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## Pushing the Limits: Reining in Ohio's Residency Restrictions for Sex Offenders

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# PUSHING THE LIMITS: REINING IN OHIO'S RESIDENCY RESTRICTIONS FOR SEX OFFENDERS

TAUREAN J. SHATTUCK\*

## ABSTRACT

The danger to children posed by convicted sex offenders living near schools, parks, and bus stops has been greatly exaggerated by the media. In turn, many state legislatures have attempted to find solutions to this perceived problem, imposing sanctions that seem to keep the “problem” at bay. A relatively new approach prevents those convicted of sex crimes from living within a certain distance of places where children congregate. Ohio is one of the states that has adopted this approach. The problem with this approach, however, is that imposing such restrictions on all individuals convicted of certain crimes imposes barriers to treatment and arguably infringes upon their constitutional rights, while the efficacy of the sanctions is not backed by research data. Despite the lack of empirical support, legislatures have continued to enact tougher new laws on sex offenders. If the Ohio legislature really wanted to effectuate their goal of protecting children from dangerous sex offenders, it would allow the courts to decide on a case-by-case basis whether residency restrictions would be proper. This is an approach taken by a growing number of states that takes into account research findings on sex offenders and recidivism, as well as addresses some of the constitutional concerns of the offenders. This Note argues for this policy shift in Ohio by examining the current approach and how the issue is evolving throughout the country.

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## I. INTRODUCTION

*“We shall act, and we shall act with good intentions. Hopefully, we will often be right, but at times, we will be wrong. When we are, let us admit it and immediately try to right the situation.”*<sup>1</sup>

Laws governing sex offenders, though enacted with benevolence, are ineffective as currently construed and may exacerbate the problem.<sup>2</sup> When crafting policies to regulate sex offenders, legislatures turn to scare tactics rather than rely on research data.<sup>3</sup>

Following a few highly publicized murders, states enacted residency restriction statutes to prevent convicted sex offenders from living within certain distances of schools, playgrounds, daycare centers, and other places where children often congregate.<sup>4</sup> However, studies show that these statutes are not effective in reducing recidivism.<sup>5</sup> Additionally, some courts hold that these statutes are unconstitutional.<sup>6</sup> This Note argues that Ohio’s approach to residency restrictions has gone too far. Ohio needs a system that gives individual judges discretion in imposing restrictions efficaciously.

Ohio law imposes residency restrictions on individuals convicted of sex offenses.<sup>7</sup> Depending on the underlying conviction, the offender is classified in one of three tiers.<sup>8</sup> These tiers categorize crimes based on their nature and severity.<sup>9</sup> The applicable tier determines whether he will have to register as a sex offender for a specified period of time.<sup>10</sup> However, placement into these tiers does not account for

<sup>1</sup> Joe Paterno, Commencement Speech at Penn State University (June 16, 1973).

<sup>2</sup> See Eric Tennen, *Risky Policies: How Effective Are Restrictions on Sex Offenders in Reducing Reoffending?*, 58 BOSTON B.J. 1 (2014).

<sup>3</sup> Christina Mancini, *Sex Offender Residence Restriction Laws: Parental Perceptions and Public Policy*, 38 J. CRIM. JUST. 1022, 1024 (2010).

<sup>4</sup> Karen Terry, *Sex Offender Laws in the United States: Smart Policy or Disproportionate Sanctions?*, 39 INT’L J. COMP. APPLIED CRIM. JUST. 113, 116 (2015).

<sup>5</sup> Jason Rydberg et al., *The Effect of Statewide Residency Restrictions on Sex Offender Post-Release Housing Mobility*, 31 JUST. Q. 421, 422 (2012).

<sup>6</sup> Terry, *supra* note 4, at 116.

<sup>7</sup> OHIO REV. CODE ANN. § 2950.034 (West 2016).

<sup>8</sup> OHIO REV. CODE ANN. §§ 2950.01, 2950.031.

<sup>9</sup> OHIO REV. CODE ANN. § 2950.01.

<sup>10</sup> OHIO REV. CODE ANN. § 2950.04.

whether the offender is likely to reoffend.<sup>11</sup> Additionally, Ohio law prohibits anyone convicted of a crime requiring registry as a sex offender from living within 1,000 feet of any school, preschool, or daycare center.<sup>12</sup> This restriction is imposed regardless of the tier in which an offender is classified.<sup>13</sup>

Many litigants raised constitutional arguments against Ohio's statutory scheme for sex offenders.<sup>14</sup> Some of these attacks were successful.<sup>15</sup> For instance, the Ohio Supreme Court recently held that residency restrictions cannot be applied to offenders who were convicted of sex offenses prior to the enactment of the residency restriction statute in 2003 and the amendments in 2007.<sup>16</sup> However, offenders were unsuccessful in arguing that residency restrictions are unconstitutional violations of the Due Process Clause.<sup>17</sup> The Ohio Supreme Court explained that the restrictions do not implicate a fundamental right; therefore, the restrictions are constitutional because they are rationally related to a legitimate state interest.<sup>18</sup>

This Note further argues that Ohio's approach to imposing residency restrictions on a blanket basis needs to be revised to only apply to sex offenders who pose the highest risk to the public. Based on the results of research studies and recent court decisions in different states,<sup>19</sup> this Note shows that the application of residency restrictions on a blanket basis is ineffective and undermines the state's interest in protecting children. Moreover, Ohio's residency restrictions do not pass the rational basis test, which is currently used to determine whether the state's legitimate interest overrides the offenders' rights.<sup>20</sup>

Part II of this Note discusses the background of residency restrictions for sex offenders throughout the country. This section highlights the history of legislation regarding sex offenders and the historical judicial treatment of residency restrictions for sex offenders. Part III of this Note examines the arguments for and against the use of residency restrictions for sex offenders. This section starts with studies that provide evidence of the ineffectiveness of residency restrictions for sex offenders. This section also provides an argument in favor of residency restrictions in a more targeted manner. Parts IV and V of this Note describe recent state action on residency restrictions for sex offenders, including how Ohio approaches these residency restrictions. Finally, Part VI of this Note concludes with a

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<sup>11</sup> See Margaret Troia, *Ohio's Sex Offender Residency Restriction Law: Does It Protect the Health and Safety of the State's Children or Falsely Make People Believe So?*, 19 J.L. & HEALTH 331, 334 (2005).

<sup>12</sup> OHIO REV. CODE ANN. § 2950.034.

<sup>13</sup> See Troia, *supra* note 11.

<sup>14</sup> See generally *In re Bruce*, 983 N.E.2d 350 (Ohio 2012); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011); *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010); *O'Brien v. Hill*, 965 N.E.2d 1050 (Ohio Ct. App. 2012).

<sup>15</sup> See generally *Bruce*, 983 N.E.2d 350; *Bodyke*, 933 N.E.2d 753.

<sup>16</sup> See *Williams*, 952 N.E.2d 1108.

<sup>17</sup> *O'Brien*, 965 N.E.2d 1050.

<sup>18</sup> *Id.* at 1054.

<sup>19</sup> *In re Taylor*, 343 P.3d 867 (Cal. 2015).

<sup>20</sup> *O'Brien*, 965 N.E.2d 1050.

recommendation on how Ohio should manage residency restrictions for sex offenders that will better effectuate its goal of protecting its citizens' safety.

