

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 in others. – Albert Camus¹

In 1932, the Soviet Union instituted the policy of propiska to control the internal movements of its population.² As a component of the propiska system, people without an “acceptable occupation” were exiled from major cities.³ The exiles were instructed not to live within 100 kilometers of designated cities within the Soviet Union.⁴ The practice of banishing people to the 101st kilometer was later expanded to include criminals, homeless persons, prostitutes, and political dissidents.⁵ 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.⁶ The practice gave rise to the expression “taken to the 101st kilometer” which is still a storied and harrowing phrase in Russia and other former Soviet states.⁷

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.⁸ Even after the collapse of the Soviet Union, and the resultant

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¹ ALBERT CAMUS, *THE REBEL* 15 (1951).

² Tova Höjdestrand, *The Soviet-Russian Production of Homelessness*, ANTHROBASE 2003, available at: http://www.anthrobase.org/Txt/H/Hoejdestrand_T_01.htm (last visited Feb. 3, 2007) (noting that, “[t]he 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.” (internal citation omitted)).

³ Nora Fitzgerald, *Russians View Fate of Exiles*, THE INTERNATIONAL HERALD TRIBUNE, Oct. 21, 2005, at 9.

⁴ *Id.*

⁵ *Id.*

⁶ Matt Bivens, *Looks More Like the KGB than TBS*, LOS ANGELES TIMES, Jul. 27, 1994, at C1.

⁷ *Id.*

⁸ Fitzgerald, *supra* note 3, at 9.

end of banishing persons to the 101st kilometer,⁹ the former exiles have struggled to reintegrate into a society that they forcibly left so long ago.¹⁰ The Soviet Union's use of mass banishment of select classes of persons from designated areas is one of the few experiments with such a practice in modern societies. It also has striking similarities to the various regimes set up in the United States to control the living arrangements of sex offenders.¹¹

Across America, states, localities, and private communities are debating and implementing laws to limit the places of residence of convicted sex offenders.¹² Nineteen states¹³ and hundreds, if not thousands, of localities have adopted sex offender residency restrictions.¹⁴ Bills to establish residency restrictions are currently pending in another twelve states.¹⁵

⁹ 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, Jan. 25, 2007, available at: <http://www.belradio.fm/en/4/reports/514/> (last visited Feb. 14, 2007).

¹⁰ Fitzgerald, *supra* note 3, at 9.

¹¹ While I do 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, of the criminal population, many of those were convicted of political crimes. Consequently, the nature of the communities at the 101st kilometer had different populations than those in sex offender enclaves in the United States. However, the analogy between the two situations is helpful for 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 be seen in states that have adopted aggressive work and residency restrictions on sex offenders. See *infra* notes 227-40 and accompanying text.

¹² See *infra* notes 157-90 and accompanying text.

¹³ ALA. CODE § 15-20-26(A) (2005); ARK. CODE ANN. § 5-14-128(A) (2004); CAL. PENAL CODE § 3003.5(B); 11 DEL. CODE ANN. TIT. 11, § 1112(A) (2006); FLA. STAT. § 794.065 (2004); GA. CODE ANN. § 42-1-13(B) (2004); IDAHO CODE § 18-8329 (2006); 720 ILL. COMP. STAT. ANN. § 5/11-9.3(B)(5) (2005); IND. CODE § 35-42-4-11(C) (2006); IOWA CODE § 692A.2A(2) (2005); KY. REV. STAT. ANN. § 17.495 (WEST 2006); LA. REV. STAT. ANN. § 14:91(A)(2) (2005); MICH. COMP. LAWS §§ 28.734(1), 28.735(1) (2006); MISS. CODE ANN. § 45-33-25 (2006); MO. CODE § 566.147 (2005); OHIO REV. CODE ANN. § 2950.031(A) (WEST 2004); OKLA. STAT. TIT. 57, § 590 (2003); OR. REV. STAT. ANN. § 144.642 (2006); TENN. CODE ANN. § 40-39-211(A) (2005) [hereinafter, collectively, "Residency Restriction Statutes"].

¹⁴ See *infra* notes 157-90 and accompanying text.

¹⁵ Ariz. H. 2380, 47th Leg., 2d Reg. Sess. (Jan. 25, 2006); Colo. H. 1089, 65th Gen. Assembly, 2d Reg. Sess. (Jan. 13, 2006); Ind. Sen. 12, 114th Gen. Assembly, 2d Reg. Sess. (Jan. 10, 2006); Kan. Sen. 506, 81st Leg., 2006 Reg. Sess. (Mar. 22, 2006); Md. H. 942, 421st Gen. Assembly, 2006 Reg. Sess. (Feb. 9, 2006); Mass. H. 889, 184th Gen. Ct., 2005 Reg. Sess. (Jan. 5, 2005); Neb. Leg. Res. 867, 99th Leg., 2d Reg. Sess. (Jan. 5, 2006); N.J. Assembly 639, 212th Leg. (Jan. 10, 2006); N.Y. Assembly 9428, 229th Annual Leg. Sess.

Given the recent development of residency restriction laws and a political environment toxic to the status of sex offenders,¹⁶ the number of states and localities with residency restriction laws will likely continue to grow.¹⁷

The typical residency regulation establishes an “exclusion zone”¹⁸ around schools, child-care facilities, parks, and/or other locations where children are commonly found.¹⁹ The exclusion zone usually requires that a sex offender live 500 to 2,500 feet from any listed protected locations.²⁰ A single exclusion zone affects just a small geographic area. However, the cumulative and aggregate effect of the many exclusion zones adopted at the state, local, and neighborhood levels, prevents sex offenders from living in many cities, towns, and communities.²¹ Further, as one jurisdiction has attempted to restrict the residency of its sex offenders by creating exclusion zones, neighboring communities have followed suit to avoid becoming a haven to local sex offenders.²² The result is an emerging race-to-the-bottom pattern²³ where communities are moving to prevent sex offenders from flocking to their exclusion-zone free municipalities.²⁴

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.”²⁵ Internal exile is an uncommon practice in the West and within the United States. Consequently, the advent of exclusion zones for sex offenders is a

(Jan. 11, 2006); R.I. H. 7621, 2005-2006 Leg. Sess. (Feb. 16, 2006); S.C. H. 4323, Gen. Assembly, 116th Sess. (Jan. 10, 2006); TX. H. 1864, Leg. Sess. 80R (Feb. 28, 2007).

¹⁶ ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE* 2-3 (2006).

¹⁷ Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Exclusion Zones*, 92 IOWA L. REV. 1, 3 (2006).

¹⁸ “Exclusion zone” has been used by Wayne Logan to describe sex offender residency restrictions. *See Id.*, at 11. To my knowledge, it is not a term that has 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.

¹⁹ *See* Residency Restriction Statutes, *supra* note 13.

²⁰ *Id.*

²¹ *See infra* notes 208-40 and accompanying text.

²² *See infra* notes 286-91 and accompanying text.

²³ *But see* Logan, *supra* note 17, at 35 (noting that states are not engaged in a race to the bottom because that pattern describes a situation where companies weaken environmental regulations to attract business which is the opposite of the exclusion zone laws). While I understand the point Logan is making, I disagree that this is not a race to the bottom among states. Each state is racing to the bottom in the sense that it is pursuing increasing aggressive exclusion zone policies without regard to the consequence. A race to the bottom does not only work in the direction of a governmental body removing laws – it can also occur in the context of increasing legislation to avoid becoming a haven to something undesirable, as is the case with sex offender exclusion laws.

²⁴ *See infra* notes 286-91 and accompanying text.

²⁵ *See infra* note 78 and accompanying text.

development that could fundamentally alter basic principles of the American criminal justice system. I argue that exclusion zones represent the reemergence of banishment as a form of punishment in the United States.

Examining the connections between banishment and exclusion zones is essential to effective policymaking for sex offenders for several reasons. First, from a doctrinal standpoint, if exclusion zone laws “resemble” banishment, then the laws are presumed punitive in nature.²⁶ If the statutes are punitive in nature, the laws 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. In the United States, the only targeted group so far has been sex offenders, easily one of the most unpopular populations in the nation.²⁷ However, the legal arguments in support of these sex offender laws could apply to numerous other outcast populations as well.²⁸

Second, from a policy perspective, the degree to which exile resembles the establishment of exclusion zones allows us to learn from prior experiences with internal exile systems. The Soviet exiling someone to the 101st kilometer is one of the few examples of internal exile in modern developed societies. As a result, I draw substantially from the Soviet experiences in understanding 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 in America. By casting out sex offenders because of a political environment charged with

²⁶ 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 punishment. *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 both resemble banishment as well as being a form of banishment.

²⁷ 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) (noting that “legislators often expediently enact new laws targeted at a most unpopular group – convicted sex offenders”); Charles Toutant, *Zoning Out Sex Offenders*, NEW JERSEY L.J., Nov. 21, 2005, at A1 (noting that residency restrictions are typically implemented with “zero opposition, since sex offenders are pariahs of modern society”).

²⁸ Logan, *supra* note 17, at 3.

hysteria and fear, America is in danger of undermining basic principles in our democratic structure.

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 in the United States, specifically. Part II discusses the development of sex offender exclusion zone laws and judicial responses to those laws. Part III identifies the connections between historical practices of banishment discussed in Part I and the new exclusion zone laws reviewed in Part II. Part IV shows how the linkages between exclusion zones and exile 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

I know how men in exile feed on dreams of hope. – Aeschylus²⁹

Banishment is a punishment with a long history in Western societies. 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 to the mainstream population. Even the death penalty seeks to permanently “banish” a convict from society. Gone are the days of normalized use of corporal punishment, shaming, and other punishments that do not isolate convicts for a period of time.³⁰ Instead, American society has sought to remove from society many of those who commit crimes through a variety of techniques.

Interestingly, though, while punishments that have the effect of banishing criminals dominate Western legal systems, banishment itself has fallen into strong disfavor in America. In the United States, only a handful of states allow banishment as a form of punishment. Even among those states that permit banishment, banishment is severely constrained in process and substance. Many states actually prohibit banishment explicitly in their constitutions.

Despite the prevalence of banishment-like punishments in Western jurisprudence, there is very little scholarship on the subject.³¹ There is also

²⁹ AESCHYLUS, *AGAMEMNON* 1668 (458 B.C.E.)

³⁰ While shaming punishments have had a limited revival in the United States in recent years, the use of such schemes is far lower than during colonial times in the Americas. See Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 *UCLA L. REV.* 1143, 1187 (2006).

³¹ Wm. Garth Snider, *Banishment: The History of Its Use and Proposal for Its Abolition Under the First Amendment*, 24 *N.E. J. ON CRIM. & CIV. CON.* 455, 456 (1998) (noting that “[t]here is a myriad of reasons why so little scholarship has been devoted to

very little reported case law related to exile as punishment.³² That fact is not surprising because banishment in the United States is most often found as a condition for probation or parole.³³ Rarely do convicts challenge probation and parole conditions for fear that they would be denied release.³⁴ When there is a challenge, it is not usually fruitful for the convict because authorities are given wide deference in probation and parole decisions.³⁵

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

A. Unguided Banishment

Banishment in its original 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 of any further punishment. The banishment could be for a term of time or for the lifetime of the exile. I refer to this historical banishment herein as “unguided banishment” or “unguided exile” because the destination of the exile was geographically undetermined.

