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Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders

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BANISHMENT BY A THOUSAND LAWS: RESIDENCY RESTRICTIONS ON SEX OFFENDERS

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INTRODUCTION

> *We all carry within us our places of exile, our crimes and our ravages. But our task is not to unleash them on the world; it is to fight them in ourselves and others.*
>
> —Albert Camus[1]

In 1932 the Soviet Union revived its policy of *propiska* to control the internal movements of its population.[2] *Propiska* was a system restricting the movement and domicile of Soviet citizens.[3] As a supplement to the *propiska* system, undesirables were exiled from major cities.[4] The exiles were instructed not to live within one hundred kilometers of designated cities within the Soviet Union.[5] The undesirables exiled to the 101st kilometer included criminals, homeless persons, prostitutes, and political dissidents.[6] One of the last great purges to the 101st kilometer accompanied the 1980 Moscow Olympic Games, as the Soviet Union sought to project a positive image of its capital city to the world community.[7] The practice gave rise to the expression, "Taken to the 101st kilometer" which is still a harrowing phrase in Russia and other former Soviet states.[8] *Propiska* passport and registration requirements enforced these population relocation programs.[9]

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1. ALBERT CAMUS, THE REBEL ix (Vintage Books 1956).
2. Tova Höjdestrand, *The Soviet-Russian Production of Homelessness*, ANTHROBASE (2003), http://www.anthrobase.org/Txt/H/Hoejdestrand_T_01.htm ("The Soviet propiska system was established by a decree by Stalin of 27th December 1932, as an instrument for the state to restrict the mass immigration to the large cities that was caused by expanding urban industrialisation and rural mass famine." (citations omitted)); *see also* Noah Rubins, *The Demise and Resurrection of the Propiska: Freedom of Movement in the Russian Federation*, 39 HARV. INT'L L.J. 545 (1998).
3. *Id*.
4. Nora FitzGerald, *Russians View Fate of Exiles*, INT'L HERALD TRIB., Oct. 21, 2005, at 9.
5. *Id.*
6. *Id.*
7. Matt Bivens, *Looks More Like the KGB than TBS*, L.A. TIMES, July 27, 1994, at C3.
8. *Id.*
9. Rubins, *supra* note 2, at 546 n.4.

Members of exile communities lived in a social "abyss" where people were separated from their families, friends, and the only places they had ever known.[10] Since the collapse of the Soviet Union and the resultant end of banishing persons to the 101st kilometer,[11] former exiles have struggled to reintegrate into a society that they were forced to leave so long ago.[12] The Soviet Union's policy of expelling undesirable populations from designated areas is a rare modern example of mass banishment. While not as explicit as the Soviet practice, the various regimes set up in the United States to control the living arrangements of sex offenders bear striking resemblance to the exile made possible by the *propiska* system.[13]

Across America, states, localities, and private communities are debating and implementing laws to limit the places where convicted sex offenders may reside.[14] Twenty states[15] and hundreds of localities have adopted sex offender residency restrictions.[16] Bills to establish residency restrictions are currently pending in another twelve states.[17] Given the

10. FitzGerald, *supra* note 4, at 9.

11. While banishment to the 101st kilometer fell out of favor after the collapse of the Soviet Union, the underlying policy of *propiska* has continued to the present day in some former Soviet states. *See, e.g.*, Kacjaryna Bulanava, *Belarus to Abolish 'Propiska'* (European Radio for Belarus broadcast Jan. 25, 2007), http://www.belradio.fm/en/4/reports/514/?tpl=208; Rubins, *supra* note 2, at 545.

12. FitzGerald, *supra* note 4, at 9.

13. While I describe the similarities in the practice of banishment to the 101st kilometer with modern work and residency restrictions on sex offenders, there are notable differences. Many of those sent to the 101st kilometer were not criminals at all—they were just victims of oppression by the Soviet government. Also, many in the criminal population were convicted of political crimes. Consequently, the communities at the 101st kilometer had different populations than those in sex offender enclaves in the United States. The analogy between the two situations is helpful, however, in understanding the effects of creating communities of the banished. While there are important differences between the populations of these two cases, many of the patterns observed in people living at the 101st kilometer are already beginning to emerge in states that have adopted aggressive work and residency restrictions on sex offenders. *See infra* notes 247–63 and accompanying text.

14. *No Easy Answers*, HUMAN RIGHTS WATCH 102–20, http://hrw.org/reports/2007/us0907; *see infra* notes 172–205 and accompanying text.

15. ALA. CODE § 15-20-26 (LexisNexis Supp. 2006); ARK. CODE ANN. § 5-14-128 (2006); CAL. PENAL CODE § 3003.5 (West Supp. 2007); DEL. CODE ANN. tit. 11, § 1112 (Supp. 2006); FLA. STAT. ANN. § 794.065 (West Supp. 2007); GA. CODE ANN. § 42-1-15 (Supp. 2006); IDAHO CODE ANN. § 18-8329 (Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/11-9.3(b-5) (West 2002 & Supp. 2006); IND. CODE ANN. § 35-42-4-11(C) (West Supp. 2006); IOWA CODE ANN. § 692A.2A(2) (West 2003 & Supp. 2007); KY. REV. STAT. ANN. § 17.495 (LexisNexis 2003 & Supp. 2006); LA. REV. STAT. ANN. § 14:91.1 (2004 & Supp. 2007); MICH. COMP. LAWS ANN. § 28.735 (West Supp. 2007); MISS. CODE ANN. § 45-33-25 (2004 & Supp. 2006); MO. REV. STAT. § 566.147 (Supp. 2005); N.C. GEN. STAT. § 14–208.16 (Supp. 2006); OHIO REV. CODE ANN. § 2950.031(A) (West 2006); OKLA. STAT. ANN. tit. 57, § 590 (West 2004 & Supp. 2007); OR. REV. STAT. ANN. § 144.642 (West 2003 & Supp. 2006); TENN. CODE ANN. § 40-39-211 (Supp. 2005) [hereinafter, collectively, "Residency Restriction Statutes"].

16. *See infra* notes 172–205 and accompanying text.

17. H.R. 2380, 47th Leg., 2d Reg. Sess. (Ariz. 2006); H.R. 1089, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006); S. 12, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006); S. 506, 81st Leg., Reg. Sess.

recent development of residency restriction laws and a political environment toxic to sex offenders,[18] the number of states and localities with residency restriction laws will likely continue to grow.[19]

The typical residency regulation establishes an "exclusion zone"[20] around schools, child care facilities, parks, and/or other locations where children are commonly found.[21] The exclusion zone usually requires that a sex offender live at least 500 to 2,500 feet from any location listed as protected.[22] A single exclusion zone affects just a small geographic area. However, the aggregate effect of the many exclusion zones adopted at the state, local, and neighborhood levels can prevent sex offenders from living in entire cities, towns, and communities.[23] Further, when one jurisdiction restricts the residency of its sex offenders by creating exclusion zones, neighboring communities are pressured to follow suit to avoid becoming a haven for local sex offenders.[24] The result is an emerging race-to-the-bottom pattern whereby communities are moving to prevent sex offenders from flocking to their exclusion-zone-free municipalities.[25]

In this Article, I argue that the establishment of exclusion zones by states and localities is a form of banishment that I have termed "internal exile."[26] Internal exile is an uncommon practice in modern developed societies. Consequently, the increasing emergence of exclusion zones is a development that could fundamentally alter basic principles of the American criminal justice system.

An examination of the connections between banishment and exclusion zones is essential to effective policymaking for several reasons. First, from a doctrinal standpoint, if exclusion zone laws are found to "resemble"

(Kan. 2006); H.D. 942, 421st Gen. Assemb., Reg. Sess. (Md. 2006); H.R. 889, 184th Gen. Ct., Reg. Sess. (Mass. 2005); S. 867, 99th Leg., 2d Reg. Sess. (Neb. 2006); Assemb. 639, 212th Leg. (N.J. 2006); Assemb. 9428, 229th Leg. Sess. (N.Y. 2006); H.R. 7621, 2005–2006 Leg. Sess. (R.I. 2006); H.R. 4323, Gen. Assemb., 116th Sess. (S.C. 2006); H.R. 1864, Leg. Sess. 80R (Tex. 2007).

18. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE 2–3 (2006).

19. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 3 (2006).

20. "Exclusion zone" is a term used by Wayne Logan to describe sex offender residency restrictions. *Id*. at 11. To my knowledge, this term has not been adopted by policymakers or judges. Nonetheless, I believe it is a good shorthand term to describe residency restrictions. Consequently, I use the terms "exclusion zone" interchangeably with "residency restrictions" throughout this Article.

21. *See* Residency Restriction Statutes, *supra* note 15.

22. *Id.*

23. *See infra* notes 226–63 and accompanying text.

24. *See infra* notes 301–09 and accompanying text.

25. *See infra* notes 301–09 and accompanying text.

26. *See infra* note 86 and accompanying text.

banishment, then the laws will be presumed punitive in nature.[27] If the laws are punitive in nature, then they cannot normally be applied retroactively (as most of the exclusion laws are), double jeopardy challenges are viable, due process claims are strengthened, cruel and unusual punishment claims may succeed, and other constitutional protections are heightened. If, however, legislatures are successful in portraying exclusion zones as entirely regulatory, then the ability to zone out any group of undesirables in America becomes a legal possibility.[28] In the United States, the only group targeted by exclusion zone laws so far has been sex offenders, easily one of the most unpopular populations in the nation.[29] However, the legal arguments in support of sex offender exclusion zone laws could apply to numerous other outcast populations as well.[30]

Second, from a policy perspective, the degree to which exclusion zones resemble exile allows us to learn from prior experiences with internal exile systems. The Soviet practice of exiling undesirables to the 101st kilometer provides a rare example of internal exile by a modern developed society. As a result, I draw substantially from the Soviet experience to understand the nature of internal banishment and its consequences.

Third, banishment is a unique punishment because of the social signaling it represents. Total social ostracization and isolation, without the possibility of reassimilation, is a punishment that carries a different set of assumptions and goals than a typical criminal sentence. By casting out sex offenders in response to a political environment charged with hysteria and fear, we are in danger of undermining the basic principles of our democratic government.

This Article is structured as follows: Part I explores the history and law of banishment as a form of punishment in the West generally and then specifically in the United States. Part II discusses the development of sex

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27. While courts addressing the constitutionality of exclusion zones have focused on whether exclusion zones are, in and of themselves, forms of banishment, the traditional test is whether a state sanction resembles banishment. *People v. Leroy*, 828 N.E.2d 769, 787 (Ill. App. Ct. 2005) (Kuehn, J., dissenting). For purposes of this Article, the difference is not particularly important because I think the evidence supports the contention that exclusion zones not only resemble banishment, but are a form of banishment as well.

28. *See infra* notes 300–01 and accompanying text.

29. Bret R. Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 GA. L. REV. 961, 962 (2006) ("[L]egislators often expediently enact new laws targeted at a most unpopular group—convicted sex offenders."); Charles Toutant, *Zoning Out Sex Offenders*, N.J. L.J., Nov. 21, 2005, at 6 (noting that residency restrictions are typically implemented with "zero opposition, since sex offenders are the pariahs of modern society").

30. Logan, *supra* note 19, at 3.

offender exclusion zone laws and judicial responses to those laws. Part III identifies the connections between the historical practices of banishment discussed in Part I and the new exclusion zone laws reviewed in Part II. Part IV shows how these connections ultimately raise substantial legal, policy, and ethical problems for residency restrictions on sex offenders. I conclude by looking to the future of sex offender laws in America.

I. BANISHMENT AS PUNISHMENT

And, I know that exiles feed themselves on hope.

—Aeschylus[31]

Banishment as punishment has a long history in Western societies.[32] In a sense, most modern punishments are a form of banishment. Prisons exile inmates to controlled environments for a term of years. Halfway houses facilitate reentry from the exiled world into the mainstream population. Even the death penalty seeks to permanently "banish" a convict from society. Gone are the days of corporal punishment, shaming, and other punishments that do not isolate convicts for a period of time.[33]

While punishments that have the effect of banishing criminals dominate Western penal systems, banishment itself has fallen into strong disfavor in America.[34] Only a handful of states allow banishment as a form of punishment.[35] Even among those states that permit banishment, the practice is severely constrained in process and substance. Many states actually explicitly prohibit banishment in their constitutions.[36]

Despite the prevalence of banishment-like punishments in Western jurisprudence, there is very little scholarship on the subject.[37] There is also very little reported case law related to exile as punishment.[38] The dearth of case law is not surprising, however, because banishment in the United

31. AESCHYLUS, AGAMEMNON 65 (William R. Link trans., Bauhan ed. 1981).

32. *See infra* notes 41–150 and accompanying text.

33. While shaming punishments have had a limited revival in the United States in recent years, such schemes were much more common during colonial times. *See* Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1187 (2006).

34. *See infra* notes 87–150 and accompanying text.

35. *See infra* note 90 and accompanying text.

36. *See infra* note 129 and accompanying text.

37. Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 456 (1998) ("There is a myriad of reasons why so little scholarship has been devoted to banishment.").

38. *Id.*

States is most often found as a condition for probation or parole.[39] Convicts infrequently challenge probation and parole conditions for fear that they will be denied release.[40] When there is a challenge, it is rarely fruitful for the convict because authorities are given wide deference in probation and parole decisions.[41]

I have identified three major periods in banishment history: expulsion, prison colonies, and internal exile. In this section, I discuss each of these periods and conclude by discussing the history and law of banishment as punishment in the United States.

A. Expulsion

Banishment in its early form was the expulsion of a person from a community or sovereign area. Ordinarily, as long as the banished person remained outside of that community or sovereign area, he or she was free from any further punishment. The banishment could be for a term of time or a lifetime of exile. I refer to this historical banishment as "expulsion" because the emphasis was on removing an undesirable person from a given community.

At least insofar as Western culture is derived from Christian thought, one could say that punishment in our society began with banishment from the Garden of Eden.[42] Expulsion has been used by governmental authorities since the time of the Code of Hammurabi in Babylon.[43] Under the Code of Hammurabi, expulsion was the punishment for incest with one's own daughter.[44] Under Mosiac law, manslaughter was punishable by expulsion.[45] In Ancient Greece, murderers were often sentenced to expulsion, although other punishments could apply as well.[46] Forced exile for a period of ten years was imposed in Athens for any citizen who posed

39. *Id.*
40. *Id.*
41. *Id.*
42. Jason S. Alloy, Note, *"158-County Banishment" in Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1085 (2002).
43. James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 48 (1996); Snider, *supra* note 37, at 459.
44. Alloy, *supra* note 42, at 1085. *See also*, Lindgren, *supra* note 43, at 48; Snider, *supra* note 37, at 459.
45. ISRAEL DRAPKIN, CRIME AND PUNISHMENT IN THE ANCIENT WORLD 77 (1989); Snider, *supra* note 37, at 459.
46. RONALD S. STROUD, DRAKON'S LAW ON HOMICIDE 31–64 (1968); Snider, *supra* note 37, at 460.

a threat to the underlying political stability of the society.[47] In Ancient Rome, expulsion was a common punishment for a variety of crimes.[48]

Expulsion continued to be a common form of punishment in the Middle Ages in many European societies.[49] Dutch and English governments were particularly enamored with expulsion as a punishment.[50] In England, the practice can be traced back to the twelfth century.[51] At that time, banishment took the form of church-protected sanctuary.[52] A criminal was afforded the opportunity to flee to a sacred place to be protected from law enforcement authorities.[53] If the criminal confessed to his or her crimes within forty days of seeking refuge, then he or she could take an oath to leave England and not return without leave from the Crown.[54] The practice of banishment subject to sanctuary fell out of favor in the early seventeenth century because it represented a significant loophole in the criminal justice system in England.[55] King James I outlawed banishment subject to sanctuary in 1623.[56]

In Amsterdam, the practice of expulsion continued well after the English had abandoned the system. From 1650 to 1750, at least ninety-seven percent of non-capital sentences included some form of banishment.[57] Expulsion served the essential functions of the death penalty without actual execution. The convict was removed from society and ordered never to return. It was as though the criminal were actually dead to society. Further, during the Middle Ages, expulsion was literally a death sentence for many persons cast out into the wilderness.[58]

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47. Snider, *supra* note 37, at 463.

48. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.23 (1963).

49. Lee H. Bowker, *Exile, Banishment and Transportation*, 24 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 67, 67 (1980); Snider, *supra* note 37, at 460.

50. Peter Spierenburg, *The Body and the State*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 49, 62–64 (Norval Morris & David J. Rothman eds., 1995); Snider, *supra* note 37, at 460–61.

51. SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 569 (1938).

52. Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 120 (1999).

53. *Id.*; Snider, *supra* note 37, at 461.

54. Bleichmar, *supra* note 52, at 120.

55. *Id.* at 120–21.

56. *Id.* at 121.

57. Spierenburg, *supra* note 50, at 62; Snider, *supra* note 37, at 461.

58. Bowker, *supra* note 49, at 67; Snider, *supra* note 37, at 460.

B. Prison Colonies

With expulsion effectively ended in England by the abandonment of sanctuary protection, it was unclear what should be done with the many criminals who would have otherwise fled. Eventually, a system of sending convicts to prison colonies developed.[59] These prison colonies were not prisons in a modern sense. Instead, criminals were either free as long as they remained in the land to which they were exiled or they became indentured servants for a term of years.[60]

The United States is a country that was, in part, founded by criminals sent to prison colonies.[61] Shipping convicts overseas afforded nations the dual benefits of removing criminals from society while providing labor for their new colonies. The practice of banishing criminals to prison colonies was especially prominent in England, where prisons were increasingly viewed as barbaric.[62]

For many decades, criminals were sent from England to the Americas on an ad hoc basis.[63] The punishment was not called exile or banishment—it was termed "transportation."[64] The ad hoc implementation of convict transportation was plagued by compliance problems, as felons would regularly buy their way out of transportation, or merchants would otherwise fail to deliver the criminals to the Americas.[65]

The practice became formalized and improved with the passage of the Transportation Act of 1718.[66] The Act was the first statutory implementation in England of the long-standing Anglo-Saxon custom of banishing criminals.[67] By offering public funds to ensure transportation of criminals, the Act eliminated the numerous loopholes that had marred the ad hoc system.[68] After the adoption of the Transportation Act, and until American independence, between 30,000 and 50,000 criminals were banished to the Americas.[69] The primary destinations for the criminals

59. Snider, *supra* note 37, at 460.

60. Bleichmar, *supra* note 52, at 123–24.

61. *See generally* COLIN A. BROWNING, THE CONVICT SHIP AND ENGLAND'S EXILES (1851).

62. Snider, *supra* note 37, at 461 ("At this period in British penological history, the prison was thought of as being barbaric and outmoded. As a result, the British could not countenance sending their fellow citizens to extended periods of penal servitude.").

63. Bleichmar, *supra* note 52, at 123–24.

64. *Id.* at 116–17.

65. *Id.* at 123–24.

66. TRANSPORTATION ACT, 1718, 4 Geo., c. 11 (Eng.); Bleichmar, *supra* note 52, at 116.

67. Bleichmar, *supra* note 52, at 129.

68. *Id.* at 126.

69. A. ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718–1775, 26–27 (1987); Bleichmar, *supra* note 52, at 116.

were the colonies of Virginia and Maryland.[70] The typical term of banishment was seven years, although most of the exiles never returned to the British Isles.[71]

Transportation was an important part of the punishment structure in England because other available sentences were viewed as too harsh or too lenient for certain crimes.[72] Ireland and Scotland also joined the formalized transportation practices and sent their criminals to the new world, largely under England's direction.[73] The practice was still common until the signing of the Declaration of Independence,[74] which effectively blocked English ships from delivering criminals to the colonies.[75]

As with expulsion, prison colonies served functions similar to capital punishment but without the bloodshed:

> Execution is a simple punishment, quick, effective, economical, but not merciful. Hence perhaps the resort to what seemed to many to be the next best thing—banishment. This at least satisfied the society from which the criminals were expelled, if no one else. There was no need to worry about their behavior in the future; the process was cheap; [and] the receiving society could usually be ignored . . . .[76]

While the British usually ignored the effects of banishment on receiving societies, the use of prison colonies marked the first significant resistance to importation by destination nations.[77] Disregard for societies receiving banished persons is a significant trend because it has accompanied the more recent forms of banishment, as noted below.

While the nations of the British Isles had to curtail transportation because of the independence of the United States, the practice continued to

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70. Bleichmar, *supra* note 52, at 116.

71. Snider, *supra* note 37, at 462.

72. Bleichmar, *supra* note 52, at 122 (noting that "[transportation] was an effective way of modulating the severity of criminal sanctions by a system that, until then, could administer punishment only with extreme harshness or extreme leniency").

73. Snider, *supra* note 37, at 462.

74. Bleichmar, *supra* note 52, at 116.

75. *Id.* at 128 ("On January 11, 1776 newspaper accounts reported that transportation was effectively suspended whilst the country [referring to the Colonies] remains unsettled." (internal quotation omitted)).

76. *Id.* at 123 (quoting A.G.L. SHAW, CONVICTS AND THE COLONIES: A STUDY OF PENAL TRANSPORTATION FROM GREAT BRITAIN AND IRELAND TO AUSTRALIA AND OTHER PARTS OF THE BRITISH EMPIRE 21 (1966)).

77. Bleichmar, *supra* note 52, at 128 ("The onslaught of convicts from the Old World spurred public alarm and apprehension in the American Colonies.").

other destinations until the middle of the nineteenth century.[78] Australia was a popular destination; almost 40,000 people were transported there from Ireland alone.[79]

France and Russia also engaged in transportation, although to a lesser extent than England.[80] France created colonies in New Caledonia and on the notorious Devil's Island[81] near French Guinea.[82] Russia's use of banishment did not even require that a criminal leave the country. Because Russia contained vast areas of undeveloped land, including Siberia, there was ample space to transport criminals to be banished within the same continent.[83] Both Russia and France continued the practice of transportation to a limited extent until the middle of the twentieth century.[84]

Prison colonies eventually became a geographical impossibility as the frontiers of the world disappeared. There was simply no habitable unsettled land for prisoners to be sent. Further, even if such a place existed, global travel became much easier, removing any guarantee that banished convicts would not return immediately after their initial exile.[85] While prison colonies afforded a solution preferable to previous forms of banishment, they became a historical relic because of the dearth of global real estate.

C. Internal Exile

Internal exile is characterized by a system banishing a person from a geographic area, but not from a larger sovereign territory. Prison colonies usually forced persons to faraway lands whereas internal exile systems allowed persons to remain in the original nation but with significant limitations. The Soviet use of internal prison colonies provided a smooth

78. Snider, *supra* note 37, at 462–63.

79. *Id.* at 464.

80. *Id.* at 463.

81. Operational from the mid-19th to the mid-20th century, Devil's Island was a prison used by France. *See generally* W.E. ALLISON-BOOTH, DEVILS ISLAND (Putnam 1931); RENE BELBENOIT, DRY GUILLOTINE (Preston Rambo trans., E.P. Dutton 1938). The conditions on the disease-ridden island were horrific and, like Alcatraz, escapes from the island had a mythical nature. *Id*.

82. Snider, *supra* note 37, at 463 n.50.

83. *Id.* at 464.

84. *Id*. at 463.

85. Bleichmar, *supra* note 52, at 129 ("In the Middle Ages, with travel being cumbersome and difficult, banishment from the village or county was sufficient. As travel became easier and more efficient, it became necessary to banish beyond the seas."). With the ease of travel today, true banishment without an expectation of return is an impossibility short of sending someone to Antarctica or the Moon.

transition to systems of internal exile aided by *propiska*. Instead of putting a convict on a train to Siberia, he or she could be ordered to leave a protected area and join a community beyond the 101st kilometer. In 1917, the prison colony system was largely abolished in Russia.[86] However, when Stalin revived the system of *propiska*, he combined prison colonies with the *propiska* concept.[87] With the advent of exile to the 101st kilometer, Stalin set the groundwork for a banishment system that Russian leaders could use to internally exile criminals and other undesirables.

For an internal exile system to be effective, a person's living and travel arrangements had to be tightly controlled. Thus, the *propiska* system was instrumental for Soviet leaders seeking to exile people to the 101st kilometer because its restrictions increased compliance with the law and largely prevented the banished from entering restricted areas.

Internal exile has not been practiced on a systemic level in the Western nations that previously used prison colony systems. Instead, with the death of prison colonies, prisons once again became the dominant method of punishing criminals.[88] Prisons offered Western societies the benefits of banishment without the necessity of frontiers. Prisoners are forced to exist in separate societies, prevented from interacting with the general population. Just as criminals sent to Australia in eras past were forgotten by the society that cast them out, modern prisons too keep inmates out of sight and out of mind for the rest of society.

As a result, the transition from prison colonies to internal exile was an aborted revolution. Prisons, rather than internal exile systems, filled the gap created by the impossibility of prison colonies in the modern era. However, as noted below, there are persuasive reasons to believe that the transition to internal exile systems is gaining new momentum.

D. Banishment in the United States

Perhaps because the founding of America was responsible for the end of banishment as punishment among several Western European countries, it should not be surprising that America has rarely used exile in its criminal justice system. While banishment was common in the American colonies, the practice fell into disfavor as a means of punishment in the United States as compared to the strong Anglo-Saxon tradition supporting

86. Snider, *supra* note 37, at 464.
87. *Id.*
88. Logan, *supra* note 19, at 5.

exile punishments.[89] Currently, as many as ten states have allowed some form of banishment as a condition of probation or replacement for imprisonment.[90] The primary reasons for the limited use of banishment in the United States are public policy objections[91] and some ambiguity about the constitutionality of the practice.[92]

While several states have experimented with banishment during the last 150 years,[93] there is no significant case law on the legal questions raised by the practice.[94] Of the states that still allow banishment, a key distinction is drawn between intrastate and interstate banishment. Interstate exile banishes a criminal from all parts of a state whereas intrastate banishment permits a convict to remain in certain areas of the state.[95] Even in those states that have few limitations on intrastate banishment, including Georgia, Wisconsin, and Mississippi, interstate banishment is strictly forbidden.[96] Interstate banishment has only been permitted in the United States in isolated instances.[97] The legality and constitutionality of intrastate banishment is still an open question in many jurisdictions around

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89. Alloy, *supra* note 42, at 1087.

90. "A survey of state case law reveals that Alabama, Alaska, California, Georgia, Illinois, Minnesota, Mississippi, Oregon, and Texas have considered intrastate banishment conditions and upheld them in limited circumstances, or indicated a willingness to do so." Stephanie Smith, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461, 1481 n.143 (2000); Matthew D. Borrelli, Note, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 469 (2003) ("[O]nly six states implore [banishment] as part of probationary sentences or as an alternative to jail time . . . ."). In addition to some of the states that Smith lists, Borrelli includes Massachusetts. *Id.*

91. Snider, *supra* note 37, at 466 ("The problem is that the reasoning given for the decisions is often void of any legal analysis and imbued with normative notions of what constitutes proper punishment.").

92. Borrelli, *supra* note 90, at 469–70.

93. *Id.* at 471–72.

> In the nineteenth century, Massachusetts courts recognized the state's power to banish individuals. In 1818 Georgia allowed interstate banishment, but in 1877 the Georgia legislature amended the state constitution to prohibit banishment beyond the limits of the state. In 1893, the New York legislature enacted laws permitting a judge to impose a discretionary sentence that included the option for banishment. . . . Since this time, a minority of courts sporadically has used their power to banish the accused from counties, states, and activities.

Id.

94. Snider, *supra* note 37, at 456.

95. Borrelli, *supra* note 90, at 477; Alloy, *supra* note 42, at 1089.

96. Borrelli, *supra* note 90, at 473.

97. *Id.* at 473–74 ("[I]n 2000 Kentucky banished a man from the state for one year when a state court found him guilty of domestic abuse."); Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253, 255–56 (2004).

the United States, but the practice is so rare that case law will probably continue to develop slowly on the issues related to exile.

1. Federal Law

The United States Supreme Court has never directly addressed the legality or constitutionality of interstate or intrastate banishment punishments.[98] However, there have been a few notable opinions which discuss the issue in other contexts.[99] Supreme Court cases mentioning exile as a punishment arise in two types of cases: immigration and Ex Post Facto Clause cases. The reason that a discussion of banishment might arise in the immigration context is fairly obvious: deportation may be construed as a form of exile.[100] The frequent discussion of banishment in ex post facto cases may appear anomalous. However, the examination of banishment as punishment in those cases stems from the discussion by Justice Chase of banishment in the over 200-year-old case that still controls Ex Post Facto Clause cases, *Calder v. Bull*.[101] As a result of Justice Chase's examination of British banishment practices in *Calder*, subsequent Courts have often rehashed the banishment part of Justice Chase's opinion, analogizing exile to the matter before them.[102]

One of the most recent Supreme Court opinions referring to exile as punishment is *Smith v. Doe*,[103] which is explored later in this Article. *Smith v. Doe* addressed the constitutionality of Alaska's sex offender registry law. In *Smith*, the Court noted that any resemblance between registry requirements and banishment was "misleading."[104] Further, the Court referred to banishment as when a criminal was "expelled . . . from the community."[105] Ultimately, the Court found the registration requirements constitutional because they were simply regulatory, not banishment.[106]

98. Snider, *supra* note 37, at 471.

99. Searching the Lexis-Nexis "U.S. Supreme Court Cases, Lawyer's Edition" database for "banish! or exile!" yielded 209 cases on September 28, 2007. However, most of those cases mention banishment or exile in a context other than punishment or only in passing. Only a small handful of cases actually address banishment or exile as punishment.

100. *See, e.g.*, Kungys v. United States, 485 U.S. 759 (1987).

101. 3 U.S. 386 (1798).

102. *See, e.g.*, Stogner v. California, 539 U.S. 607, 614–15 (2003).

103. 538 U.S. 84 (2003).

104. *Id.* at 98.

105. *Id.*

106. *Id.* at 98–99.

Generally, the immigration cases do not offer much insight into how the Court will address an actual claim that banishment is unconstitutional because American citizens are afforded greater protection against exile. However, there are a small number of immigration cases related to the refusal of officials to allow reentry of Chinese laborer citizens that have some bearing on the topic of this Article.

In *United States v. Sing Tuck*,[107] the Supreme Court upheld a statute requiring a person of Chinese ethnicity seeking admission into the United States to submit his or her claim to an immigration officer.[108] The decision of the immigration officer was final, and even claims of actual citizenship were not subject to appellate review or habeas relief unless a person could show actual abuse of authority by the government.[109]

Applying the precedent in *Sing Tuck*, the Court in *United States v. Ju Toy*[110] upheld a denial of habeas relief to a Chinese laborer seeking reentry to the United States as a citizen who had been barred entry by a government official without a hearing.[111] The court upheld the appellate court's denial of habeas relief despite a clear factual finding by the district court that Ju Toy was, in fact, a citizen.[112] Justice Holmes' majority opinion made no mention of exile or banishment. However, Justice Brewer in his dissent engaged in an elaborate discussion of banishment, deportation, and the refusal to allow entry.[113]

Justice Brewer attempted to distinguish the case before him from the decision in *Fong Yue Ting v. United States*,[114] where the Court held that banishment through deportation of an alien was not punishment. Justice Brewer argued that "it was not suggested, and indeed could not be, that the deportation and exile of a citizen was not punishment."[115] The dissent went on to discuss various definitions of banishment and some history of exile as punishment.[116] Justice Brewer's conclusion was that "banishment is a punishment . . . of the severest sort."[117]

Justice Brewer's dissent has no value as precedent and is distinguishable from residency restrictions because he was considering

107. 194 U.S. 161 (1904).
108. *Id*. at 170.
109. *Id*.
110. 198 U.S. 253 (1905).
111. *Id*. at 258–59.
112. *Id*. at 263–64.
113. *Id*. at 269–80 (Brewer, J., dissenting).
114. 149 U.S. 698 (1893).
115. 198 U.S. at 269 (Brewer, J., dissenting).
116. *Id*. at 269–73.
117. *Id*. at 273.

banishment from the entire United States. Nonetheless, his writings are the most significant by the Court on the issue of banishment as punishment. The fact that the majority opinions in the Chinese laborer cases, while still "good" law, are not remembered as high points in American legal thought[118] could lend some authority to Justice Brewer's thorough analysis of the issue.

