supportive family members.²⁹⁷ Feeling desperate and deprived can "make the offender feel hopeless and useless and therefore[,] bring[,] him closer to the feelings that caused him to be an offender in the first place."²⁹⁸ Rehabilitation is "more successful when offenders are employed, have family and community connections, and have a stable residence."²⁹⁹ By implementing the residency restrictions, legislatures intended to decrease the rate of recidivism, but in reality, the restrictions can remove offenders from positive support networks,³⁰⁰ creating a "recipe for recidivism."³⁰¹

(available at <http://www.doc.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf>).

287. *No Easy Answers: Sex Offender Laws in the U.S.*, 19 Hum. Rights Watch 115 (Sept. 2007) [hereinafter *No Easy Answers*]. *But 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, 175 (2005) (access to victims and sexual interest in children is associated with recidivism, but blanket restrictions may fail to consider individualized risk factors).

288. Minn. Dept. Corrects., *supra* n. 286, at 25. *See also* Levenson & Cotter, *supra* n. 287, at 175.

289. Greenblatt, *supra* n. 5, at 725. One study suggested that most recidivists come into contact with their victims through "social or relationship proximity," and the most common contact was from dating the child's mother. *No Easy Answers*, *supra* n. 287, at 116 (footnote omitted).

290. Levenson & Cotter, *supra* n. 287, at 169 (sex offenders more likely to travel to another neighborhood where they would not be recognized than seek victims in close residential proximity).

291. *Id.* at 176.

292. *Id.* at 169; *see also* Levenson & D'Amora, *supra* n. 98, at 183.

293. Yung, *supra* n. 279, at 142, 157.

294. Levenson & D'Amora *supra* n. 98, at 183; Nieto & Jung, *supra* n. 8, at 18.

295. Levenson & Cotter, *supra* n. 287, at 175; *No Easy Answers*, *supra* n. 287, at 116.

296. Levenson & Cotter, *supra* n. 287, at 175; Levenson & Hern, *supra* n. 99, at 63 (citation omitted).

297. Levenson & Cotter, *supra* n. 287, at 172; *see also* *No Easy Answers*, *supra* n. 287, at 117.

298. Levenson, *supra* n. 109, at 158.

299. Iowa Co. Attys. Assoc., *Statement on Sex Offender Residency Restrictions in Iowa* 4 (Feb. 14, 2006) (available at <http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%2011%2006.pdf>).

300. *No Easy Answers*, *supra* n. 287, at 116–17.

301. Yung, *supra* n. 279, at 144; *see also* Levenson, *supra* n. 109, at 163.

Further, residency restrictions that disperse sex offenders from larger communities may increase the risk of child sexual abuse in rural communities.³⁰² Geographic isolation in rural areas provides more isolated locations for potential assaults to occur.³⁰³ Social norms of keeping things private in rural areas may also prevent detection by law enforcement.³⁰⁴ In smaller communities, there is typically more social interaction among acquaintances, and most children are abused by someone they know.³⁰⁵ These factors, in addition to removing offenders from support networks, may contribute to higher rates of child sexual abuse in rural areas.³⁰⁶

In urban areas, continued difficulty in finding housing that complies with the residency restrictions may result in sex offenders forming their own communities, most typically located in apartment complexes or motels.³⁰⁷ There is already evidence of this problem in Oklahoma,³⁰⁸ and it may continue to increase. At first glance, this may seem like a positive outcome by isolating offenders from potential victims, but, in reality, it creates a dangerous networking opportunity for sex offenders.³⁰⁹ As one scholar observed,

Creating a community with a lot of persons prone to repeat past sex crimes will facilitate an environment in which sexual violence is more acceptable. There are fewer normalizing, socializing, and other pressures against sexual violence in a community in which virtually everyone is there precisely because they have committed some form of sexual violence in their life. . . . [L]awmakers are risking the creation of environments in which sexual violence is the norm, not the exception.³¹⁰

Uniting sex offenders and providing them an opportunity to socialize and learn from each other only hinders public safety.³¹¹

Law enforcement's monitoring of sex offenders has become more difficult due to the residency restrictions.³¹² Due to the inability to comply with the restrictions, sex offenders provide false addresses, change residences without notifying law enforcement, and may disappear completely.³¹³ For example, Iowa saw the number of unaccounted-for sex offenders double only one year after the enactment of residency restrictions.³¹⁴ Oklahoma has also seen an increase in the number of unaccounted-for sex offenders.³¹⁵

302. Levenson & D'Amora, *supra* n. 98, at 184.

303. Kim S. Menard & R. Barry Ruback, *Prevalence and Processing of Child Sexual Abuse: A Multi-Data-Set Analysis of Urban and Rural Counties*, 27 L. & Hum. Behav. 385, 399 (2003).