## II. BACKGROUND ON TREATMENT OF SEX OFFENDERS

### A. History of Legislation Regarding Sex Offenders

Legislation regarding sex crimes increased in the 1990s although instances of sex crime decreased.<sup>21</sup> Some scholars suggest that increased media attention on a few high-profile crimes was the root cause for the increase in legislation.<sup>22</sup> In short, the increased media exposure gave the public a false impression that sex crimes were on the rise, so the public demanded that action be taken to combat the perceived spike in crime.<sup>23</sup> State legislatures quickly responded to the pressure from both the general public and the federal government.<sup>24</sup> Focusing on the need to protect children, legislators passed laws regulating sex offenders without the support of much empirical research and relied upon the heightened perception of danger.<sup>25</sup>

The increase in legislation regarding sex offenders began with the murders of several children.<sup>26</sup> In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Jacob Wetterling Act").<sup>27</sup>

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<sup>21</sup> Bianca Easterly, *Playing Politics with Sex Offender Laws: An Event History Analysis of the Initial Community Notification Laws Across American States*, 43 POL'Y STUD. J. 355 (2014); see also Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008) (reporting that between 1992 and 2000, substantiated child sexual abuse cases decreased from 150,000 to 89,500, or by approximately 40%).

<sup>22</sup> See Easterly, *supra* note 21.

<sup>23</sup> *Id.* at 355 ("The media's role in disseminating information about and entertaining the public with crime stories significantly heightened public fear of crime in the 1990s.").

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 359.

Recognizing the political opportunity that adopting sex offender laws presented, states hastily adopted some version of [sex offender registration and notification] legislation before federal intervention, naming many of the laws after the young victims such as 'Megan's Law.' Social constructionists would explain this behavior as a political opportunity for elected officials to demonize sex offenders further while reminding the public of their interest in protecting children as a way to ensure a substantial political payoff.

*Id.*; see also Mancini, *supra* note 3, at 1024 ("[M]any federal and state legislative reforms have been named in honor of sexually victimized and murdered children . . . a development that has led . . . to the erroneous perception that 'many, if not most, sex offenders go on to kill.'").

<sup>26</sup> See Easterly, *supra* note 21, at 356 ("[I]t is commonly believed that extensive media attention to the tragic murders of Jacob Wetterling, Polly Klaas, Megan Kanka, and other children in the 1980s and early 1990s led to the most recent wave of sex offender laws."); see also Wright, *supra* note 21.

<sup>27</sup> Elizabeth Ehrhardt Mustaine, *Sex Offender Residency Restrictions: Successful Integration or Exclusion?*, 13 CRIMINOLOGY & PUB. POL'Y 169, 169 (2014) ("[The Act] required states to track sex offenders' places of residence annually for 10 years after their release into the community (and quarterly for the rest of their lives if they were violent)."); see also Daniel J.

The Jacob Wetterling Act created two components that impacted sex offenders: registration and community notification.<sup>28</sup> The legislation established a national sex offender registry and required states to submit sex offender information, conviction data, and fingerprints to the FBI.<sup>29</sup> The community notification portion of the Jacob Wetterling Act allowed states to release sex offender information to the public.<sup>30</sup> Congress gave states three years to implement the components of the Jacob Wetterling Act, threatening to withhold federal funding for failure to comply.<sup>31</sup> The Jacob Wetterling Act was somewhat discretionary for local law enforcement agencies.<sup>32</sup> Police departments were not required to notify the community about the “presence and location of sex offenders.”<sup>33</sup>

In 1996, Congress amended the Jacob Wetterling Act because it determined that increased disclosure of sex offender registration information was important for the public’s protection.<sup>34</sup> This amendment, which became known as “Megan’s Law,” requires law enforcement authorities to make information available to the public regarding registered sex offenders.<sup>35</sup> The federal Megan’s Law amendment to the Jacob Wetterling Act was similar to the original state version of Megan’s Law that was initially enacted in New Jersey.<sup>36</sup> In any event, the Megan’s Law amendment to

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Schubert, *Challenging Ohio’s Adam Walsh Act: Senate Bill 10 Blurs the Line Between Punishment and Remedial Treatment of Sex Offenders*, 35 U. DAYTON L. REV. 277, 280 (2010) (“[T]he Jacob Wetterling Act mandated that all states enact laws requiring offenders convicted of offenses ‘against a minor or a sexually violent offense to register a current address with state or local authorities.’”).

<sup>28</sup> Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 94 (1996).

<sup>29</sup> *Id.* at 95; see also Schubert, *supra* note 27, at 280 (“Under the Jacob Wetterling Act, the length of registration was determined by the ‘previous number of convictions, the nature of the offense, and the characterization of the offender as a sexual predator.’”).

<sup>30</sup> Lewis, *supra* note 28, at 95.

<sup>31</sup> See Wright, *supra* note 21, at 29.

<sup>32</sup> *Id.* at 30.

<sup>33</sup> *Id.*

<sup>34</sup> Kristen M. Zgoba, *Residence Restriction Buffer Zones and the Banishment of Sex Offenders: Have We Gone One Step Too Far?*, 10 CRIMINOLOGY & PUB. POL’Y 391, 392 (2011).

[Megan Kanka’s murder], as well as others, alerted Congress that some law enforcement agencies were not exercising their discretion to notify communities of sex offenders living in the area, leading to inconsistent community notification standards. In response, Congress amended the Jacob Wetterling Act in 1996, which abolished law enforcement discretion and imposed an affirmative duty on law enforcement agencies to release sex offender registration information.

Schubert, *supra* note 27, at 281.

<sup>35</sup> *Id.* at 393; see also Easterly, *supra* note 21, at 356.

<sup>36</sup> Koresh A. Avrahamian, *A Critical Perspective: Do “Megan’s Laws” Really Shield Children From Sex-Predators?*, 19 J. JUV. L. 301, 302 (1998); see also Daniel M. Filler,

the Jacob Wetterling Act received nearly unanimous support having been enacted in some version by all fifty states and the District of Columbia.<sup>37</sup> President Clinton later stated the following in support of Megan's Law:

Nothing is more important than keeping our children safe. We have taken decisive steps to help families protect their children, especially from sex offenders, people who according to study after study are likely to commit their crimes again and again. We've all read too many tragic stories about young people victimized by repeat offenders. That's why in the crime bill we required every state in the country to compile a registry of sex offenders, and gave states the power to notify communities about child sex offenders and violent sex offenders that move into their neighborhoods.<sup>38</sup>

A decade later, Congress passed the Adam Walsh Act, which "enhanced sex offender registration and notification requirements, expanded the duration of the sex offender registration, and increased penalties for sex offenders who fail to register."<sup>39</sup> The Adam Walsh Act "increase[d] mandatory sentences for federal sex offenders, civil commitment of sex offenders, criminal information record checks, child pornography investigative and prosecutorial resources, require[d] the creation of a national child abuse registry, and provide[d] grant funding for implementation."<sup>40</sup> It also created a classification system for sex offenders, which included three tiers into which different sex crimes would fall,<sup>41</sup> and mandated that sex offenders register for a specified period of time.<sup>42</sup>

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*Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 315 (2001) ("Within days of [Megan Kanka's] death, Megan's parents . . . began a campaign to pressure the New Jersey legislature to adopt a sex-offender community-notification law in her memory. Their plea was personal and explicitly tied to the death of their daughter.").

<sup>37</sup> Zgoba, *supra* note 34, at 392-93; *see also* Avrahamian, *supra* note 36, at 303.

<sup>38</sup> Maureen S. Hoppell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present, and Future of Megan's Law*, 42 DUQ. L. REV. 331, 338-39 (2004) (quoting *President Clinton's Weekly Radio Address*, CNN, June 22, 1996).

<sup>39</sup> Zgoba, *supra* note 34, at 393; *see also* Mustaine, *supra* note 27, at 170 (stating that the Adam Walsh Act also "created the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking to oversee the implementation and maintenance of federal sex offender policy"); Schubert, *supra* note 27, at 282 ("[T]he Adam Walsh Act requires those law enforcement agencies to 'make sex offenders' information accessible to anyone with the click of a button.'").

<sup>40</sup> Wright, *supra* note 21, at 31.

<sup>41</sup> *Id.* at 32.

<sup>42</sup> *Id.*

Tier I offenders must register for fifteen years, tier II offenders for twenty-five years, and tier III offenders for life. Offenders who do not re-offend for a minimum of ten years may reduce the length of time that they must register. There is no provision for an offender to be removed from the registries prior to those minimum dates. Offenders are required to allow the jurisdiction to verify their addresses and take a current photograph of them: each year if they are a tier I offender, every six months if they are a tier II offender, and every three months if they are a tier III offender.

