

IN ACCORDANCE WITH A PUBLIC OUTCRY: ZONING OUT SEX
OFFENDERS THROUGH RESIDENCE RESTRICTIONS IN
FLORIDA

*Steven J. Wernick**

I.	INTRODUCTION	1148
II.	PROGRESSION OF LEGISLATION AIMED AT SEX OFFENDERS	1151
	A. <i>Stranger Danger: The Sex Offender Problem</i>	1151
	B. <i>Identification and Notification Laws</i>	1153
	C. <i>Development of Residence Restrictions</i>	1157
III.	RESIDENCE RESTRICTIONS IN FLORIDA	1160
	A. <i>State Legislation</i>	1160
	1. Restrictions Against General Sex Offenders	1161
	2. Restrictions Against Sexual Predators	1162
	B. <i>Local Ordinances</i>	1163
IV.	CONSTITUTIONAL CHALLENGES TO RESIDENCE RESTRICTIONS: <i>DOE V. MILLER</i>	1166
	A. <i>Procedural Due Process</i>	1168
	B. <i>Substantive Due Process</i>	1170
	1. Right to Privacy Regarding Family Life	1171
	2. Right to Travel	1172
	3. Right to Live Where One Chooses	1174
	4. Rational Basis Review	1175
	C. <i>Self-Incrimination</i>	1177
	D. <i>Ex Post Facto Laws</i>	1178
V.	ANALYZING FLORIDA’S APPROACH TO RESIDENCE RESTRICTIONS	1182
	A. <i>Lessons from Miller: Upholding Florida’s Statewide Restrictions Under the Eighth Circuit’s Analysis</i>	1182

* J.D. anticipated 2007, University of Florida Levin College of Law; M.R.P. 2004, UNC-Chapel Hill; B.A. 2002, Boston University. This Note would not be possible without the guidance of my advisor, Jeffrey Bekiares, and Professor Michael Allan Wolf, who has served as a tremendous mentor throughout the past year. I would also like to thank Katherine O’Donniley for her endless words of encouragement and for challenging me to think deeply about my views on this engaging topic, politics, and so much more. Finally, this Note is dedicated to my parents, Bob and Ellie—two fantastic human beings. I am eternally grateful for their love and support.

B. <i>Unintended Consequences</i>	1187
1. Problems with Enforcement	1187
2. Potential Increase in Rates of Recidivism	1188
3. Impact on Families	1189
4. Intergovernmental Competition	1190
C. <i>State v. Local Laws: The Case for Preemption</i>	1191
VI. SUGGESTIONS FOR LEGISLATIVE REFORM	1193
A. <i>Identifying an Opportunity for Florida Lawmakers</i>	1193
B. <i>Model Legislation</i>	1193
VII. CONCLUSION	1195

I. INTRODUCTION

On January 11, 2006, William Smith Jr., a sixty-five-year-old convicted sex offender,¹ moved into a small wooden house behind a day-care center in Ocala, Florida.² His housewarming, however, was short-lived. The day after Smith moved in, local police officers arrived at his house and informed him that he would have to find another place to call home.³ Under a new city ordinance, sex offenders guilty of crimes against children under the age of sixteen are prohibited from living within 1,500 feet of locations where children gather.⁴ When Smith failed to take steps to change his residence,⁵ on January 30, 2006, he became the first person arrested under Ocala's residence restrictions.⁶

Ocala is not the only place where sex offenders face restrictions on where they may reside. Twenty different states and a spate of local governments have turned to residential buffer zones as a possible method of preventing sex crimes against children.⁷ Expanding upon registration

1. Millard K. Ives, *Police Arrest Sex Felon Living Near Daycare*, STAR-BANNER, Jan. 31, 2006, at A1. Smith had been convicted in Miami in 1990 of sexual battery on a child under the age of thirteen. *Id.* Throughout this Note, the term "sex offender" is used to describe a broad class of sex offenders, including any person who has been convicted of a sex crime, regardless of the severity of the crime or likelihood of reoffending. Conversely, the term "sexual predator" is used sparingly to refer to only those repeat offenders who have been classified as more dangerous offenders under the law.

2. *Id.*

3. *Id.*

4. OCALA, FLA., CODE OF ORDINANCES § 15-3 (2005).

5. Ives, *supra* note 1, at A1. While police officers sat down with Smith and pointed out potential residences in Ocala on a map, Smith claimed that he could not afford to move until he received his pending government check. *Id.*

6. *Id.*

7. See RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79D.07[2][h] (Michael Allan Wolf ed., 2006) [hereinafter POWELL ON REAL PROPERTY].

laws aimed at keeping tabs on previously convicted sex offenders,⁸ state lawmakers have enacted residence restrictions prohibiting sex offenders from living near schools and other child-centered facilities.⁹ Not satisfied with existing state legislation, numerous municipalities have passed or are considering laws imposing even harsher restrictions.¹⁰ In the spirit of the Not in My Backyard (NIMBY) movement, these laws often appear to be an attempt by towns, cities, counties, and other local governments to expel sex offenders altogether.¹¹

Proponents of residence restrictions argue that there is no cure for sex offenders and that sex offenders have a high rate of recidivism that makes them a potential threat forever.¹² Opponents counter that recent studies show no causal link between proximity of sex offenders to children and the propensity of recidivism.¹³ Despite evidence that residence restrictions

8. See Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1216-18 (1998) (discussing the development of sex offender registration and community notification statutes in the 1990s).

9. See, e.g., FLA. STAT. § 794.065 (2006) (prohibiting sex offenders convicted of sexual battery, lewd or lascivious conduct, sexual performance involving a child, or the selling of a child, from living within 1,000 feet of a school, day-care facility, park, or playground when the victim of the offense was under the age of sixteen). For a list of other states that have enacted residence restrictions, see statutes cited *infra* note 60.

10. See POWELL ON REAL PROPERTY, *supra* note 7, at § 79D.07[2][h].

11. See Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1850 (2005). Teichman asserts that jurisdictions often adopt harsh policies aimed at driving unwanted persons or activities away, especially when neighboring jurisdictions are engaging in the same policies. *Id.* “[S]uch laws and policies are another example of what has become known as Not In My Back Yard (NIMBY) legislation, which aims to remove unwanted activities to other jurisdictions.” *Id.*

12. See *Doe v. Miller*, 405 F.3d 700, 707 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005) (relaying the testimony of a psychologist that “there are never any guarantees that they might not reoffend” and that “there are ‘very high rates of re-offense for sex offenders who had offended against children’”); Samantha Imber, *Sexual Offenses: Prohibit Sexual Predators from Residing Within Proximity of Schools or Areas Where Minors Congregate*, 20 GA. ST. U. L. REV. 100, 101 (2003) (stating that restrictions on locations of residence are necessary because sex offenders are “virtually impossible to rehabilitate and these crimes are so difficult to detect and control”); Steve Thompson, *Sex Offender Law Criticized for Increasing Risk*, ST. PETERSBURG TIMES, May 16, 2004, at B1, available at http://www.sptimes.com/2004/05/16/news-pf/Pasco/Sex_offender_law_crit.shtml (quoting Florida State Senator Mike Fasano as stating that “[n]o longer will the worst of the worst be allowed to live anywhere near a location where children spend most of their waking lives”).

13. See Association for the Treatment of Sexual Abusers, Facts About Adult Sex Offenders, <http://www.atsa.com/ppOffenderFacts.html> (last visited Sept. 4, 2006) [hereinafter ATSA Policy Statement]. In fact, opponents argue that sex offenders may be more likely to reoffend under these residence restrictions because of emotional distress associated with being segregated from society and lack of access to treatment. MINN. DEP’T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 9-10 (2003) (revised Feb. 2004) (finding such problems with residence restrictions as “a high concentration of

may be missing the mark when it comes to preventing sex crimes involving child victims, courts are typically reluctant to interfere with state legislatures on how best to protect the health and safety of their citizens.¹⁴ In light of the Eighth Circuit's ruling in *Doe v. Miller*¹⁵ and the Supreme Court's decision not to grant certiorari,¹⁶ it seems unlikely that Florida's current legislation will succumb to constitutional challenges.