The only other Supreme Court opinion of relevance to this Article is the 1800 case of *Cooper v. Telfair*.[119] The plaintiff in *Cooper* argued that the state of Georgia could not constitutionally confiscate his property simply because the plaintiff had joined British forces against the United States.[120] In his opinion, Justice Cushing wrote that "[t]he right to confiscate and banish, in the case of an offending citizen, must belong to every government."[121] This clear statement has led at least one scholar to argue that the Supreme Court has offered a definitive ruling on the legality of banishment.[122] However, the facts of the case are readily distinguishable from any modern example. The Court in *Cooper* held that the nature of the constitutional compact allowed legislatures to confiscate the property of and banish persons who took up arms against the United States.[123] Such reasoning cannot be easily applied to banishment for an ordinary criminal offense, where the security of the country is not at stake.

Other federal courts have provided opinions related to banishment, but there is no clear agreement among the decisions.[124] The federal case most often cited by scholars and courts[125] in support of the proposition that banishment is illegal under United States law is *Dear Wing Jung v. United States*.[126] In *Dear Wing Jung*, the Ninth Circuit held that it was unlawful to allow an alien to choose banishment in exchange for a suspended prison sentence.[127] However, like the other immigration cases at the Supreme Court level, *Dear Wing Jung* does not actually address the banishment of a citizen within the confines of the United States. As a result, citing it for the proposition that banishment is per se illegal is erroneous.[128] As with

118. *See generally* Ming-sung Kuo, *The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases Revisited*, 67 ALA. L. REV. 27 (2003).
119. 4 U.S. 14 (1800).
120. *Id*. at 15.
121. *Id*. at 20.
122. Snider, *supra* note 37, at 469.
123. 4 U.S. at 18–20.
124. *See infra* notes 125–28 and accompanying text.
125. Snider, *supra* note 37, at 467.
126. 312 F.2d 73 (9th Cir. 1962).
127. *Id*. at 75–76.
128. Snider, *supra* note 37, at 468.

Supreme Court opinions on the issue, no clear holdings by the circuit or district courts have emerged to decide the legality of banishment as punishment. As a result, there is no established, controlling federal law on banishment as punishment.

2. State Law

At least sixteen states forbid or otherwise limit banishment in their constitutions.[129] Some states, such as Tennessee and Maryland, limit exile as punishment by adding a due process requirement before someone is banished.[130] Because of the emphasis on determinate sentencing ranges with specific terms of imprisonment, banishment is not part of state sentencing statutes.[131] The lack of specific statutory or constitutional references to banishment in most states often leaves the questions surrounding exile to the courts.

The majority of state courts that have addressed the issue hold that interstate banishment is against public policy.[132] In the various decisions addressing the legality of banishment at the state level, there has been almost no mention of the constitutionality of the practice.[133] The public policy rationales are often vague, but the recurring theme among state courts is that banishment is likely to cause discord between the communities doing the banishing and those receiving the banished.[134] Another common reason that state courts strike down banishment sentences is that the sentences lack specific statutory authorization.[135] The Michigan Supreme Court, in *State v. Baum*,[136] offered one of the most detailed explanations for why interstate banishment as a form of punishment should be illegal in the United States:

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129. *Id.* at 465; *see* ALA. CONST. art. I, § 30; ARK. CONST. art. II, § 21; GA. CONST. art. I, § 1, para. 21; ILL. CONST. art. I, § 11; KAN. CONST. § 12 (amended 1972); MD. CONST. art. IV; MASS. CONST. pt. 1, art. XII; NEB. CONST. art. I, § 15; N.H. CONST pt. 1, art. XIV; N.C. CONST. art. I, § 19; OHIO CONST. art. I, § 12; OKLA. CONST. art. II, § 29; TENN. CONST. art. I, § 8; TEX. CONST. art. I, § 20; VT. CONST. ch. I, art. I; W. VA. CONST. art. III, § 5.

130. Snider, *supra* note 37, at 465.

131. *Id.* at 466.

132. Borrelli, *supra* note 90, at 477 n.58 (citing Ex parte Scarborough, 173 P.2d 825, 827 (Cal. Ct. App. 1946); Commonwealth v. Pike, 701 N.E.2d 951, 957 (Mass. 1998); State v. Halverson, 154 N.W.2d 699, 702 (Minn. 1967); State v. J.F., 621 A.2d 520, 522 (N.J. Super. Ct. App. Div. 1993); People v. Marcial, 577 N.Y.S.2d 316, 317 (N.Y. App. Div. 1991); State v. Culp, 226 S.E.2d 841, 842 (N.C. Ct. App. 1976)).

133. Borrelli, *supra* note 90, at 477–78.

134. *See, e.g.*, People v. Baum, 231 N.W. 95, 96 (Mich. 1930).

135. Snider, *supra* note 32, at 467.

136. 231 N.W. 95 (Mich. 1930).

> To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself.[137]

For those states that allow intrastate banishment, the punishment is usually analogized to "buffer zone" punishments applied in the context of domestic abuse situations to keep abusers away from their victims.[138] If the prosecution can connect banishment to a rehabilitative or crime prevention purpose, then the likelihood that the punishment will be upheld on appeal is increased.[139] Mississippi, Florida, Wisconsin, and Oregon specifically require that exile facilitate rehabilitation.[140]

Some states have distinguished between banishment as part of probation and as a condition of parole.[141] When state courts have reviewed banishment as part of a probation plan, they have almost always held that the practice is illegal.[142] As a condition of parole or pardon, however, the use of banishment has sometimes been supported, although the case law is sparse because convicts rarely challenge their parole conditions for fear that their parole will be revoked.[143]

Perhaps the most unusual state in terms of banishment is Georgia. The Georgia Constitution expressly forbids banishment from the state.[144] However, in *State v. Collett*,[145] the Georgia Supreme Court held that banishment from 158 of the state's 159 counties was valid.[146] Not surprisingly, prosecutors have taken advantage of the decision and have sought 158-county banishment for many offenders.[147] The two typical

137. *Id*. at 96.
138. Borrelli, *supra* note 90, at 475.
139. *Id.* at 479–80.
140. *Id.* at 479.
141. Snider, *supra* note 37, at 466.
142. *Id.* at 471–72 ("Almost without exception, courts reviewing a plan of probation requiring a person to leave the state or a large geographical subdivision of the state, have found the plan to be illegal."). The reason for this distinction is that as a condition of parole or pardon, banishment is an alternative to prison time. Thus, in such cases, banishment is viewed as a lesser of two possible punishments. However, as a condition of probation, banishment is viewed as increasing the overall amount of punishment since probation does not normally include an exile requirement.
143. *Id.* at 471.
144. GA. CONST. art. 1, § 1, para. XXI.
145. 208 S.E.2d 472 (Ga. 1974).
146. *Id.* at 474.
147. Alloy, *supra* note 42.

counties that prosecutors seek to send offenders are Ware County, "a remote, sparsely populated area in southern central Georgia,"[148] and Echols County, where "[t]here are no restaurants, hotels or banks, and only four thousand residents in the county."[149] Since *Collett*, a single prosecutor in DeKalb County has had over 200 defendants banished to Echols County.[150] The majority opinion in *Collett* did not address the fact that none of the defendants sentenced to 158-county banishment would likely choose to live in Ware or Echols County. The result of the 158-county banishment sentences, while not technically ordering the defendants to leave the state, has been to cause such an exodus to occur.

In states where the practice of banishment is of questionable legality, the trend among courts allowing banishment has been to call the punishment something other than banishment.[151] This judicial sleight-of-hand is usually accomplished by the court adopting a very narrow definition of what constitutes banishment.[152] This feat is performed with relative ease because of the lack of developed case law defining the specific parameters of what constitutes "banishment" or "exile." This ambiguity in the definition of banishment becomes prominent in reviewing the case law related to sex offender exclusion zones.

II. CONTROLLING AND PUNISHING SEX OFFENDERS

> *This is why some think that legislators ought to stimulate men to virtue and urge them forward by the motive of the noble, on the assumption that those who have been well advanced by the formation of habits will attend to such influences; and that punishments and penalties should be imposed on those who disobey and are of inferior nature, while the incurably bad should be completely banished.*
>
> —Aristotle[153]

Pedophiles are easy targets for politicians seeking to look tough on crime.[154] Their crimes make front page headlines and are attacked as

148. Snider, *supra* note 37, at 455.
149. Alloy, *supra* note 42, at 1099.
150. *Id.*
151. Borrelli, *supra* note 90, at 481.
152. *Id.*
153. THE WORKS OF ARISTOTLE 1180a5 to a10 (W.D. Ross trans., 1925).
154. Hobson, *supra* note 29, at 962.

morally incomprehensible.[155] When a child is involved, the perpetrator is thought to be of the vilest sort.[156] Media coverage of the crimes leaves little of the heinous details to the imagination. Bill O'Reilly has been one of the most vocal media members attacking legislators who are "weak" on sex offender issues. In admonishing those who oppose a crackdown on sex offenders, he recently said, "[e]very day, you guys dither around, thousands of children get hurt in America. Every day that local law enforcement doesn't have the information it should have, predators are more free to rape and kill."[157] Against such a backdrop, it is a wonder that child molesters are not all sentenced to life in prison or death. Indeed, prison sentences for sex offenders have been quickly increasing in states across the country.[158]

In the United States, imprisonment is still the most common method of expelling felons from society. As with banishment punishments before, prisons serve the punishment goals of deterrence, retribution, and incapacitation. They also allow societies to forget about the people living within the prisons as they are not forced to interact with many of the undesirables of American society.

However, the cost of imprisonment for a single inmate has skyrocketed in the United States, making the level of incarceration in America potentially unsustainable.[159] From an economic standpoint, alternative sentencing approaches make substantial sense.[160] Parole also serves as an important safety valve to check prison overcrowding and to limit the overall prison population.[161] Nonetheless, the cost of imprisonment of America's convicts continues to grow.[162]

Because they are particularly high-profile criminals, sex offenders have become a popular target for various alternative sentencing schemes. In the 1990s, several states diverted convicted sex offenders to psychiatric facilities following imprisonment.[163] The Supreme Court, in *Kansas v.*

155. Heidi Schlumpf, *Bad News on the Rise*, U.S. CATHOLIC, Nov. 2002, at 26.

156. Steven J. Wernick, Note, *In Accordance With a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1151 (2006).

157. *The O'Reilly Factor: Talking Points Memo and Top Story* (Fox News television broadcast Apr. 27, 2006).

158. Hobson, *supra* note 29, at 964.

159. Editorial, *Follow Texas' Lead in Reforming State Prisons*, THE DETROIT NEWS, July 9, 2007, at 10A.

160. Alexandra Marks, *In Drug War, Treatment is Back*, CHRISTIAN SCI. MONITOR, Jul. 14, 2000, at 1.

161. Nancy Vogel, *Rehab in Prison Can Cut Costs, Report Says*, L.A. TIMES, June 30, 2006, at B1.

162. Editorial, *supra* note 159.

163. Hobson, *supra* note 29, at 963.

Hendricks,[164] held that a Kansas statute that put sexually violent predators in psychiatric facilities did not raise due process or ex post facto concerns.[165] Because of the Supreme Court's approval of the practice, the medicalization of sex offender sentencing has continued into the new millennium.[166]

Another notable sentencing development in the late 1980s and the early 1990s was the advent of registration laws.[167] These registration laws were supplemented by community notification provisions that alerted people when sex offenders moved into their neighborhoods.[168] The first community notification law was passed in Washington in 1990.[169] As with the registry statutes, the Supreme Court found no constitutional infirmities with notification statutes.[170]

Failure to register became a federal crime in 2006 with the passage of the Adam Walsh Child Protection and Safety Act.[171] Today, Senator John McCain is leading an effort to further federalize the registration requirements by requiring e-mail address registration for sex offenders nationwide.[172] In the current proposal under consideration by Congress, a failure to register e-mail addresses would be punishable by a term of imprisonment up to ten years.[173]

Civil commitment, registry, and notification were precursors to the current trend of applying residency exclusion zones to convicted sex offenders. The recent implementation of exclusion zones is an outgrowth of the sex offender registries and related community notification

164. 521 U.S. 346 (1997).

165. *Id*. at 370–71. The *Hendricks* court held that there was no ex post facto concern because the purpose and effect of civil commitment is not punishment. *Id*. The procedural due process argument by the petitioner was not persuasive to the majority because of the various rules in place to ensure that only the most violent predators would be sent to mental institutions under the law. *Id.* at 356–60.

166. *Id.* As Eric Janus has noted, the statutes committing sex offenders to psychiatric facilities are not of recent origin. JANUS, *supra* note 18, at 22. In America, mental hygiene laws aimed at "sex psychopaths" that diverted sex offenders to mental institutions were very common in the 1930s. *Id*. However, by the early 1980s, all of these laws were either repealed or ceased being used. *Id*. This focus away from civil commitment was in large part to an overwhelming scientific consensus that the laws were total failures. However, only a decade later, these lessons were forgotten and a new round of civil commitment laws were passed. *Id*. at 22.

167. Hobson, *supra* note 29, at 963.

168. *Id.*

169. WASH. REV. CODE ANN. § 4.24.550 (West 2005); Recent Legislation, 108 HARV. L. REV. 787, 787 (1995).

170. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7–8 (2003).

171. PUB. L. NO. 109-248, 120 Stat. 587 (2006).

172. Jeremy Pelofsky, *Lawmakers Take Aim at Sex Offenders on Internet*, WASH. POST, Jan. 30, 2007, at A1.

173. *Id.*

provisions.[174] The advent of exclusion zones has changed the landscape of sex offender law in important respects. Instead of choosing between registered, but otherwise relatively unrestricted release, and locking up offenders and throwing away the key, many states are experimenting with a form of internal exile through the use of exclusion zones. Exclusion zones are often hastily drafted with little debate following a high-profile crime committed against a minor by a convicted sex offender.[175] Below, I detail the state of the law in regards to sex offender exclusion zones.

A. State and Local Efforts

There are notable differences between various states in their sex offender exclusion zones. Localities have supplemented and acted in lieu of existing state laws, implementing their own residency restrictions. I offer some highlights of the twenty varied state approaches below. I follow the discussion of state efforts with a brief overview of the different local restrictions that have been adopted.

1. States

Alabama is a typical example of a state that has developed an exclusion zone policy containing several different restrictions. Alabama's decision to strengthen its sex offender restrictions was driven by a July 2005 episode of the O'Reilly Factor[176] in which Bill O'Reilly named Alabama as a state that does not care about sex offenders.[177] One week after the episode,

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174. Recent Legislation, 119 HARV. L. REV. 939, 939 (2006) [hereinafter Recent Legislation I]. David Singleton explains the interrelation between media and law passage this way:

> As the enactment dates of these statutes illustrate, sex offender residency restrictions are likely a response to high-profile media coverage of child abduction cases. It is probably no accident that passage of the first sex offender residency restrictions in 1995 followed on the heels of the Klaas and Kanka murders in 1993 and 1994, respectively. Prior to the Klaas murder, national coverage of such crimes was comparatively slight. Beginning with the Klaas case, however, media coverage of such crimes exploded. The increased attention to child abduction cases and the public outcry generated thereby likely led to passage of the first restrictions in 1995. Regardless of the reasons for the first restrictions, there can be little doubt that the highly publicized murders of Brucia and Lunsford in 2005 played a significant role in the spate of new sex offender residency restrictions proposed and enacted in 2005 and 2006.