Another legislative measure taken to protect the public was the enactment of residency restrictions for individuals convicted of sex offenses.<sup>43</sup> Florida was the first state to implement statewide residency restrictions in 1995.<sup>44</sup> Currently, more than thirty states impose residency restrictions on sex offenders.<sup>45</sup> Residency restrictions vary from state to state in their specific distances and zones excluded.<sup>46</sup> The intent behind residency restrictions was to keep children safe by prohibiting sexual offenders from being in areas where children normally congregate.<sup>47</sup> This concept is derived from routine activity theory.<sup>48</sup> In reference to sex offenders, the routine activity theory

posits that if potential sex offenders are not in close proximity to suitable targets (i.e., children), they will not have opportunities to commit these crimes, even in the absence of capable guardians (e.g., teachers, parents, coaches, neighbors, etc.). Therefore, policies on residential restrictions assume that these restrictions stop sex offenders from living in restricted areas, and that post release community correctional officers can regularly check on and ensure that sex offenders comply with their restrictions.<sup>49</sup>

Residency restrictions for sex offenders are based upon the assumption that “most sex offenders meet their victims by going to nearby child congregation locations, loitering around, and gaining access to these young strangers by

*Id.*

<sup>43</sup> Mustaine, *supra* note 27, at 170.

<sup>44</sup> Zgoba, *supra* note 34, at 393.

<sup>45</sup> John Kip Cornwell, *Sex Offender Residency Restrictions: Government Regulation of Public Health, Safety, and Morality*, 24 WM. & MARY BILL RTS. J. 1, 7 (2015) (“In addition, several states allow municipalities within them to enact their own restrictions, either in lieu of or in addition to statewide regulation.”); *see also* Mancini, *supra* note 3, at 1023.

<sup>46</sup> Mustaine, *supra* note 27, at 170. (“These types of restrictions typically include prohibitions from living and loitering closer to various child congregation locations (e.g., schools, parks, daycare centers, etc.) than a legally specified distance (e.g., 500-1000 feet.”); *see also* Zgoba, *supra* note 34, at 393.

<sup>47</sup> Richard Tewksbury, *Evidence of Ineffectiveness: Advancing the Argument Against Sex Offender Residence Restrictions*, 13 CRIMINOLOGY & PUB. POL’Y 135, 135 (2014) [hereinafter Tewksbury, *Evidence of Ineffectiveness*] (explaining that the logic of such restrictions is built upon public safety – if sex offenders do not reside within sight or easy walking distance of places children gather, then those children will be spared sexual victimization); *see also* Mancini, *supra* note 3, at 1023 (“Residence restriction laws were heralded by lawmakers as a ‘reasonable endeavor in helping parents protect their children.’”).

<sup>48</sup> Mustaine, *supra* note 27, at 170; *see also* Richard Tewksbury et al., *Examining Rates of Sexual Offenses from a Routine Activities Perspective*, 3 VICTIMS & OFFENDERS 75, 77 (2008) [hereinafter Tewksbury et al., *Examining Rates of Sexual Offenses*] (“Routine activities theory was originally introduced by Cohen & Felson (1979), who believed that crime rates were influenced by the daily routines of individuals. Specifically, they believed that the convergence of (1) a potential offender, (2) a suitable target, and (3) ineffective or absent guardianship allowed for the necessary conditions to be present for a predatory crime to occur.”).

<sup>49</sup> *Id.*



manipulation and coercion.”<sup>50</sup> Despite the empirical evidence dispelling this assumption,<sup>51</sup> many jurisdictions have increased the use of residency restrictions for sex offenders.<sup>52</sup> Some states increased the use of residency restrictions as a reactionary measure to prevent the state from becoming a haven for sex offenders fleeing neighboring states with more restrictive laws.<sup>53</sup>

As explained above, the proliferation of laws regulating the treatment of sex offenders has increased in recent history.<sup>54</sup> These laws have increased because legislators do not fear backlash from their constituency for getting “tough” against sex offenders.<sup>55</sup> The increase in sex offender legislation is also partly caused by the way the courts have traditionally treated residency restrictions for sex offenders.<sup>56</sup>

### *B. Historical Judicial Treatment of Residency Restrictions*

Residency restrictions for sex offenders have faced many constitutional challenges over the years.<sup>57</sup> Most constitutional challenges to residency restrictions implicate *ex post facto* laws or substantive due process challenges.<sup>58</sup> Courts traditionally strike down *ex post facto* challenges “because the punitive effects of the statute [imposing residency restrictions for sex offenders] do not override the legitimate legislative intent to enact a non-punitive, civil, non-excessive regulatory measure to promote child safety.”<sup>59</sup>

Similarly, courts rule against substantive due process challenges “by finding that the laws rationally advance a legitimate government purpose to protect children by reducing the opportunity and temptation convicted offenders with high recidivism rates face near schools.”<sup>60</sup> As one scholar noted, “[substantive due process c]hallenges are difficult to sustain, however, because of the Court’s unwillingness to expand protections beyond traditional fundamental interests.”<sup>61</sup> Because sex offenders have not been able to assert rights that courts deem fundamental, residency

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<sup>50</sup> *Id.*

<sup>51</sup> See Mancini, *supra* note 3, at 1024.

<sup>52</sup> Zgoba, *supra* note 34, at 393.

<sup>53</sup> *Id.*; see also Wright, *supra* note 21, at 44-45.

<sup>54</sup> See *supra* Section II.A.

<sup>55</sup> See Megan A. Janicki, Note, *Better Seen Than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 B.U. PUB. INT. L.J. 285, 287 (2007) (“No one ever lost votes going after sex offenders.”).

<sup>56</sup> See *infra* Section II.B.

<sup>57</sup> See Troia, *supra* note 11, at 350.

<sup>58</sup> *Id.* at 350-55.

<sup>59</sup> *Id.* at 350.

<sup>60</sup> *Id.* at 351.

<sup>61</sup> Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1123 (2012) (“[T]he Court has held firm to the proposition that the right asserted must be ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty.’”) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

restrictions only need to be rationally related to a legitimate state interest to be upheld.<sup>62</sup>

The highest court to hear a case regarding residency restrictions for sex offenders imposed by a state legislature was the Eighth Circuit Court of Appeals.<sup>63</sup> In *Doe v. Miller*, the court upheld the constitutionality of an Iowa statute that imposed a residency restriction prohibiting persons convicted of particular sex offenses involving minors from residing within 2,000 feet of a school or child-care facility.<sup>64</sup> The court upheld the constitutionality of the statute because no fundamental rights were violated and the residency restriction rationally advanced the state's legitimate interest in promoting safety for children.<sup>65</sup> The class of sex offenders claimed that Iowa's residency restriction statute violated the "right to privacy and choice in family matters, the right to travel, and the fundamental right to live where you want."<sup>66</sup> The court held that the statute did not restrict those who may live with the sex offender<sup>67</sup> and did not restrict a sex offender from traveling to<sup>68</sup> or within the state,<sup>69</sup> the court determined the statute simply restricted where the sex offender can live. The court also concluded that there was not a fundamental right to "live where you want."<sup>70</sup>

After finding that the statute did not violate any fundamental rights, the court then used the rational basis test to determine whether the statute "rationally advanced some legitimate governmental purpose."<sup>71</sup> The court determined that the Iowa legislature had a legitimate concern with the risks posed by sex offenders<sup>72</sup> and that restricting where the sex offenders could live was a rational means to pursue the State's legitimate interest.<sup>73</sup> To support this determination, the court stated that

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<sup>62</sup> *Id.* ("Legislation that interferes with a fundamental right or liberty will survive constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest. Without a fundamental interest to anchor the inquiry, legislation will be deemed constitutional if it is rationally related to a legitimate governmental interest.")