At least insofar as Western culture is in part derived from Christian thought, one could say that the punishment at the roots of our society was banishment from the Garden of Eden.³⁶ Unguided banishment has been used by governmental authorities since at least the time of the Hammurabi Code in Babylon.³⁷ Under the Hammurabi Code, unguided exile was the punishment for incest with one’s own daughter.³⁸ Under Mosiac law, manslaughter was punishable by unguided exile.³⁹ In Ancient Greece, murderers were often sentenced to unguided banishment, although other punishments could apply as well.⁴⁰ Forced exile for a period of ten years

banishment.”).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Jason S. Alloy, “158-County Banishment” in *Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1085 (2002).

³⁷ 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 31, at 459.

³⁸ *Id.*

³⁹ ISRAEL DRAPKIN, *CRIME AND PUNISHMENT IN THE ANCIENT WORLD* 77 (1989); Snider, *supra* note 31, at 459.

⁴⁰ RONALD S. STROUD, *DRAKON’S LAW ON HOMICIDE* 66-70 (1968); Snider, *supra* note 31, at 460.

was imposed in Athens for any citizen that posed a threat to the underlying political stability of the society.⁴¹ In Ancient Rome, unguided banishment was commonly used as punishment for a variety of crimes.⁴²

Unguided banishment continued as a common form of punishment in the Middle Ages in many European societies.⁴³ Dutch and English governments became particularly enamored with unguided banishment as a punishment.⁴⁴ In England, the practice can be traced back to the Twelfth Century.⁴⁵ At that time, banishment took the form of church-protected sanctuary.⁴⁶ A criminal was afforded the opportunity to flee to a sacred place to be protected from the authorities.⁴⁷ If the criminal then confessed his or her crimes within forty days of seeking refuge, he or she could take an oath to leave England and not return without leave from the Crown.⁴⁸ The practice of banishment subject to sanctuary fell out of favor in the early seventeenth century because it represented too large of a loophole in the criminal justice system in England.⁴⁹ King James I outlawed banishment subject to sanctuary in 1623.⁵⁰

In Amsterdam, the practice of unguided exile continued well after the English had abandoned the system. From 1650 to 1750, at least 97 percent of non-capital sentences included some form of banishment.⁵¹ Unguided banishment served the essential functions of the death penalty without having to execute a person. The convict was removed from society and was never to return. It was as though the criminal were actually dead to his or her previous society. And during the Middle Ages, exile was literally a death sentence for many persons cast out into the wilderness.⁵²

⁴¹ Snider, *supra* note 31, at 463.

⁴² *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963).

⁴³ Lee Bowker, *Exile, Banishment and Transportation*, 24 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 67, 67 (1980); Snider, *supra* note 31, at 460.

⁴⁴ PETER SPIERENBURG, THE BODY AND THE STATE, IN THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 49, 62 (Norval Morris & David J. Rothman, eds., 1995); Snider, *supra* note 31, at 460-61.

⁴⁵ WILLIAM HOLDSWORTH, 11 A HISTORY OF ENGLISH LAW 569 (1938).

⁴⁶ Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Implication on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 120 (1999).

⁴⁷ *Id.*; Snider, *supra* note 31, at 461.

⁴⁸ Bleichmar, *supra* note 46, at 120.

⁴⁹ *Id.* at 120-21.

⁵⁰ *Id.* at 121.

⁵¹ Snider, *supra* note 31, at 461; SPIERENBURG, *supra* note 44, at 62.

⁵² SPIERENBURG, *supra* note 44, at 62; Snider, *supra* note 31, at 460-61.

B. Prison Colonies

With unguided banishment effectively ended in England by the abandonment of sanctuary protection, there was ambiguity with what should be done with the many criminals who would have otherwise fled. Eventually, a system of sending convicts to prison colonies developed.⁵³ 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.⁵⁴

The United States is a country that was, in part, founded by criminals sent to prison colonies. The ability to ship 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.⁵⁵

For many decades, criminals were sent from England to the Americas on an ad hoc basis.⁵⁶ The punishment was not called exile or banishment – it was termed “transportation.”⁵⁷ The ad hoc implementation of transportation of convicts 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.⁵⁸

The practice became formalized and improved with the passage of the Transportation Act of 1718.⁵⁹ The Act was notable because it was the first statutory implementation in England of the long-standing Anglo-Saxon custom of banishing criminals.⁶⁰ By offering public funds to ensure transportation of criminals, the law eliminated the numerous loopholes that had marred the ad hoc system.⁶¹ After the adoption of the Transportation Act, until American Independence, 30,000 to 50,000 criminals were banished to the Americas.⁶² The primary destinations for the criminals were

⁵³ *Id.*

⁵⁴ Bleichmar, *supra* note 46, at 123-24..

⁵⁵ Snider, *supra* note 31, at 461 (noting that “[a]t this period of 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”).

⁵⁶ Bleichmar, *supra* note 46, at 123-24.

⁵⁷ *Id.* at 116.

⁵⁸ *Id.* at 123-24.

⁵⁹ TRANSPORTATION ACT OF 1718, 4 Geo. I, ch. 11; Bleichmar, *supra* note 46, at 116.

⁶⁰ Bleichmar, *supra* note 46, at 129.

⁶¹ *Id.* at 126.

⁶² ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718-1775 26-27 (1987); Bleichmar, *supra* note 46, at 116.

the colonies of Virginia and Maryland.⁶³ The typical term of banishment was seven years although most of the exiles never returned to the British Isles.⁶⁴

Transportation was an important part of the punishment structure in England because the other available sentences were viewed as too harsh or too lenient for certain crimes.⁶⁵ Ireland and Scotland also joined the formalized transportation practices and saw their citizens sent to the Americas.⁶⁶ The practice was still extremely common until the signing of the Declaration of Independence⁶⁷ which effectively blocked English ships from delivering criminals to the Americas.⁶⁸

As with unguided banishment, prison colonies served functions similar to capital punishment without the blood:

[E]xecution 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...⁶⁹

While the effects on receiving societies were usually ignored, the use of prison colonies marked the first significant time when the destination nations for convicts came to resist the importation of criminals.⁷⁰ This trend is significant because it recurs with 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 other destinations until the middle of the nineteenth century.⁷¹ Australia was a popular destination and almost 40,000 people were transported there from Ireland alone.⁷²

⁶³ *Id.*

⁶⁴ Snider, *supra* note 31, at 462.

⁶⁵ Bleichmar, *supra* note 46, 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”).

⁶⁶ Snider, *supra* note 31, at 462.

⁶⁷ Bleichmar, *supra* note 46, at 116.

⁶⁸ *Id.* at 128 (noting that “[o]n January 11, 1776 newspaper accounts reported that transportation was effectively suspended whilst the country [referring to the Colonies] remains unsettled” (internal quotation omitted)).

⁶⁹ *Id.* at 123 (quoting A.G.I. SHAW, *CONVICTS AND THE COLONIES: A STUDY OF PENAL TRANSPORTATION FROM GREAT BRITAIN AND IRELAND TO AUSTRALIA AND OTHER PARTS OF THE BRITISH EMPIRE* 24-25 (1966)).

⁷⁰ Bleichmar, *supra* note 46, at 128 (noting that “[t]he onslaught of convicts from the Old World spurred public alarm and apprehension in the American Colonies”).

⁷¹ Snider, *supra* note 31, at 462-63.

⁷² *Id.* at 464.

France and Russia also engaged in transportation, although to a lesser extent than England.⁷³ France created colonies in New Caledonia and on the notorious Devil's Island near French Guinea.⁷⁴ Russia's use of banishment to colonies did not even require that a criminal leave the country. Because Russia contained vast areas of undeveloped land, including Siberia, there was ample space for transported criminals to be banished on the same continent.⁷⁵ Both Russia and France continued the practice of transportation to a limited extent until the middle of the twentieth century.

Prison colonies eventually became a geographical impossibility as the frontiers of the world disappeared. There was no habitable land for prisoners to be sent. Further, even if such a place still existed, global travel became much easier so that a nation had no guarantee that banished convicts would not return immediately after their initial exile.⁷⁶ So, while prison colonies afforded a solution superior to previous forms of banishment, they became a historical relic because of a 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 on the same continent. Prison colonies usually forced persons to faraway lands whereas internal exile systems allow a person to remain in the original nation but with significant limitations. The Soviet use of internal prison colonies provided a smooth transition to systems of internal exile like propiska and banishing someone to the 101st kilometer. Instead of putting a convict on a train to Siberia, they 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.⁷⁷ However, when Stalin revived the system of banishment, he was able to combine prison colonies with the propiska concept.⁷⁸ With the advent of exile to the 101st kilometer, Stalin set the groundwork for a banishment system that Russian and Soviet Union leaders could use to internally exile criminals and other undesirables.

⁷³ *Id.* at 463.

⁷⁴ *Id.* at 463 n.50.

⁷⁵ *Id.* at 464.

⁷⁶ Bleichmar, *supra* note 46, at 129 (noting that “[i]n 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.

⁷⁷ Snider, *supra* note 31, at 464-65.

⁷⁸ *Id.*

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 a necessary supplement to Soviet attempts to exile people to the 101st kilometer because it increased compliance and largely prevented the banished from entering restricted areas.

However, 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. Prisons offered Western societies the benefits of banishment without the necessity of frontiers. Prisoners are forced to exist in separate societies and they are not free to act with the general population. Just as those sent to Australia in eras past were forgotten by the society that had cast them out, modern prisons keep the inmates out-of-sight and out-of-mind.

As a result, the transition from prison colonies to internal exile is an aborted revolution. While prison colonies are an impossibility in the modern era, prisons have filled the gap rather than internal exile systems. 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 the United States 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, banishment fell into strong disfavor as a means of punishment in the United States in relation to the strong Anglo-Saxon tradition supporting exile punishments.⁷⁹ Currently, only six states specifically allow banishment as a condition of probation or replacement for imprisonment.⁸⁰ The primary reasons for the limited use of banishment in the United States are amorphous public policy objections⁸¹ and some ambiguity about the constitutionality of the practice.⁸²

⁷⁹ Alloy, *supra* note 36, at 1087.

⁸⁰ Matthew D. Borrelli, *Banishment: The Constitutional and Policy Arguments Against this Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 469 (2003) (noting that "only six states implore [banishment] as part of probationary sentences or as an alternative to jail time").

⁸¹ Snider, *supra* note 31, at 466 (noting that, "[t]he 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").

⁸² Borrelli, *supra* note 90, at 469-70.