304. *Id.*

305. *Id.*

306. Levenson & D'Amora, *supra* n. 98, at 184.

307. Yung, *supra* n. 279, at 140.

308. David Schulte, *Sex Offenders to Get Boot: New Park to Make Town West-Area Motels off Limits*, Tulsa World A-18 (Sept. 18, 2007) (approximately 60 registered offenders living in four hotels along an interstate outside of Tulsa).

309. Yung, *supra* n. 279, at 141.

310. *Id.* at 142.

311. *See id.* at 141-42.

312. Greenblatt, *supra* n. 5, at 726; *No Easy Answers*, *supra* n. 287, at 116.

313. Greenblatt, *supra* n. 5, at 726.

314. *Id.* *See also* Nieto & Jung, *supra* n. 8, at 24 (prior to residency restriction, county sheriff knew where almost all offenders lived; after restriction took effect, sheriff knows where only 50-55 percent of offenders live) (citation omitted).

315. Marshall, *supra* n. 115, at A-1.

After enactment of the residency restrictions, sex offenders quickly discovered that they could avoid the restrictions by falsely registering as homeless.³¹⁶ In effect, residency restrictions actually undercut sex offender registration laws³¹⁷ because homeless and lost offenders are more difficult, if not impossible, to track and supervise.³¹⁸

Another unintended consequence of the residency restrictions is a decrease in the number of sex offense convictions.³¹⁹ After the enactment of residency restrictions in Iowa, prosecutors reported a decrease in the number of confessions as well as a decrease in defendants' willingness to enter into plea agreements.³²⁰ As a result, many offenders will not be successfully prosecuted or held fully accountable and will not be required to complete treatment or rehabilitation.³²¹ Public safety is compromised by a decrease in accurate charges and convictions.³²²

V. RESIDENCY RESTRICTIONS IN OKLAHOMA

*When everything is classified, then nothing is classified and the system becomes one to be disregarded by the cynical or the careless.*³²³

The Oklahoma Legislature's concern for protecting children and others from predatory sex offenders resulted in the original enactment of Oklahoma's Sex Offenders Registration Act.³²⁴ By adding residency restrictions to this Act,³²⁵ the legislature intended to keep registered sex offenders away from potential child victims³²⁶ by preventing offenders from living close to schools, day care facilities, parks, and playgrounds.³²⁷ The residency restrictions, however, apply to all registered sex offenders, regardless of whether the triggering offense involved a child.³²⁸ The statute treats rapists, child molesters, and one-time flashers the same, and all offenders are subject to the residency restriction while registered;³²⁹ the only difference is the length of registration.³³⁰

316. Nicole Marshall, *Homeless Claims May Be False, Police Say*, Tulsa World A-1 (Jan. 22, 2008).

317. Greenblatt, *supra* n. 5, at 724.

318. Nieto & Jung, *supra* n. 8, at 24; *No Easy Answers*, *supra* n. 287, at 116.

319. Iowa Co. Attys. Assoc., *supra* n. 299, at 3.

320. *Id.* at 3.

321. *Id.*

322. *See id.*

323. Wayne A. Logan, *Sex Offender Registration & Community Notification: Past, Present, & Future*, 34 New Eng. J. Crim. & Civ. Confinement 3, 14 (2008) (quoting *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) (The exact language of the case is "For when everything is classified and the system becomes one to be disregarded by the cynical or the careless.")).

324. Okla. Stat. tit. 57, § 581(B) (Supp. 2007).

325. Okla. Stat. tit. 57, § 590.

326. 35 Okla. Op. Atty. Gen. 51, 52 (2005); Coppemoll, Dean & Sutter, *supra* n. 114.

327. Okla. Stat. tit. 57, § 590(A).

328. *Id.*

329. *See id.*; Coppemoll, Dean & Sutter, *supra* n. 114, at 1A.