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, 609–10 (2006).

175. Toutant, *supra* note 29, at 6; Logan, *supra* note 19, at 3.

176. *The O'Reilly Factor: Factor Investigation: Which States are Soft on Child Sex Offenders*? (Fox News television broadcast Jul. 11, 2005).

177. Recent Legislation I, *supra* note 174, at 942.

Governor Bob Riley "convened a special session of the legislature" to debate reform to Alabama's sex offender laws.[178] The result was several changes to Alabama's laws, including residency restrictions for convicted sex offenders.[179] The residency exclusion zones in Alabama apply to sex offenders who have committed crimes against adults as well as children.[180]

Alabama has supplemented its exclusion zones with an additional loitering restriction.[181] The anti-loitering requirement prohibits sex offenders from being within 500 feet of a facility with the "principal purpose of caring for, educating, or entertaining minors" if they have no legitimate reason for being there.[182]

Like Alabama, Florida enacted residency restrictions after public outcry following three high-profile crimes allegedly committed by convicted sex offenders.[183] Florida is one of the minority of states that applies residency restrictions only to those sex offenders whose crimes involved a minor.[184] Most states with residency restrictions apply the exclusion zones to sex offenders even though their crimes did not involve children.[185]

Georgia currently has one of the harshest exclusion zone laws nationwide.[186] Georgia's law established a 1,000 foot radius exclusion zone that applies to churches, bus stops, parks, playgrounds, gymnasiums, swimming pools, and other areas where "minors congregate."[187] The

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178. *Id.*
179. *Id.* at 941.
180. ALA. CODE § 15-20-26(f) (LexisNexis Supp. 2007).
181. *Id.*
182. *Id.*; Recent Legislation I, *supra* note 174, at 941.
183. Hobson, *supra* note 29, at 962. Hobson described the notable cases as:

> First, eleven-year-old Carlie Brucia disappeared from Sarasota, Florida in February 2004. A carwash surveillance camera captured the abduction on tape. Authorities eventually charged a convicted sex offender with Carlie's kidnap, rape, and strangulation. Next, nine-year-old Jessica Lunsford vanished from her bedroom in Homosassa, Florida on February 24, 2005, just over a year after Carlie's ordeal. Police found her body buried in a neighbor's yard nearly three weeks later. The authorities arrested convicted sex offender John Couey for kidnapping, sexually assaulting, and killing Jessica. Although he pleaded not guilty to all charges, Couey told investigators he buried Jessica alive after keeping her captive for days. Finally, thirteen-year-old Sarah Lunde of Ruskin, Florida suffered a similar fate mere weeks after police unearthed Jessica's corpse. Searchers found Sarah's semi-clad, strangled body in a pond near her home. Prosecutors charged a convicted rapist, David Onstott, with Sarah's abduction and murder.

Id. at 962–63. *See also* Abby Goodnough, *Florida Legislature is Near an Agreement on Sex Offenders*, N.Y. TIMES, Apr. 22, 2005, at A14.
184. FLA. STAT. ANN. § 794.065 (West Supp. 2007).
185. *See* Residency Restriction Statutes, *supra* note 15.
186. GA. CODE ANN. § 42-1-15 (Supp. 2006).
187. GA. CODE ANN. § 42-1-15(a) (Supp. 2006).

Georgia law also has higher penalties than other states—a convicted sex offender in Georgia who knowingly violates the residency restrictions could face thirty years in prison.[188] Early reports on the experience in Georgia are that a large majority of sex offenders have had to relocate because of the exclusion zones.[189]

Iowa pushed the envelope in terms of exclusion zone radius when it required sex offenders to live 2,000 feet away from a school or registered child care facility.[190] Like Florida, Iowa residency restrictions only apply to offenders who committed sexual crimes against minors.[191] The Iowa law, like most other statutes, does not require an individual determination of dangerousness for the residency restriction to apply.[192]

Louisiana's exclusion zones include more protected areas than most other state statutes. In addition to the common zones around schools and child care centers, residency restrictions in Louisiana also apply around playgrounds, youth centers, public swimming pools, and video arcades.[193] Louisiana limits the sex offenders included in the statute to those who are "sexually violent predators," but that population includes offenders who committed crimes against adults as well as children.[194]

A notable development in some states is the use of Global Positioning System (GPS) monitoring of sex offenders. Alabama,[195] California,[196] and Florida,[197] all utilize some form of monitoring to aid in enforcement of their exclusion zones. One of the primary goals of the GPS system is to provide real-time monitoring of sex offenders to see if they are in proximity to schools or other "danger" areas.[198] However, because of the cost of such real-time coverage, no state has been able to actually provide that level of monitoring.[199]

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188. Jill Young Miller, *Registered Sex Offenders Ordered to Find New Homes*, ATLANTA J.-CONST., May 19, 2006, at 1A, *available at* 2006 WLNR 8605742.

189. *Id.* (noting that in Cobb County, there are very few places for sex offenders to live and in Rockdale County, forty-eight of fifty-one sex offenders registered in the county had to relocate).

190. IOWA CODE ANN. § 692A.2A (West 2003 & Supp. 2007).

191. IOWA CODE ANN. § 692A.2A(1) (West 2003 & Supp. 2007).

192. *Id.*

193. LA. REV. STAT. ANN. § 14:91.1(A)(2) (2004 & Supp. 2007).

194. *Id.* § 14:91.1.

195. ALA. CODE § 15-20-25.3 (LexisNexis Supp. 2006); Recent Legislation I, *supra* note 174, at 941.

196. Patt Morrison, *Brainless Laws, Gutless Pols*, L.A. TIMES, Nov. 16, 2006, at A31.

197. Hobson, *supra* note 29, at 964; Robert F. Worth, *Exiling Sex Offenders From Town: Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B6.

198. Brandon Bain, *Spotty Track Record; Nassau Probation Department Audit Finds High-Risk Sex Offenders Who Wear GPS Devices Aren't Monitored 24-7*, NEWSDAY (N.Y.), Oct. 25, 2006, at A03.

199. *Id.*

Arkansas is probably the biggest outlier among the states with exclusion zone laws. It has implemented the most narrow exclusion zone policy of the twenty states with such laws. The Arkansas statute uses a tiered risk scheme and requires an individual determination of dangerousness of the offender.[200] Thus far, Arkansas is the only state to have taken a narrowly tailored approach with some measure of due process in its use of exclusion zones.

2. Localities

The number of localities considering or adopting sex offender restrictions continues to grow. On any given day, one can read newspapers across the country and usually find several communities debating sex offender laws. Local laws are often not publicized or available online. As a result, a sex offender may be accountable for knowing the local rules with no actual notice of those rules. This creates an expectation that a sex offender is able to engage in legal research into any community in which he or she may work, live, or visit to ensure compliance with a plethora of different rules. While this expectation is a legal fiction, a sex offender's failure to comply with local rules can be punished by substantial fines and jail time.

Because there are so many local restrictions across the nation, I only discuss a sampling of some of the laws in a few states. These examples illustrate how difficult compliance with the rules could be for a registered sex offender. The examples that follow also show how much uncertainty exists among different communities about what an exclusion zone rule should look like.

Nebraska is an example of a state with no statute establishing residency restrictions, but with many towns and cities that have adopted residency restriction ordinances of their own. Cities such as La Vista, Omaha, and Ralston each adopted ordinances prohibiting high-risk sex offenders from living within 500 feet of schools.[201] Nebraska towns were motivated by a desire to avoid becoming havens to sex offenders fleeing Iowa after Iowa adopted some of the most onerous restrictions in the country.[202]

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200. ARK. CODE ANN. § 5-14-128(a) (2006).

201. Karen Sloan, *La Vista Restricts Sex Offenders*, OMAHA WORLD-HERALD, May 17, 2006, at 5B.

202. Karen Sloan, *State Law Trumps Limits by Cities*, OMAHA WORLD-HERALD, Apr. 27, 2006, at 2A.

Like Nebraska, New Jersey is another state where there is no statewide exclusion zone law, but local communities have filled the vacuum.[203] In New Jersey, Woolwich went further than the over 110 other towns in the state that have implemented exclusion zones by adopting a 2,500 foot exclusion zone around any school, park, playground, library, child care center, or house of worship for the two highest tiers of convicted sex offenders.[204]

In Florida, over sixty cities adopted residency restrictions in the year after the first local ordinance was adopted.[205] Most of these city ordinances impose a 2,000 to 2,500 foot exclusion zone around restricted areas, including schools, day care facilities, and playgrounds.[206] Florida was also the site of one the more unusual restrictions on sex offenders. In 2005, some localities banned sex offenders from public hurricane shelters, forcing the offenders to seek refuge in local prisons.[207] Rather than quibble with the creation of limited exclusion zones that may leave certain parts of the city "unprotected," Tampa is considering an ordinance that will simply prohibit sex offenders living in any part of the city.[208]

To get a feeling for how many communities are considering residency restrictions at any given time, one can simply review news accounts of articles from a random month in any online news database and find scores of towns, counties, cities, and other communities considering sex offender restrictions.[209] The details of each local community's discussion vary, but the common message is that neighborhoods and towns across America want sex offenders to leave. Given the relative newness of local implementation of these laws, the trend toward community laws is likely to continue for some time.

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203. Logan, *supra* note 19, at 9–10.

204. Anna Nguyen, *Woolwich OKs Limits on Sex Offenders*, COURIER POST (Cherry Hill, N.J.), May 16, 2006, at 1G.

205. Todd Leskanic, *More Cities Limit Residences of Sex Offenders*, TAMPA TRIB., May 14, 2006, at 1, *available at* 2006 WLNR 8468968.

206. *Id.*

207. Hobson, *supra* note 29, at 963–64.

208. Janet Zink, *Tampa Wants to Keep Sex Offenders Outside City Limits*, ST. PETERSBURG TIMES (Fla.), Jan. 19, 2007, at 1A.

209. For example, I reviewed articles in the All News database on Lexis-Nexis with the search: "(city or community or localit! or town or township or county) w/30 (law or ordinance or statute or rule) w/30 (sex offender) w/30 (residency or work) and date aft 10/1/2006 and date bef 11/1/2006." The search yields 101 articles. Although many deal with related issues and laws already in effect, the search shows the array of communities debating sex offender restrictions. Because not all local deliberations are reported, many smaller newspapers are not available on Lexis, and my search terms may have missed some articles. The number of communities outlined in those articles is quite likely lower than the actual number of communities that considered residency or work restrictions on sex offenders during October 2006.

B. Judicial Responses to State and Local Efforts

There are several constitutional arguments that plaintiffs have used to challenge the validity of living restrictions on sex offenders. The primary constitutional arguments used against exclusion zones are that they violate the doctrine of substantive due process, violate procedural due process rights of sex offenders, infringe upon the right to intrastate travel, compel sex offenders to unconstitutionally incriminate themselves, and violate the Ex Post Facto Clause. So far, every highest appellate court that has considered the legality and constitutionality of sex offender exclusion zones has upheld the statutes authorizing the exclusion zones.

The Eighth Circuit is the only federal appellate court to assess the constitutionality of the various state and locality residency restrictions on sex offenders. In *Doe v. Miller*,[210] a panel of three Eighth Circuit judges reversed the judgment of the district court[211] and upheld Iowa's sex offender restrictions.[212] The critical portion of Iowa's law reads: "A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility."[213] For purposes of the statute, a "person" is someone "who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor."[214]

The Eighth Circuit reversed the district court's judgment to strike down the statute on several grounds. Among the arguments against the statute before the Eighth Circuit were that it: (1) violates the doctrine of substantive due process; (2) violates the procedural due process rights of sex offenders; (3) infringes on the right to intrastate travel (the court treats this as part of the substantive due process discussion); (4) compels sex offenders to unconstitutionally incriminate themselves; and (5) violates the Ex Post Facto Clause.[215] Ultimately, the majority opinion rejected all of the challenges to the statute.[216]

The Eighth Circuit affirmed its holding in *Doe v. Miller* in *Weems v. Little Rock Police Department*,[217] which addressed the constitutionality of

210. 405 F.3d 700 (8th Cir. 2005) [hereinafter *Doe II*].
211. Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004) [hereinafter *Doe I*].
212. *Doe II*, 405 F.3d at 723.
213. IOWA CODE ANN. § 692A.2A(2) (West 2003).
214. *Id.* § 692A.2A(1).
215. *Doe II*, 405 F.3d at 708–22.
216. *Id.*
217. 453 F.3d 1010 (8th Cir. 2006).

Arkansas' sex offender restrictions statute.[218] Judge Colloton authored both the opinion in *Weems* and the majority opinion in *Doe v. Miller*. As noted above, the Arkansas statute is very different than the Iowa law. Most significantly, in Arkansas, an individual determination of dangerousness is necessary before the restrictions are enforced.[219]

Because the court in *Weems* simply applied the decision in *Doe v. Miller* to a more narrowly tailored statute, the court did not need to revisit its analysis. Consequently, the panel did not substantially expand upon its discussion in *Doe v. Miller*. As of this date, *Doe v. Miller* and *Weems v. Little Rock Police Department* remain the leading precedents on sex offender exclusion zones. The findings in those opinions are representative of the various other state appellate court[220] and federal district court opinions[221] concerning exclusion zones.

C. Private Actors

Supplementing state and local exclusion zones, an increasing number of private communities are adopting their own rules excluding sex offenders from their borders. In Florida, the state database of registered sex offenders has provided communities with an easy mechanism to exclude sex offenders.[222] In some gated communities, even temporary stays by convicted sex offenders are prohibited.[223]

The actions of private actors are troublesome because they are likely to completely evade judicial and legislative review. In America, community associations are afforded virtual carte blanche in restricting who lives within that community unless the exclusion is of a protected class.[224] The

218. *Id*. at 1015.

219. *Id.*

220. Boyd v. State, No. CR-04-0936, 2006 Ala. Crim. App. LEXIS 18 (Ala. Crim. App. Feb. 3, 2006); Boyd v. State, 2006 Ala. LEXIS 380, No. 1041122, (Ala. Dec. 29, 2006); Lee v. State, 895 So. 2d 1038 (Ala. 2004); Mann v. State, 603 S.E.2d 283 (Ga. 2004); State v. Seering, 701 N.W.2d 655 (Iowa 2005); ACLU of N.M. v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215; Nasal v. Dover, 169 Ohio App. 3d 262, 2006-Ohio-5584, 862 N.E.2d 571; Hyle v. Porter, No. CO50768, 2006 Ohio App. Lexis 5456, 2006-Ohio-5454 (Oct. 20, 2006).

221. Doe v. Petro, No. 1:05CV125, 2005 U.S. Dist. LEXIS 35537 (S.D. Ohio May 4, 2005); Doe v. Petro, No. 1:05CV125, 2006 U.S. Dist. LEXIS 80753 (S.D. Ohio Oct. 24, 2006); Coston v. Petro, 398 F. Supp. 2d 878 (S.D. Ohio 2005); Graham v. Henry, No. 06CV381TCK (FHM), 2006 U.S. Dist. LEXIS 65880 (N.D. Okla. Sept. 14, 2006); Doe v. Parish, No. 06CV0457CVE (FHM), 2006 U.S. Dist. LEXIS 65873 (N.D. Okla. Sept. 14, 2006); Doe v. Baker, No. 1:05CV2265 (TWT), 2006 U.S. Dist. LEXIS 67925 (N.D. Ga. Apr. 5, 2006).