While several states have experimented with banishment during the last 150 years,⁸³ there has not been significant case law on the legal questions raised by the practice.⁸⁴ 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.⁸⁵ Even in those states that have almost no other limitations on intrastate banishment, including Georgia, Wisconsin, and Mississippi, interstate banishment is strictly forbidden.⁸⁶ Only in very isolated instances has interstate banishment been permitted in the United States.⁸⁷ The legality and constitutionality of intrastate banishment is still an open question in many jurisdictions around 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.⁸⁸ However, there have been a few notable opinions which discuss the issue in other contexts.⁸⁹ The Supreme Courts 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.⁹⁰ The frequent discussion of banishment in ex post facto cases may appear anomalous. However, the examination of banishment as a punishment in those cases stems from the extensive discussion by Justice

⁸³ *Id.*, at 471-72 (noting that “[i]n 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 that time, a minority of courts sporadically has used their power to banish the accused from counties, states, and activities”).

⁸⁴ Snider, *supra* note 31, at 456.

⁸⁵ Borrelli, *supra* note 90, at 477; Alloy, *supra* note 36, at 1089.

⁸⁶ Borrelli, *supra* note 90, at 473.

⁸⁷ *Id.* at 473-74 (noting that, “in 2000 Kentucky banished a man from the state for one year when a state court found him guilty of domestic abuse”).

⁸⁸ Snider, *supra* note 31, at 471.

⁸⁹ Searching the Lexis-Nexis “U.S. Supreme Court Cases, Lawyer’s Edition” database for “banish! or exile!” yielded 209 cases on October 28, 2006. 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.

⁹⁰ *See, e.g., Kungys v. United States*, 485 U.S. 759 (1987).

Chase of banishment in the over 200-year-old case which stills controls Ex Post Facto Clause cases, *Calder v. Bull*.⁹¹ As a result of Justice Chase's thorough examination of British banishment practices in *Calder*, future Courts have often rehashed that part of the opinion analogizing exile to whatever matter is before them.⁹²

Interestingly, one of the most recent Supreme Court opinions featuring references to exile as punishment, was *Smith v. Doe*,⁹³ which 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."⁹⁴ Further the court referred to banishment as when a criminal was "expelled [] from the community."⁹⁵ Ultimately, the court found the registration requirements to be constitutional because they were simply regulatory, and thus, not banishment.⁹⁶

Generally, the immigration cases do not offer much insight into how the Court will address an actual claim that banishment is unconstitutional because citizens are afforded greater protection against exile. However, there is a small set 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*,⁹⁷ the Supreme Court upheld a statute that required that a person of Chinese ethnicity seeking admission into the United States must submit his or her claim to an immigration officer.⁹⁸ 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.⁹⁹

Applying the precedent in *Sing Tuck*, the Court, in *United States v. Ju Toy*,¹⁰⁰ 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. 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. The majority opinion, by Justice Holmes, made no mention of exile or banishment. However, Justice Brewer in his dissent

⁹¹ 3 U.S. 386 (1798).

⁹² See, e.g., *Stogner v. California*, 539 U.S. 607 (2003).

⁹³ 538 U.S. 84 (2003).

⁹⁴ 538 U.S. at 98.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 194 U.S. 161 (1903).

⁹⁸ *United States v. Ju Toy*, 198 U.S. 253, 261 (1905).

⁹⁹ 194 U.S. at 163.

¹⁰⁰ 198 U.S. at 253.

engaged in an elaborate discussion of banishment, deportation, and the refusal to allow entry.¹⁰¹

Justice Brewer attempted to distinguish the case before him with the decision in *Fong Yue Ting v. United States*¹⁰² when the court had 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.”¹⁰³ The dissent went on to discuss various definitions of banishment and some history of exile as punishment. Justice Brewer’s conclusion was that, “[s]umming this up, banishment is a punishment and of the severest sort.”¹⁰⁴

Justice Brewer’s dissent has no value as precedent and is distinguishable from residency restrictions because he was considering banishment from the entire United States. Nonetheless, his writings are the most significant from the Supreme 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 well¹⁰⁵ could lend some authority to Justice Brewer’s thorough analysis of the issue.

The only other Supreme Court opinion of relevance to this article was in the 1800 case of *Cooper v. Telfair*.¹⁰⁶ The plaintiff in *Cooper* argued that the acts of the state of Georgia were unconstitutional when the state confiscated the plaintiff’s property because the plaintiff had joined British forces against the United States. In Justice Cushings’s opinion, he wrote that, “[t]he right to confiscate and banish, in the case of an offending citizen, must belong to every government.”¹⁰⁷ Such a clear statement has led at least one scholar to argue that the Supreme Court has offered a definitive ruling on the legality of banishment.¹⁰⁸ However, the facts in 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 property of and banish persons who took up arms in the formation of the United States.¹⁰⁹ Such reasoning cannot be easily applied to banishment for an ordinary criminal offense as the very fabric of the American project is not at stake.

¹⁰¹ 198 U.S. at 264 (Brewer, J., dissenting).

¹⁰² 149 U.S. 698 (1893).

¹⁰³ 198 U.S. at 269 (Brewer, J., dissenting).

¹⁰⁴ *Id.* at 273.

¹⁰⁵ See generally, Ming-sung Kuo, *The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases Revisited*, 67 ALB. L. REV. 27 (2003).

¹⁰⁶ 4 U.S. 14 (1800).

¹⁰⁷ *Id.* at 20.

¹⁰⁸ Snider, *supra* note 31, at 469.

¹⁰⁹ 4 U.S. at 21-23.

Other federal courts have provided opinions related to banishment, but there is no clear reasoning among the decisions. The federal case most often cited¹¹⁰ to support the proposition that banishment is illegal under United States law is *Dear Wing Jung v. United States*.¹¹¹ In *Dear Wing Jung*, the Ninth Circuit held unlawful giving an alien the choice between banishment in exchange for a suspended prison sentence.¹¹² 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, its citation for the proposition that banishment is per se illegal is erroneous.¹¹³ As with Supreme Court opinions on the issue, no clear holdings by the circuit and district courts have emerged to decide the legality of banishment as punishment. As a result, there is essentially no established, controlling federal law of banishment as punishment.

2. State Law

At least fifteen states forbid or otherwise limit banishment in their constitutions.¹¹⁴ Some states, such as Tennessee and Maryland, limit exile as punishment by adding a due process requirement before someone is banished.¹¹⁵ Because of the emphasis on determinate sentencing ranges with specific terms of imprisonment, banishment is not part of state sentencing statutes.¹¹⁶ 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 have held that interstate banishment is against public policy.¹¹⁷ In the various decisions addressing the legality of banishment at the state level, there has been

¹¹⁰ Snider, *supra* note 31, at 467.

¹¹¹ 312 F.2d 73 (9th Cir. 1962).

¹¹² *Id.* at 75-76.

¹¹³ Snider, *supra* note 31, at 468.

¹¹⁴ Snider, *supra* note 31, at 465; 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. PART 1, ART. XII; NEB. CONST. ART. I, § 15; NH. CONST PART 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.

¹¹⁵ Snider, *supra* note 31, at 465.

¹¹⁶ *Id.* at 466.

¹¹⁷ Borrelli, *supra* note 90, at 477; *Commonwealth v. Pike*, 701 N.E.2d 951, 957 (Mass. 1998); *Ex parte Scarborough*, 173 P.2d 825, 827 (Cal. Ct. App. 1946); *State v. Halverson*, 154 N.W.2d 699, 702 (Minn. 1967); *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); *State v. J.F.*, 621 A.2d 520, 522 (N.J. Super. Ct. App. Div. 1993).

almost no mention of the constitutionality of the practice.¹¹⁸ The public policy rationales are often vague, but the recurring theme among courts is that banishment is likely to cause discord between the communities doing the banishing and those receiving the banished.¹¹⁹ Another common reason for courts to strike down banishment sentences is that the sentences lack specific statutory authorization.¹²⁰ The Michigan Supreme Court, in *State v. Baum*, offered one of the most detailed explanations for why interstate banishment as a form of punishment should be illegal in the United States:

[T]o 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.¹²¹

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.¹²² 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.¹²³ Mississippi, Florida, Wisconsin, and Oregon specifically require that exile facilitate rehabilitation.¹²⁴

Some states have distinguished between banishment as part of probation and as a condition of parole.¹²⁵ When those state courts have reviewed banishment as part of a probation plan, they have almost always held that the practice is illegal.¹²⁶ However, as a condition of parole or pardon, the use of banishment has sometimes been supported, although the case law is sparse in that area because convicts rarely challenge their parole conditions for fear that the parole will be revoked.¹²⁷

Perhaps the most unusual state in terms of banishment is Georgia. The Georgia constitution expressly forbids banishment from the state.¹²⁸

¹¹⁸ Borrelli, *supra* note 90, at 477-78.

¹¹⁹ See, e.g., *People v. Baum*, 231 N.W. 95, 96 (Mich. 1930).

¹²⁰ Snider, *supra* note 31, at 467.

¹²¹ 231 N.W. at 96.

¹²² Borrelli, *supra* note 90, at 475.

¹²³ *Id.* at 479-80.

¹²⁴ *Id.* at 479.

¹²⁵ Snider, *supra* note 31, at 466.

¹²⁶ *Id.* (noting that “[a]lmost 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”).

¹²⁷ *Id.* at 471.

¹²⁸ GA. CONST. art. 1, § 1, para. I.

However, in *State v. Collett*,¹²⁹ the Georgia Supreme Court held that banishment from 158 of the state's 159 counties was valid.¹³⁰ Not surprisingly, prosecutors have taken advantage of the decision and have sought 158-county banishment for many offenders. The two typical counties that prosecutors choose between to allow a defendant to enter are Ware County, "a remote, sparsely populated area in southern central Georgia,"¹³¹ and Echols County, where "[t]here are no restaurants, hotels or banks and only four thousand residents in the county."¹³² Since *Collett*, a single prosecutor in DeKalb County has had over 200 defendants banished to Echols County.¹³³ 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 banishment sentences, while not technically ordering the defendants to leave the state, was surely to cause such an exodus to occur.

In states where the practice is of questionable legality, the trend among courts that have allowed banishment has been to call the punishment something other than banishment.¹³⁴ This judicial sleight-of-hand is usually accomplished by the court adopting a very narrow definition of what constitutes banishment.¹³⁵ This feat is performed with relative ease because of the lack of a 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

*That 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*¹³⁶

¹²⁹ 208 S.E.2d 472 (Ga. 1974).

¹³⁰ *Id.* at 474.

¹³¹ Snider, *supra* note 31, at 455.

¹³² Alloy, *supra* note 36, at 1099.

¹³³ *Id.*

¹³⁴ Borrelli, *supra* note 90, at 481.

¹³⁵ *Id.*

¹³⁶ THE COMPLETE WORKS OF ARISTOTLE 1180a5-10 (W.D. Ross and J.O. Urmson, trans., 1984).