The recent upsurge in municipal efforts to enact even stricter residence restrictions, however, is cause for concern.¹⁷ These municipal ordinances may be pre-empted by, or in conflict with, state law when the state has already occupied the field. Most importantly, and from a policy perspective, tougher residence restrictions may not solve the problem. Even if these ordinances are constitutional on their face, the myopic race to exclude sex offenders from communities could potentially increase their propensity to reoffend.¹⁸

The Florida Legislature is continuously re-thinking its comprehensive approach to the sex offender problem.¹⁹ This Note evaluates Florida's

offenders with no ties to the community; isolation; lack of work, education, and treatment options; and an increase in the distance traveled by agents who supervise offenders"); Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 174 (2005) (relaying comments of sex offenders in Florida that residence restrictions do not stop them from seeking out victims).

14. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985) ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.").

15. 405 F.3d 700.

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

17. See Amy Sherman & Nikki Waller, *Creating a 'Devil's Island,'* MIAMI HERALD, May 30, 2005, at 1B.

18. See Monica Davey, *Time Served: Barring the Unwanted, Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1 (summarizing the argument that residency restrictions are ineffective because they increase homelessness and clustering of sex offenders).

19. See, e.g., H.B. 91, 108th Leg., Reg. Sess. (Fla. 2006) (prohibiting sex offenders from living within 2,500 feet of schools, day-care facilities, parks, playgrounds, public school bus stops, or "other places where children regularly congregate"); H.B. 251, 108th Leg., Reg. Sess. (Fla. 2006) (expressly permitting counties and municipalities to create residence restrictions independent from state law); H.B. 591, 108th Leg., Reg. Sess. (Fla. 2006) (prohibiting sex offenders from living "within 1,500 feet of any school, day-care center, park, playground, library, or other business or place where children regularly congregate"); S.B. 768, 108th Leg., Reg. Sess. (Fla. 2006) (prohibiting sex offenders from living within 2,500 feet of schools, day-care facilities, parks, playgrounds, public school bus stops, or other places where children regularly congregate and defining "within 2,500 feet" as being measured as a straight line between two property boundary lines). Although none of these bills were enacted into law during the 2006 Florida legislative session, a number of state legislators have continued to discuss strengthening laws against sex

residence restrictions against sex offenders in light of the most recent developments in the courts and discusses potential solutions to protecting these restrictions against litigation. This Note will proceed with a background on sex crimes, discussing the progression of restrictive legislation aimed at sex offenders, from registration and notification laws to new laws that effectively quarantine sex offenders from certain neighborhoods. This Note will then address constitutional challenges faced by state and local governments and the recent holding in *Doe v. Miller*, upholding the legitimacy of these laws.

In the wake of *Doe v. Miller*, this Note will analyze Florida's approach to residence restrictions against sex offenders and the likelihood that these buffer zones will withstand judicial scrutiny. Even assuming that states and local governments will be afforded broad discretion, there are several concerns that must be addressed to protect against as-applied challenges and to create more effective laws, including the potential conflict between state and local laws. This Note will conclude with a proposal for creating uniform legislation that withstands judicial scrutiny while effectuating the legislative purpose of protecting children from future harm.

II. PROGRESSION OF LEGISLATION AIMED AT SEX OFFENDERS

A. *Stranger Danger: The Sex Offender Problem*

Sex crimes²⁰ have long been considered among the most monstrous offenses in society, especially when the victims are children.²¹ More often than not, victims of sex crimes are under the age of eighteen.²² In addition

offenders, and surely laws against sex offenders remain a topic of discussion around the state.

20. The term "sex crimes" includes a number of different offenses involving sexual violence and exploitation. For a listing of those crimes involving children, see FLA. STAT. ANN. § 943.0435 (1)(a) (West 2006) (identifying a sex offender as a person who has committed, attempted, or conspired to commit kidnapping, false imprisonment, luring or enticing a child under the age of twelve, sexual battery, procuring child for prostitution, indecent exposure, sexual exploitation of a minor, obscenity, involvement in pornography, and the selling and buying of minors).

21. Janis F. Bremer, *Juveniles, Rehabilitation, and Sex Offenses: Changing Laws and Changing Treatment*, 29 WM. MITCHELL L. REV. 1343, 1346 (2003) ("A sexual offense in our society is generally seen as the most heinous of crimes, particularly if the victim is a child."); Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 46-50 (1998) (discussing different reasons why sex offenses are distinguished, including cultural norms, the role of gender, psychological consequences, and the victim/offender relationship); Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 485-86 (1999) (stating that there is an assumption that sex offenders specialize in sex crimes and have mental disorders that make them more dangerous than other criminals).

22. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS 24 (1997) [hereinafter SEX OFFENSES] (finding that a majority of sexual assault victims in 1995 were under the age of eighteen). "Victims of sexual assault were the youngest victims among those

to suffering physical harm, child victims of sex crimes suffer psychological injuries with enormous long-term impacts on these young victims, their families, and even society at large.²³ Furthermore, the victimization of children is an even greater problem than many people perceive, considering that many sex crimes go unreported.²⁴

Despite evidence that the majority of sex crimes involving children are committed by friends and family members,²⁵ extensive media coverage of child abductions has drawn significant attention to “stranger danger”²⁶ and contributed to a rising fear of habitual sex offenders.²⁷ Because there is no commonly recognized cure for sex offenders,²⁸ and because research

persons described by incarcerated violent state prisoners. The median age of the victims of imprisoned sexual assaulters was less than [thirteen] years old.” *Id.*

23. See Berliner, *supra* note 8, at 1206 (asserting that research has shown that victims of sex crimes are more likely to develop Post-Traumatic Stress Disorder); Lieb et al., *supra* note 21, at 45-46 (examining whether sex offenders should be treated as a special class of offenders). While the nature of the offense and level of violence involved will surely alter the impacts on each individual victim, the sexual component of sex offenses involves a personal invasion inherently different from other crimes that leads to enhanced psychological harm. *Id.* at 48. For an examination of the effects on society, see Larry K. Brown, M.D. et al., *Impact of Sexual Abuse on the HIV-Risk-Related Behavior of Adolescents in Intensive Psychiatric Treatment*, 157 AM. J. PSYCHIATRY 1413-15 (2000) (finding that sexually abused adolescents were more likely to contract STDs and were more likely to engage in types of behavior related to HIV infection); SEX OFFENSES, *supra* note 22, at 23 (finding that in a study of state prison inmates “[s]exual assault offenders were substantially more likely than any other category of offenders to report having experienced physical or sexual abuse while growing up”).

24. See National Center for Missing & Exploited Children, Frequently Asked Questions and Statistics, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=242#3a (last visited Sept. 4, 2006) (stating that “[s]tatistics show that 1 in 5 girls and 1 in 10 boys are sexually exploited before they reach adulthood, yet less than 35% of those child sexual assaults are reported to authorities”).

25. See Daniel L. Feldman, *The “Scarlet Letter Laws” of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1107 (1997) (stating that “[b]etween seventy-five and eighty-nine percent of child sexual abuse is committed by relatives and friends” (quoting Bonnie Steinbock, *Megan’s Law: A Policy Perspective*, 14 CRIM. JUST. ETHICS 4, 5 (1995))).

26. See Cory Reiss, *Dealing with the Sex Offenders: Many Politicians Talk Tough, but From There, the Solutions Aren’t Easy*, SARASOTA HERALD-TRIB., June 14, 2005, at B1 (stating that “stranger danger” gets the most press and is the driving force behind most of the legislation against sex offenders).