222. S.I. Rosenbaum, *Sex Offenders not Wanted in River Hills*, ST. PETERSBURG TIMES (Fla.), May 19, 2006, at 22.

223. *Id.*

224. *See generally* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*,

only opinion considering the legality of private covenants against sex offenders, *Mulligan v. Panther Valley Property Owners Ass'n*,[225] held that a community was allowed to bar a sale to a sex offender because of a restrictive covenant.[226] The trend toward private restrictions on sex offenders is hardly surprising because, as Lior Strahilevitz has noted, "the presence of convicted offenders seems to raise serious alarm among neighbors, such that targeting sex offenders for exclusion may be a rational response for some homeowners associations."[227] There is also a strong economic incentive for communities to bar sex offenders, as a single offender moving to a community can have a substantial negative effect on property values.[228]

While the effects of private community restrictions may seem miniscule when compared to the larger, broader restrictions of states and localities, the importance of these restrictions may become more pronounced in the future. As new housing developments become old developments, the covenants and restrictions on the property remain. There is also a heightened risk of these private restrictions becoming common in cities where only a few neighborhoods are outside of government exclusion zones. In those cases, the Not-In-My-Backyard ("NIMBY") effect will serve as a driving force to prevent a neighborhood from becoming a haven to sex offenders.[229] While the development of private exclusion zones is in its very early stages, it is a trend that bears watching because it could further accentuate the effects of state and local exclusion zones.

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104 MICH. L. REV. 1835 (2006); John J. Herman, *Not in My Community: Is it Legal for Private Entities to Ban Sex Offenders from Living in Their Communities?*, 16 WIDENER L.J. 165 (2006).

225. Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).

226. *Id*. at 1192.

227. Strahilevitz, *supra* note 224, at 1845.

228. Caleb Durling, Comment, *Never Going Home: Does it Make Us Safer? Does it Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 333–34 (2006).

229. Logan, *supra* note 19, at 10.

III. BANISHMENT AND SEX OFFENDERS

> *Lots of times you can feel as an exile in a country that you were born in.*
>
> —Azar Nafisi[230]

I began this Article by reviewing a long history of banishment in Western societies. Then, I turned to the evolution of sex offender punishment in America during the last decade. I believe there are important connections between the historical practices of banishment and the use of residency restrictions on sex offenders. These connections help to illustrate the legal, policy, and ethical problems with sex offender exclusion zones.

A. Are Residency Restrictions Banishment?—Court Opinions

Courts that have reviewed sex offender residency restriction policies have attempted to distinguish exclusion zones from banishment. The challenges to exclusion zone laws thus far have focused on single state laws. The issue of whether restrictions are analogous to banishment arises primarily in the discussion of retroactive application of residency restrictions.

Because residency restrictions are relatively new and are typically applied to sex offenders who committed crimes before the passage of the law, persons challenging the statutes argue that the restrictions constitute ex post facto punishments. The Ex Post Facto Clause of Article I, Section 10 of the Constitution prohibits legislatures from enacting laws that apply punishment retroactively for criminal acts that have already been committed.[231] In analyzing a statute to determine whether it violates the Ex Post Facto Clause, a court must first determine whether the legislation at issue was intended to be civil or criminal in nature.[232] If the law was intended to be criminal, then the law is necessarily punitive and subject to the Ex Post Facto Clause.[233] However, if the legislature intended the statute to be civil, then a court must determine if the statute is so punitive in purpose or effect as to negate the intent of the legislature.[234] The

230. Interview with Azar Nafisi, *Identity Theory*, Feb. 5, 2004, http://www.identitytheory.com/interviews/birnbaum139.php.

231. Calder v. Bull, 3 U.S. 386, 390 (1798).

232. Smith v. Doe, 538 U.S. 84, 92 (2003).

233. *Id.*

234. *Id.*

Supreme Court, in *Kennedy v. Mendoza-Martinez*,[235] identified several factors to determine whether a particular law is punitive in purpose or effect.[236] One of those factors is whether the statute is historically or traditionally similar to punishment.[237] It is at this stage of analysis that courts evaluating the constitutionality of work and residency restrictions on sex offenders determine whether the restrictions are analogous to banishment.

Despite the dearth of housing available to sex offenders under the Iowa law, the Eighth Circuit in *Doe v. Miller* found that Iowa's sex offender restrictions did not constitute banishment.[238] As is typical, the Eighth Circuit approached the analogy to banishment in the context of its ex post facto analysis. Notably, the panel split on this issue and Judge Melloy wrote a dissent arguing that the Iowa residency restrictions forced sex offenders into exile.[239] In disagreeing with Judge Melloy, the majority identified three reasons for finding the analogy to banishment unpersuasive.[240]

First, the majority found that although the Iowa law restricted where a sex offender could live, it did not actually expel the offender from the community.[241] Under the Iowa law, a sex offender could freely enter the 2,000 foot radius around a school, but could not live within that perimeter.[242] This distinction was significant for the Eighth Circuit in distinguishing the Iowa law from historical practices of banishment.[243]

Second, the court found that because the statute had a grandfather clause which allowed offenders who established residence within a restricted zone before July 1, 2002 to remain at that residence, the law was not intended to banish sex offenders.[244] This reasoning is dubious given that the law was being challenged in a class action and the court did not distinguish between those plaintiffs who had an established residence and those that did not. In a facial challenge to a law by a class, it was probably

235. 372 U.S. 144 (1963).

236. The five factors are whether the law: has been historically considered to be punishment, promotes the traditional goals of punishment, imposes an affirmative disability or restraint, has a rational connection to some nonpunitive purpose, and is excessive with respect to the purpose. *Id*. at 168–69.

237. *Id.*

238. *Doe II*, 405 F.3d 700, 719–20.

239. *Id.* at 723 (Melloy, J., dissenting).

240. *Id*. at 719–20.

241. *Id.* at 719.

242. *Id*.

243. *Id.*

244. *Id.*

a mistake for the Eighth Circuit to rely on a narrowly crafted exception to the general law to evaluate its overall intent.

Third, the court found that because sex offender statutes are of relatively recent origin and unique in nature, they are distinct from the historical punishment of banishment.[245] This line of argument is also suspect since any recently crafted law would escape analogy to past punishment by virtue of its newness. As noted earlier, banishment has never been a common punishment in the United States. Further, the historical forms of banishment, expulsion and prison colonies, are not possible in the modern era. As a result, newness should not be a definitive factor lest any innovative punishment scheme survive review.

Because of the vacuous nature of the majority's second and third reasons for distinguishing banishment from the Iowa statute, a fair reading of the opinion would place great weight on the first reason offered by the panel: that the law did not actually prohibit sex offenders from traveling into the restricted zones. This was the primary distinction upon which the dissent focused.

Judge Melloy's dissent highlighted the district court's factual finding that the Iowa law effectively barred sex offenders from living in large, contiguous areas throughout the state.[246] The district court found that:

> [S]ex offenders are completely banned from living in a number of Iowa's small towns and cities. In the state's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited . . . . In larger cities such as Des Moines and Iowa City, the maps show that the two thousand foot circles cover virtually the entire city area. The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods.[247]

Based upon this factual finding, the dissent argued that sex offenders were effectively banished, in fact, from numerous Iowa communities even though legal "safe" zones existed throughout the state. A crucial difference between the dissent and the majority decision is that the dissent recognized that a sex offender could not enter a "safe" zone and expect to find suitable housing.

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245. *Id.* at 720.
246. *Id.* at 724 (Melloy, J., dissenting).
247. *Id.* (quoting *Doe I*, 298 F. Supp. 2d at 869, 851).

The discussion in *Doe v. Miller* also illustrates that different judges have different definitions of "banishment." And those definitions are neither explicitly stated nor discussed in the opinions. Consequently, I hope to rectify the failure of courts to define the parameters of banishment in the next section.

B. What is Banishment?

While most courts have presumed an unspoken definition of "banishment," a few have actually offered some meaning for the word. As discussed earlier, in *United States v. Ju Toy*,[248] Justice Brewer offered an extensive investigation of banishment in his dissenting opinion. In his dissent, Justice Brewer borrowed from *Black's Law Dictionary*, defining banishment as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specific period of time, or for life."[249] In *Smith v. Doe*, the Court described banishment as punishment where criminals could not "return to their original community."[250] In *Delgadillo v. Carmichael*,[251] the Supreme Court found that deportation can be the "equivalent of banishment or exile."[252] Whatever the definition of "exile" is, the evidence is clear that at the time of the original Constitutional Convention banishment was considered punishment.[253] However, the exact parameters of what is "banishment" are still undefined by the Supreme Court. Certainly, most scholars would agree that a simple restraining order is not "banishment." Yet, the dictionary and similar definitions utilized by courts do not offer a clear distinction between a restraining order and complete banishment.

Without a clear definition of banishment, there is no bright line for courts to apply in comparing the existing sex offender restrictions with traditional enforcement of exile punishments. An impediment to creating a definition of "banishment" with precision is that it is difficult to address the exact geographic limits and account for changes in the ease of travel. In ancient societies, banishing someone from a city-state only required the person to move a few miles away. In the modern world, there is a

248. 198 U.S. 253, at 269–70 (Brewer, J., dissenting) (quoting BLACK'S LAW DICTIONARY).
249. *See supra* note 115 and accompanying text.
250. *Smith*, 538 U.S. 84, 98.
251. 332 U.S. 388 (1947).
252. *Id*. at 391.
253. Bleichmar, *supra* note 52, at 117 ("[B]y focusing on the Colonial period as the point in time in which banishment was considered to be punishment, originalism becomes a powerful interpretative tool for the Constitutional argument that deportation is in fact punishment.").

presumption that the area from which a person is expelled must be much larger. After all, the simple restraining order often keeps a criminal away from a victim, but is a far cry from actual exile. Thus, any definition is subject to the vagaries of transportation, urban sprawl, and community size. As a result, I do not offer a distance measure as an element of banishment.

An important consideration in the above discussion is that there is no definitional reason that exile requires a person to leave a sovereign territory. No case law makes that part of the definition. From a historical perspective, the use of prison colonies in Soviet societies demonstrates that exile need not be to an external place.

Based upon a review of the historical uses of banishment, I have identified three core elements that recur in every exile scheme. First, banishment is the expulsion in fact of a person from a community. This part of the definition emphasizes that a person must be sent away from a group of persons in a common community. Thus, it is distinguishable from the restraining order scenario. The definition also makes no distinction based on state or national boundaries as the practice of exile predated any such modern state distinctions.

Second, banishment is always to a non-institutional setting. While a person might speak colloquially in saying a person was banished to a prison or mental institution, banishment as a policy necessitates neither institutional control nor support for the banished. In expulsion, prison colonies, and internal exile, a person had the responsibility to care for themselves and had substantially more freedom than an average prisoner.

Third, banishment is intended to sever ties to a community. This is the only part of the definition that looks to the goals and purposes of the state in using exile as a criminal sentence. Expulsion, prison colonies, and internal exile systems have all been characterized by the intent to sever community ties. Thus, Georgia's use of 158-county exile is banishment because it attempts to sever a convict's ties with the Georgia community. However, a restraining order that only prevents a person from being within 100 feet of his or her victim does not attempt to sever community ties.

With a definition of "banishment" in place that draws from the various historical examples, I turn to the task of determining how sex offender exclusion zones fit within the historical precedents of banishment punishments.

C. Are Residency Restrictions Banishment?—Revisited

Applying the above definition of banishment to the sex offender residency restriction context yields a different conclusion than the one reached by the majority in *Doe v. Miller*. Sex offender exclusion zones fit all three of the elements of banishment as described above.

First, residency restrictions lead to the expulsion in fact of a person from many communities. The factual analysis by the district court reviewing the effects of the Iowa statute makes clear that even in a largely rural state like Iowa, sex offenders were offered very few places to live.[254] In smaller towns, the presence of a single school would bar a sex offender from living or working anywhere within the incorporated areas of the town.[255] Some medium-sized towns and cities only have a few pockets of areas where sex offenders could live.[256] However, those "safe" areas were often industrial sectors or contained little housing in which an average sex offender could find residency.[257] Throughout the state, most of the areas where the statute permitted sex offenders to live were located in rural areas.[258] The district court noted that these rural areas had housing that was "not necessarily readily available."[259] If these were the effects of exclusion zones in Iowa, a largely rural state, one can only imagine the results in California once its residency restriction law goes into effect.

In Georgia, the state maintains a 1,000 foot radius for exclusion zones, half as far of a radius as Iowa and California. This is the map of DeKalb County that plaintiffs challenging the exclusion zones created to illustrate the effects of Georgia's residency restrictions:[260]

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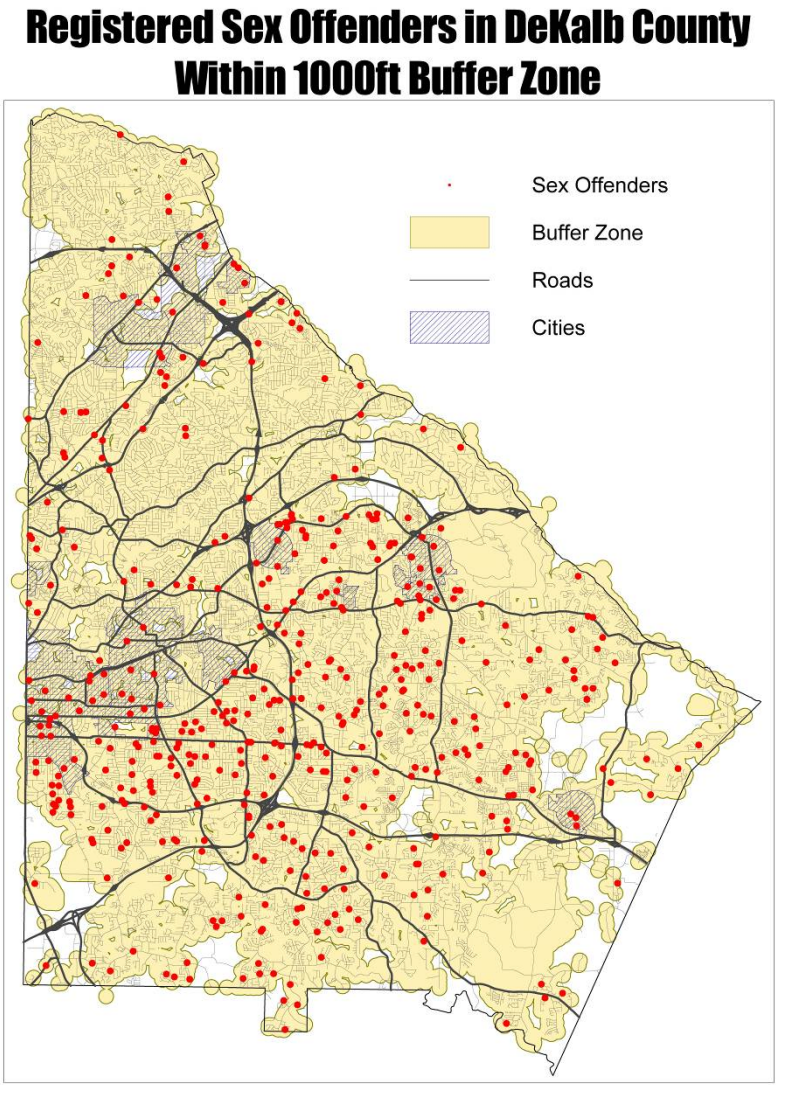
254. *Doe I*, 298 F. Supp. 2d at 851.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. This map was produced by the Southern Center for Human Rights pursuant to its litigation in Consent Order, Whitaker v. Perdue, No. 4:06-140-CC (N.D. Ga. Aug. 31, 2006).



The shaded areas in the map are places where sex offenders cannot live. The dots represent the sex offenders who were part of the class action suit challenging the residency restrictions. As the map illustrates, the residency options for sex offenders in the county are essentially nonexistent.

Second, residency restrictions do not put an offender in an institutional setting with institutional support. Residency restrictions are different than

the use of prisons and mental health facilities for sex offenders as there is clearly no institutional control or support present.