Pedophiles are easy targets for politicians seeking to look tough on crime.¹³⁷ Their crimes make front page headlines and are morally incomprehensible to the general population. When a child is involved, the perpetrator is thought to be of the vilest sort.¹³⁸ The media coverage of the crimes leaves little of the heinous details to the reader's 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."¹³⁹ 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.¹⁴⁰

Imprisonment is still the most common method of dealing with felons in the United States. 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.¹⁴¹ From an economic standpoint, alternative sentencing approaches make substantial sense.¹⁴² Parole also serves as an important safety valve to check prison overcrowding and to limit the overall prison population.¹⁴³ Nonetheless, the cost of imprisonment of America's convicts continues to grow.¹⁴⁴

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

¹³⁷ Hobson, *supra* note 27, at 962.

¹³⁸ Steven J. Wernick, *In Accordance With a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1151 (2006).

¹³⁹ *The O'Reilly Factor: Talking Points Memo and Top Story* (Fox News television broadcast Apr. 27, 2006).

¹⁴⁰ Hobson, *supra* note 27, at 962.

¹⁴¹ Ted Pincus, *JFY Helps Poor Kids Find Motivation And a Job*, CHICAGO SUN-TIMES, Jul. 25, 2006, at 53.

¹⁴² Alexandra Marks, *In Drug War, Treatment is Back*, CHRISTIAN SCIENCE MONITOR, Jul. 14, 2000, at 1.

¹⁴³ Jenifer Warren and Jordan Rau, *Prison Reform Plan Falls Short; Lawmakers, Calling It Faulty, Say They'll Reject Most Of The Governor's \$6-Billion Proposal To Ease Overcrowding*, LOS ANGELES TIMES, Aug. 30, 2006, at B1.

¹⁴⁴ Pincus, *supra* note 141.

facilities following imprisonment.¹⁴⁵ The United States Supreme Court, in *Kansas v. Hendricks*, held that a Kansas statute that put sexually violent predators in psychiatric facilities did not raise due process and ex post facto law concerns.¹⁴⁶ Because of the Supreme Court's approval of the practice, the medicalization of sex offender sentencing has continued into the new millennium.¹⁴⁷

Another notable sentencing development in the late 1980s and the early 1990s for sex offenders was the advent of registration laws.¹⁴⁸ These registration laws were supplemented by community notification provisions that alerted people when sex offenders moved into their neighborhoods.¹⁴⁹ The first community notification law was passed in Washington in 1990.¹⁵⁰ As with the registry statutes, the Supreme Court found no constitutional infirmities with notification statutes.¹⁵¹

Failure to register became a federal crime in 2006 with the passage of the Adam Walsh Child Protection and Safety Act.¹⁵² Senator John McCain is leading an effort to further federalize the registration requirements by requiring email address registration for sex offenders nationwide.¹⁵³ In the current proposal under consideration by Congress, a failure to register email addresses would be punishable by a term of imprisonment up to ten years.¹⁵⁴

Civil commitment, registry, and notification were precursors to the growing trend of applying residency exclusion zones against convicted sex offenders. The recent implementation of exclusion zones is an outgrowth of the sex offender registries and related community notification provisions.¹⁵⁵

¹⁴⁵ Hobson, *supra* note 27, at 963.

¹⁴⁶ *Kansas v. Hendricks*, 521 U.S. 346, 370-71 (1997).

¹⁴⁷ *Id.* As Eric Janus has noted, the statutes committing sex offenders to psychiatric facilities are not of recent origin. In America, mental hygiene laws aimed at "sex psychopaths" that diverted sex offenders to mental institutions were very common in the 1930's. However, by the early 1980's, all of these laws were either repealed or ceased being used. 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. JANUS, *supra* note 16, at 22.

¹⁴⁸ Hobson, *supra* note 27, at 963.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; WASH. REV. CODE ANN. 4.24.550 (West 2005); *Recent Legislation*, 108 HARV. L. REV. 787, 787 (1995).

¹⁵¹ *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003).

¹⁵² PUB. L. NO. 109-248 (2006).

¹⁵³ Jeremy Pelofsky, *Lawmakers Take Aim at Sex Offenders on Internet*, WASHINGTON POST, Jan. 30, 2007, at A1.

¹⁵⁴ *Id.*

¹⁵⁵ *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:

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.

These exclusion zones have often been hastily drafted with little debate following a high-profile crime committed against a minor by a convicted sex offender.¹⁵⁶ As a result, the efforts of states often have fairly obvious defects. In other cases, the exclusion zones would have done little to prevent the crime that triggered the adoption of the restrictions. 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 with their own residency restrictions. I offer some highlights of the varied sixteen state approaches below. I follow the discussion of state efforts that with a brief overview of the different local restrictions that have been adopted.

1. States

Alabama provides a typical example of a state that has created an exclusion zone policy that contains several different restrictions. Alabama's decision to adopt sex offender restrictions was driven by a July 2005 episode of the O'Reilly Factor¹⁵⁷ in which Bill O'Reilly named Alabama as

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 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).

¹⁵⁶ Toutant, *supra* note 27, at A1; Logan, *supra* note 17, at 3.

¹⁵⁷ *The O'Reilly Factor: Factor Investigation: Which States are Soft on Child Sex*

a state that did not care about sex offenders.¹⁵⁸ One week after the episode, Governor Bob Riley convened a special session of the legislature to debate reform to Alabama's sex offender laws.¹⁵⁹ The result was several changes in Alabama's laws, including residency restrictions on convicted sex offenders.¹⁶⁰ The general residency exclusion zones in Alabama apply to sex offenders who committed crimes against adults as well as children.¹⁶¹

Alabama has supplemented the original exclusion zones with an additional loitering restriction.¹⁶² 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.¹⁶³

Similar to Alabama, Florida's residency restrictions were enacted after a public outcry from three high-profile crimes allegedly committed by convicted sex offenders.¹⁶⁴ Florida is one of the minority of states that applies residency restrictions only to those sex offenders whose crimes involved a minor.¹⁶⁵ Most states with residency restrictions apply the exclusion zones to sex offenders even though their crimes did not involve children.¹⁶⁶

Offenders? (Fox News television broadcast Jul. 11, 2005).

¹⁵⁸ Recent Legislation I, *supra* note 155, at 942.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ ALA. CODE § 15-20-26(f).

¹⁶² *Id.*

¹⁶³ *Id.*; Recent Legislation I, *supra* note 155, at 941.

¹⁶⁴ Hobson, *supra* note 27, 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 and Agreement on Sex Offenders*, N.Y. TIMES, Apr. 22, 2005, at A14.

¹⁶⁵ Fla. Stat. § 794.065.

¹⁶⁶ See Residency Restriction Statutes, *supra* note 13.

Georgia currently has one of the harshest exclusion zone laws nationwide.¹⁶⁷ Georgia's law established 1,000 foot radius exclusion zone that applies to churches, bus stops, parks, playgrounds, gymnasiums, swimming pools, and other areas where "minors congregate."¹⁶⁸ The Georgia law has higher penalties than other states as a convicted sex offender who knowingly violates the residency restrictions could face thirty years in prison.¹⁶⁹ Early reports on the experience in Georgia are that a large majority of sex offenders have had to relocate because of the exclusion zones.¹⁷⁰

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.¹⁷¹ Like Florida, Iowa residency restrictions only apply to offenders who committed sexual crimes against minors.¹⁷² The Iowa law, like most other statutes, requires no individual determination of dangerousness for the residency restriction to apply.¹⁷³

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.¹⁷⁴ However, 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.¹⁷⁵

A notable development in some states is the use of Global Positioning System ("GPS") monitoring of sex offenders. Alabama,¹⁷⁶ California,¹⁷⁷ and Florida,¹⁷⁸ 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

¹⁶⁷ GA. CODE ANN. § 42-1-13(b) (2004).

¹⁶⁸ GA. CODE ANN. § 41-1-15(a).

¹⁶⁹ Jill Young Miller, *Registered Sex Offenders Ordered to Find New Homes*, THE ATLANTA JOURNAL-CONSTITUTION, May 19, 2006, at 1A.

¹⁷⁰ *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).

¹⁷¹ IOWA CODE § 692A.2A.

¹⁷² IOWA CODE § 692A.2A(1).

¹⁷³ *Id.*

¹⁷⁴ LA. REV. STAT. ANN. § 14: 91.1(a)(2) (2005).

¹⁷⁵ *Id.*

¹⁷⁶ ALA. CODE 15-20-25.3; Recent Legislation I, *supra* note 155, at 941.

¹⁷⁷ Patt Morrison, *Brainless Laws, Gutless Pols*, LOS ANGELES TIMES, Nov. 16, 2006, at A31.

¹⁷⁸ Hobson, *supra* note 27, at 964; Robert F. Worth, *Exiling Sex Offenders from Town: Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1.

schools or other “danger” areas.¹⁷⁹ However, because of the cost of such real-time coverage, no state has been able to actually provide that level of monitoring.¹⁸⁰

Arkansas is probably the biggest outlier among the states with exclusion zone laws. It has implemented the most narrow exclusion zone policy of the sixteen states with such laws. The Arkansas statute uses a tiered-risk scheme and requires an individual determination of dangerousness of the offender.¹⁸¹ 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 the 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 in 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 wholly unrealistic, a sex offender’s failure to comply with local rules is often punishable 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. I believe these examples illustrate just how complex complying with the rules is for a registered sex offender. The examples of community ordinances that follow also show just how much uncertainty there is among different communities about what an exclusion zone rule should look like.

Nebraska is an example of a state with no state statute establishing residency restrictions, but with many towns and cities having adopted residency restriction ordinances. In Nebraska, cities such as La Vista, Omaha, and Ralston each adopted ordinances prohibiting high-risk sex offenders from living within 500 feet of schools.¹⁸² Nebraska towns were

¹⁷⁹ Brandon Bain, *Spotty Track Record; Nassau Probation Department Audit Finds High-Risk Sex Offenders Who Wear GPS Devices Aren’t Monitored 24-7*, NEWSDAY (NEW YORK), Oct. 25, 2006, at A03.

¹⁸⁰ *Id.*

¹⁸¹ ARK. CODE ANN. § 5-14-128(a).

¹⁸² Karen Sloan, *La Vista Approves Sex Offender Limits*, OMAHA WORLD-HERALD, May 18, 2006, at 5B.

motivated by a desire to avoid becoming havens to sex offenders fleeing Iowa after Iowa adopted the most onerous restrictions in the country.¹⁸³

Like Nebraska, New Jersey is another state where there is no statewide exclusion zone law, but local communities have filled the vacuum.¹⁸⁴ 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.¹⁸⁵

In Florida, over sixty cities adopted residency restrictions in the first year after the first such ordinance was adopted.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

To get a feeling of how many communities are considering residency restriction 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 discussing sex offender restrictions.¹⁹⁰ The details of each local community’s discussion vary, but

¹⁸³ Karen Sloan, *Cities Will Be Altering Limits on Offenders*, OMAHA WORLD-HERALD, Apr. 27, 2006, at 1A.