330. Okla. Stat. tit. 57, § 583(C).

In order to continue receiving federal funding, the legislature patterned Oklahoma's risk levels after the tiers used in the Adam Walsh Act.³³¹ Implementing risk levels and acknowledging that sex offenders are not all the same is a small step in the right direction towards improving the registration system.³³² However, instead of following other states' approaches of using individualized risk assessments,³³³ the risk assessment review committee decided to follow the federal approach and classify offenders based solely on the severity and recurrence of convictions³³⁴ without considering other relevant factors.³³⁵ This appears to be in contradiction to the plain language of the statute.³³⁶ The statute explicitly states the screening tool "must use an objective point system under which a person is assigned a designated number of points for *each* of the various *factors*. The offense for which the person is convicted shall serve as the *basis* for the minimum numeric risk level assigned to the person."³³⁷ The statute also states a "range of points on the sex offender screening tool"³³⁸ should determine each of the three different levels. However, the screening tool selected by the committee does not look at "various factors";³³⁹ it looks at only *one* factor, the convicted offense.³⁴⁰ In addition, a "range"³⁴¹ of points does not determine each of the three levels; one point equals level one, two points equal level two, and three points equal level three.³⁴² The risk level is based on a perceived and general risk according to offense and is not based on the individual sex offender's threat to the community or likelihood to re-offend.³⁴³ As implemented in Oklahoma, a sex offender's statutorily assigned risk level may or may not be an accurate representation of that individual's actual threat to the public.³⁴⁴

Inexplicably, Oklahoma's Department of Corrections already uses individualized risk assessments for probation and parole of sex offenders,³⁴⁵ but these same risk assessments are not used in assigning the statutory risk level of the applicable residency restrictions.³⁴⁶ Within 45 days of probation or parole, all sex offenders must complete a Sex Offender Need Assessment Rating ("SONAR") or Stable and Acute Assessment.³⁴⁷

331. Josh Rabe, *Capitol: A Look at the Progress of Two Oklahoma Laws That Went into Effect One Year Ago—After the Ink Dried—Sex-Offender Rules Need Work*, *Agencies Say*, *Oklahoman* 11A (Nov. 1, 2007).

332. *Id.* See also Okla. Stat. tit. 57, § 582.5(C).

333. See *supra* pt. I(B) (discussing different types of assessments).

334. Okla. Dept. Corrects., *supra* n. 83; E-mail from Jim Rabon, Administr., Sentence Admin. & Offender Recs. Unit, Okla. Dept. Corrects., to Rhiannon Thoreson, *Sex Offender Assessments* (Nov. 13, 2007, 4:30 p.m. CST) (copy on file with author).

335. *Supra* pt. I(B) (discussing static and dynamic factors).

336. See Okla. Stat. tit. 57, § 582.5(C).

337. *Id.* (emphasis added).

338. Okla. Stat. tit. 57, § 582.5(C)(1)–(3).

339. *Id.*

340. Okla. Dept. of Corrects., *supra* n. 83.

341. Okla. Stat. tit. 57, § 582.5(C)(1)–(3).

342. Okla. Dept. of Corrects., *supra* n. 83.

343. See Rabe, *supra* n. 331 (levels are based on perceived risk and do not consider individual context).

344. See *id.*

345. Justin Jones & Okla. Dept. Corrects., *Operations Memo. No. OP-160601: Supervision of Sex Offenders* 3–4 (Jun. 6, 2007) (available at <http://www.doc.state.ok.us/Offtech/op160601.pdf>).

346. Rabon, *supra* n. 334.

347. Jones & Okla. Dept. Corrects., *supra* n. 345, at 3.

Both of these tools examine stable and acute dynamic risk factors associated with recidivism.³⁴⁸ While on probation or parole, this assessment is reviewed every six months.³⁴⁹ In addition, all male sex offenders must complete a Static-99 assessment, designed to predict sexual and violent recidivism.³⁵⁰ The SONAR and the Static-99 are both commonly used actuarial assessments.³⁵¹ The Static-99, used alone, can identify offenders whose risk for sexual recidivism is greater than 50 percent.³⁵² When used in conjunction with the SONAR, which considers dynamic risk factors,³⁵³ the risk assessment accuracy is further increased.³⁵⁴ The combined assessments should capture short-term, intermediate, and long-term risk factors associated with sexual recidivism.³⁵⁵ As currently utilized, these tools help the Department of Corrections determine the appropriate treatment and supervision during probation and parole based on the individual sex offender's risk, needs, and responsiveness.³⁵⁶

Although sex offenders are more likely to be re-arrested for a sex crime,³⁵⁷ this risk is relatively low and most do *not* re-offend.³⁵⁸ Contrary to popular opinion, repeat offenders do not commit the majority of sex crimes.³⁵⁹ Classifying an offender's risk level based solely on the convicted offense is insufficient evidence of risk to the public.³⁶⁰ Researchers have developed and fine-tuned risk assessment tools based on empirical evidence and specific factors associated with recidivism.³⁶¹ Oklahoma already uses two of these tools to assess sex offenders for probation and parole purposes³⁶² and the State should extend the application of those assessments to assign the statutory risk levels. The current system that uses only one factor, the offense, to determine the level of risk is not as accurate as tools that actually look at multiple factors,³⁶³ as required by Oklahoma statute.³⁶⁴

348. *Id.*

349. *Id.* at 4.