Third, with exclusion zones, there is a well-documented intent by lawmakers who pushed for and passed residency restriction laws to sever community connections with sex offenders. The state politicians proposing and supporting residency restrictions have made their intent to exile sex offenders quite clear.[261] In Georgia, legislators said their goal was to "drive sex offenders out of the state."[262] The Attorney General in Nebraska told reporters in support of residency restrictions that his goal was to "[keep] these criminals out of our communities."[263] An Iowa mayor supporting exclusion zones stated that he "just didn't want those kind of people moving into town."[264] In Florida, state representative Susan Goldstein said that the state's residency restriction law was designed "to get these people out of our neighborhoods and hopefully our state."[265] Examples of the intent to have sex offenders leave communities are present in nearly every discussion to adopt local or state residency restriction laws.

Based upon prior precedent of banishment, exclusion zones fit clearly within that historical paradigm. Residency restrictions meet all three essential elements to amount to exile punishment. Even beyond the definitional argument, the similarities to the *propiska* internal exile system in the Soviet Union are also strong.

Exclusion zones for sex offenders in the United States resemble the Soviet Union's practices enabled by *propiska* in several important ways. First, neither system actually banished an offender from the sovereign territory. Rather, the statutes focused on limiting the residency options of criminals. Both systems resulted in a situation where a person was banished from mainstream society, but not allowed to leave the larger sovereign body. Second, the laws targeted some of the most unsympathetic members of their respective societies. In the Soviet Union, prostitutes and repeat criminals were the primary targets for

261. Logan, *supra* note 19, at 19–20.

262. Matthew S.L. Cate, *Perdue Signs Sex Offender Bill*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Apr. 27, 2006, at B2.

263. Press Release, State of Nebraska, Governor, Attorney General, Sponsoring Senator Laud Implementation of LB 1199, (July 12, 2006), *available at* http://gov.state.ne.us/archive/news/2006_07/12_sex_offender_law.html.

264. Marion Rhodes, *Read Their Laws; No New Sex Offenders*, OMAHA WORLD-HERALD (Neb.), Mar. 19, 2006, at 2B.

265. Jason Garcia, *State Cracks Down on Predators*, ORLANDO SUN SENTINEL (Fla.), Sept. 14, 2005, at A1.

banishment.[266] In the United States, sex offenders have made easy targets for politicians.[267] Third, the laws have been enforced entirely extra-judicially and without possibility of appeal.[268] Many of the statutes in the United States have also applied retroactively and required no finding of individual future dangerousness.

For the most part, other Western societies have not followed the Soviet example. In fact, the forcible relocation and banishment by Soviet leaders was frequently condemned by Western countries.[269] With the development of sex offender exclusion zones, however, it appears the United States is taking the first steps in potentially following the lead of the Soviet Union in the utilization of internal exile punishments.

Given that the system enabled by *propiska* is one of the very few examples of modern systems of internal exile, we would ignore these commonalities at our peril. The connections between exclusion laws and *propiska* can help to illustrate the pitfalls of an exclusion-zone-centered approach to sex offender policy. Identifying those connections helps to demonstrate how America may be moving to a system of internal exile as a key component of its criminal justice system.

With sex offenders, America is undergoing an experiment with internal exile. These internal exile systems represent an important step in the evolution of banishment systems in Western history.[270] Without frontiers, expulsion and prison colonies are not possible. Banishment has been historically motivated by the dissatisfaction with prisons as a means of punishment. While the roots of that motivation in Anglo-Saxon tradition were cyclical public backlashes against the barbarism of prisons, the current ire at prisons is due in most part to simple economics. Exclusion zones are the natural culmination of a society which does not want to rely wholly on prisons, but still wants to remove its offenders from its midst.

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266. *See supra* note 5 and accompanying text.

267. *See supra* note 154 and accompanying text.

268. Logan, *supra* note 19, at 16.

269. *See, e.g.*, David Bird, *Global Rights Group Calls For More Pressure*, N.Y. TIMES, Oct. 16, 1986, at A16.

270. The blog TalkLeft had a post, "Exiles from Main Street," which was very similar to the original title of this Article: "Exiles on Main Street." *See* Posting of TChris to TalkLeft: The Politics of Crime, *Exiles from Main Street*, http://www.talkleft.com/story/2005/10/03/627/48298 (Oct. 3, 2005, 09:26:06 AM EST). I mention this similarity because it illustrates the fine line between internal exile and de facto complete exile. Internal exile allows a person to continue to traverse large sections of a sovereign area. However, at some point, if there are no available places to sleep at night, then the right to traverse is fundamentally lost. A person thus becomes, banished *from* "Main Street." As it stands today, most states have only exiled sex offenders *on* "Main Street" because they still travel freely to many of the locations where they cannot live. However, as more states and localities adopt restrictions, TalkLeft's title will become the accurate description.

Certainly, residency restrictions are different than expulsion and prison colonies. However, the resemblances to internal exile are striking. Further, exclusion zones meet every aspect of our definition of banishment which is derived from the historical use of banishment as punishment. If we then proceed under the assumption that exclusion zones are in fact internal banishment policies, what does that tell us about their legal, policy, and ethical status?

IV. THE FAILINGS OF INTERNAL EXILE

> *People who feel themselves to be exiles in this world are mightily inclined to believe themselves citizens of another.*
>
> —Santayana[271]

Internal exile through the use of sex offender exclusion zones is a significant development in criminal law in the United States. The move to any form of banishment on a mass scale is relatively unprecedented in America. The choice of internal exile is even more unusual in a historical context as only the Soviet Union and Russia have adopted similar policies before. Because of the uniqueness of these policies, policymakers and courts should tread carefully in this emerging area of lawmaking.

In this section, I address the various issues raised by the use of exclusion zones for sex offenders. These issues include legal questions, policy concerns, and problems associated with the cultural context in which these laws are being adopted. I also answer the policy arguments in favor of residency restriction laws.

A. Problems with Internal Exile of Sex Offenders

I have divided the core problems with an internal exile system for sex offenders into two major categories. First, exclusion zones reinforce the otherness of offenders by rendering them exiles. This effect undermines the stated goals of residency restrictions while jeopardizing fundamental American values. Second, exclusion zones use a form of class-based banishment that is antithetical to American democracy. I discuss each of these major problem areas below in detail.

The creation of communities at the 101st kilometer in the Soviet Union was a notable event, in part because of the effects felt by the population

271. THE VIKING BOOK OF APHORISMS 73 (W.H. Auden & Louis Kronenberger eds., The Viking Press 1966).

living within those communities. A significant part of being exiled is assuming the identity of an exile. An "exile" is someone cast out by society, separated from friends, family, and familiar places. A community of "exiles" is a transient community in the extreme sense. The population is brought together by external forces against the wishes of those located there. There is no wealth in such a community. The prospects of finding gainful employment for a large segment of the population are poor. A town of the banished has no history and an uncertain future. It is a place and a people living only in the present. As the quote from Santayana that begins this section makes clear, when a population is forced out of the world they know, they come to believe themselves citizens of another world entirely.

Valentina Ievleva-Pavlenko is one of the many who were banished to the 101st kilometer.[272] Ievleva-Pavlenko settled in Alexandrov, 101 kilometers from Moscow and the "unofficial capital of the 101st kilometer."[273] She recalled that "[b]efore [she] came [to Alexandrov], [she] went from place to place . . . . The problem was where [she] could get a job, they would not let [her] live. Where [she] was allowed to live, there were no jobs."[274] So, Ievleva-Paylenko, and others like her, continued to live within the Soviet Union because they could not leave. They became part of one of many communities that existed because the government had no other place to send the people living there.[275]

So far, exclusion zones in America have only created small pockets of sex offender communities, often located in motels or small apartment complexes.[276] However, the small degree to which offender communities have formed is due in large part to the recency of the enforcement of these laws. Further, most of the early enforcers of exclusion zones (Iowa, Georgia, and Alabama) are rural states. As a result, large portions of the states were still open to sex offenders. As more urbanized states like California begin to enforce their restrictions and other states increase their exclusion zone radii to 2,500 feet or greater, the areas where sex offenders can live will certainly decrease. As private communities seek to drive out sex offenders, a market will certainly develop, and as the experience in the Soviet Union demonstrated, exile communities will develop. When these

272. FitzGerald, *supra* note 4.
273. *Id.*
274. *Id.*
275. *Id*.
276. Brandon Bain, Erik German & Tom McGinty, *Sex Offenders Where They Live*, NEWSDAY (N.Y.), Oct. 23, 2006, at A6, *available at* 2006 WLNR 1359764.

communities develop and grow, a variety of problems will develop as well.

One of the primary hopes of the American criminal justice system is that after someone has served his time in prison, he will be able to become a productive member of society. However, as the experience of those internally exiled in Russia illustrates, reentry and reassimilation is extremely difficult for the banished. Given the general hostility toward sex offenders in the United States, as opposed to those who were banished in the Soviet Union, it is likely that internal exile for sex offenders will only exacerbate the difficulties of reentry. And, as research has indicated, a failure to facilitate successful reentry will likely increase the risk of sex offender recidivism.[277] Further, undermining housing, employment, and access to public transportation also increases the risk of recidivism.[278] Without an ability to be part of mainstream American society, sex offenders will be left with little choice but to return to their lives as criminals.

Unlike the towns of the 101st kilometer, the emerging ghettos brought about by the war on sex crimes have populations with one powerful connection among them: they are all convicted sex offenders. Thus, a sex offender community in search of its identity need not look far to find something to unite them. Pedophiles will find many others just like them. Rapists will surely have rapists as their neighbors. There is a large literature about the schools-of-crime pattern in prisons.[279] The growth of the Internet has also shown the problem of networking among sex offenders.[280] Creating sex offender communities will likely cause a repeat of these problems in a public environment. Sex offenders can learn from each other in the same way prisoners do. Further, especially in the context of child pornography, ready-made networks will be formed—the same type of networks that police in America are constantly trying to fight.[281]

The demographics of these ghettos will surely be unusual. An overwhelming majority of convicted sex offenders are men.[282] While some

277. COLO. DEP'T OF PUB. SAFETY, REP. ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 5 (2004), http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf [hereinafter COLORADO REPORT].

278. Carrie Coppernoll, Bryan Dean, & John David Sutter, *Sex Offenders Exiled*, DAILY OKLAHOMAN, Aug. 20, 2006, at 4A.

279. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME (Vintage Books 1977) (1975).

280. Edith Bevin, *Child Porn Ring Unravels in Raids*, NORTHERN TERRITORY NEWS (Austl.), Oct. 1, 2004, at 7, *available at* 2004 WL 9085789.

281. *Id.*

282. Brady Dennis & Matthew Waite, *Where is a Sex Offender to Live?*, ST. PETERSBURG TIMES (Fla.), May 15, 2005, at 1A.

of these men will marry or remarry upon release from prisons, the gender breakdown of the population will likely skew toward a large population of men. With so few couples, one would also expect few children in such a town. This, of course, fits well with the goals of restricting the residency of sex offenders. With mostly men and few children around, there will be fewer opportunities for the typical patterns of sexual violence (male to female, male to child of either sex).

However, even if there will be fewer potential victims in sex offender communities, it does not follow that there will be fewer incidents of sexual violence. A notable aspect of child molesters is that they often abuse the same victims over a long time frame.[283] Similarly, child pornography often uses the same "models" over and over.[284] 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. By adopting exclusion zones, lawmakers are risking the creation of environments in which sexual violence is the norm, not the exception. This will not likely facilitate the treatment and rehabilitation of offenders.

However, many sex offenders may choose not to join emerging sex offender ghettos. Because of the various negative effects on the lives of sex offenders, the incentive to disappear under a residency restriction program is heightened. Under a normal probation scheme, there is a certain percentage of sex offenders who fail to report or otherwise disappear.[285] This has developed into an accepted inevitability in the American criminal justice system.

With the advent of exclusion zones, there are good reasons to expect this disappearing act to occur more frequently with sex offenders.[286] The life of a restricted sex offender who chooses to live in a community with exclusion zones is one of constant accountability and responsibility. Offenders must know where all of the protected areas are within their larger community. Before choosing any place to live, the offender must determine where each exclusion zone begins and ends. This could include consulting state, local, and private restrictions. If the offender's family

283. Wendy Koch, *Feds: Chat Site Showed Live Molestation*, USA TODAY, Mar. 16, 2006, at 3A.
284. *Id*.
285. Coppernoll et al., *supra* note 278.
286. *Id*. In Oklahoma the progress the state made in decreasing the number of sex offenders off-the-grid was "erased" by the adoption of residency restrictions. *Id*.

lives within an exclusion zone, then the offender must either live separately or the whole family must relocate. Because many sex offenders are transients,[287] this difficulty can manifest itself on a repeating basis. Once an offender settles on a domicile, the process may have to be repeated if the state or locality also has work restrictions. Given the incredible difficulty sex offenders have in finding any job, the exclusion zones can be a sentence to perpetual unemployment. With some localities adding loitering or travel restrictions, a sex offender must be aware of the boundaries of every exclusion zone that he or she may breach in daily travel.

The trend of offenders going underground was exactly what happened under internal exile systems in the Soviet Union and Russia. A newspaper investigation of those living at the 101st kilometer under Soviet rule described the experience of the exiles as such:

> When you study the files of investigations, you are astonished at the sameness of the case histories. . . . After the first conviction, the person is sent to live beyond the "101st kilometer." He makes futile attempts to find a job, travels to Moscow and lives there without being registered. He spends his nights in sheds, empty houses, dumps, and garrets. Then come numerous warnings from the police, and finally, criminal charges are brought for persistent violation of [internal] passport regulations or vagrancy.[288]

The risk of going underground can vary from state to state with the level of enforcement for compliance and the penalties associated with noncompliance.

While no state has developed sufficient data to really examine the threat of sex offenders going underground in response to residency restrictions, the experience in Iowa is telling. Already, local police and probation officers are reporting a one hundred percent increase in sex offenders failing to report since the residency restrictions went into effect.[289] As a result, a group of prosecutors and police in Iowa have formed to try to get the state to repeal its exclusion zone legislation.[290]

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287. Durling, *supra* note 228, at 334–36.

288. *The "One Hundred First" Kilometer*, CURRENT DIG. OF THE SOVIET PRESS, Nov. 1, 1989, at 25 (citing N. Modestov, PRAUDA, Oct. 4, 1989, at 2).

289. Brandon Bain, *What If There's No Space?*, NEWSDAY (N.Y.), Nov. 23, 2006, at A18, *available at* 2006 WLNR 20287872 ("After Iowa legislators last year passed a law requiring offenders to live 2,000 feet from places where children congregate, law enforcement said the number of offenders unaccounted for doubled.").

290. Megan Woolhouse, *Can Bans Protect Kids from Attack? Some Raise Doubts on Residency*

Ultimately, if more offenders go underground, then the net result of sex offender residency restrictions will be negative. When an offender is off the radar, then the existing compliance, treatment, and monitoring options will have no effect. An offender is also unlikely to find any stability or employment when living underground. Such a scenario is a recipe for recidivism. An offender will be without any social contacts or employment and probably living in transitional housing. Such an outcome will render residency restrictions useless for that offender and the risk of recidivism will only increase.

In order to address the concern that sex offenders would be more inclined to go underground with an exclusion zone system, California became the first state to adopt universal GPS monitoring to enforce the state's restrictions.[291] At first blush, GPS monitoring does serve to address a primary weakness in the exclusion zone systems. However, that monitoring comes at a very high economic cost.[292] To ensure lifetime enforcement in relative real-time for sex offenders, the cost would be exorbitant.[293] For the time being, the state is offering far less to prevent GPS monitoring from becoming as expensive as imprisonment. The statute requires sex offenders to pay for the cost of their monitoring if they can afford it.[294] However, early reports show that the population of offenders that could actually pay for their monitoring may be very small.[295]

It is also unclear what benefits GPS monitoring offers if a sex offender makes a conscious decision to go underground. The attached anklet is readily removable and an offender could easily discard it before disappearing.[296] As a result, it is unlikely that GPS monitoring offers more than a band-aid to the serious problem of sex offenders deciding to go underground to avoid the hassles of complying with exclusion zones.