¹⁸⁴ Logan, *supra* note 17, at 9-10.

¹⁸⁵ Anna Nguyen, *Woolwich OKs Limits on Sex Offenders*, COURIER POST (CHERRY HILL, NEW JERSEY), May 16, 2006, at 1G.

¹⁸⁶ Todd Leskanic, *More Cities Limit Residences of Sex Offenders*, TAMPA TRIBUNE (FLORIDA), May 14, 2006, at 1.

¹⁸⁷ *Id.*

¹⁸⁸ Hobson, *supra* note 27, at 963-64.

¹⁸⁹ Janet Zink, *Tampa Wants to Keep Sex Offenders Outside City Limits*, ST. PETERSBURG TIMES (FLORIDA), Jan. 19, 2007, at 1A.

¹⁹⁰ For example, I reviewed articles in the 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 ninety-eight 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.

the common message is that neighborhoods and towns across America want sex offenders to leave. And given the relative newness of local implementation of these laws, the trend toward community laws is likely to continue for some time.

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 the laws violate the doctrine of substantive due process, violate the 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 Court of Appeals is the only federal appellate court to have assessed the constitutionality of the various state and locality residency restrictions on sex offenders. In *Doe v. Miller*,¹⁹¹ a panel of three Eighth Circuit judges reversed the judgment of the district court¹⁹² and upheld Iowa's sex offender restrictions.¹⁹³ 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."¹⁹⁴ 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."¹⁹⁵

The Eighth Circuit reviewed the judgment of the district court which struck 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. Ultimately, the majority opinion rejected all of the challenges to the statute.

¹⁹¹ 405 F.3d 700 (8th Cir. 2005) (hereinafter "Doe II")

¹⁹² *Doe v. Miller*, 298 F.Supp.2d 844 (S.D. Iowa 2004) (hereinafter "Doe I").

¹⁹³ *Doe II*, 405 F.3d at 723.

¹⁹⁴ IOWA CODE § 692A.2A(2) (2005).

¹⁹⁵ *Id.*

The Eighth Circuit affirmed its holding in *Doe v. Miller* in *Weems v. Little Rock Police Department*,¹⁹⁶ which addressed the constitutionality of Arkansas' sex offender restrictions statute. 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 was necessary before the restrictions were enforced.¹⁹⁷

Because *Weems* was just applying the decision in *Doe v. Miller* to a more narrowly tailored statute, the Eighth Circuit did not need to revisit its analysis on several legal issues. Consequently, the panel did not expand substantially 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 court¹⁹⁸ and federal district court opinions¹⁹⁹ concerning exclusion zones.

C. Private Actors

A growing trend supplementing governmental exclusion zones has been that private communities are adopting rules prohibiting sex offenders from living within those communities. In Florida, the state database of registered sex offenders has provided communities an easy mechanism to exclude sex offenders.²⁰⁰ In some gated communities, even temporary stays by convicted sex offenders are prohibited.²⁰¹

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

¹⁹⁶ 452 F.3d 1010 (8th Cir. 2006).

¹⁹⁷ *Id.*

¹⁹⁸ *Boyd v. State*, 2006 Ala. Crim. App. LEXIS 18 (Al. Crim. App. 2006); *Boyd v. State*, 2006 Ala. LEXIS 380 (Al. 2006); *Lee v. State*, 895 So. 2d 2004 (Al. Crim. App. 2004); *Mann v. State*, 603 S.E.2d 283 (Ga. 2004); *State v. Seering*, 701 N.W.2d 655 (2005); *ACLU of N.M. v. City of Albuquerque*, 137 P.3d 1215 (N.M. Ct. App. 2006); *Nasal v. Dover*, 2006 Ohio 5584, 2006 Ohio App. LEXIS 5592 (Ohio Ct. App., Miami County Oct. 20, 2006); *Hyle v. Porter*, 2006 Ohio 5454, 2006 Ohio App. LEXIS 5456 (Ohio Ct. App., Hamilton County Oct. 20, 2006).

¹⁹⁹ *Doe v. Petro*, 2005 U.S. Dist. LEXIS 35537 (S.D. Ohio 2005); *Doe v. Petro*, 2006 U.S. Dist. LEXIS 80753 (S.D. Ohio Oct. 24, 2006); *Coston v. Petro*, 398 F. Supp. 2d 878, 2005 U.S. Dist. LEXIS 38424 (S.D. Ohio 2005); *Graham v. Henry*, 2006 U.S. Dist. LEXIS 65880 (N.D. Okla. 2006); *Doe v. Parish*, 2006 U.S. Dist. LEXIS 65873 (N.D. Okla. Sept. 14, 2006); *Doe v. Baker*, 2006 U.S. Dist. LEXIS 67925 (N.D. Ga. Apr. 5, 2006).

²⁰⁰ S.I. Rosenbaum, *Sex Offenders not Wanted in River Hills*, ST. PETERSBURG TIMES (FLORIDA), May 19, 2006, at 22.

²⁰¹ *Id.*

within that community unless a protected class is the one being excluded.²⁰² The only court to publish an opinion considering the legality of private covenants against sex offenders, *Mulligan v. Panther Valley Property Owners Ass'n*,²⁰³ held that a community was allowed to bar a sale to a sex offender because of a restrictive covenant.²⁰⁴ 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.”²⁰⁵ There is also a strong economic incentive for communities to bar the presence of sex offenders as a single offender moving to a community can have a substantial negative effect on property values.²⁰⁶

While the effects of gated communities and new private developments are miniscule in the current environment, the effect of community covenants being adopted against sex offenders has a time lag making it an important consideration in the future. As new developments become old developments, the covenants and restrictions on the property remain.

There is also a heightened risk of these private restrictions become 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.²⁰⁷ 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.

III. BANISHMENT AND SEX OFFENDERS

*Lots of times you can feel as an exile in a country that you were born in. – Azar Nafisi*²⁰⁸

²⁰² See generally Lior Jacob Strahilevitz, *Information Asymmetries and the Right to Exclude*, 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).

²⁰³ *Mulligan v. Panther Valley Property Owners Ass'n*, 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).

²⁰⁴ *Id.* at 1192.

²⁰⁵ Strahilevitz, *supra* note 202, at 1845.

²⁰⁶ Caleb Durling, *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).

²⁰⁷ Logan, *supra* note 17, at 10.

²⁰⁸ Azar Nafisi, *Identity Theory*, Feb. 5, 2004 (available at <http://www.identitytheory.com/interviews/birnbaum139.php>) (last visited Oct. 2, 2006).

I began by reviewing a long history of banishment in Western societies. Then, I turned to the much shorter history 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 the restrictions are analogous to banishment arises primarily in the discussion of the retroactive application of residency restrictions.

Because residency restrictions 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.²⁰⁹ In analyzing a statute to determine whether a particular statute violates the Ex Post Facto Clause, a court must first determine whether the legislation at issue was meant to be civil or criminal in nature.²¹⁰ If the law is intended to be criminal, then the law is necessarily punitive and subject to the Ex Post Facto Clause.²¹¹ 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.²¹² The United States Supreme Court, in *Kennedy v. Mendoza-Martinez*,²¹³ identified five factors to determine whether a particular law is punitive in purpose or effect. Notably, among those five factors, a court evaluates whether the statute of issue is historically or traditionally similar to punishment.²¹⁴ 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.

²⁰⁹ *Calder v. Bull*, 3 U.S. 386, 390 (1798).

²¹⁰ *Smith v. Doe*, 538 U.S. 84, 92 (2003).

²¹¹ *Id.*

²¹² *Id.*

²¹³ 372 U.S. 144, 168-69 (1963).

²¹⁴ *Id.*

Despite the dearth of available housing, the Eighth Circuit, in *Doe v. Miller*, found that the sex offender restrictions did not constitute banishment.²¹⁵ 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 that argued that the Iowa residency restrictions forced sex offenders into exile.²¹⁶ The majority identified three reasons for finding the analogy to banishment unpersuasive.

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.²¹⁷ Under the Iowa law, a sex offender could freely enter the 2,000 foot radius around a school, but could not live or work within that perimeter. This distinction was significant for the Eighth Circuit in distinguishing the Iowa law from banishment.²¹⁸

Second, the panel 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.²¹⁹ 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 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 of relatively recent origin and unique in nature, they are distinct from the historical punishment of banishment.²²⁰ 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, unguided exile 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 vacuous nature of the majority's second and third reasons for distinguishing banishment and 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

²¹⁵ *Doe II*, 405 F.3d at 719-20.

²¹⁶ *Id.* at 723 (Melloy, M., dissenting).

²¹⁷ *Id.* at 719.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 720.

restricted zones. And that primary distinction was the one 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.²²¹ The district court found that:

Sex 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.²²²

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

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*,²²³ Justice Brewer offer an extensive investigation of the banishment in his dissenting opinion. In his dissent, Justice Brewer borrowed from *Black's Law Dictionary*, and defined banishment as "punishment inflicted on criminals by compelling them to quit a city, place, or country for a specified period of time, or for life." In *Smith v. Doe*, the Court described banishment as punishment where a criminal could not "return to their original community."²²⁴ In *Delgado v. Carmichael*, the Supreme Court found that deportation is the "equivalent of banishment or exile."²²⁵ Whatever the definition of "exile" is, the evidence

²²¹ *Id.* at 724 (Melloy, M., dissenting).

²²² *Doe I*, 298 F.Supp.2d at 851.

²²³ 198 U.S. at 269-70 (Brewer, J., dissenting) (quoting BLACK'S LAW DICTIONARY).

²²⁴ *Smith*, 538 U.S. at 98.

²²⁵ *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947).

is clear that at the time of the original Constitutional Convention, banishment was considered punishment.²²⁶ 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 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 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 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 exercise 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 reoccur 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 unguided banishment, internal exile, and prison colonies, a person had the responsibility to care for themselves and had substantially more freedom than an average prisoner.

²²⁶ Bleichmar, *supra* note 46, at 117 (noting that “by 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”).

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. Unguided banishment, 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 that 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 majority reached in *Doe v. Miller*. Sex offender exclusion zones fit all three of the elements of banishment as described above.

First, residency restrictions lead to banishment is 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.²²⁷ 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.²²⁸ Some middle size towns and cities only had a few pockets of areas where sex offenders could live.²²⁹ However, those "safe" areas were often industrial sectors or contained little housing in which an average sex offender could find residency.²³⁰ Throughout the state, most of the areas where the statute permitted sex offenders to live were located in rural areas.²³¹ The district court noted that these rural areas had housing that was "not necessarily readily available."²³² 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 as Iowa and California. This is the map of DeKalb County that

²²⁷ Doe I, 298 F.Supp.2d at 851.