27. See Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.—C.L. L. REV. 89, 89, 92 (1996) (reciting the tragic stories of Megan Kanka and Jacob Wetterling as the impetus for laws requiring sex offender registration); Lisa Henderson, Comment, *Sex Offenders: You are Now Free to Move About the Country. An Analysis of Doe v. Miller’s Effects on Sex Offender Residential Restrictions*, 73 UMKC L. REV. 797, 801-02 (2005) (noting that in reaction to “media induced fears, the public . . . insists these offenders be immediately removed from society and harsher laws [be] enacted to prevent such atrocities”).

28. ATSA Policy Statement, *supra* note 13.

suggests that sex offenders have a higher rate of recidivism than non-sex offenders,²⁹ there is a persistent perception that every child is a potential victim to the stranger lurking around the corner.³⁰ The array of media attention directed toward sex crimes and their perpetrators, in the form of news reports and television programming,³¹ has propelled this perception forward and generated a climate of intolerance towards sex offenders in the community.³²

Growing concern has prompted more than a decade of legislation to counter sex crimes against children. This legislation has progressed from laws focused on identifying sex offenders and notifying the public, to laws that literally remove certain offenders from a community altogether.³³ One thing is obvious from the progression of legislation against sex offenders: As long as courts remain deferential to legislatures, lawmakers are continuously willing to revamp these laws to alleviate public anxiety.

B. *Identification and Notification Laws*

In reaction to public concerns for children's safety, both individual

29. See generally SEX OFFENSES, *supra* note 22 (citing statistics that indicate sex offenders are far more likely to be re-arrested for another sex crime than other violent offenders).

30. See Joelle Anne Moreno, "Whoever Fights Monsters Should See to It That in the Process She Does Not Become a Monster": Hunting the Sexual Predator With Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart—Kansas v. Hendricks, 49 FLA. L. REV. 505, 506-07 (1997) (noting the depiction of sex offenders in mass culture as demonic sexual monsters).

31. VICTOR E. KAPPELER ET AL., THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE 25 (2d ed. 1996) (explaining the media's obsession with sex offenders); see also Harold Miller, *John Walsh – America's Most Wanted*, AUBURNPUB.COM, Feb. 26, 2006, http://www.auburnpub.com/articles/2006/02/26/news/lake_life/feat04.txt (discussing the abduction of Adam Walsh in 1981 and the popularity of FOX TV's "America's Most Wanted," hosted by Adam's father, John Walsh). Most recently, Dateline NBC has found a solid audience for its 'To Catch a Predator' series, in which Chris Hansen exposes sexual predators prowling the Internet for children by luring them to a house under the pretense of fulfilling sexual fantasies with teenagers only to find a camera crew and a team of police officers waiting nearby. *Dateline NBC, To Catch a Predator: Potential Predators in Petaluma* (NBC television broadcast, Sept. 29, 2006) (transcript available at <http://www.msnbc.msn.com/id/14824427/>).

32. See Henderson, *supra* note 27, at 801-02 (discussing the relationship between media coverage, public fear, and political action in relation to legislation aimed at sex offenders). In addition to media coverage, there are several other reasons why legislation has been directed at non-familial sex offenders. See Lieb et al., *supra* note 21, at 54 (surmising that political support is strongest for protection against serious injury often incurred from non-familial offenders, that intra-familial offenses are not perceived as a threat to the entire community, that intra-familial offenders are easier to supervise than extra-familial offenders, and that non-familial offenders as individuals are more dangerous because they tend to have a greater number of victims).

33. Compare Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e)(2) (2006)), with Jimmy Ryce Act, FLA. STAT. §§ 394.910-.930 (2005).

states and the federal government have enacted laws aimed at identifying sex offenders and notifying communities of their whereabouts. In 1994, partially in response to the abduction of eleven-year-old Jacob Wetterling in Minnesota,³⁴ Congress passed a federal law requiring all sex offenders to register with local law enforcement and submit information on their permanent residence.³⁵ In 1996, in the wake of the murder of seven-year-old Megan Kanka in New Jersey,³⁶ President Bill Clinton signed “Megan’s Law,”³⁷ which added a requirement that states create notification protocols that provide public access to information on registered sex offenders.³⁸ By August 1996, all fifty states and the District of Columbia had enacted their own version of Megan’s Law,³⁹ and many states now have websites to disseminate information to the public.⁴⁰ Sex offenders challenged these laws, arguing that they constituted retroactive punishment in violation of the Ex Post Facto Clause.⁴¹ In 2003, in *Smith v. Doe*, the Supreme Court upheld registration laws as valid state regulatory schemes and concluded that information about sexual predators may be posted on the Internet.⁴²

34. See Jacob Wetterling Foundation, The Jacob Wetterling Story, <http://www.jwf.org/ReadArticle.asp?articleId=34> (last visited Sept. 4, 2006). Jacob Wetterling was an eleven-year-old boy from St. Joseph, Minnesota who was kidnapped in 1989 on his way home from a convenience store. *Id.* This case served as a wakeup call for law enforcement agencies that, at the time, did not have comprehensive lists of sex offenders from which to start an investigation.

35. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)).

36. Megan Nicole Kanka Foundation, Mission Statement, <http://www.megannicolekankafoundation.org/mission.htm> (last visited Feb. 18, 2006). Megan Kanka was a seven-year-old girl from Hamilton Township, New Jersey who disappeared on July 29, 1994. *State v. Timmendequas*, 737 A.2d 55, 66 (N.J. 1999). One of the Kanka’s neighbors, Jesse Timmendequas, a convicted sex offender, admitted luring Megan into his house, sexually assaulting her, and brutally suffocating her to death. *Id.* at 68-69.

37. Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e) (2006)).

38. 42 U.S.C. § 14071(e). Megan’s Law also required that states maintain a website for disseminating information. *Id.* § 14071(e)(2). That same year, Congress passed the Lynchner Act, which toughened up registration requirements for sex offenders, imposed fines for failure to register, and created a national database under the supervision of the FBI. Pam Lynchner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) (codified as amended at 42 U.S.C. § 14071(b)(2) (2006)). Today, the National Sex Offender Registry (NSOR) is accessible to the public and provides links to individual state registries. See National Sex Offender Registry, <http://www.nsor.net> (last visited on Feb. 16, 2006).

39. Teichman, *supra* note 11, at 1854.

40. See, e.g., Fla. Dep’t of Law Enforcement, Florida Sexual Offenders and Predators, <http://www3.fdle.state.fl.us/sopu/index.asp?PSessionId=676547599&> (last visited Mar. 18, 2006); Office of the Att’y Gen., Cal. Dep’t of Justice, Megan’s Law—Information on Registered Sex Offenders, <http://www.meganslaw.ca.gov> (last visited Mar. 18, 2006).

41. See, e.g., *Smith v. Doe*, 538 U.S. 84, 91 (2003).

42. *Id.* at 105-06 (finding that the law did not violate the Ex Post Facto Clause because the

In 1995, Florida lawmakers amended the Florida Sexual Predators Act to require sexual predators to register with law enforcement and authorizing law enforcement to notify communities of their presence.⁴³ Under the Act, sexual predators must register with the Department of Law Enforcement and maintain that registration for the rest of their lives.⁴⁴ Once a sexual predator registers, local law enforcement agencies are required to disseminate information about the offender's description, crimes committed, and current residence.⁴⁵

Those offenders not included under the Florida Sexual Predators Act are subject to virtually the same requirements under the Sex Offender Act. Adopted in 1997, the Sex Offender Act requires sex offenders to register with their local sheriffs' offices within forty-eight hours of release from custody or relocation into Florida and to maintain registration for life.⁴⁶ The major difference between the two acts is that under the Sex Offender Act, community notification by law enforcement agencies is not mandatory.⁴⁷

Registration and notification provisions in both the Florida Sexual

Alaska Legislature intended a sex offender registration law to operate as a civil regulatory scheme rather than criminal punishment). Furthermore, the Court determined that use of the Internet to disseminate information to the public was a legitimate way to effectuate public safety and "the attendant humiliation is but a collateral consequence of a valid regulation." *Id.* at 99.