<sup>63</sup> *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

<sup>64</sup> *Id.* at 704-05.

<sup>65</sup> *Id.* at 710-16.

<sup>66</sup> *Id.* at 709.

<sup>67</sup> *Id.* at 710.

<sup>68</sup> *Id.* at 712.

<sup>69</sup> *Id.* at 713.

<sup>70</sup> *Id.* at 714. The court, relying on prior case law, reasoned that the right was not fundamental, and the court noted that the appellees did not even argue that the right is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* (citing *Prostrollo v. Univ. of S.D.*, 507 F.2d 775, 781 (8th Cir. 1974)) ("We cannot agree that the right to choose one's place of residence is necessarily a fundamental right.")

<sup>71</sup> *Id.* at 714 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

<sup>72</sup> *Id.* ("There can be no doubt of a legislature's rationality in believing that 'sex offenders are a serious threat in this nation,' and that 'when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.") (quoting *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003)).

<sup>73</sup> *Id.* at 716.

“[s]ex offenders have a high rate of recidivism, and the parties presented expert testimony that reducing the opportunity and temptation is important to minimizing the risk of reoffense.”<sup>74</sup> It then continued to state that “it is the state legislature’s job to judge the best means to protect the health and welfare of its citizens ‘in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable.’”<sup>75</sup>

The *Doe* court also ruled against the sex offenders’ procedural due process claims.<sup>76</sup> The offenders claimed that the Iowa residency restriction statute was unconstitutional because the statutory scheme did not have a separate process to determine the level of dangerousness to society that each individual offender posed.<sup>77</sup> Rejecting their claim, the court stated that

[t]he restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove they are not individually dangerous or likely offend against neighboring schoolchildren.<sup>78</sup>

*Doe v. Miller*, the case heard by the highest court thus far regarding residency restrictions, has been used by other courts as precedent for determining the constitutionality of residency restriction statutes.<sup>79</sup> For example, it was used in Ohio to show that the statutes imposing residency restrictions for sex offenders did not violate the offenders’ substantive due process rights.<sup>80</sup>

### III. ARGUMENTS FOR AND AGAINST THE USE OF RESIDENCY RESTRICTIONS FOR SEX OFFENDERS

#### *A. Studies Showing the Ineffectiveness of Residency Restrictions*

The main goal for legislatures enacting residency restrictions against sex offenders is to protect children.<sup>81</sup> However, studies show that residency restrictions are not effective in achieving this goal.<sup>82</sup> The theoretical premise behind residency restrictions is that if sex offenders are prohibited from residing near children, they are unlikely to have the opportunity to reoffend; thus, sex offender recidivism is

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<sup>74</sup> *Id.*

<sup>75</sup> See Troia, *supra* note 11, at 353 (quoting *Doe*, 405 F.3d at 714).

<sup>76</sup> *Doe*, 405 F.3d at 709.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Wright, *supra* note 21, at 42.

<sup>80</sup> State *ex rel.* O’Brien v. Heimlich, 2009-Ohio-1550, ¶ 32 (10th Dist.).

<sup>81</sup> Tewksbury, *Evidence of Ineffectiveness*, *supra* note 47; see also Zgoba, *supra* note 34, at 394.

<sup>82</sup> Tewksbury, *Evidence of Ineffectiveness*, *supra* note 47; see also Zgoba, *supra* note 34, at 394.

reduced.<sup>83</sup> However, during the period where sex offender legislation was on the rise,<sup>84</sup> evidence shows that “sex offenders were the least likely to reoffend.”<sup>85</sup> Additionally, studies that were conducted to determine whether the residency restrictions actually reduce recidivism rates show “no statistically significant relationship between proximity to schools . . . and sex offender recidivism.”<sup>86</sup>

One researcher noted that “residence restrictions are based on the assumption that if offenders live farther away from schools, daycares, and so on, they are unable or unlikely to access such locations.”<sup>87</sup> However, as Judge Kuehn of the Appellate Court of Illinois, Fifth District, pointed out in *People v. Leroy*,

[i]nnocent children . . . frolicking upon playgrounds, within eyeshot of some child sex offender, remain every bit the temptation that they present to child sex offenders at large, regardless of where those offenders live. Simply put, the statutory [residency] restriction is pointless. It is a mindless effort that does nothing to prevent any child sex offender intent on reoffending from doing so.<sup>88</sup>

Alternatively, studies show that residency restrictions have a negative effect on the sex offenders themselves.<sup>89</sup> Evidence shows “neighborhoods that were open to sex offenders (that is, they fall outside the legal residential restrictions) had fewer available rentals, rentals were less affordable, and were likely located in more rural locations.”<sup>90</sup> With residency restrictions in place, sex offenders have reduced access to treatment, often live apart from family, and, in many cases, end up being homeless.<sup>91</sup> Some studies even suggest that the instability caused by residency restrictions may lead to an increased likelihood of reoffending,<sup>92</sup> contrary to the goals of the restrictions. Additionally, studies show that when residency restrictions

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<sup>83</sup> Mustaine, *supra* note 27, at 170. Mustaine disagrees with this theoretical basis by stating that “[a]lthough routine activity theory is an empirically valid theory for many crimes, it is apparently not useful for sex offenses and offenders.” *Id.*

<sup>84</sup> See Easterly, *supra* note 21, at 359 (stating that regulations on sex offenders increased dramatically after the mid-1990s).

<sup>85</sup> *Id.* at 358; see also Wright, *supra* note 21, at 26.

<sup>86</sup> Mancini, *supra* note 3, at 1024.

<sup>87</sup> Richard Tewksbury, *Policy Implications of Sex Offender Residence Restrictions Laws*, 10 CRIMINOLOGY & PUB. POL’Y 345, 346 (2011) [hereinafter Tewksbury, *Policy Implications*].

<sup>88</sup> Troia, *supra* note 11, at 347 (quoting *People v. Leroy*, 828 N.E.2d 769 (Ill. App. Ct. 2005)).

<sup>89</sup> See Rydberg et al., *supra* note 5, at 422; see also Tewksbury, *Policy Implications*, *supra* note 87, at 345; Zgoba, *supra* note 34, at 395 (“[A] great deal of research has indicated that residence restrictions yield contrary results and maintain collateral consequences that may lead to increased offending.”).

<sup>90</sup> Mustaine, *supra* note 27, at 172.

<sup>91</sup> Zgoba, *supra* note 34, at 395; see also Wright, *supra* note 21, at 43.

<sup>92</sup> Zgoba, *supra* note 34, at 395.

are expanded in distance (e.g. 1,000 to 2,500 feet), entire jurisdictions, such as cities and towns, may be excluded as options for sex offenders looking for a place to live.<sup>93</sup>

Statutory schemes that impose residency restrictions need to be reformed.<sup>94</sup> Evidence shows that residency restrictions are ineffective in achieving state legislatures' goals<sup>95</sup> and negatively impact sex offenders.<sup>96</sup>

### *B. Advocacy for the Targeted Use of Residency Restrictions*

Although evidence exists that shows the ineffectiveness of residency restrictions, states continue to utilize them as collateral consequences for convicted sex offenders.<sup>97</sup> One scholar advocated for the use of residency restrictions for sex offenders who present a high-risk of danger to the community.<sup>98</sup> In his article, John Cornwell identified the source of states' power to impose residency restrictions, provided an explanation of how the restrictions fit within that power, identified some of the flaws of their restrictions, and discussed how limiting the application of the restrictions should be the primary focus.<sup>99</sup>

Cornwell posited that states that impose residency restrictions on individuals who are convicted of sexual offenses are using "police power to protect public health, safety, and morality."<sup>100</sup> The Supreme Court upheld this use of police power, which stems from the Tenth Amendment.<sup>101</sup> Cornwell then compared the dangers presented to the public by sex offenders with a plague, giving the states justification for quarantining sex offenders.<sup>102</sup> Using this justification, Cornwell discussed a history of cases in which the Supreme Court upheld states' use of quarantine to protect public safety and health.<sup>103</sup>

<sup>93</sup> Mustaine, *supra* note 27, at 174.