²²⁸ *Id.*

²²⁹ *Id.*

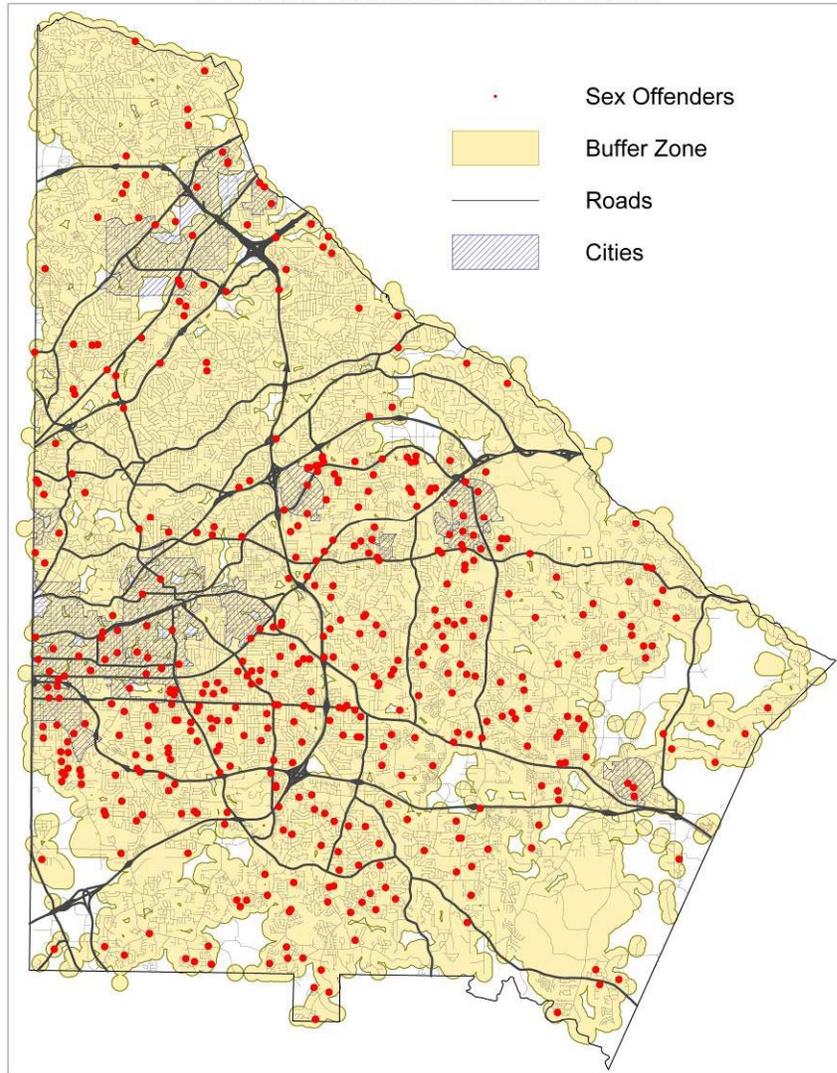
²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

plaintiffs in the case created to illustrate the effects of Georgia's residency restrictions:

Registered Sex Offenders in DeKalb County Within 1000ft Buffer Zone



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 non-existent.

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.²³³ In Georgia, the legislators said their goal was to “drive sex offenders out of the state.”²³⁴ The Attorney General in Nebraska in support of residency restrictions told reporters that his goal was to “[k]eep[] these criminals out of our communities.”²³⁵ An Iowa Mayor supporting exclusion zones made it clear that he “just didn’t want those kind of people moving into town.”²³⁶ 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.”²³⁷ 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 the prior precedents of banishment, exclusion zones fit clearly within that historical paradigm. The residency restrictions meet all three essential elements to an exile punishment. Even beyond the definitional argument, the similarities to the only major internal exile system in the Soviet Union are also strong.

Prospika has several important commonalities with the exclusion zones in America. First, neither system actually banishes an offender from the sovereign territory. Rather the statutes focus on limiting the residency options of criminals. The result is a situation where a person is banished from mainstream society, but not allowed to leave the larger sovereign body. Second, the laws target some of the most unsympathetic members of their respective societies. In the Soviet Union, prostitutes and repeat criminals were the primary targets for banishment. In the United States, sex offenders have made easy targets for politicians. Third, the laws are

²³³ Logan, *supra* note 17, at 19-20.

²³⁴ Matthew S.L. Cate, *Perdue Signs Bill Targeting Sex Offenders*, CHATTANOOGA TIMES FREE PRESS, Apr. 27, 2006, at B1.

²³⁵ *Governor, Attorney General, Sponsoring Senator Laud Implementation of LB 1199*, US STATES NEWS, July 12, 2006.

²³⁶ Marion Rhodes, *Iowa Towns Tell Sex Offenders to Stay Out: An Increasing Number of Communities are Passing Strict Residency Restrictions*, OMAHA WORLD-HERALD (NEBRASKA), Mar. 19, 2006, at 06B.

²³⁷ Jason Garcia, *State Cracks Down on Predators*, ORLANDO SUN SENTINEL, Sep. 14, 2005, at A1.

enforced entirely extra-judicially and without possibility of appeal.²³⁸ Many of the statutes in the United States also apply retroactively and require 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.²³⁹ With the development of sex offender exclusion zones, however, it appears the United States is taking its first steps in potentially following the lead of the Soviet Union in the utilization of internal exile punishments.

Given that *prospika* is one of the very few modern systems of internal exile, we would ignore these commonalities at our peril. The connections between exclusion laws and *prospika* can help to illustrate the pitfalls of an exclusion-zone-centered approach to sex offender policy. And identifying those connections helps demonstrate that 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.²⁴⁰ Without frontiers, unguided banishment 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 prisoners is due in most part to simple economics. Exclusion zones are the natural culmination of a society which does not want to wholly rely on prisons, but still wants to remove its offenders from its midst.

Certainly, residency restrictions are different than unguided banishment 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

²³⁸ Logan, *supra* note 17, at 16.

²³⁹ David Bird, *Global Rights Group Calls For More Pressure*, NEW YORK TIMES, Oct. 16, 1986, at A16.

²⁴⁰ 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 *Exiles from Main Street*, TALKLEFT: THE POLITICS OF CRIME, <http://www.talkleft.com/story/2005/10/03/627/48298>, Oct. 3, 2005 (last visited November 17, 2006). 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.

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. – George Santayana²⁴¹

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 three major categories. First, exclusion zones reinforce the otherness of offenders by rendering them exiles. This effect fundamentally undermines the stated goals of residency restrictions while jeopardizing fundamental American values. Second, residency restrictions create a false sense of security by targeting the wrong population with ineffective restrictions. The restrictions also undermine more effective methods of fighting sex offender recidivism. Third, 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.

1. Reinforcement of Otherness

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

²⁴¹ W.H. AUDEN, VIKING BOOK OF APHORISMS 73 (1920).

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 George 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.²⁴² Ievleva-Pavlenko settled in Alexandrov, 101 kilometers from Moscow and the “unofficial capital of the 101st kilometer.”²⁴³ 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.”²⁴⁴ So, Ievleva-Pavlenko, and others like her, continued to live within the Soviet Union, because she could not leave, and became part of one of many communities that existed because the government had no other place to send the people living there.

So far, exclusion zones have only created small pockets of sex offender communities often located in motels or small apartment complexes.²⁴⁵ 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. And as private communities seek to drive out sex offenders, a market will certainly develop such that as the experience in the Soviet Union demonstrated, exile communities will develop. When these 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 time in prison, they will be able to become “productive” members of society. However, as the experience of those

²⁴² Fitzgerald, *supra* note 3.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Brandon Bain, Erik German and Tom McGinty, *Sex Offenders Where They Live; Neighbors You May Not Know About; Largest Clusters of Sex Offenders are Concentrated Across the South Shore Of LI In Low-Income Communities*, *NEWSDAY* (NEW YORK), Oct. 23, 2006, at A06.

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 Russia, it is likely that internal exile will only exacerbate the difficulties of reentry in America. And, as research has indicated, a failure to facilitate successful reentry will likely increase the risk of sex offender recidivism.²⁴⁶ Further, undermining housing, employment, and access to public transportation also increases the risk of recidivism.²⁴⁷ 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.²⁴⁸ The growth of the Internet has also shown the problem of networking among sex offenders.²⁴⁹ Creating sex offender communities will likely create both 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.²⁵⁰

The demographics of these ghettos will surely have unusual aspects. An overwhelming majority of convicted sex offenders are men.²⁵¹ While some of them marry or re-marry upon release from prisons, the gender breakdown of the population will certainly 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, the opportunities for

²⁴⁶ COLO. DEPT. OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 5, available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf (Mar. 15, 2004) [hereinafter “Colorado Report”].

²⁴⁷ Carrie Coppernoll, Bryan Dean, and John David Sutter, *Sex Offenders Exiled*, DAILY OKLAHOMAN, Aug. 20, 2006 [hereinafter “Coppernoll”].

²⁴⁸ JAMES Q. WILSON, THINKING ABOUT CRIME 146 (rev. ed. 1983).

²⁴⁹ Edith Bevin, *Child Porn Ring Unravels in Raids*, NORTHERN TERRITORY NEWS (AUSTRALIA), Oct. 1, 2004, at 7.

²⁵⁰ *Id.*

²⁵¹ Brady Dennis and Matthew Waite, *Where is a Sex Offender to Live?*, ST. PETERSBURG TIMES (FLORIDA), May 15, 2005, at 1A

the typical patterns of sexual violence (male to female, male to child of either sex) will have less targets.

However, even if there will be fewer victims in sex offender communities, it does not follow that there will be less incidents of sexual violence. A notable aspect of child molesters is that they often abuse the same victims over a long-time frame.²⁵² Similarly, child pornography often uses the same “models” over and over.²⁵³ Creating a community with a lot of persons prone to repeat past sex crimes will facilitate an environment where sexual violence is more acceptable. There is less normalizing, socializing, and other pressures against sexual violence in a community where 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 where sexual violence is the norm, not the exception. That is not something that will facilitate the treatment and rehabilitation of offenders.

However, many sex offenders may not choose 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 are a certain percentage of sex offenders that fail to report or otherwise disappear.²⁵⁴ This has developed into an accepted inevitability in the American criminal justice system.²⁵⁵

With the advent of exclusion zones, there are good reasons to expect this disappearing act to occur more frequently with sex offenders.²⁵⁶ The life of a restricted sex offender who chooses to live in a community with exclusion zones is one of constant accountability and responsibility. An offender 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 lives within an exclusion zone, then the offender must either live separately or the whole family must relocate. Because sex offenders are often a transient population,²⁵⁷ 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

²⁵² Wendy Koch, *Chat Site Showed Live Molestation*, USA TODAY, Mar. 16, 2006, at 3A.

²⁵³ *Id.*

²⁵⁴ Coppernoll, *supra* note 247.

²⁵⁵ *Id.*

²⁵⁶ 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.*

²⁵⁷ Durling, *supra* note 206, at 334-36.

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 system 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.²⁵⁸

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

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.²⁵⁹ As a result, a group of prosecutors and police in Iowa have formed a group to try to get the state to repeal its exclusion zone legislation.²⁶⁰

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, no 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.