43. 1996 Fla. Sess. Law Serv. Ch. 96-388 (West) (as codified at FLA. STAT. § 775.21 (2005)). Sexual predators are designated as those persons committing felony sex crimes in Florida, those persons labeled sexual predators in other states, and those persons who have been labeled predators through civil commitment. FLA. STAT. § 775.21(4) & (5) (2005).

44. FLA. STAT. § 775.21(6). Information required includes a sex offender's name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, and all permanent and temporary addresses. *Id.*

45. *Id.* § 775.21(7).

[T]he sheriff of the county or the chief of police of the municipality where the sexual predator temporarily or permanently resides shall notify each licensed day care center, elementary school, middle school, and high school within a 1-mile radius of the temporary or permanent residence of the sexual predator of the presence of the sexual predator.

Id.

46. 1997 Fla. Sess. Law Serv. Ch. 97-299 (West) (as codified at FLA. STAT. § 943.0435 (2005)). Under the Sex Offender Act, sexual offenders are defined as persons who have committed, or attempted, solicited, or conspired to commit kidnapping, false imprisonment, luring or enticing a child under the age of twelve, sexual battery, procuring a child for prostitution, indecent exposure, sexual exploitation of a minor, obscenity, involvement in pornography, and the selling and buying of minors. FLA. STAT. § 943.0435(1)(a) (2005). Sex offenders are also persons who have been designated as sexual predators in another state. *Id.*

47. Compare FLA. STAT. § 943.0435(7)(a)(2) (2005), with *id.* § 775.21.

Predators Act and the Sex Offender Act have withstood judicial scrutiny.⁴⁸ In 2003, in response to a conflict between the Second and Third District Courts of Appeal,⁴⁹ the Florida Supreme Court held that the Sexual Predators Act was constitutionally valid because it did not violate procedural due process or separation of powers.⁵⁰ In 2005, faced with a class action suit challenging the legitimacy of the Sex Offender Act, the United States Court of Appeals for the Eleventh Circuit upheld the Act, holding that the registration provisions did not violate due process, equal protection, right to travel, or separation of powers.⁵¹

Clamping down on sex offenders continues to be a hot-button issue in Florida and lawmakers have developed more creative ways to protect against future offenses. In 1998, the Florida Legislature passed the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act,⁵² establishing civil commitment procedures for those sexual predators with mental disorders that increase their likelihood of reoffending.⁵³ In 2005, the Florida Legislature tightened up laws against sex offenders, passing the Jessica Lunsford Act.⁵⁴ The Act increases the mandatory prison term for sex crimes against children younger than twelve from ten to twenty-five years.⁵⁵ The Act also requires certain offenders

48. *Milks v. State*, 894 So. 2d 924, 925 (Fla. 2005); *Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005).

49. *Compare Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003) (upholding the Florida Sexual Predator Act), *with Espindola v. State*, 855 So. 2d 1281 (Fla. 3d DCA 2003) (striking down the Florida Sexual Predator Act on grounds that it violated procedural due process rights).

50. *Milks*, 894 So. 2d at 925. The Florida Supreme Court resolved the conflict, stating that the existence of a prior conviction is the only material fact under the Florida Sexual Predators Act, and both defendants received "a procedurally safeguarded opportunity" to contest that fact. *Id.* at 928 (citing *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003)).

51. *Moore*, 410 F.3d at 1349.

52. 1998 Fla. Sess. Law Serv. Ch. 98-64 (West) (codified as amended at FLA. STAT. §§ 394.910-.930 (2005)).

53. The Act authorizes the state attorney, following a written assessment and recommendation by experts, to file a petition stating that a person is a sexually violent predator who should be confined to civil commitment. FLA. STAT. § 394.914 (2005). A person may be subjected to civil commitment only upon determination by clear and convincing evidence that the person is a sexually violent predator. *Id.* § 394.917. The Act requires that a person committed have a mental examination at least once every year to determine whether to continue holding that person involuntarily. *Id.* § 394.918.

54. 2005 Fla. Sess. Law Serv. Ch. 2005-28 (West).

55. FLA. STAT. § 775.082 (3)(a) (2005). For a life felony committed on or after September 1, 2005, which is a violation of FLA. STAT. § 800.04 (5) (referring to lewd or lascivious molestation of a victim less than twelve years old), the offender is to be punished by:

- a. A term of imprisonment for life; or
- b. A split sentence that is a term of not less than 25 years imprisonment and not exceeding life imprisonment, followed by probation or community control for

placed on conditional release supervision to be monitored by global satellite positioning devices for the rest of their lives.⁵⁶ Additionally, the Act authorizes prosecutors to file felony charges against anyone who knowingly helps a sex offender avoid reporting requirements, including failure to report non-compliance.⁵⁷

C. Development of Residence Restrictions

In 1996, Florida became the first state to enact statewide residence restrictions against sexual predators whose victims were children.⁵⁸ In 1999, Alabama was the first state to extend those restrictions to a broad class of sex offenders.⁵⁹ Since then, at least twenty states have enacted residence restrictions, in one form or another, prohibiting sex offenders from living within a specified distance from schools and other child-centered facilities.⁶⁰

the remainder of the person's natural life as provided in s. 948.012 (4).

Id. § 775.082 (3)(a)(4).

56. *Id.* § 948.012(4). The statute provides that “for offenses committed on or after September 1, 2005, . . . [the] probation or community control portion of the split sentence . . . must extend for the duration of the defendant's natural life and include a condition that he or she be electronically monitored.” *Id.*

57. *Id.* § 775.21(10)(g). Any person who intentionally assists a sexual predator by failing to report non-compliance, providing false information about a sexual predator, and harboring or concealing a sexual predator commits a third degree felony. *Id.*

58. 1996 Fla. Sess. Law Serv. Ch. 1996-388 (West). The residence restrictions under this statute apply only to the limited number of sex offenders labeled sexual predators and who are subject to Florida's Conditional Release Program. FLA. STAT. § 947.1405(7)(a) (2005).

59. 1999 Ala. Legis. Serv. 99-572 (as codified at ALA. CODE § 15-20-26(a) (2005)).

60. *See, e.g.*, ALA. CODE § 15-20-26(a) (2005) (restricting offenders from living or working within 2,000 feet of school or child-care facility); ARK. CODE ANN. § 5-14-128(a) (2005) (prohibiting level 3 and 4 offenders from residing within 2,000 feet of an elementary school, secondary school, or day-care center); CAL. PENAL CODE § 3003(g-h) (Deering 2005) (prohibiting sex offender released on parole from residing within one-quarter mile of a school, or within one-half mile of a school if the offender is deemed to be a high risk to the public); FLA. STAT. § 794.065 (2005) (prohibiting sex offenders whose victims were under sixteen from “living within 1,000 feet of a school, day care center, park, or playground”); GA. CODE ANN. § 42-1-15 (2006) (prohibiting sex offenders from living or loitering “within 1,000 feet of any child care facility, church, school, or area where minors congregate”); 720 ILL. COMP. STAT. 5/11-9.3(b) (2005) (prohibiting sex offenders from residing or knowingly loitering within 500 feet of a school); IND. CODE ANN. § 11-13-3-4(g)(2) (LexisNexis 2005) (prohibiting a sex offender on parole from residing within 1,000 feet of school property for the remainder of parole, unless parole board provides written exemption); IOWA CODE § 692A.2A(2) (2005) (prohibiting convicted child sex offenders from residing within 2,000 feet of a school or child-care facility); KY. REV. STAT. ANN. § 17.495 (LexisNexis 2005) (prohibiting sex offenders from residing within 1,000 feet of a school, preschool, or day-care facility); LA. REV. STAT. ANN. § 14:91.1(A)(2) (2005) (prohibiting sex offenders from residing within 1,000 feet of any school, day-care facility, playground, youth center, public swimming pool, or video arcade facility); MICH. COMP. LAWS § 28.735(1) (2006) (prohibiting