350. *Id.* at 3.

351. See Harris, *supra* n. 70, at 38–39.

352. Hanson, *supra* n. 69, at 70.

353. Harris, *supra* n. 70, at 39.

354. See Hanson, *supra* n. 69, at 71.

355. Harris, *supra* n. 70, at 39.

356. Jones & Okla. Dept. Corrects., *supra* n. 345, at 4.

357. Langan, Schmitt & Durose, *supra* n. 2, at 24 tbl. 21.

358. Hanson, *supra* n. 69, at 64 (within five years, only 13.4 percent recidivated with a new sexual offense; within 20 years, 30–40 percent may recidivate); *No Easy Answers*, *supra* n. 287, at 4, 27 (75 percent of sex offenders do not re-offend).

359. *No Easy Answers*, *supra* n. 287, at 4, 25.

360. Hanson, *supra* n. 69, at 71.

361. Ctr. for Sex Offender Mgt., *The Importance of Assessment in Sex Offender Management: An Overview of Key Principles and Practices*, U.S. Dept. Just. 4–5 (July 2007) (available at http://www.csom.org/pubs/assessment_brief.pdf).

362. Jones & Okla. Dept. Corrects., *supra* n. 345, at 3.

363. See Ctr. for Sex Offender Mgt., *supra* n. 361, at 5 (It is a mistake to rely on a single source of information to assess risk.).

364. Okla. Stat. tit. 57, § 582.5(C) (“various factors”).

As implemented in Oklahoma, 78 percent of the registered sex offenders were assigned to level three, three percent to level two, and 19 percent to level one.³⁶⁵ In other words, 78 percent of the offenders were deemed a “serious danger to the community and will continue to engage in criminal sexual conduct.”³⁶⁶ These ratios inaccurately reflect the risk to children or to the public in general because the majority of sex offenders do not re-offend.³⁶⁷ “The least number of people should be in the worst tier”³⁶⁸ and not the other way around.³⁶⁹ The state legislators intended individual assessments be used to determine risk so law enforcement could focus their time and resources on the offenders who are the biggest threat to the public.³⁷⁰ Instead, assigning risk based solely on the offense resulted in classifications that are inaccurate and too broad.³⁷¹ The Department of Corrections should apply the tools the state already uses in probation and parole to determine the individual sex offender’s statutory risk level.

Based on an individualized risk assessment as outlined above, level one sex offenders should not be subject to the residency restrictions because they are a low threat to the community and are unlikely to re-offend.³⁷² It is questionable whether residency restrictions prevent recidivism and some research indicates the laws may actually make things worse.³⁷³ If the state continues to use residency restrictions, the law should not apply to all registered sex offenders, only those likely to re-offend.³⁷⁴ Law enforcement would then be able to focus on the offenders who pose a real threat to the community.³⁷⁵

Individualized risk assessments are stronger on constitutional grounds than arbitrary classifications based solely on offense.³⁷⁶ If Oklahoma ties the residency restrictions to the statutory risk levels, sex offenders will be entitled to procedural protections under the Due Process Clause.³⁷⁷ Because the risk levels indicate a corresponding degree of risk to the public, a factual finding of dangerousness is relevant and the offender should be entitled to a hearing to establish this material fact.³⁷⁸ The statute allows the risk assessment review committee or the court to override an offender’s risk level with proper documentation.³⁷⁹ This suggests judicial review is available, and even if this review or hearing does not take place until after the

365. Nicole Marshall, *New Sex-Offender Law Faces Opposition*, Tulsa World A-1, A-4 (Oct. 28, 2007).

366. Okla. Stat. tit. 57, § 582.5(C)(3).

367. Hanson, *supra* n. 69, at 64; *No Easy Answers*, *supra* n. 287, at 4, 27.

368. Marshall, *supra* n. 365, at A-4 (quoting Tulsa Police Sgt. Gary Stansill).

369. *See id.*

370. Mock & Dean, *supra* n. 117, at 6A.

371. *See* Marshall, *supra* n. 365, at A-4.

372. *See* Okla. Stat. tit. 57, § 582.5(C)(1).