²⁵⁸ N. Modestov, *The “One Hundred First” Kilometer*, CURRENT DIGEST OF THE SOVIET PRESS, Nov. 1, 1989, at 25.

²⁵⁹ Brandon Bain, *What if There is no Space?: Residency Limits on Sex Offenders May Need to be Adjusted*, author of *Suffolk legislation says*, NEWSDAY (NEW YORK), Nov. 23, 2006, at A18 (noting that, “[a]fter Iowa legislators last year passed a law requiring offenders to live 2,000 feet from places where children congregate, law enforcement said that the number of offenders unaccounted for has doubled”).

²⁶⁰ Megan Woolhouse, *Can Bans Protect Kids from Attack?: Some Raise Doubts on Residency Limits*, THE BOSTON GLOBE, at 1.

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. 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.²⁶¹ In order to ensure lifetime enforcement in relative real-time for sex offenders, the cost would be exorbitant.²⁶² For the time being, the state is offering far less to avoid 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. However, early reports show that the population of offenders that could actually pay for their monitoring may be very few.²⁶³

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.²⁶⁴ 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.

2. False Sense of Security

Even though courts have repeatedly upheld exclusion zones, they have acknowledged that from a policy perspective, the laws do not make a lot of sense. Residency exclusion zones only control where a sex offender sleeps at night. During waking hours, an offender is free to roam near schools, playgrounds, or parks.

Insofar as the exclusion zone laws are a band-aid on the problem of sex offender recidivism, they create a false sense of security. Instead of pursuing policies with a track record of success, exclusion zones create an illusionary cure to the problem. Meanwhile, the rates of sex offenders not reporting to their probations officers increase, offender communities and networks are actually reinforced, and treatment options are curtailed.²⁶⁵

²⁶¹ Wernick, *supra* note 138, at 1188 (noting that, "many communities lack the resources to effectively monitor the movement of sex offenders"); Niki E. Delson, *Prop. 83 – Jessica's Law – is Dangerous for Humboldt County*, EUREKA TIMES STANDARD (CALIFORNIA), Sep. 30, 2006.

²⁶² *Id.*

²⁶³ Delson, *supra* note 261 (noting that, "the physical and financial burden of monitoring the ever-increasing number of registrants will fall on local law enforcement").

²⁶⁴ *Id.*

²⁶⁵ Perhaps the only way to compensate for the shortcomings of the existing exclusion zone statutes is to expand the protected zone radii to completely banish the offenders. If that is the result, then the predictions of this article will have occurred. And if not, then it is

A major problem in having intelligent debate about sex offender policy is the hysteria that has been used to misinform and, consequently, misdiagnose the situation.²⁶⁶ One of the most common myths about sex offenders is that most of them are lurking in the bushes ready to attack a child who might happen by.²⁶⁷ This fear of the stranger predator replicates an earlier myth concerning the rape of adult women.²⁶⁸ However, approximately ninety-three percent of sexual offenses against children are committed by a family member, friend, or other person known to the victim.²⁶⁹ As Eric Janus has noted:

Sexual predators are rare, atypical sex offenders. But because of the intense focus of the media and these new laws, predators have become archetypical. In the headlines, and in these laws, sexual predators have come to symbolize the essence of the problem of sexual violence.²⁷⁰

A key question in determining the proper policies for convicted sex offenders who have been released into the community is what are the expectations of recidivism? Notably, the Eighth Circuit, in *Doe v. Miller*, relied on the factual finding that sex offender recidivism “is between 20 and 25 percent.”²⁷¹ On the question of recidivism, the best available study was issued in 2003 by the Department of Justice (“DOJ”).²⁷² The DOJ study examined the criminal records of the 9,691 sex offenders released in fifteen states since 1994. The key finding of the study was that recidivism rates among sex offenders were far lower than previously believed.²⁷³ The DOJ study found that:

Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime. Within the first 3 years following their release from prison in 1994, 5.3% (517 of the

unlikely that exclusion zones will realize any of the policy goals of the lawmakers supporting them. That is the double-bind of these laws. If they only limit the sleeping hours of the offenders, but allow the offenders to live within relative proximity to children, then they have accomplished almost nothing. If, however, the exclusion zones continue to expand, then the laws switch from simple regulations to de facto exile from entire states.

²⁶⁶ Hobson, *supra* note 27, at 966.

²⁶⁷ *Id.* at 965 (noting that, “[a]lthough many people believe that incurable, creepy strangers stalking children commit all child abuse, only a small fraction of child molestation actually comes at the hands of strangers”).

²⁶⁸ Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 Nw. U.L. Rev. 1271, 1280 (1994).

²⁶⁹ HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000).

²⁷⁰ JANUS, *supra* note 16, at 3.

²⁷¹ *Id.* at 707.

²⁷² LAWRENCE A. GREENFELD, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003).

²⁷³ *Id.* at 3.

9,691) of released sex offenders were rearrested for a sex crime. The rate for the 262,420 released non-sex offenders was lower, 1.3% (3,328 of 262,420).²⁷⁴

The recidivism rate of only 5.3% for the critical first three years after release, while still substantially higher for sex offenders than for other criminals, is notable because every legislature and court analyzing exclusion laws has relied on figures much higher.²⁷⁵

Sex offenders are far from a monolithic population. Sex crimes include rape, sexual assault, statutory rape, child molestation, public nudity, bestiality, necrophilia, criminal voyeurism, and production of obscene materials.²⁷⁶ Even among a population like child molesters, there are a wide range of criminals. There are offenders who commit incest, who sexually assault pre-pubescent children, primarily engaged in the production of child pornography, who have committed statutory rape with a teen, and, the rarest case of all for which exclusion zones are actually targeted, those who target the children of strangers for sexual purposes. And then among each sub-population, there are individuals with shorter and longer histories of criminal behavior. There are also different levels of likelihood for rehabilitation and reform.

To treat all of those populations the same by applying a life sentence of social isolation through internal exile is foolhardy. If society simply wants to keep sex offenders away from children, then it would be better served by simply applying lifetime prison sentences across-the-board. Releasing prisoners and applying the same social control mechanism regardless of individual differences is a policy that will fail to serve any legitimate punitive or regulatory interest. Residency restrictions treat these incredibly diverse populations the same with little regard to the efficacy of doing so.

Another one of the unfortunate side effects of exclusion zones is that sex offenders are often forced to move far away from treatment facilities.²⁷⁷ Because exclusion zones are typically centered around schools 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

²⁷⁴ *Id.* at 5.

²⁷⁵ More reliable data specific to exclusion zones has not yet been collected. Studying the efficacy of exclusion zones is currently very problematic because of the small sample sizes involved. Even in states that have passed exclusion zone laws two years ago, implementation was delayed because of courts issuing preliminary injunctions until the resolution of legal challenges. As a result, the exclusion zones have just begun being enforced within the last year. The data from those states is just beginning to be collected and it will be some time before any reliable empirical evidence is available on the effects of residency restrictions on sex offenders.

²⁷⁶ *See generally*, RICHARD A. POSNER & KATHERINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS (1996).

²⁷⁷ Winter, *supra* note 286, at B1.

offenders into rural areas. Unfortunately, almost all major sex offender treatment facilities are located in urban areas. Generally, the sex offender treatment programs are located at major universities and health care facilities. As a consequence, by pushing offenders far away from treatment facilities, the result is that less sex offenders are able to get treatment.²⁷⁸

This effect can be even 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 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 on which 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.”²⁷⁹ 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 of 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.²⁸⁰ While the studies do suffer from various methodological limitations,²⁸¹ the empirical evidence from states with developed treatment programs show a statistically significant difference in the level of sex offender recidivism.²⁸² Treatment has also shown greater effectiveness of decreasing recidivism of certain classes of offenders.²⁸³

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 tradeoff with one of the few policies that has actually shown promise in decreasing offender recidivism.

²⁷⁸ *Id.*

²⁷⁹ TENN. CODE ANN. § 40-39-211(a) (2006).

²⁸⁰ JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 8 (2005).

²⁸¹ *Id.* at 20.

²⁸² JANUS, *supra* note 16, at 53-54.

²⁸³ LA FOND, *supra* note 280, at 20.

By removing sex offenders from friends, family, and treatment, we are surely setting them up for failure. It reinforces the cycle of crime and essentially washes 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.

3. Class-Based Banishment in American Democracy

Beyond the consequentialist objections to the formation of sex offender societies and pushing offenders underground, there is a significant problem with expel 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. 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 extrajudicially with no warning and no recourse for the offender. Wayne Logan argues that this move upsets America's basic collectivist endeavor.²⁸⁴ 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.

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. There were major exclusions like racial segregation of African Americans and interning of Japanese-Americans. There are also less well-known attempts to physically exclude like the Chinese laborer situation described in Brewer's dissent in *Ju Toy* and the crackdown on homeless persons in the middle of the Twentieth Century.

Sex offenders are easily distinguishable from all of those ugly chapters 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. That the Georgia Supreme Court saw no problem with the legislature's

²⁸⁴ See generally, Logan, *supra* note 17.

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 an easy target 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.²⁸⁵ That tool may never be wielded against anyone other than sex offenders, but its mere presence is an affront to basic precepts of American pluralism.

B. Aggravating Factors

The effects of reinforcing otherness and creating a false sense of security are being 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 “uncertainty effect” which makes the 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.²⁸⁶ 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.²⁸⁷ Wyoming has

²⁸⁵ JANUS, *supra* note 16, at 5.

²⁸⁶ Deena Winter, *City to Look at Offender Restrictions*, LINCOLN JOURNAL STAR (NEBRASKA), May 16, 2006, at B1.

²⁸⁷ Leskanic, *supra* note 186, 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.”)

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.²⁸⁸

Quick and effective reaction by a community neighboring one with an established exclusion policy is also necessary to avoid "inter-community strife."²⁸⁹ Communities are forced with the choice of risking becoming dumping grounds for other communities' sex offenders or to implement their own exclusion zones. There is not any 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.²⁹⁰

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 been a steady increase in the radii of exclusion zones used by states, a trend that is likely to continue in the future.²⁹¹

The race-to-the bottom is, in itself, not inherently destructive. After all, if every community adopted sex offender exclusion zones, it at least might yield some uniformity among differing sovereign areas. However, the domino effect serves to exacerbate the 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 were 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.

²⁸⁸ *Wyoming's Sex Offender Rules May Attract Convicts from Other States*, BOSTON HERALD, Feb. 20, 2007, at A7.

²⁸⁹ Snider, *supra* note 31, at 457.

²⁹⁰ Logan, *supra* note 17, at 20.

²⁹¹ *Id.* at 3.

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. Child-care 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 the state-defined exclusion zones. Those state exclusion zones are supplemented by the restrictions of over 200 cities. Some of these 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 complex that police have been unable to figure out when offenders are in violation of the residency restrictions.²⁹²

Unfortunately for offenders, states and localities have provided little guidance to offenders about where they can and cannot live. And the landscape for acceptable residencies changes on a regular basis because of the increasing trend of localities adopting their own restrictions on offenders. Without that information deficit, 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.