States take different approaches to defining the category of offenders subject to these residence restrictions. For example, Louisiana's residence restrictions apply only to those offenders deemed "sexually violent predators,"⁶¹ while Ohio includes a broader group, restricting any "person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt . . . offense or a child-victim oriented offense."⁶² As discussed in more detail in Part III, Florida maintains two different residence restrictions: one for sexual predators and one for general sex offenders.⁶³

States also vary in their methods of punishing offenders who knowingly violate the residence restrictions. The majority of states impose criminal penalties for violations, with some states applying uniform penalties and others imposing punishment based on the sex offender's previous conviction.⁶⁴ Ohio, however, merely provides for injunctive

persons required to register as sex offenders from residing within "student safety zones"—equivalent to 1,000 feet from a school); MO. REV. STAT. § 566.147 (2005) ("Any person who has . . . been convicted of . . . [certain sexual crimes against minors] shall not establish residency within one thousand feet of any public school, . . . any private school, . . . or child care facility"); N.C. GEN. STAT. § 14-208.16 (2006) (prohibiting registered sex offenders from "knowingly" residing with 1,000 feet of any school or child-care center); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis 2005) (prohibiting any sex offender from residing within 2,000 feet of a school); 57 OKL. STAT. ANN. tit. 57, § 590 (2005) (prohibiting sex offenders from living within 2,000 feet of a public school site or educational institution); OR. REV. STAT. § 144.642(1)(a) (2005) (authorizing the Department of Corrections to adopt rules including a "general prohibition against allowing a sex offender to reside in any dwelling, with the exception of a treatment facility or halfway house, near locations where children are the primary occupants or users"); S.D. CODIFIED LAWS § 22-24B-23 (Michie 2006) (prohibiting sex offenders from residing or loitering within 500 feet of any school, public park, playground, or pool); TENN. CODE ANN. § 40-39-211(a) (2005) (prohibiting sex offenders from living within 1,000 feet of a school, child-care facility, or day-care center); TEX. CODE CRIM. PROC. ANN. art. 42.12 (13B) (Vernon 2005) ("If . . . a child . . . was the victim of the offense, the judge shall [require] that the defendant not . . . go in, on, or within 1,000 feet of a premises where children commonly gather . . ."); W. VA. CODE § 62-12-26(b)(1) (2006) (prohibiting certain paroled sex offenders from residing or working "within one thousand feet of a school or child care facility . . ."). In addition to current statewide restrictions, at least two states have enacted enabling legislation, giving local governments authorization to enact residence restrictions. *See, e.g.*, NEB. REV. STAT. § 29-4017 (2006) ("A political subdivision may enact an ordinance, resolution, or other legal restriction prescribing where sex offenders may reside" so long as "the restrictions are limited to sexual predators, extend no more than five hundred feet from a school or child care facility" and do not apply to retroactively or to sexual predators who reside in state-owned prisons or correctional facilities); S.B. 6325, 59th Leg., Reg. Sess. (Wash. 2006) (enabling Washington cities to create statewide standards for imposing residence restrictions).

61. LA. REV. STAT. ANN. § 14:91.1 (2005).

62. OHIO REV. CODE ANN. § 2950.031(a) (LexisNexis 2005).

63. *Compare* FLA. STAT. § 947.1405(7)(a) (2005), *with id.* § 794.065.

64. *Compare* GA. CODE ANN. § 42-1-15(d) (2006) (making a violation of residence restrictions a felony offense punishable by "imprisonment for not less than ten nor more than 30 years"), *with* FLA. STAT. § 794.065 (2005) (making a violation a felony of the third degree

relief, allowing neighbors and local prosecutors to petition the courts to forcibly remove sex offenders from buffer zones.⁶⁵

Local governments have enacted their own residence restrictions. Many have taken action because their constituents feel that statewide restrictions are inadequate to combat against the threat of sex offenders living near schools and other child-centered facilities.⁶⁶ While some have tailored ordinances to avoid litigation and ensure that the restrictions apply to only the most dangerous offenders,⁶⁷ the majority of local governments appear to be more focused on creating broad buffer zones that leave limited options for sex offenders to find housing.⁶⁸ Regardless, many local officials admit that they feel pressure to enact some sort of legislation when neighboring towns and cities have already acted.⁶⁹

Surely there is a legitimate and important purpose behind residence restrictions: to prevent convicted sex offenders from committing further crimes against children.⁷⁰ Lawmakers believe that by restricting access to

punishable by up to five years imprisonment when the violator was previously convicted of a first degree felony; but making a violation a misdemeanor of the first degree punishable by up no more than one year imprisonment and/or a fine of up to \$1,000).

65. See, e.g., OHIO REV. CODE ANN. § 2950.031(B) (West 2006) (providing that when an offender violates the provisions of the statute, an owner or lessee of real property within a 1,000 foot buffer or the prosecuting attorney for the municipality with jurisdiction over the area affected shall have “a cause of action for injunctive relief against the person”).

66. See Karen Sloan, *Bluffs Sex Offenders on the Move Where Can They Live? ‘Really Nowhere’ Left*, OMAHA WORLD-HERALD, Oct. 18, 2005, at 01A (stating that the City of Des Moines, in response to concerns over sex offenders’ potential residence locations, passed a stricter ordinance to extend the 2,000-foot restriction “to include parks, swimming pools, libraries and recreational trails”); Davey, *supra* note 18, at A1 (stating that Galena, Illinois passed a local ordinance to prevent Iowa’s sex offenders from finding refuge across the border).

67. See Michael Pritchard, *Mullica Twp. Restricts Where Sex Offenders Can Live*, PRESS ATLANTIC CITY, Jan. 26, 2006, at C4 (stating that Mullica Township, New Jersey created a less restrictive ordinance that only applies to Tier II and III sex offenders and does not bar sex offenders from living near bus stops).

68. See Jim Saunders, *Lawmakers Want State to Create Uniformity in Sex Predator Rules*, DAYTONA BEACH NEWS-JOURNAL, Oct. 20, 2005, at 1C (detailing the efforts of a number of municipalities in Florida that have enacted buffer zones above and beyond the 1,000-foot statewide restrictions).

69. See Pritchard, *supra* note 67, at C4 (quoting a local official as saying “[w]e didn’t want to be the only town without such an ordinance and then actually finding ourselves to be attracting sex offenders to the township”).

70. See *Doe v. Miller*, 405 F.3d 700, 704 (stating that the Iowa General Assembly enacted legislation creating residence restrictions on sex offenders “in an effort to protect children in Iowa from the risk that convicted sex offenders may reoffend in locations close to their residences”); Ga. House Daily Report, 2003 Reg. Sess. No. 37 (Ga. 2003) (documenting the unanimous vote to pass residence restrictions “designed to protect [Georgia’s] youngest and most vulnerable citizens”); see also Ian Demsky, *Sex Offenders Live Near Many Schools, Day Cares*, TENNESSEAN, July 18, 2005, at A1 (quoting Tennessee District Attorney John Carney, who helped draft state legislation, as saying that “[t]he primary purpose is to protect children” and that “[i]t all boils down to the specific

schools and other places where children congregate, sex offenders will have less interaction with children and be less able to act on their impulses to reoffend.⁷¹ Residence restrictions are thus another weapon in the prophylactic arsenal of laws enacted to reduce the overall number of crimes against children.⁷² Though there is no evidence to prove that these laws have any impact on the number of offenses committed,⁷³ several state legislatures are taking steps to expand their restrictions to cover additional places where children gather and to increase buffer zones to upwards of 2,500 feet.⁷⁴

III. RESIDENCE RESTRICTIONS IN FLORIDA

A. State Legislation

Florida is among the twenty states that have enacted statewide residence restrictions on sex offenders. Florida's restrictions are unique. While a majority of these states have enacted one statute to deal with a single category of offenders,⁷⁵ Florida has taken a dual-category approach,

fact that sex offenders tend to continue to commit assaults”).

71. Imber, *supra* note 12, at 101.

72. Henderson, *supra* note 27, at 798-99 (stating that many supporters view statutes as “prophylactic measures enacted to reduce the total number of sex offenses committed”).