<sup>94</sup> *Id.* at 170 ("It is evident that the emotional and political components involved in sex offender policy development do not produce legislation that is solidly based on the empirical evidence emerging from the relevant scientific community.").

<sup>95</sup> Tewksbury et al., *Examining Rates of Sexual Offenses*, *supra* note 48, at 76.

<sup>96</sup> Zgoba, *supra* note 34, at 395; *see also* Mustaine, *supra* note 27, at 173 ("When sex offenders experience these difficult collateral consequences as a result of residential restrictions, they are not likely to reintegrate successfully back into the community.").

<sup>97</sup> Cornwell, *supra* note 45, at 6.

<sup>98</sup> *Id.* at 15.

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* at 5.

<sup>101</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

<sup>102</sup> Cornwell, *supra* note 45, at 20.

<sup>103</sup> *Id.* (discussing *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (upholding civil commitment of sexually violent predators); *see also* *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (upholding civil commitment of mentally ill persons for purposes other than treatment) (Burger, C.J., concurring); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 276-77 (1940) (upholding psychiatric detention of individuals with "psychopathic personalities"); *Jacobson v. Massachusetts*, 197 U.S. 11, 11-12 (1905) (upholding compulsory vaccinations of persons for the prevention of smallpox)). These cases show how the Supreme Court has upheld the quarantine of individuals for the sake of the health and safety of the public. *Id.*

After identifying the source of states' power to impose residency restrictions and explaining how these restrictions on sex offenders fit within the states' power, Cornwell identified various flaws with the residency restrictions imposed on sex offenders.<sup>104</sup> He provided evidence that "over-inclusive restrictions may actually reduce public safety by driving sex offenders underground where they cannot be monitored by correctional and mental health agencies."<sup>105</sup> He also stated that over-inclusive residency restrictions "overwhelm the system and force governments to make choices for financial reasons that may undermine public safety."<sup>106</sup>

Despite these flaws, Cornwell argued that focusing residency restrictions on the most dangerous sex offenders was sound policy.<sup>107</sup> He noted that there were states, such as Iowa, whose sex offender statutes differentiated high-risk and low-risk offenders.<sup>108</sup> Cornwell explained that "[f]ocusing residency restrictions on a smaller group of high-risk sex offenders is consistent . . . with data on recidivism."<sup>109</sup> After highlighting that there is a small subset of sex offenders who do have certain characteristics that render them a danger to society, Cornwell said that "[t]argeting individuals based on . . . identifiable high-risk factors makes far more sense than arbitrary reliance on factors such as parolee status in making statutory enforcement decisions."<sup>110</sup>

Other scholars have argued in favor of residency restrictions for sex offenders<sup>111</sup> because these restrictions make the public and policy-makers feel like they are doing something to combat to sex offenders.<sup>112</sup> For instance, one scholar noted that "[t]he community has a right to both feel and live safely from sexually violent offenders,

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<sup>104</sup> See Cornwell, *supra* note 45, at 1.

<sup>105</sup> *Id.* at 14.

<sup>106</sup> *Id.* at 15.

<sup>107</sup> *Id.* at 35.

<sup>108</sup> *Id.* at 15.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 16; see also Mustaine, *supra* note 27, at 174.

As noted, sex offenders are not all the same. Some are older; others are younger. Some have child victims; others have adult victims (and still others have both). Some were involved in consensual relations with victims, but the victims were under age; others were coercive and forceful with victims. Some offenders are juveniles or had families with whom they lived and must return to these families when they are released; others are less attached adults and must find their own housing. Some sex offenders have more financial resources and can afford the scarce housing that does not fall into restricted zones; others are destitute and end up homeless. Thinking that any one policy could effectively service all of these offenders borders on ridiculous.

*Id.*

<sup>111</sup> Tewksbury, *Evidence of Effectiveness*, *supra* note 47.

<sup>112</sup> *Id.* ("[R]esidency restrictions offer the positive of symbolic value, which may be possessed by both policy makers and society in general (as such policies may be a 'means of fortifying solidarity' against the socially undesirable."); see also Zgoba, *supra* note 34, at 394 ("[Residency restrictions] simply make sense to lawmakers and the public.").

and policy makers are well intentioned in their efforts to bring this sentiment to fruition.”<sup>113</sup>

#### IV. RECENT STATE ACTION ON RESIDENCY RESTRICTIONS FOR SEX OFFENDERS

Recent state action in reference to residency restrictions for sex offenders has shown that traditional views on the statutory approaches to the restrictions may be changing.<sup>114</sup>

##### *A. California’s Approach to Residency Restrictions*

The California Supreme Court recently struck down the state’s blanket use of residency restrictions as unconstitutional.<sup>115</sup> In doing so, the California Supreme Court became the first state supreme court to strike down residency restrictions for sex offenders as violations of substantive due process.<sup>116</sup> Within *In re Taylor*, sex offenders claimed that residency restrictions imposed upon them by the State of California were “unconstitutionally unreasonable” under the due process clause.<sup>117</sup> The trial court ultimately agreed and held:

[T]he blanket application of the residency restrictions violates [the sex offenders’] constitutional rights by denying them access to nearly all rental housing in the county that would otherwise be available to them, and as a direct consequence, has caused a great many of them to become homeless, and has further denied them reasonable access to medical and psychological treatment resources, drug and alcohol dependency services, job counseling, and other social services to which parolees are entitled by law.<sup>118</sup>

The appellate court and Supreme Court of California subsequently upheld the trial court’s conclusions.<sup>119</sup>

As the sex offenders alleged that the residency restrictions infringed on their substantive due process rights, the court had to determine whether the rights allegedly infringed upon were fundamental.<sup>120</sup> The sex offenders specifically alleged that the restrictions infringed upon the “rights to intrastate travel, to establish and maintain a home, and to privacy and free association with others within one’s

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<sup>113</sup> Zgoba, *supra* note 34, at 396.

<sup>114</sup> See discussion *infra* Section V.

<sup>115</sup> *In re Taylor*, 343 P.3d 867 (Cal. 2015). California’s residency restrictions were enacted in the Sexual Predator Punishment and Control Act: Jessica’s Law. *Id.* at 869. The residency restrictions prevented sex offenders from living within 2,000 feet of a public or private school, or a park where children regularly gather. *Id.* (citing CAL. PENAL CODE § 3003.5(b) (2006)).

<sup>116</sup> Cornwell, *supra* note 45, at 16-17.

<sup>117</sup> *Taylor*, 343 P.3d at 877.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 869.

<sup>120</sup> *Id.* at 878 (“The Fourteenth Amendment’s due process clause ‘forbids the government to infringe . . . fundamental liberty interests in any manner’ unless the infringement is narrowly tailored to serve a compelling state interest.”).

home.<sup>121</sup> The court discussed that the level of review would depend on whether the rights claimed by the sex offenders were fundamental; it would be strict scrutiny if the rights were fundamental, and it would be rational basis if the rights were not fundamental.<sup>122</sup>

The court in *Taylor* stated that it did not need to decide whether strict scrutiny or rational basis review applied because the blanket residency restrictions for sex offenders could not even survive the rational basis review.<sup>123</sup> The court pointed out both the harsh and severe restrictions and the disabilities on liberty and privacy rights.<sup>124</sup> The court also discussed how the residency restrictions hampered efforts to monitor, supervise, and rehabilitate sex offenders, which ran contrary to what the restrictions were designed to accomplish.<sup>125</sup> The court held that the residency restrictions bore no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators.<sup>126</sup>

Additionally, the respondents in *In re Taylor* argued that the sex offenders do not have the same protections as the general public while they are on parole.<sup>127</sup> The court responded by stating that "all parolees retain certain basic rights and liberty interests, and enjoy a measure of constitutional protection against the arbitrary, oppressive and unreasonable curtailment of 'the core values of unqualified liberty.'"<sup>128</sup>

Although the *Taylor* court struck down the blanket application of residency restrictions, the court emphasized that the Department of Corrections retained authority to impose special restrictions on sex offenders, including residency restrictions, so long as they were supported by the "particularized circumstance of each individual case."<sup>129</sup>

### *B. Massachusetts' Approach to Residency Restrictions*

The Supreme Court of Massachusetts also recently struck down the blanket use of residency restrictions for sex offenders.<sup>130</sup> In *City of Lynn*, a municipality

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 879.