Another one of the unfortunate side effects of exclusion zones is that sex offenders are often forced to move far away from treatment facilities.[297] Because exclusion zones are typically centered around schools

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Limits, BOSTON GLOBE, July 16, 2006, at 1, *available at* 2006 WLNR 12384788.

291. *See supra* note 196 and accompanying text.

292. Wernick, *supra* note 156, at 1187 ("[M]any communities lack the resources to effectively monitor the movement of sex offenders."); Niki E. Delson, Opinion, *Prop. 83—Jessica's Law—is Dangerous for Humboldt County*, EUREKA TIMES STANDARD (Cal.), Sept. 30, 2006.

293. *Id.*

294. CAL. PENAL CODE § 3004 (West Supp. 2007).

295. Delson, *supra* note 292 ("[T]he physical and financial burden of monitoring the ever-increasing number of registrants will fall on local law enforcement.").

296. *Id*.

297. John Ingold, *Lyons Trustees Decide Against Residency Rule on Sex Offenders*, DENVER

and child care facilities, they are predominately found in urban areas. In those states with large exclusion zone radii there is a definite effect of driving sex offenders into rural areas. Unfortunately, almost all major sex offender treatment facilities are located in urban areas.[298] As a consequence, by pushing offenders far away from treatment facilities, the result is that fewer sex offenders are able to get treatment.[299]

This effect can be even more pronounced in cities and states that supplement exclusion zones with anti-loitering provisions. No state has carved out exceptions to their loitering provisions for offenders to receive treatment. Without those exceptions, a sex offender can be legally barred from going to a treatment facility because it is proximate to a school, child care facility, or other protected area. With some states adding bus stops to the list of protected areas, it is unlikely that many sex offenders will be able to travel the large distances to treatment facilities even if they are so inclined.

Tennessee adopted a very unusual law that actually prohibits sex offenders from going to a treatment facility "within one thousand feet . . . of the property line of any public school, private or parochial school, licensed day care center, other child care facility, public park, playground, recreation center or public athletic field available for use by the general public."[300] The net result is that sex offenders cannot get treatment to help fight the urge to re-offend. This policy choice by Tennessee is currently exceptional, but if other states or localities follow its lead, then treatment may be unattainable to many sex offenders seeking professional help.

While treatment is not a panacea for sex offender recidivism, the limited evidence that exists shows that treatment is an important part of decreasing future criminality.[301] While the studies do suffer from various methodological limitations,[302] the empirical evidence from states with developed treatment programs show a statistically significant difference in

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POST, Apr. 17, 2007, at B03, *available at* 2007 WLNR 7283895; Deena Winter, *City to Look at Offender Restrictions*, LINCOLN J. STAR (Neb.), May 16, 2006, at B1, *available at* 2006 WL 8628803.

298. Jim Collar & Wendy Harris, *Advocates: Sex Abuse Misconceptions Abound*, POST-CRESCENT (Appleton, Wis.), July 29, 2007, at 12A.

299. Ingold, *supra* note 297; Winter, *supra* note 297.

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

301. JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 8 (2005).

302. *Id.* at 20.

the level of sex offender recidivism.[303] Treatment has also shown greater effectiveness in decreasing recidivism of certain classes of offenders.[304]

Insofar as sex offenders are released from prison, there is a societal responsibility to do everything possible to ensure offenders do not find more victims. After all, this is the rationale for the exclusion zone laws. However, by diminishing access to treatment by displacing offenders from treatment facilities, exclusion laws directly reduce the effectiveness of one of the few policies that has actually shown promise in decreasing offender recidivism.

By removing sex offenders from friends, family, and treatment, we are surely setting them up for failure. Exclusion zones reinforce the cycle of crime and essentially wash our hands clean of addressing the problems of sexual violence. A simple abdication of responsibility through exclusion zones is an untenable policy over the long term. It also represents a complete dissociation between the American public and the lives of sex offenders.

B. Class-Based Banishment in American Democracy

Beyond the consequentialist objections to forming sex offender societies and pushing offenders underground, there is a significant problem with expelling a class of persons from American society. With the exception of the Arkansas statute, sex offender exclusion zones do not require any additional hearing or finding of dangerousness.[305] The laws simply treat all sex offenders under the statutes as part of a class to be exiled.

This type of action is virtually unprecedented in the United States. When a convict is sent to prison, due process is afforded, a trial occurs, and appeals are made. However, when a sex offender is internally exiled, it is performed extra-judicially with no warning and no recourse for the offender. Wayne Logan argues that this move upsets America's basic collectivist endeavor.[306] I think the problem is even larger than that. Designating a class in America as undesirable or wholly unwanted is against the basic principles of American pluralism. The analogy to Soviet internal exile practices is not just an illustration; it is a warning.

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303. JANUS, *supra* note 18, at 53–54.
304. LA FOND, *supra* note 301, at 20.
305. *See supra* note 200 and accompanying text.
306. *See generally* Logan, *supra* note 19.

America has physically excluded populations based upon membership in a class in very rare cases, and those situations are hardly the brightest spots in American history. Historically, major exclusions included racial segregation of African Americans and interning of Japanese Americans. There were also less well-known attempts to physically exclude, like the Chinese laborer situation described in Justice Brewer's dissent in *Ju Toy*[307] and the crackdown on homeless persons in the middle of the twentieth century.

Sex offenders are easily distinguishable from all of those excluded populations because they have committed heinous acts. For that reason, one might argue that this sort of class-based banishment does not represent a substantial harm to the American system of democracy and justice. However, the law as it is currently evolving does not premise exclusion on the horrible acts of sex offenders. In fact, a great many people subject to the residency restrictions have done very little. One of the plaintiffs in Georgia was a mother who bought contraceptives for her underage child who was having sex.[308] That the Georgia Supreme Court saw no problem with the legislature's decision to enforce residency restrictions against her (with the penalty of up to thirty years in prison for violation of those restrictions) shows that exclusion zones represent a danger to people well beyond the serial child molester.

While sex offenders are easy targets because of their political vulnerability, there is no legal reason to distinguish the internal exile of sex offenders from other potentially undesirable populations. Once we accept the premise that internal exile of a class of persons without a hearing is merely a regulatory action, a powerful tool is placed in the hands of governmental authority.[309] That tool may never be wielded against groups other than sex offenders, but its mere presence is an affront to basic precepts of American pluralism.

C. Aggravating Factors

The negative effects of residency restrictions are reinforced by three aggravating trends. First, in order to avoid becoming havens for sex offenders, communities are in a race to the bottom in terms of regulating sex offenders. Second, the failure by states and localities to notify sex offenders of the boundaries of exclusion zones actually creates an

307. *See supra* notes 110–19 and accompanying text.
308. Complaint at 4, Whitaker v. Perdue, No. 4:06-140-CC (N.D. Ga. 2006).
309. JANUS, *supra* note 18, at 5.

"uncertainty effect" which makes protected areas much larger than their statutorily defined limits. Third, the aggregation of sex offender restrictions greatly heightens the negative effects of exclusion zones. These three aggravating factors make the harms created by residency restrictions much worse and will increase those effects over time.

1. Racing to the Bottom

The race-to-the-bottom pattern is already occurring in several states. In Lincoln, Nebraska, the mayor identified a "domino effect" throughout the state of towns implementing sex offender exclusion zones so that the state would not become a refuge for Iowa's sex offenders.[310] The rapid pace at which Florida cities have adopted exclusion zones is attributable to each community fearing that it would become a safe haven for sex offenders after a neighboring town implemented residency restrictions.[311] Wyoming has begun debating residency restrictions in response to a report that the state's wide open spaces and libertarian tendencies make it a popular destination for fleeing sex offenders.[312]

Quick and effective reaction by a community neighboring another with an established exclusion policy is also necessary to avoid "inter-community strife."[313] Communities are faced with the choice of either risking becoming dumping grounds for other communities' sex offenders or implementing their own exclusion zones. There is not a middle-ground option available once the dominos start falling for localities without residency restrictions. The race to the bottom is also facilitated by the clear holding in *Doe v. Miller* which provides judicial cover to any community seeking to adopt its own exclusion zone law.[314]

The race to the bottom is also self-reinforcing. As the number of communities in a given area without exclusion zones decreases, the incentive to adopt residency restrictions increases in order to avoid becoming one of the few safe havens for offenders to live. There has also

310. Winter, *supra* note 297, at B1.

311. Leskanic, *supra* note 205, at 1 (noting that "[t]he contiguous cities of Miami Beach, North Bay Village and Miami Gardens passed restrictions within two weeks of one another. Within four months, at least 17 other municipalities in Miami-Dade and Broward counties adopted restrictions.").

312. Associated Press, *Wyoming's Sex Offender Rules May Attract Convicts from Other States*, CHI. TRIB., Feb. 21, 2007, at A6, *available at* 2007 WLNR 3460561.

313. Snider, *supra* note 37, at 457.

314. Logan, *supra* note 19, at 20–21.

been a steady increase in the radii of exclusion zones used by states, a trend that is likely to continue in the future.[315]

The race to the bottom is not, in itself, inherently destructive. After all, if every community adopted sex offender exclusion zones, this at least might yield some uniformity among differing sovereign areas. However, the domino effect serves to exacerbate other problems, described herein, associated with residency restrictions. Given the sheer volume of states and localities that have implemented exclusion zones in the few years since the first such measure went into effect, it is likely that many more communities will adopt similar restrictions in the near future. This accelerating trend further isolates sex offenders from their communities and society in general.

The race to the bottom is a particularly important trend in the potential creation of sex offender enclaves and ghettos. If no new sex offender restrictions are adopted, there would probably be just a few sex offender communities forming. However, if the domino effect continues on its present course, then the amount of real estate available to sex offenders will continue to decrease and more sex offender communities will emerge.

2. Uncertainty Effect

Typically, the statutes create a buffer zone some distance from a school or other protected area "as the crow flies." Such a distance is not easily measured by an average sex offender. The distances are even less clear when the protected area is something other than a school. Childcare facilities may include peoples' homes. Playgrounds may include a local neighborhood swing set.

The problem is compounded by the interaction of the various statutes and rules. In Florida, for example, there are state-defined exclusion zones. Those state exclusion zones are supplemented by the restrictions of over 200 cities. Some of the restrictions apply strictly for residency; others apply to work location as well. Some communities also have loitering and/or travel exclusion zones. The protected areas also vary depending upon the city. Some towns include playgrounds and beaches in addition to child care facilities and schools. In all, a sex offender in Florida is accountable for an incredible array of information in order to decide where to live, work, and travel. The "patchwork" system in Florida has grown so

315. *Id*. at 3.

complex that police have been unable to figure out when offenders are in violation of the residency restrictions.[316]

Unfortunately for offenders, states and localities have provided little guidance to offenders about where they can and cannot live. Further, the landscape for acceptable residencies changes on a regular basis as more localities adopt residency restrictions on offenders. Without that information, sex offenders have a high degree of uncertainty about how to comply with relevant statutes.

As a result of this uncertainty, sex offenders have every incentive to avoid being close to an exclusion zone because mistake is not a defense to a violation of residency restrictions. The result, then, is likely to be de facto exclusion zones much broader than the actual legal limits. This "uncertainty effect" will only exacerbate the tendency to banish sex offenders from communities in states with residency restrictions. Even in situations where sex offenders are allowed to live in large sections of a town or city, the uncertainty effect is likely to deter sex offenders from living in the "safe" pockets outside of exclusion zones.

3. Aggregation

As it stands, the majority opinion in *Doe v. Miller* is persuasive authority for other courts deciding whether exclusion zones banish sex offenders. However, courts have not yet been forced to evaluate the aggregate effects of multiple, overlapping exclusion zone policies. As localities continue to adopt their own exclusion zone laws at an alarming rate, less and less real estate will be available to sex offenders. The result will be banishment, not in one fell swoop, but in the gradual elimination of "safe" areas for sex offenders to live.

There are two types of aggregation relevant to residency restrictions. First, there is the aggregation of different protected zones. This type of aggregation occurs prominently under the Georgia law.[317] The map of DeKalb County shows that the state's decision to include bus stops in its list of protected areas left very few habitable areas for offenders.[318] This is because bus stops supplement the already expansive exclusion zones covering schools, child care facilities, and other locations. The overlapping

316. Sandra Pedicini, *Sex-Offender Buffer Zones Change Little; The Effect of the Ordinances Has Been to Encourage Offenders to Stay Put*, ORLANDO SENTINEL (Fla.), May 28, 2006, at B1, *available at* 2006 WLNR 9163831.

317. *See supra* text accompanying note 260.

318. *See supra* note 260.

zones aggregate the off-limits areas into an incredible amount of real estate where sex offenders are not permitted to live.

The second type of aggregation is of the laws of different governmental bodies. The discussion earlier of Florida laws illustrates this point. The state and hundreds of localities have adopted residency restrictions and anti-loitering provisions (which bar sex offenders from even entering an area). Any one of these rules, taken alone, has a very limited effect. Even if Tampa passed its complete ban on sex offenders living within the community, an offender might only have to move a few miles. However, with neighboring communities also adopting residency restrictions, the net effect could be that an offender has to relocate to a wholly different portion of the state, or leave the state entirely. This form of aggregation is growing more significant and is a prime reason why the early cases upholding sex offender residency restrictions are losing their legal resonance.

D. Legal Implications of Residency Restrictions as Banishment

If a court accepts the argument that residency restrictions are a form of internal exile, or, at the very least, that exclusion zones "resemble" banishment, then how does that change the legal outcomes in cases reviewing restrictions? Since *Doe v. Miller* is still the leading authority on this issue and is regularly cited and relied on by every opinion since, it makes sense to use that opinion as a template.

As noted earlier, the majority opinion in *Doe v. Miller* analyzed the analogy to banishment in the context of the ex post facto claim. In its analysis, the court applied the *Kennedy v. Mendoza-Martinez* test[319] as applied in *Smith v. Doe*.[320] After finding that the legislature's intent in passing the restrictions bill was civil and not punitive, the court had to determine "whether the law is nonetheless 'so punitive either in purpose or effect as to negate' the State's nonpunitive intent."[321]

The punitive effects test has several elements. The Eighth Circuit articulated the five key factors this way: "whether the law has been regarded in our history and traditions as punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive

319. 372 U.S. 144, 168–69 (1962).
320. 538 U.S. 84 (2003).
321. *Doe II*, 405 F.3d 700, 718 (2005) (quoting *Smith v. Doe*, 538 U.S. 84, 92 (2003)).

purpose, and whether it is excessive with respect to that purpose."[322] These factors are "neither exhaustive nor dispositive," but they provided the framework for the court's analysis.[323]

The majority found that the second factor, whether the law promoted a traditional aim of punishment, weighed in favor of the plaintiff.[324] Similarly, the court found that the third factor, whether the law imposed an affirmative disability or restraint, favored the plaintiff's claim.[325] However, the court found in favor of the government concerning the first factor (that the law would be considered punishment under America's history and traditions), the fourth factor (that there was a rational connection to a non-punitive purpose), and the fifth factor (that the statute was excessive in relation to that purpose).[326]

Even if the majority were to have accepted, as the dissent did, that exclusion zones were a form of banishment under America's history and traditions, it is unclear if that would have changed the outcome. After all, the court wrote that the fourth factor—concerning a non-punitive purpose of the statute—was the "most significant factor" in its opinion.[327] However, it is notable that Judge Melloy reached the opposite conclusion by virtue of finding that residency restrictions were a form of banishment according to traditions and history in the United States.[328]

The closeness of this issue under American law is a reason why the aggravating factors listed above are particularly important. If these laws actually create an "uncertainty effect," much like the chilling of speech in free speech cases,[329] the punitive effects of the statutes are much greater than the text of the laws might indicate. Similarly, if the race to the bottom

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322. *Doe II*, 405 F.3d at 719 (citing *Smith*, 538 U.S. at 97).