73. ATSA Policy Statement, *supra* note 13 (positing that “there is no research to support the idea that residence restrictions prevent repeat sex crimes”); Levenson & Cotter, *supra* note 13, at 174-75 (finding that an overwhelming majority of sex offenders in Florida perceived residence restrictions to be ineffective in altering the risk of reoffending).

74. *See, e.g.*, H.B. 91, 2006 Leg., Reg. Sess. (Fla. 2006) (proposing amendments to Florida's law that: (1) increase the buffer zone from 1,000 feet to 2,500 feet; (2) include public school bus stops; and (3) increase the number of affected sex offenders by including sex offenders whose victims were under the age of 18); H.B. 157, 2006 Leg., Reg. Sess. (Ky. 2006) (proposing amendments to Kentucky's law that would increase the buffer zone from 1,000 to 1,500 feet); S.B. 6, 2006 Leg., Reg. Sess. (Ind. 2006) (proposing amendments to Indiana's law that would remove possibility of parole board exceptions and would require predators to wear electronic monitoring devices). California legislators have turned to the initiative process in hopes of sweeping reforms to statewide restrictions against sex offenders. Endorsed by Democrats and Republicans alike, including Governor Schwarzenegger, Proposition 83 could very well spark a national trend if voters approve the new measure, which prohibits all released sex offenders from living within 2,000 feet of a school or park and provides for lifetime monitoring through electronic tracking devices. *See* Jennifer Warren, *Sex Offender Crackdown Measure Ties into a National Trend*, L.A. TIMES, Sept. 18, 2006, 2006 WLNR 16159743.

75. *See, e.g.*, ARK. CODE ANN. § 5-14-128(a) (2005) (applying residence prohibitions against “sex offender[s] . . . required to register under the Sex Offender Registration Act of 1997, §12-12-901 et seq.”); IOWA CODE ANN. § 692A.2A (West 2005) (designating persons subject to the provisions as “person[s] who [have] committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor”).

providing for one set of restrictions applying to sex offenders⁷⁶ and another more stringent set of restrictions for a small group of sexual predators.⁷⁷

1. Restrictions Against General Sex Offenders

During the 2004 legislative session, the Florida Legislature passed a law that prohibits certain sex offenders from residing “within 1,000 feet of any school, day care center, park or playground.”⁷⁸ In tailoring the statute to effectuate the goal of protecting children, these restrictions apply only to those sex offenders committing offenses on or after October 1, 2004, whose victims were under the age of sixteen at the time of the crime.⁷⁹ Offenders who violate the law are subject to two potential criminal penalties. A violator whose qualifying conviction was classified as a first-degree felony or higher is charged with committing a third-degree felony.⁸⁰ A violator whose qualifying conviction was less than a first-degree felony is charged with committing a first-degree misdemeanor.⁸¹

On its face, § 794.065 works to both broaden and narrow the category of offenders included within its grasp. First, these residence restrictions apply regardless of whether a sex offender has served any time behind bars.⁸² This broadens the scope of the statute, potentially including sex offenders who cut deals to stay out of jail and offenders with suspended sentences. Second, these residence restrictions apply only to those offenders who were convicted of offenses committed on or after October 1, 2004.⁸³ Thus, the statute applies prospectively, and thereby narrows the category of offenders by exempting a whole host of past offenders from

76. FLA. STAT. § 794.065 (2005).

77. *Id.* § 947.1405.

78. 2004 Fla. Sess. Law Serv. Ch. 2004-55 (West).

It is unlawful for any person who has been convicted of a violation of s. 794.011, s. 800.04, s. 827.071, or s. 847.0145, regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age, to reside within 1,000 feet of any school, day care center, park, or playground.

FLA. STAT. § 794.065(1) (2005). The restrictions created under § 794.065 apply to sex offenders convicted of sexual battery (§ 794.011); lewd or lascivious offenses (§ 800.04); sexual performance by a child (§ 827.071); or selling or buying of minors (§ 847.0145). *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* “It is unlawful for any person who has been convicted of a violation of s. 794.011, s. 800.04, s. 827.071, or s. 847.0145, *regardless of whether adjudication has been withheld.*” *Id.* (emphasis added)

83. *Id.* § 794.065(2).

the restrictions.⁸⁴

2. Restrictions Against Sexual Predators

Within the same bill, the Florida Legislature amended the Conditional Release Program Act to include even stricter residence restrictions against a smaller group of offenders labeled sexual predators.⁸⁵ Originally drafted in 1996, § 947.1405(7)(a) prohibited sexual predators subject to conditional release supervision from “living within 1,000 feet of a school, daycare center, park, playground, or other place where children regularly congregate.”⁸⁶ In 2004, the Florida Legislature added to § 947.1405(7)(a), prohibiting sexual predators from living within 1,000 feet of a public school bus stop.⁸⁷ Persons subject to these restrictions are those sex offenders who were convicted of the same qualifying crimes included in § 794.065,⁸⁸ and have been labeled sexual predators under § 775.21 because of their enhanced threat to society.⁸⁹ The restrictions under § 947.1405 apply to those sexual predators convicted of a crime committed on or after October 1, 1995, whose victims were under the age of eighteen at the time of the crime.⁹⁰

These restrictions are more severe than those placed on general sex offenders. Sexual predators subject to § 947.1405 are still under the supervision of the Department of Corrections.⁹¹ Rather than going through the courts, violations are assessed by the Parole Commission.⁹² The most

84. The Florida Legislature likely limited the application of residence restrictions to future offenders to ensure that the restrictions would withstand challenges that the restrictions amounted to an ex post facto law. *See* FLA. SENATE STAFF, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON S.B. 120, 4-5 (Fla. 2004) (noting that FLA. STAT. § 794.065, as enacted, will not face ex post facto challenges because it does not apply retroactively).

85. 2004 Fla. Sess. Law Serv. Ch. 2004-55 (West). “If the victim was *under the age of 18*, a prohibition on living within 1,000 feet of a school, day care center, park, playground, *designated public school bus stop, or other place where children regularly congregate.*” FLA. STAT. § 947.1405(7)(a)(2) (2005) (emphasis added). In 2004, the Florida Department of Corrections predicted that only about thirty-five offenders would be subject to the residence restrictions under § 947.1405(7)(a). Thompson, *supra* note 12, at B1.

86. 1996 Fla. Sess. Law Serv. Ch. 96-388 (West).

87. FLA. STAT. § 947.1405(7)(a)(2) (2005).

88. *See supra* note 78 and accompanying text (discussing four different types of crimes).

89. FLA. STAT. § 775.21(3)(a) (2005). “Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety.” *Id.*

90. *Id.* § 947.1405(7)(a)(2).

91. *Id.*

92. *See id.* § 947.141(4) (detailing the procedure by which the Parole Commission determines the consequences when a sexual predator violates the terms of § 947.1405(7)(a)(2)). One potential consequence of a violation is that a sexual predator may lose his right to continue in the Conditional Release Program and return to prison to finish the remainder of his term. *Id.*

significant provision within the residence restrictions themselves is the inclusion of public school bus stops and “other place[s] where children regularly congregate” within the buffer zone.⁹³ Considering that public school bus stops are numerous and typically located in residential areas where children live too far away to walk to school,⁹⁴ restrictions faced by sexual predators cover enormous ground and prohibit them from living in some of Florida’s most remote areas as well.⁹⁵

B. Local Ordinances

Towns, cities, counties, and other local governments around Florida have jumped into the fray, enacting even stricter regulations than those imposed by the State to effectively push these undesirable offenders out of the community. Prompted in 2005 by the murder of Jessica Lunsford in central Florida⁹⁶ and the *Miller* decision in April of that same year,⁹⁷ local residence restrictions have appeared rapidly throughout the state.⁹⁸

Following the lead of the city of Miami Beach,⁹⁹ local governments in

93. *Id.* § 947.1405(7)(a)(2).