373. *Supra* pt. IV (discussing effectiveness of residency restrictions).

374. Marshall, *supra* n. 365, at A-4.

375. *Id.*

376. *See Weems*, 453 F.3d at 1017.

377. *Id.* at 1019.

378. *See Conn. Dept. of Pub. Safety*, 538 U.S. at 7–8 (finding of dangerousness was not material under state law and therefore offender was not entitled to a hearing).

379. Okla. Stat. tit. 57, § 582.5(D). *But see* Rabon, *supra* n. 334 (committee does not plan to override risk level). The statute does not specify whether the override can increase or decrease the risk level, but the Department of Corrections interprets the statute as providing an option only to increase the level. *See* Okla. Stat. tit. 57, § 582.5(D); Justin Jones & Okla. Dept. Corrects., Operations Memo. No. OP-020307: Sex and Violent Crime Offender Registration I(B) (Nov. 1, 2007) (available at www.doc.state.ok.us/ofttech/op020307.pdf).

classification and restrictions are in effect, procedural due process is probably satisfied.³⁸⁰ The Due Process Clause does not require all procedural protections be provided before the initial deprivation of a liberty interest.³⁸¹ In evaluating a similar state statute, the Eighth Circuit found that a combination of procedures prior to risk determination and procedures available after the risk determination satisfied procedural due process.³⁸²

Oklahoma courts would examine substantive due process challenges using a rational basis standard because fundamental rights are not implicated.³⁸³ The State's interest in protecting children and the public from repeat sex offenders³⁸⁴ would be better served by applying the residency restrictions only to those offenders who are a greater risk to the public.³⁸⁵ The rational relationship between the State's interest and the laws is strengthened by tying the restrictions to the statutory risk levels.³⁸⁶

Although residency restrictions have been upheld against *ex post facto* arguments,³⁸⁷ courts are not as unanimous, and strong dissents indicate the possibility that these laws may eventually be found unconstitutional.³⁸⁸ When considering whether the restrictions are so punitive in purpose or effect as to negate the legislative intent to create civil and non-punitive proceedings, the most important factors are whether the law is rationally related to the state's purpose³⁸⁹ and whether the law is excessive in relation to the state's purpose.³⁹⁰ Using individualized risk assessments and imposing restrictions only on high-risk offenders increases the likelihood that the restrictions are rationally connected and not excessive in relation to the state's purpose of protecting the public.³⁹¹ When based on individualized assessments, the restrictions are on stronger *ex post facto* footing.³⁹²

In determining a registered sex offender's numeric risk level, Oklahoma should follow the statutory language and use individualized risk assessments that take into consideration multiple factors instead of relying solely on the offense. Furthermore, if residency restrictions continue to be used in Oklahoma, the restrictions should not apply to level one sex offenders because by definition, those individuals are deemed unlikely to re-offend and are a "low danger to the community."³⁹³ If, and when, Oklahoma's residency restrictions are challenged, the laws will more likely be upheld if the

380. *See Weems*, 453 F.3d at 1019.

381. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981).

382. *Weems*, 453 F.3d at 1019.

383. *Weems*, 453 F.3d at 1015; *Miller*, 405 F.3d at 710–11; *Graham*, 2006 WL 2645130 at *7; *Seering*, 701 N.W.2d at 663; *Leroy*, 828 N.E.2d at 776–77. *See also supra* pt. III(A) (discussing right to privacy and choice in family matters, right to travel, and the right to live where one wants).

384. Okla. Stat. tit. 57, § 581(B).

385. *See Marshall, supra* n. 365, at A-4.

386. *See Weems*, 453 F.3d at 1015–16.

387. *Supra* pt. III(B) (discussing *ex post facto* factors).

388. *E.g. Miller*, 405 F.3d at 723 (Melloy, J., concurring in part and dissenting in part); *Seering*, 701 N.W.2d at 671 (Wiggins, J., and Lavorato, C.J., concurring in part and dissenting in part); *Leroy*, 828 N.E.2d at 785 (Kuehn, J., dissenting).

389. *Miller*, 405 F.3d at 721 (citing *Smith*, 538 U.S. at 102).

390. *Smith*, 538 U.S. at 103.

391. *Weems*, 453 F.3d at 1017.

392. *Id.*

393. Okla. Stat. tit. 57, § 582.5(C)(1).

restrictions only apply to registered sex offenders actually assessed to be at risk of re-offending.³⁹⁴

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394. *Supra* pt. V (discussing due process and ex post facto challenges).

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