²⁹² Sandra Pedicini, *Sex-Offender Buffer Zones Change Little; The Effect of the Ordinances Has Been to Encourage Offenders to Stay Put*, ORLANDO SENTINEL (FLORIDA), May 28, 2006, at B1.

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, sex offenders will be offered less and less real estate where they can live. 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 between different protected zones. This type of aggregation occurs prominently under the Georgia law. 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. This is because bus stops supplement the already expansive exclusion zones covering schools, child-care facilities, and other locations. The overlapping 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 between the laws of different governmental bodies. The discussion of the Florida laws earlier is illustrative on 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 of one of these rules 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 the early cases upholding sex offender residency restrictions are losing their legal resonance.

C. 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 analyzed the analogy to banishment in the context of the ex post facto claim. In its analysis, it applied the *Kennedy v. Mendoza-Martinez* test²⁹³ as applied in *Smith v. Doe*.²⁹⁴ After finding 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."²⁹⁵

The punitive effects test has five elements. The Eighth Circuit articulated the five 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 purpose, and whether it is excessive with respect to that purpose."²⁹⁶ These factors are neither exhaustive nor dispositive, but they provided the framework for the court's analysis.²⁹⁷

The majority found the second factor, that the law promoted a traditional aim of punishment, weighed in favor of the plaintiff.²⁹⁸ Similarly, the court found the third factor, that the law imposed an affirmative disability or restraint, favored the plaintiff's claim.²⁹⁹ 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.³⁰⁰

²⁹³ 372 U.S. at 168-69.

²⁹⁴ 538 U.S. 84.

²⁹⁵ Doe II, 405 F.3d at 718 (quoting *Smith*, 538 U.S. at 92).

²⁹⁶ Doe II, 405 F.3d at 719.

²⁹⁷ *Id.*

²⁹⁸ 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 overemphasized, for it can "prove[] too much," as "any number of governmental programs might deter crime without imposing punishment."

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

²⁹⁹ Doe II, 405 F.3d at 721.

³⁰⁰ Doe II, 405 F.3d at 719-23.

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, then 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 "most significant factor" in its opinion.³⁰¹ 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.

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, the punitive effects of the statute are much greater than the text of the law might indicate. Similarly, if the race to the bottom 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 actually require a person only travel 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, minor relocation turns into de facto banishment.

While the courts have primarily focused on the analogy to banishment in their ex post facto analyses, the finding that the laws are punitive in effect also bears on the outcome of other constitutional questions as well. Without a finding that a statute actually punishes an offender, a cruel and unusual punishment is impossible to win under the Eighth Amendment.³⁰² A double jeopardy challenge gains more traction if the *Kennedy v. Mendoza-Martinez* factors weigh in favor of the offender.³⁰³ If the sex offender is found to be actually banished, the court will be forced to address the substance of the interstate³⁰⁴ and intrastate travel³⁰⁵ rights claims. Further, a court may actually be forced to decide the muddled area of law about whether

³⁰¹ Doe II, 405 F.3d at 721 (quoting *Smith*, 538 U.S. at 102).

³⁰² *Coker v. Georgia*, 433 U.S. 584 (1977).

³⁰³ *Hudson v. United States*, 522 U.S. 93, 98-99 (1997).

³⁰⁴ *United States v. Guest*, 383 U.S. 745, 757 (1966).

³⁰⁵ *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002).

banishment as punishment is illegal if the court first determines that exclusion zones actually banish defendants. 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.

D. Addressing Arguments for Residency Restrictions

While the 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 in turn below.

1. Avoiding Temptation and Victim Grooming

The most common rationale offered in favor of these laws is that they prevent temptation of sex offenders in their daily lives.³⁰⁶ The temptation argument is that sex offenders will not be around children and therefore not be tempted to commit a sex offense against them. A secondary, and probably more powerful, argument is that by having sex offenders in communities, they are able to form linkages with potential victims to enable 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 victim.

While these arguments are facially appealing, there are several problems with them. Some of these argumentative 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,³⁰⁷ or other non-child-focused sex offender, is a high-risk candidate for raping a child. In fact, someone guilty of non-sexual assault is a much risk offender who is not included under existing residency restriction

³⁰⁶ Singleton, *supra* note 155, at 610.

³⁰⁷ Oklahoma for example puts “indecent exposure” in the class of sex offenders subject to residency restrictions. Coppernoll, *supra* note 247 (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).

schemes.³⁰⁸ The mismatch between targeted offender populations and those who actually pose some risk undermines the ability to monitor offenders to ensure compliance with restrictions. The only existing residency restriction which addresses this problem is the Arkansas law because it requires a particular finding of dangerousness. Without such a provision, the other nineteen state statutes 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 evidence that even with residency restrictions that contact with children is limited to the extent of avoiding 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 actually would result in a notable net increase in children living in proximity to the sex offender.³⁰⁹ 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 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 school or parks affects reoffense."³¹⁰ 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."³¹¹ After reviewing the effects of Iowa's statute, the Iowa County Attorneys Association found that, "[r]esearch does not support

³⁰⁸ GREENFELD, *supra* note 272, at 24.

³⁰⁹ Singleton, *supra* note 155, at 612-13 (noting that, "[o]verall, 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.").

³¹⁰ MINNESOTA DEPARTMENT OF CORRECTIONS, LEVEL THREE OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 4 (2003).

³¹¹ Colorado Report, *supra* note 246, at 37.

the belief that children are more likely to be victimized by strangers at the covered locations than at other places.”³¹² No study to date has shown any positive effect of these statutes in terms of decreasing recidivism.³¹³

The arguments presented above in regards to reinforcing otherness and creating a false sense of security bear on this argument as well. If offenders are forced into sex offender ghettos, the abilities to form sex criminal networks and sex offender schools of crime are enhanced. Further, to the degree that offenders end up going underground, the current probation officer and police monitoring is completely lost.³¹⁴ The result is offenders have less supervision, not more. Further, the lack of social linkages and treatment opportunities for sex offenders subject to a residency restriction scheme means that the offenders will lack the ability to 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 the heinous nature of sex offenders means that my concerns are misplaced. 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 sex offenders are the most vile criminals, then should not any punishment be acceptable? And of all the punishments available, including death and life in prison, banishment seems minor in comparison.

This argument would have more merit if the banishment was 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 or 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

³¹² Matthew Bruun, *Sex Offender Plan Raises Questions; ACLU to Contact Fitchburg Councilors*, TELEGRAM & GAZETTE (MASSACHUSETTS), Jun. 23, 2006, at A1; Delson, *supra* note 261.

³¹³ Singleton, *supra* note 155, at 615.

³¹⁴ Dee Dixon, *Ordinances Leave Areas’ Sex Offenders With Anxiety*, THE BEAUMONT ENTERPRISE (TEXAS), Oct. 23, 2006.

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

This argument also puts supporters of residency restrictions at odds with the judicial rationales needed to find 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 pivot point for determining the legality of exclusion zones. 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 does nothing to protect children and reduce 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 these statutes have.

The just desserts argument is also substantially undermined by the enormous class of persons affected by these statutes. I have explained in detail the incredible number 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 over-punished 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 system, probation officers and registry requirements already assure that most sex offenders are monitored and police would know where to turn to find particular sex offenders.³¹⁵ While there might be some advantage to

³¹⁵ *Id.*

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. Schools of crime can easily develop. Whatever benefits are to be 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 Sarnoff³¹⁶

The use of internal exile for sex offenders is a misguided approach to dealing with sex offender recidivism while sacrificing 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 raised that pattern 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 dominate the front page of newspapers and lead local news coverage. These forces make an intelligent debate about sex offenders a very difficult proposition. Without a change in the underlying attitudes making the sex offender crackdown a no-lose issue for politicians, a reorientation of sex offender policy is unlikely.

Despite these obstacles, there are many alternatives for policymakers opposed to an exile-centric approach to sex crimes. These solutions offer viable policy and litigation options through all levels of government.³¹⁷ Eric

³¹⁶ David Sarnoff, *David Sarnoff Quotes*, available at: http://thinkexist.com/quotation/we_cannot_banish_dangers-but_we_can_banish_fears/202813.html (last visited Feb. 2, 2007).

³¹⁷ Wayne Logan is optimistic that a challenge on dormant commerce clause grounds could succeed in the courts. Logan, *supra* note 17, at 23-38. To support his contention, he cites Rehnquist's willingness to engage in an expansive reading of the dormant commerce clause. *Id.* Logan also cites cases like *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), to show how similar exclusion zones against homeless persons were struck down in

Janus, among others, has forcefully argued for a public health approach to dealing with sex offenders.³¹⁸ Such an approach eschews isolation and exile and focuses on assimilation, prevention, and re-entry. 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).³¹⁹ 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 to be tailored to individuals subject to those policies. 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.³²⁰ I have discussed earlier how Arkansas has managed to integrate risk assessment into a residency restriction policy. 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 on living near a high school, but may have no risk in being near a

a reading of the constitution at least in part derived from the dormant commerce clause. I am not as optimistic, especially with Rehnquist no longer on the Court, that the remaining conservative Justices will be willing to embrace the liberal sensibilities of Justice Douglas in *Papachristou*. Without a clear constitutional argument against exclusion zones, I think waiting for a Supreme Court decision striking down the legislation is a poor course of action. Similarly, expecting state courts to offer such an expansive reading of the federal or state constitutions seems to be overly optimistic.

Logan ultimately concludes that a Congressional solution is undesirable because of its poor record in creating effective legislation related to other hot-button criminal issues. Logan, *supra* note 17, at 37. Logan also doubts that Congress would be serious in its efforts to limit exclusion laws given the overwhelming popularity of the statutes. *Id.* I agree with Logan that a federal legislative action is probably unlikely and undesirable given the past failings in bills like the Adam Walsh Child Protection and Safety Act. PUB. L. NO. 109-248 (2006).

As a result, I think the best hope for a solution is probably in state legislatures. States have adopted the exclusion zone laws with little debate and little thought about what the long-term consequences of their policies will be. However, in Kansas and Colorado, the legislatures have had much more reasoned debates and, thus far, have not implemented residency restriction laws.

³¹⁸ JANUS, *supra* note 16, at 116-20.

³¹⁹ *Id.* at 116.

³²⁰ Durling, *supra* note 206, at 348-49.

child care center.³²¹ At the very least, it would offer the offender a chance to rebut the state's rationales for seeking internal exile.

Instead of a simple life-time penalty, follow-up policies can play a role. In instances where there are clear indications that an offender is likely to reoffend, a judge can be allowed 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.

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, that means higher sentences are warranted. Other times, probation and treatment are preferable. And, in some instances, it is even possible that some form of exile may be part of a narrowly-tailored package of punishment.

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

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³²¹ *Id.*, at 350-51.