94. *See id.* § 234.01 (mandating Florida school boards to provide transportation for students whose homes are more than a “reasonable walking distance” from the student’s assigned school). For further explanation, see FLA. ADMIN. CODE ANN. r. 6A-3.001 (2006) (defining “reasonable walking distance” as “any distance not more than two (2) miles between the home and school or one and one-half (1 1/2) miles between the home and the assigned bus stop”). For information on the sheer number of bus stops, see Thompson, *supra* note 12, at B1 (stating that Pinellas County alone has over 15,000 public school bus stops).

95. However, the legislature added a caveat to § 947.1405 regarding public school bus stops that protects sexual predators who have pre-established residences. FLA. STAT. § 947.1405(7)(a)(2) (2005). While sexual predators subject to the Conditional Release Program are prohibited from moving within 1,000 feet of an established bus stop, school districts are prohibited from creating new bus stops and are required to move any existing bus stops within the same distance of any predators already maintaining a residence before October 1, 2004. *Id.* Interestingly, this provision creates reverse buffer zones against school districts, blocking off certain areas that otherwise may be ideal candidates for public school bus stops. Thompson, *supra* note 12, at B1 (detailing the difficulties faced by school districts in locating new bus stops as a result of this law).

96. Manuel Roig-Franzia, *Miami Beach Mayor Seeks to Exclude Sex Offenders*, WASH. POST, Apr. 25, 2005, at A03 (discussing the murder of Jessica Lunsford, a nine-year-old girl from central Florida who was found dead with her hands bound on Mar. 19, 2005).

97. *Supra* note 15 and accompanying text.

98. *See* FLA. H.R. STAFF, H.R. STAFF ANALYSIS OF H.B. 91, at 4 (2005) [hereinafter H.R. STAFF ANALYSIS OF H.B. 91] (stating that “[a]s of October 17, 2005, of the 153 municipalities that responded [to the Committee’s survey], 50 municipalities indicated that they had passed ordinances and 14 had pending proposed ordinances”); Mike Carlson, *Not in My City*, ORLANDO WEEKLY, Aug. 25, 2005, available at <http://www.orlandoweekly.com/features/story.asp?id=8250> (stating that the City of Davie, on May 18, 2005, became the first city in Florida to formally enact a local ordinance that prohibited sex offenders from living within 2,500 feet of schools).

99. Carlson, *supra* note 98 (stating that Miami Beach Mayor Alan Dermer began advocating for a stricter local ordinance shortly after the death of Jessica Lunsford in March). Dermer proposed

Florida have taken a much stricter approach to residence restrictions, expanding the ban from the state-mandated 1,000 feet to 2,500 feet.¹⁰⁰ Like the majority of local governments, the City of Miami Beach has created a hybrid ordinance, placing prohibitions on general sex offenders more in line with statewide restrictions against sexual predators. The city prohibits sex offenders whose victims were under the age of sixteen from “living within 2,500 feet of a school, designated public school bus stop, day care center, park, playground, or other place[s] where children regularly congregate.”¹⁰¹ In addition, the city prohibits sex offenders from establishing either a permanent or temporary residence within a restricted zone.¹⁰²

While many local ordinances place additional restrictions on sex offenders above and beyond those enacted by the State, there are a couple of areas in which local ordinances are less restrictive. First, penalties imposed upon violators are not as harsh. A majority of local governments impose a small fine along with the possibility of sixty days in jail for a first offense, while a second offense commands a higher fine and the possibility of twelve months in jail.¹⁰³ Second, local ordinances provide exceptions for

increasing the distance to 2,500 feet, based on the statewide exclusions for adult-entertainment facilities. *Id.*

100. *See, e.g.*, CITY OF MIAMI BEACH, FLA., ORDINANCE § 70-402 (2005) (prohibiting sex offenders whose victims were under the age of sixteen from establishing a permanent or temporary residence “within 2,500 feet of any school, designated public school bus stop, day care center, park, playground, or other place where children regularly congregate”); CITY OF WINTER PARK, FLA., ORDINANCE NO. 2638-05 (2005) (prohibiting sexual offenders or predators from establishing a permanent or temporary residence within 2,500 feet of any park, school, school bus stop, day-care center, or playground).

101. CITY OF MIAMI BEACH, FLA., ORDINANCE § 70-402(a) (2005). The City of Miami Beach is one of many who have borrowed the terms “public school bus stop” and “other place where children regularly congregate” from the State’s residence restrictions against sexual predators. *See* FLA. STAT. § 947.1405(7)(a)(2) (2005).

102. CITY OF MIAMI BEACH, FLA., ORDINANCE § 70-401.

Temporary residence means a place where the person abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not the person’s permanent address, or a place where the person routinely abides, lodges, or resides for a period of four or more consecutive or nonconsecutive days in any month and which is not the person’s permanent residence.

Id. State residence restrictions, conversely, merely prohibit sex offenders from *residing* . . . , and the Florida legislature has not elaborated on what it means to reside somewhere. *See* FLA. STAT. § 794.065 (2005).

103. *See, e.g.*, CITY OF MIAMI BEACH, FLA., ORDINANCE § 70-402(c) (2005).

Penalties. A person who violates this section shall be punished by a fine not

sex offenders who have established a permanent residence prior to the enactment of the residence restrictions. There are also exceptions for offenders who were prosecuted as juveniles, offenders who are still juveniles, and offenders whose residence is brought into conflict with a restricted area through the creation of a school, bus stop, or other child-centered facilities.¹⁰⁴

In an attempt to find efficient ways to ensure that sex offenders do not slip through the cracks, local governments prohibit landlords from knowingly renting any residence located within a buffer zone to sex offenders subject to residency restrictions.¹⁰⁵ The goal of these landlord compliance provisions is to create a self-enforcement mechanism that alleviates pressure on local law enforcement agencies. This purpose is made clear by the fact that violators are typically only subject to code

exceeding \$500.00 or by imprisonment for a term not exceeding 60 days, or by both such fine and imprisonment; for a second or subsequent conviction of a violation of this section, such person shall be punished by a fine not to exceed \$1,000.00 or imprisonment in the county jail not more than 12 months, or by both such fine and imprisonment.

Id.

104. *See, e.g.,* CITY OF MIAMI BEACH, FLA., ORDINANCE § 70-402(d) (2005). The ordinance provides an exception for sex offenders when:

- (1) The person established the permanent residence or temporary residence and reported and registered the residence pursuant to F.S. § 775.21, 943.0435 or 944.607, prior to July 1, 2005.
- (2) The person was a minor when he/she committed the offense and was not convicted as an adult.
- (3) The person is a minor.
- (4) The school, designated public school bus stop or day care center within 2,500 of the persons permanent residence was opened after the person established the permanent residence or temporary residence and reported and registered the residence pursuant to F.S. § 775.21, 943.0435 or 944.607.

Id.

105. *See, e.g.,* CITY OF NORTH LAUDERDALE, FLA., CODE OF ORDINANCES § 38-93(a) (2005).

It is unlawful to let or rent any place, structure, or part thereof, trailer or other conveyance, with the knowledge that it will be used as a permanent residence or temporary residence by any person prohibited from establishing such permanent residence o[r] temporary residence pursuant to s. 134.62 of this Code, if such place, structure, or part thereof, trailer or other conveyance, is located within two thousand five hundred (2500) feet of any school, designated public school bus stop, day care center, park, playground, or other place where children regularly congregate.