323. *Id*.

324. *Id*. However, the majority did so rather grudgingly. The court wrote:

> We agree with the district court that the law could have a deterrent effect, but we do not agree that the deterrent effect provides a strong inference that the restriction is punishment. The primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense. The Iowa statute is designed to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime. We observe, moreover, that the Supreme Court has cautioned that this factor not be over-emphasized, for it can "prove[] too much," as "[a]ny number of governmental programs might deter crime without imposing punishment."

Doe II, 405 F.3d at 720 (quoting *Smith*, 538 U.S. at 102).

325. *Doe II*, 405 F.3d at 721.

326. *Id.* at 719–23.

327. *Id.* at 721 (quoting *Smith*, 538 U.S. at 102).

328. *Id*. at 723–26 (Melloy, J., dissenting).

329. Frederick Scuaver, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect*," 58 B.U. L. REV. 685, 692–93 (1978) ("A Chilling Effect occurs when individual seeking to engage in activity protected by the First Amendment are deterred from doing so by government regulation").

continues, combined with an aggregation of statutes, then even the most unsympathetic judge may be forced to agree that sex offenders have been "banished" by a thousand different laws.

A single exclusion zone, even one with a 5,000 foot diameter, is unlikely to be considered banishment by any American court under the law established by *Doe v. Miller* and various state opinions. The Iowa statute, for example, effectively banished offenders from the cities of Des Moines and Iowa City. Banishment from those cities is not unlike the ancient Athenian and Roman forms of banishment which would require a person to travel only a few miles to comply. In our modern era, with easy travel, being forced to move just a few miles probably does not rise to the level of "exile" in the eyes of most judges. However, with uncertainty, aggregation, and the emerging race to the bottom, seemingly minor relocation turns into actual banishment.

While the courts have primarily focused on the analogy to banishment in their ex post facto analyses, a finding that the laws are punitive in effect would also bear on the outcome of other constitutional questions as well. Without a finding that a statute actually punishes an offender, a cruel and unusual punishment claim is sure to fail under the Eighth Amendment.[330] A double jeopardy challenge gains more traction if the *Kennedy v. Mendoza-Martinez* factors weigh in favor of the offender.[331] If the sex offender is found to be actually banished, the court will be forced to address the substance of interstate[332] and intrastate travel[333] claims. Further, if a court determines that exclusion zones effectively banish defendants, a court may actually be forced to decide the muddled area of law about whether banishment as punishment is illegal. Thus, while the banishment analogy has been addressed by courts primarily as an ex post facto issue, a different finding on the comparison could alter the results of sex offender challenges on a variety of claims.

E. Addressing Arguments for Residency Restrictions

While legislative debates about the rationales for residency restrictions are often brief, there have been several arguments made in favor of restrictions that warrant attention. I address each of these arguments below.

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330. Coker v. Georgia, 433 U.S. 584, 591–92 (1977).
331. Hudson v. United States, 522 U.S. 93, 98–100 (1997).
332. United States v. Guest, 383 U.S. 745, 757 (1966).
333. Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002).

1. Avoiding Temptation and Victim Grooming

The most common rationale offered in support of these laws is that they prevent the temptation of sex offenders in their daily lives.[334] The temptation argument is that sex offenders will not be around children, therefore they will not be tempted to commit a sex offense against them. A secondary, and probably more powerful, argument is that the presence of sex offenders in communities creates opportunities for those offenders to form linkages with potential victims, enabling their future crimes. This second argument is more potent because it acknowledges the overwhelming statistical evidence that child molesters are most often friends or family members of the victims.[335]

While these arguments are facially appealing, they are flawed in several ways. Some of these shortcomings stem from design deficiencies in existing residency restriction programs, while others are inherent to an exclusion zone scheme. Ultimately, these rationales for residency restrictions fail to offer persuasive reasons for implementing exclusion zones.

As currently designed, the inclusion of sex offenders who did not commit crimes against children demonstrates the flimsiness of these rationales. There is no empirical evidence to support the contention that a flasher,[336] or other non-child-focused sex offender, is a high-risk candidate for sexually assaulting a child. In fact, someone guilty of a non-sex-based offense is a higher risk offender than many of those included under existing residency restriction schemes.[337] The mismatch between targeted offender populations and those who actually pose some risk undermines the ability to focus efforts on offenders to ensure compliance with restrictions. The only existing residency restriction addressing this problem is the Arkansas law, which requires a particular finding of dangerousness. Without such a provision, the other nineteen state statutes

334. Singleton, *supra* note 174, at 610.

335. HOWARD N. SNYDER, U.S. DEP'T OF JUST., SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), http://www.ojp.gov/bjs/pub/pdf/saycrle.pdf.

336. Oklahoma for example puts "indecent exposure" in the class of sex offenders subject to residency restrictions. *See* Coppernoll et al., *supra* note 278, at 1A (telling the story of "Wayne" who, due to his indecent exposure conviction, is one of 5,200 sex offenders in Oklahoma subject to residency restrictions).

337. PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 24 (2003), http://www.ojp.org/bjs/pub/pdf/rsorp94.pdf.

and countless local ordinances undermine the effectiveness of their laws through overinclusiveness.

Further, insofar as these laws fall short of complete banishment from the United States, they only control the eight or so hours in which a sex offender is asleep—the hours when the risk of offense is essentially zero. There is no empirical evidence to suggest that residency restrictions are effective in limiting temptation. While removing offenders from schools keeps them away from large gatherings of children, the restrictions do not necessarily decrease the number of children in a sex offender's neighborhood. In Ohio, for example, the state's residency restrictions would result in a notable net increase in the number of children living in proximity to a sex offender.[338] There is also no empirical support for the notion that there is a linear relationship between the number of children seen by a pedophile and the desire to re-offend. As a result, as long as an offender has some contact with children, the risk of temptation remains. Also, offenders are free to cultivate relationships with children who may not live near them, but may have other connections to the offender.

Even without these design deficiencies, there is no empirical support for the idea that residency restrictions actually decrease sex offender recidivism. The Minnesota Department of Corrections explored the subject in depth and found no evidence that "residential proximity [of sex offenders] to a park or school" affects re-offense.[339] Similarly, the Colorado State Judiciary Committees examined the efficacy of sex offender residency restrictions and found that, "[p]lacing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism."[340] After reviewing the effects of Iowa's statute, the Iowa County Attorney's Association found that, "[r]esearch does not support the belief that children are more likely to be victimized by strangers at the covered locations than at other places."[341]

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338. Singleton, *supra* note 174, at 612–13 ("Overall, the net effect of the twelve relocations was an increase of 2.97 children per acre. Although one might counter that being near a school provides a larger pool of potential victims, there's nothing to stop determined child molesters from placing themselves in positions where they can have access to large numbers of children—regardless of whether or not the child molesters live nearby a school.").

339. MINNESOTA DEP'T OF CORR., LEVEL THREE OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 9 (2003), http://www.doc.state.mn.us/publications/legislativereports/pdf/2004/Lvl%203%20sex%20offenders%20report%202003%20(revised%202-04).pdf.

340. COLORADO REPORT, *supra* note 277, at 37.

341. Matthew Bruun, *Sex Offender Plan Raises Questions; ACLU to Contact Fitchburg Councilors*, TELEGRAM & GAZETTE (Mass.), June 23, 2006, at A1.

No study to date has shown any positive effect of these statutes in terms of decreasing recidivism.[342]

The argument presented above in regards to reinforcing otherness bears on this argument as well. If offenders are forced into sex offender ghettos, their ability to form sex criminal networks and sex offender schools of crime are enhanced. Further, to the degree that offenders end up going underground, current probation officer and police monitoring is undermined.[343] The result is that offenders have less supervision, not more. Further, the lack of positive social networks and treatment opportunities for sex offenders subject to residency restriction schemes means that the offenders will lack the resources to help them cope with temptation. Instead of having professional help, offenders under an aggressive residency restriction scheme are left to fend with their demons alone. Thus, even if residency restrictions create some positive effect on recidivism, the net effect is still likely to be an overall increase in re-offending.

2. Sex Offenders Deserve It

Some have argued that concerns such as these are misplaced because of the heinous nature of the crimes committed by sex offenders.[344] After all, these people are criminals who have committed some of the worst possible crimes—is it not justice to see them isolated from society? If we believe that sex offenders are the most vile criminals, then should not any punishment be acceptable? And of all the punishments available, including death or life in prison, banishment seems minor in comparison.

This argument would have more merit if banishment were part of an offender's original sentence or if a separate hearing with due process resulted in a new sentence of exile. However, none of these procedural protections exist under the current exclusion laws, with the notable exception of the Arkansas statute. The result is that, by legislative fiat, a class of persons is being banished from mainstream American society for life. There are no trials, no hearings, and no appeals. It is simply commanded and the sex offenders must comply. A failure to comply with

342. Singleton, *supra* note 174, at 615.

343. Dee Dixon, *Ordinances Leave Areas' Sex Offenders With Anxiety*, BEAUMONT ENTERPRISE (Tex.), Oct. 23, 2006, *available at* 2006 WLNR 18365247.

344. *See, e.g.*, Marisa L. Mortensen, Comment, *GPS Monitoring: An Ingenious Solution to the Threat Pedophiles Pose to California's Children*, 27 J. JUV. L. 17 (2006).

this brazen act of legislative power can result in a prison term of up to thirty years.[345]

This argument also puts rationales in support of residency restrictions at odds with the judicial rationales finding these statutory schemes legal. As the decision in *Doe v. Miller* makes clear, a finding that the restrictions are regulatory and not punitive is the pivotal point for determining the legality of exclusion zones.[346] If defenders of residency restrictions justify the laws by virtue of their harsh effect on offenders, that undermines the legal argument in favor of those restrictions. If retribution is the motive, then more due process is needed before someone receives a lifetime sentence of de facto banishment.

Even beyond the procedural protections, however, the argument of just desserts represents a classic example of cutting off one's nose to spite one's face. Punishing offenders just for the sake of doing so may actually endanger children and increase recidivism. The discussion above illustrates the many ways in which residency restrictions are counterproductive. Adding retribution as an argument for exclusion zones will only blind policymakers from the real effects of these statutes.

The just desserts argument is also substantially undermined by the enormous class of persons affected by these statutes. I have explained in detail the broad range of crimes that are covered by typical residency restrictions, so I will not repeat the argument here. The breadth of the class affected illustrates that any retribution-based deontological claim is fundamentally premised on spurious claims when a great number of offenders are substantially overpunished for their minor offenses.

3. Sex Offender Ghettos are Actually Good

One could argue that pushing offenders into communities like those that formed beyond the 101st kilometer in the Soviet Union might be a good thing. While this argument has not actually been advanced by defenders of residency restrictions, it is worth addressing. In defense of the development of sex offender communities, one might argue that such a development might actually facilitate law enforcement. Police may certainly know where to look for the "usual suspects" when initiating a sex offender investigation.

However, it is unclear that police would gain any substantial advantage by having all sex offenders living in the same zip code. In the current

345. GA. CODE ANN. § 42-1-15 (Supp. 2006).
346. *See supra* notes 210–17 and accompanying text.

system, probation officers and registry requirements already assure that most sex offenders are monitored and that police would know where to turn to find particular sex offenders.[347] While there might be some advantage to being able to use community police techniques to monitor neighborhoods with a high concentration of sex offender residents, such an advantage is surely overwhelmed by the resultant increase in sex offenders going underground to escape exclusion zone requirements.

I have also discussed the ways in which the formation of sex offender communities is actually counterproductive for law enforcement. Child pornographers are able to form networks and schools of crime can easily develop. Any benefits that are derived from having offenders in a known location are offset through the numerous ways criminal enforcement is undermined by the formation of sex offender ghettos.

CONCLUSION

We cannot banish dangers, but we can banish fears.

—David Sarnoff[348]

The use of class-based residency restrictions for sex offenders is a misguided approach to dealing with sex offender recidivism, one that sacrifices justice and liberty. Social, economic, and physical isolation creates an environment ripe for recidivism. While those supporting these laws have the interests of children at heart, the policies they are promoting will ultimately do more damage to children and society.

Unfortunately, the political and cultural forces behind the crackdown on sex offenders are strong. While crime in general has long been an easy issue for politicians to gain support through the adoption of higher sentences, the situation with sex offenders has taken this political strategy to a new level. Sex offenders may be the single most despised population in the United States. Measures against them usually pass with little opposition. Stories of little girls and boys victimized by pedophiles go straight to the front pages of newspapers and dominate local news coverage. These forces make an intelligent debate about sex offenders a very difficult proposition. Without changes in the underlying attitudes that make sex offender crackdowns a no-lose issue for politicians, a reorientation of sex offender policy is unlikely.

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347. *Id.*

348. David Sarnoff Quotes, http://thinkexist.com/quotation/we_cannot_banish_dangers-but_we_can_banish_fears/202813.html (last visited Feb. 2, 2007).

Despite these obstacles, there are many alternatives available for policymakers opposed to an exile-centric approach to sex crimes. These solutions offer viable policy and litigation options for all levels of government. Eric Janus, among others, has forcefully argued for a public-health approach to dealing with sex offenders.[349] Such an approach eschews isolation and exile and focuses on assimilation, prevention, and reentry. A public health paradigm has the advantage of recognizing sexual violence within the context of the larger cultural environment while tailoring solutions to particular offenders (instead of class-based banishment).[350] A public-health approach also allows treatment to be integrated into an effective sex offender policy.

Any long-term solution to sexual violence needs to include a variety of policies tailored to individual offenders. If a limited banishment of a particular defendant could help decrease the risk of re-offense, then there are better ways to go about it than the current one-size-fits-all model of punishment. Nebraska, in particular, has started utilizing more refined dangerousness prediction tools to assess the particular risks of convicts.[351] I discussed earlier how Arkansas has managed to integrate risk assessment into a residency restriction policy.[352] If judges were offered residency restrictions as a sentencing alternative and had access to the appropriate risk prediction tools, it would help limit banishment punishments to the few instances when it might actually be warranted. And it would allow the protected areas to be appropriately defined for a particular defendant. A serial statutory rapist, for example, may warrant a restriction against living near a high school, but may not warrant restrictions against proximity to a child care center.[353] At the very least, such a scheme would offer the offender a chance to rebut the state's rationales for seeking internal exile.

Instead of a simple lifetime penalty, follow-up policies could play a role. In instances where there are clear indications that an offender is likely to re-offend, a judge could have the discretion to order regular hearings to screen offenders for rehabilitative progress as well as the risk of recidivism. Periodic risk assessments help to address the shortcomings of the existing predictive tools by evaluating offenders over a longer time frame than is usually available in the criminal justice system.

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349. JANUS, *supra* note 18, at 116–20.
350. *Id*. at 116.
351. Durling, *supra* note 228, at 348–50.
352. *See supra* text following note 302.
353. Durling, *supra* note 228, at 350–51.

Instead of adopting the easy solution of class-based banishment and isolation, real progress in the fight against sexual violence requires a willingness to embrace a range of options. Sometimes, higher sentences may be warranted. Other times, probation and treatment might be preferable. And, in some instances, it is even possible that some form of exile may be part of a narrowly tailored package of punishment.

Changing the fear and hysteria surrounding sex offenders is no small task. All that I can offer is the hope that eventually the facts of the issue will surface, eroding the various myths about the homogeneous class of "sex offenders" in the same way that modest gains have been made in dispelling rape myths among the general population. However, as experience demonstrates, cultural change is often slow and prone to regression. Only by fighting oversimplification of the sex offender debate can effective policies be adopted. Hopefully, this Article can play a role in combating those norms.