<sup>124</sup> *Id.* at 881 (discussing how registered sex offenders could be cut off from access to public transportation, medical care, and other social services to which they are entitled, as well as reasonable opportunities for employment due to restrictions).

<sup>125</sup> *Id.* (providing residency restrictions increased incidences of homelessness, making it harder to supervise and track offenders, which undermines the governmental objective to keep the public safe); *see also* Cornwell, *supra* note 45, at 32 ("That one-third of the individuals subject to Jessica's Law in San Diego County were homeless was especially troubling to the court, since it has severely compromised law enforcement's ability to effectively monitor and supervise that population.").

<sup>126</sup> *Taylor*, 343 P.3d at 879.

<sup>127</sup> *Id.* at 878.

<sup>128</sup> *Id.* at 882 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

<sup>129</sup> *Taylor*, 343 P.3d at 882.

<sup>130</sup> *Doe v. City of Lynn*, 36 N.E.3d 18, 24-25 (Mass. 2015) (discussing a city ordinance that imposed a 1,000 feet residency restriction against level two and three sex offenders,



enacted an ordinance for sex offenders to “to add location restrictions to such offenders where the State law is silent.”<sup>131</sup> The court noted that “[t]he geographical and temporal reach of the ordinance effectively prohibit[ed] all level two and three sex offenders from establishing residence, or even spending the night in a shelter, in ninety-five per cent of the residential properties in Lynn.”<sup>132</sup>

The court in *City of Lynn* determined that the residency restriction imposed by the city ordinance was unconstitutional because it was “inconsistent with the comprehensive [state] statutory scheme governing the oversight of convicted sex offenders. . . .”<sup>133</sup> The state had already established a registration scheme with a very narrow residency restriction that only applied to level-three sex offenders.<sup>134</sup> The court held that not only did the state establish a comprehensive statutory scheme, but also, the ordinance would negatively affect the ability to monitor and track sex offenders.<sup>135</sup> This allowed the court to infer that the legislature of Massachusetts “intended to preclude local regulation of sex offender residency options.”<sup>136</sup>

The court then noted that even the narrow residency restriction imposed on level three offenders would be unconstitutional without an individualized assessment of the offender to determine whether the offender posed a risk to the public.<sup>137</sup> The court in *City of Lynn* recognized arguments against the blanket use of residency restrictions as well.<sup>138</sup> The court proclaimed that “the days are long since past when whole communities of persons, such [as] Native Americans and Japanese-Americans[,] may be lawfully banished from our midst.”<sup>139</sup> The court also pointed out that imposing residency restrictions disrupts the home situation of the sex offender, a factor that has been recognized to reduce recidivism rates.<sup>140</sup> The court

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prohibiting the offenders from living within the restricted area of public, private, and church schools).

<sup>131</sup> *Id.* at 20 (“The stated purpose of the ordinance is to ‘reduce the potential risk of harm to children of the community by impacting the ability of registered sex offenders to be in contact with unsuspecting children in locations that are primarily designed for use by, or are primarily used by children.’”).

<sup>132</sup> *Id.* (discussing that a sex offender would have difficulty in moving to a nearby town or city, as many of them had similar restrictions on sex offenders).

<sup>133</sup> *Id.* at 19.

<sup>134</sup> *Id.* at 24 (emphasizing that, for level three sex offenders, the residency restriction, with the aim of protecting a vulnerable population, only precluded them from living in rest homes or other long-term care facilities) (“Registration information for level one sex offenders is not provided to the public, information for level two and level three offenders is available to the public by request or on the Internet, and information for level three offenders may be disseminated actively to the public.”).

<sup>135</sup> *Id.* at 23.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 24-25 (citing *Doe v. Police Comm’r of Bos.*, 951 N.E.2d 337 (Mass. 2011)).

<sup>138</sup> *City of Lynn*, 36 N.E.3d at 25.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 26.

held that this conflicted with the legislature's goal of protecting the public from sex offenders.<sup>141</sup>

## V. OHIO'S CURRENT APPROACH ON RESIDENCY RESTRICTIONS

### A. Ohio Statutes Regulating Sex Offenders

Ohio's legislature has passed laws to regulate sex offenders in the state.<sup>142</sup> In reference to the registration and notification requirements for sex offenders,<sup>143</sup> Ohio law establishes a tiered system to categorize sex offenders depending on the crime underlying the conviction.<sup>144</sup> Ohio also imposes residency restrictions on sex offenders, and they are imposed regardless of which tier the sex offender has been assigned.<sup>145</sup> This means that Ohio imposes residency restrictions "on all registered

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<sup>141</sup> *Id.*

<sup>142</sup> OHIO REV. CODE ANN. §§ 2950.01-.99 (West 2016); *State v. Williams*, 952 N.E.2d 1108, 1110, 1117-18 (Ohio 2011); *see also* Schubert, *supra* note 27, at 277 ("S.B. 10 was enacted to amend, among other chapters, chapter 2950 of the Ohio Revised Code in order to bring Ohio sex offender registration laws into compliance with the [Adam Walsh Act]"). Ohio's current scheme of laws regarding sex offenders is based on the federal Adam Walsh Act, 42 U.S.C. §§ 16901-16962 (2006).

<sup>143</sup> OHIO REV. CODE ANN. § 2950.04(A)(1)(a) ("[O]ffender[s] shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender was convicted of or pleaded guilty to the sexually oriented offense."); *see also* Schubert, *supra* note 27, at 288 ("That notification includes the offender's: (1) name; (2) address; (3) offense and conviction; (4) classification; and (5) photograph.").

<sup>144</sup> OHIO REV. CODE ANN. § 2950.01. Tier I offenses are: importuning, unlawful sexual conduct with a minor, voyeurism, sexual imposition, gross sexual imposition, illegal use of a minor in nudity-oriented material or performance, and child enticement. *Id.* at § 2950.01(E). Tier II offenses are: compelling prostitution, pandering obscenity involving a minor, illegal use of a minor in nudity-oriented material or performance (different subsections from Tier I offense), child endangering, kidnapping with sexual motivation, unlawful sexual conduct with a minor, and any sexual offense that occurs after the offender has been classified as a Tier I sex offender. *Id.* at § 2950.01(F). Tier III offenses are: rape, sexual battery, aggravated murder with sexual motivation, unlawful death or termination of pregnancy as a result of committing or attempting to commit a felony with sexual motivation, kidnapping of minor to engage in sexual activity, kidnapping of minor not by parent, gross sexual imposition (if victim under 13), felonious assault with sexual motivation, and any sexual offense that occurs after the offender has been classified as a Tier II sex offender. *Id.* at § 2950.01(G); *see also* Schubert, *supra* note 27, at 287 ("[T]he duration and frequency of the registration of sex offenders is determined by the tier and is as follows: (1) Tier I sex offenders must register every year for fifteen years; (2) Tier II offenders must register every 180 days for twenty-five years; (3) Tier III offenders must register every ninety days for life.").

<sup>145</sup> OHIO REV. CODE ANN. § 2950.034 ("No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residency or occupy residential premises within one thousand feet of any school premises or preschool or child day-care premises."); *see also* Schubert, *supra* note 27, at 288 ("In addition, landlords are permitted to terminate rental agreements and seek injunctive relief in an effort to oust the offender from the residence.").

sex offenders regardless of the crime's severity, whether or not the victim was a minor, or if the offender presents a future risk of danger.<sup>146</sup>

In enacting these laws against sex offenders, the Ohio legislature found that “[s]ex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest.”<sup>147</sup> It also found that “[a] person who is found to be a sex offender or a child-victim offender has a reduced expectation of privacy because of the public’s interest in public safety and in the effective operation of government.”<sup>148</sup>

### B. Retroactivity and Residency Restrictions

Ohio’s residency restrictions, first enacted in 2003<sup>149</sup> and amended in 2007,<sup>150</sup> are not to be applied retroactively.<sup>151</sup> In *Hyle v. Porter*, the Supreme Court of Ohio held that Ohio’s initial residency restrictions statute, formerly Ohio Revised Code Section 2950.031, was only prospective in nature.<sup>152</sup> In determining whether the residency restrictions could apply retroactively, the Supreme Court of Ohio held that “because R.C. 2950.031 was not expressly made retroactive, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute.”<sup>153</sup>

Subsequently, an Ohio appellate court further defined how courts are to determine whether the residency restrictions are being applied retroactively to sex offenders.<sup>154</sup> The court first noted that the only difference between the current statute enacting residency restrictions, Section 2950.034, and the statute that preceded it, Section 2950.031, was the current statute’s restriction from preschools and daycare centers.<sup>155</sup> The court discussed the analysis used to determine what types of conduct

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<sup>146</sup> Troia, *supra* note 11; *see also* Schubert, *supra* note 27, at 288 (“One of the most significant differences between R.C. chapter 2950, as amended by H.B. 180, and R.C. chapter 2950, as amended by S.B. 10, is that H.B. 180 amendments allowed judges to use discretion when determining a sex offender’s classification. Therefore, under H.B. 180 amendments, judges were able to determine the sex offender’s risk of recidivism, and then apply the appropriate sex offender registration requirements necessary to protect the community from the sex offender. The enactment of S.B. 10 erased this discretion and now requires all current sex offenders to be classified or re-classified under one of the three tiers, which are based solely on the offense committed.”).

<sup>147</sup> OHIO REV. CODE ANN. § 2950.02(A)(2).

<sup>148</sup> *Id.* at § 2950.02(A)(5).

<sup>149</sup> OHIO REV. CODE § 2950.031 (2007), *invalidated by* State v. Bodyke, 933 N.E.2d 753 (Ohio 2010).

<sup>150</sup> OHIO REV. CODE ANN. § 2950.034.

<sup>151</sup> *Hyle v. Porter*, 882 N.E.2d 899, 901 (Ohio 2008).

<sup>152</sup> *Id.* at 902.

<sup>153</sup> *Id.* at 904.

<sup>154</sup> *See* O’Brien v. Phillips, 43 N.E.3d 1 (Ohio Ct. App. 2015).

<sup>155</sup> *Id.* at 5.

would trigger the retroactive application of the residency restrictions.<sup>156</sup> Based on that analysis, the court held that it was the conviction for the sex offense that triggers the application of the residency restrictions; therefore, as long as the conviction occurs after the effective date of the statute enacting the residency restrictions, the statute is not operating retroactively.<sup>157</sup>

### *C. Ex Post Facto Considerations for Residency Restrictions*

The holding of another Ohio case furthers the notion that the amendments to Ohio's statutory treatment of sex offenders cannot be applied retroactively.<sup>158</sup> The *State v. Williams* court held that Ohio's statutory scheme regulating sex offenders is punitive after S.B. 10.<sup>159</sup> In pertinent part, the court held:

Sex offenders are no longer allowed to challenge their classifications as sex offenders because classification is automatic depending on the offense. Judges no longer review the sex-offender classification. In general, sex offenders are required to register more often and for a longer period of time. They are required to register in person and in several different places. . . . Furthermore, all the registration requirements apply without regard to the future dangerousness of the sex offender. Instead, registration requirements and other requirements are based solely on the fact of a conviction. Based on these significant changes to the statutory scheme governing sex offenders, we are no longer convinced that R.C. Chapter 2950 is remedial, even though some elements of it remain remedial. We conclude that as to a sex offender whose crime was committed prior to the enactment of S.B. 10, the act 'imposes new or additional burdens, duties, obligations, or liabilities to a past transaction' . . . and "creates new burdens, new duties, new obligations, or new liabilities not existing at the time."<sup>160</sup>

This classification is important because

when a law is deemed to be punitive, substantive and procedural constitutional protections must flow from that determination. One constitutional limitation on criminal legislation is the Ex Post Facto Clause, which prohibits retroactive application of a law that "inflicts a greater punishment, than the law annexed to the crime, when committed."<sup>161</sup>

Therefore, if Ohio's statutes regarding sex offenders were applied retroactively, there would potentially be Ex Post Facto ramifications following the *State v. Williams* holding.

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<sup>156</sup> *Id.* at 6.

<sup>157</sup> *Id.*

<sup>158</sup> See *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011).

<sup>159</sup> *Id.* at 1112.

<sup>160</sup> *Id.* at 1113.

<sup>161</sup> Carpenter, *supra* note 61, at 1105.

*D. Due Process and Residency Restrictions*

Ohio courts have held that residency restrictions imposed on sex offenders are constitutional under the Due Process Clause.<sup>162</sup> In *O'Brien v. Hill*, the court held that the residency restrictions do not infringe on a fundamental right of sex offenders.<sup>163</sup> The court stated Ohio courts have consistently rejected arguments that Ohio's residency restrictions infringe on the right of sex offenders to use and enjoy property.<sup>164</sup>

The appellate court then quoted its holding in *State ex rel. O'Brien v. Heimlich*:

[A]lthough former R.C. 2950.031(A) prohibits appellant from residing within 1,000 feet of a school premises, the statute does not preclude him from owning, renting, or leasing a home within 1,000 feet of a school premises. Sexually oriented offenders are simply precluded from living within 1,000 feet of a school premises. Accordingly, the statute does not impair appellant's substantive property rights as enumerated in the Ohio Constitution.<sup>165</sup>

The court also proclaimed that the freedom to live wherever a person wants is not fundamental, despite its importance.<sup>166</sup>

Because the residency restrictions did not violate a fundamental right, the court used a rational basis review to determine whether the restrictions were constitutional.<sup>167</sup> Using this level of review, the court stated that the statute imposing residency restrictions was rationally related to the state's legitimate interest in protecting children.<sup>168</sup>

V. A TAILORED APPROACH FOR OHIO TO EFFECTUATE ITS OVERALL GOAL OF PROTECTING CHILDREN

Ohio should shift from its current system of implementing residency restrictions on a blanket basis to the case-by-case system suggested in California and Massachusetts.<sup>169</sup> Various scholars support this suggestion as well.<sup>170</sup> Instead of imposing residency restrictions on anyone "who has been convicted of, is convicted of, has plead guilty to, or pleads guilty to a sexually oriented offense or a child-

<sup>162</sup> See, e.g., *O'Brien v. Hill*, 965 N.E.2d 1050, 1053 (Ohio Ct. App. 2012).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (quoting *O'Brien v. Heimlich*, 2009-Ohio-1550, at ¶ 31 (10th Dist.)).

<sup>166</sup> *Hill*, 965 N.E.2d at 1053.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (citing *O'Brien*, 2009-Ohio-1550).

<sup>169</sup> See *In re Taylor*, 343 P.3d 867 (Cal. 2015); see also *Doe v. City of Lynn*, 36 N.E.3d 18 (Mass. 2015).

<sup>170</sup> See Cornwell, *supra* note 45, at 1; see also Zgoba, *supra* note 34 ("Rather than a generic approach to dealing with sex offenders, criminal justice practices should fundamentally rely on the individualized, empirically tested risk assessments conducted in most states. This tailored approach offers a reasonable and justifiable alternative to the broad policies currently in existence.").

victim oriented offense,”<sup>171</sup> the judges in Ohio would have the ability to impose residency restrictions after first having an individualized assessment completed to determine his or her risk to the public.<sup>172</sup> After completing the assessment, sex offenders who are deemed to have a high probability of reoffending would be eligible for residency restrictions, and possibly other restrictions, imposed upon them.<sup>173</sup> Sex offenders who have a low probability of reoffending will have appropriate restrictions placed on them that will not impede on the treatment and support they will need to rehabilitate.

Changing Ohio’s current system of imposing residency restrictions to a case-by-case approach will address some of the flaws of the system imposing the restrictions on a blanket basis. First, by conducting an individual assessment to make a determination on the dangerousness of the sex offender to the public, there would be evidence to support the imposition of the residency restrictions on that particular sex offender. This individualized approach would eliminate the argument that the residency restrictions are an “unreasonable, arbitrary, and oppressive” action of the state.<sup>174</sup>

Second, by targeting the use of residency restrictions to those who are deemed a high-risk of danger to the public, the burden on law enforcement would decrease. The current system requires law enforcement to expend resources on sex offenders who are unlikely to reoffend. This inefficient use of resources is wasteful.<sup>175</sup> The case-by-case system would allow law enforcement resources to be focused on monitoring and enforcing the residency restrictions on the sex offenders who may actually pose a risk to children, further effectuating the stated goals of the statute. As noted in his review of *In re Taylor*, Cornwell described the inability of law enforcement officials to effectively monitor and supervise sex offenders, thereby putting the public at risk, as one of the main reasons that the court held that the

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<sup>171</sup> OHIO REV. CODE ANN. § 2950.034 (West 2016).

<sup>172</sup> See Schubert, *supra* note 27, at 284-85. Ohio utilized individualized assessments to determine the dangerousness of sex offenders prior to 2003. The factors used to determine the dangerousness of the sex offenders were

- (1) the offender’s age; (2) any prior criminal record; (3) the age of the victims; (4) the number of victims; (5) whether drugs or alcohol were used to impair the victim; (6) whether any prior convictions or pleas led to any available programs for sex offenders; (7) mental illness or mental disability; (8) the nature of the conduct with the victim and evidence of a pattern of abuse; (9) whether the offender acted with cruelty or threatened cruelty; (10) any additional behavior that contributed to the conduct.

*Id.*

<sup>173</sup> See, e.g., Mustaine, *supra* note 27, at 174. Sex offenders at high risk for sexually recidivating with child victims may be managed effectively with residential boundary restrictions, while young adult offenders with slightly younger (but still underage) consensual victims are likely to need other types of restrictions/treatment to keep them law abiding. In essence, it is unlikely that all sex offenders need residency restrictions to remain in the community. *Id.*

<sup>174</sup> *In re Taylor*, 343 P.3d 867, 879 (Cal. 2015).

<sup>175</sup> Zgoba, *supra* note 34, at 396.

statute in California was not rationally related to protecting children from sex offenders.<sup>176</sup>

Third, reducing the number of sex offenders subject to residency restrictions diminishes the concentration of sex offenders in those designated areas with limited housing options.<sup>177</sup> Arguably, it would also help mitigate homelessness in this particular population because there would be less competition for the available housing options in the limited areas outside of the restricted zones for sex offenders. Ameliorating homelessness would not only increase the quality of life for sex offenders, but also would allow law enforcement officers to better monitor and supervise sex offenders, making the public at large safer.

Fourth, changing Ohio's system of imposing residency restrictions to a case-by-case system would address the arguments that the current system of imposing the restrictions is excessive.<sup>178</sup> The inclusion of an individualized risk assessment would limit the focus of the residency restrictions to those who pose the greatest risk to public safety.<sup>179</sup>

Finally, changing Ohio's system of imposing residency restrictions to a case-by-case system would place Ohio in accord with the current shift across the nation in managing these types of restrictions for sex offenders.<sup>180</sup> Courts are recognizing that an assessment of the risk that is posed by each sex offender is needed,<sup>181</sup> as not all sex offenders pose the same risk to children.<sup>182</sup> Changing Ohio's system would give its courts the freedom to make an individualized determination of the risk that a sex offender poses.

The blanket use of residency restrictions is one of the reasons for the ineffectiveness in reducing recidivism rates.<sup>183</sup> By imposing residency restrictions on all persons convicted of sex offenses without making a determination of the offender's likelihood to reoffend, some states, including Ohio,<sup>184</sup> are burdening some

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<sup>176</sup> Cornwell, *supra* note 45, at 33.

<sup>177</sup> This argument assumes similar results as currently seen in California's new approach after *In re Taylor*. See Editorial, *New Residency Restrictions Help Officers Keep Better Tabs on High Risk Sex Offenders*, VENTURA CTY. STAR (Dec. 15, 2015), <http://www.vcstar.com/opinion/editorials/editorial-new-residency-restrictions-help-officers-keep-better-tabs-on-high-risk-sex-offenders-26f2c-362543891.html>.

<sup>178</sup> See Cornwell, *supra* note 45, at 29 ("Sex offender residency restrictions in some jurisdictions focus, like pretrial detention and civil commitment, on a select group of individuals who pose a heightened risk of danger to the community . . . Statutes in other jurisdictions lack any individualized risk assessment, the absence of which has concerned courts, leading some to find an ex post facto violation.").

<sup>179</sup> *Id.*

<sup>180</sup> See Editorial Board, *The Pointless Banishment of Sex Offenders*, N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/08/opinion/the-pointless-banishment-of-sex-offenders.html>.

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

<sup>182</sup> See Mustaine, *supra* note 27, at 174.

<sup>183</sup> Troia, *supra* note 11, at 358.

<sup>184</sup> OHIO REV. CODE ANN. § 2950.034 (West 2016).

individuals unlikely to reoffend.<sup>185</sup> As a result, Ohio wastes valuable resources enforcing residency restrictions on individuals who are unlikely to benefit from them.<sup>186</sup>

## VI. CONCLUSION

Although protecting the safety and well-being of children is an important goal,<sup>187</sup> laws that are enacted to accomplish this goal should be tailored so that they are most effective. On its face, imposing blanket residency restrictions to prevent sexual offenders from living in close proximity to children appears to promote the goal of protecting children. However, in practice, the residency restrictions impose great burdens, such as higher risks of homelessness and limited access to social services,<sup>188</sup> on convicted sex offenders without accomplishing the goal of protecting children.<sup>189</sup> Research shows residency restrictions have failed to reduce recidivism rates.<sup>190</sup>

A well-known scholar and author on the topic of sex offenders proclaimed, “We are not being smart. We are just flailing about. We need to enact laws based on the latest headline case. Politicians under pressure pass symbolic [residency] laws . . . that are not based on any solid research.”<sup>191</sup>

Ohio should amend its current law imposing residency restrictions on a blanket basis for those convicted of sex offenses and utilize individual assessments to determine whether an offender is likely to reoffend. This shift would give Ohio’s judges greater discretion to retain residency restrictions for the state’s more dangerous offenders. As described above, statutes imposing residency restrictions on sex offenders began with benevolence but have overreached due to unfounded fears and misconceptions. Despite substantial research demonstrating the ineffectiveness of their current application, lawmakers, especially at the local level, continue to promote their use in a misguided effort to protect the children in their communities. A change needs to be made.

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<sup>185</sup> Troia, *supra* note 11, at 358.

<sup>186</sup> Zgoba, *supra* note 34, at 396.

<sup>187</sup> OHIO REV. CODE § 2950.02 (A)(2) (“Sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest.”).

<sup>188</sup> Zgoba, *supra* note 34, at 395.

<sup>189</sup> See Tewksbury, *Policy Implications*, *supra* note 87.

<sup>190</sup> See *id.*

<sup>191</sup> Troia, *supra* note 11, at 343-44 (quoting Ian Demsky, *Sex Offenders Live Near Many Schools, Day Cares*, THE TENNESSEAN, July 18, 2005, at A1).