Id.

enforcement provisions amounting to a slap on the wrist.¹⁰⁶

Local governments have enacted these residence restrictions under the broad police powers conferred upon them by the State of Florida.¹⁰⁷ Local governments cite many of the same concerns expressed by state lawmakers: that sex offenders represent an extreme threat to public safety, that offenders have a high risk of recidivism, that many sex crimes involving children go unreported, and that the repercussions of these crimes come at an unbearable cost to victims and society as a whole.¹⁰⁸ Aiming to provide maximum protection to their citizens, local legislative bodies have borrowed state regulatory language barring adult-entertainment facilities within 2,500 feet of schools¹⁰⁹ as a basis for expanding residence restrictions beyond the 1,000-foot statewide restrictions.¹¹⁰

IV. CONSTITUTIONAL CHALLENGES TO RESIDENCE RESTRICTIONS: *DOE V. MILLER*

While relatively new, residence restrictions have thus far withstood judicial scrutiny. State and federal courts have thrown out challenges for lack of standing,¹¹¹ and several state courts of last resort have upheld the legitimacy of residence restrictions against a variety of different constitutional challenges.¹¹² In *Doe v. Miller*, the lone challenge to reach

106. See, e.g., CITY OF MIAMI BEACH, FLA., ORDINANCE § 70-403(b) (2005) (stating that violations are subject to code violation penalties).

107. See FLA. CONST. art VIII, § 2(b). “Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.” *Id.*; see also FLA. STAT. § 166.021(3) (2005).

108. The legislature recognizes that pursuant to the grant of power set forth in Art. VIII, § 2(b) of the Florida Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act. FLA. STAT. § 166.021(3); see, e.g., CITY OF NORTH LAUDERDALE, FLA., CODE OF ORDINANCES § 38-90(a) (2005).

109. FLA. STAT. § 847.0134 (2005).

110. See CITY OF CORAL SPRINGS, FLA., CODE OF ORDINANCES § 14-1 (2005).

111. See, e.g., *Coston v. Petro*, 398 F. Supp. 2d 878, 883 (S.D. Ohio 2005) (holding that plaintiff offenders did not have standing to bring § 1983 challenge because they lived in an area not affected by residence restrictions); *Boyd v. State*, CR-04-0963 2006 WL 250832 (Ala. Crim. App. Feb. 3, 2006) (holding that defendant lacked standing to challenge the Alabama restrictions for violating fundamental rights to enjoy the privacy of marriage because the defendant failed to introduce evidence that he was married).

112. See, e.g., *State v. Seering*, 701 N.W. 2d 655, 670 (Iowa 2005) (holding that Iowa’s statute was not unconstitutional because the residency restrictions did not deprive a sex offender of his constitutionally protected rights); *Mann v. State*, 603 S.E.2d 283, 285-86 (Ga. 2004) (holding that the application of Georgia statute to the petitioner did not amount to a takings violation, that the phrase child-care facility was not void for vagueness, and that the statute was not overly broad);

a federal circuit court, the United States Court of Appeals for the Eighth Circuit held that nothing in the Constitution prevented Iowa from using its police powers to establish residence restrictions against sex offenders in furtherance of the health and safety of the state's citizens.¹¹³

In 2002, Iowa enacted legislation that prohibited sex offenders convicted of certain offenses against a minor¹¹⁴ from residing within 2,000 feet of a school or registered child-care facility.¹¹⁵ A group of sex offenders in Iowa brought a class action suit in federal district court to challenge the legitimacy of Iowa's new statewide residence restrictions.¹¹⁶ Declaring the restrictions unconstitutional, the district court issued a permanent injunction barring enforcement of the law.¹¹⁷ However, on April 29, 2005, a three-judge panel of the Eighth Circuit, in *Doe v. Miller*, reversed the lower court's decision and upheld Iowa's statute as a valid use of the state's police powers.¹¹⁸ Specifically, the court held that the Iowa statewide residence restrictions did not violate procedural due process¹¹⁹ or substantive due process,¹²⁰ and did not amount to self-incrimination¹²¹ or a retroactive law in violation of the Ex Post Facto Clause.¹²²

While *Miller* is an important case for defending the legitimacy of these laws, the legality of residence restrictions is still the subject of much debate.¹²³ First, *Miller* was not a unanimous decision.¹²⁴ In his dissent,

Lee v. State, 895 So. 2d 1038, 1044 (Ala. Crim. App. 2004) (holding that 2,000 foot residence restrictions against sex offenders was nonpunitive and therefore, the retroactive application did not constitute a violation of the Ex Post Facto Clause).

113. *Miller*, 405 F.3d at 704.

114. IOWA CODE § 692A.2A (1) (2002) (stating that the restrictions apply to "a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor").

115. *Id.* § 692A.2A (2).

116. *Doe v. Miller*, 298 F. Supp. 2d 844, 847 (S.D. Iowa 2004).

117. *Id.* at 880.

118. *Doe v. Miller*, 405 F.3d 700, 704 (8th Cir. 2005). The Eighth Circuit declined to hear the case en banc, *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), and the U.S. Supreme Court denied certiorari, *Doe v. Miller*, 126 S. Ct. 757 (2005).

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

120. *Id.* at 716 ("[W]e are not persuaded that the means selected to pursue the State's legitimate interest are without rational basis.").

121. *Id.*

122. *Id.* at 723.

123. See H.R. STAFF ANALYSIS OF H.B. 91, *supra* note 98, at 8-9 (2005) (stating that a proposed increase in Florida's statewide residence restrictions to 2,500 feet will likely invite a constitutional challenge on grounds that the statute amounts to a violation of the Ex Post Facto Clause); Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 778-79 (2005) (asserting that while states have acted with good intentions, residence restrictions against sex offenders have "swept away constitutional protections of substantive due process, the prohibition on ex post facto laws, and adequate notice guaranteed by procedural due process"); Henderson, *supra* note 27, at 811-12 (arguing that there is no

Judge Michael Melloy pointed to the *ex post facto* challenge as a serious threat to the legitimacy of these restrictions, and sowed the seeds of a future majority opinion.¹²⁵ Second, *Miller* is only binding on those seven mid-western states within the Eighth Circuit's reach.¹²⁶ Finally, the Supreme Court may be waiting for the issue to percolate in the lower courts before handpicking a case.¹²⁷ In light of these possibilities, the constitutional issues at stake in *Miller* are worthy of further discussion.

A. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment guarantees that “no State shall deprive any person of life, liberty, or property without due process of law.”¹²⁸ Procedural due process protection is primarily concerned with ensuring that when laws infringe on protected rights of individuals, the government provides adequate procedural safeguards to ensure fairness to those punished or affected by the laws.¹²⁹ In analyzing Iowa's residence restrictions, the court in *Miller* found that the restrictions did not deny sex offenders due process of the law.¹³⁰

After implicitly recognizing a liberty interest in the right to choose one's residence,¹³¹ the *Miller* court addressed whether the residence

supporting evidence that residence restrictions will prevent re-offenses and that state statutes apply unequally to different categories of sex offenders); *cf. supra* note 12 (summarizing the position of proponents of residence restrictions).

124. *See Miller*, 405 F.3d at 705.

125. *See id.* at 723-26 (Melloy, J., dissenting). Judge Melloy found the Iowa statute to be a punitive law in violation of the Ex Post Facto Clause, but otherwise joined the majority opinion. *Id.* at 723.

126. The Eighth Circuit Court of Appeals hears appeals from federal district courts located in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. United States Courts, U.S. Courts of Appeals, <http://www.uscourts.gov/courtlinks> (last visited Mar. 7, 2006).

127. *See H. W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 249 (1991) (finding that the Supreme Court, in deciding whether to grant certiorari, often looks favorably upon a case that has had a chance to percolate in the federal appellate courts).

128. U.S. CONST. amend. XIV, § 1.

129. *See Carey v. Phipus*, 435 U.S. 247, 259 (1978) (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”).

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

131. The first question in every procedural due process challenge is whether the government has deprived the individual of a protected interest in property or liberty. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Since failure to find a deprivation of a protected liberty interest would have relieved the State from any requirement to provide due process, the court would not have had reason to evaluate the challenges brought by respondents. *See Paul v. Davis*, 424 U.S. 693, 700-01 (1976) (stating that due process is not required unless a deprivation of property or liberty interest has been found).

restrictions failed to provide adequate notice of prohibited conduct.¹³² Respondents claimed that the statute was void for vagueness because certain cities in Iowa were unable to provide sex offenders with full information on the location of restricted areas¹³³ and that measuring 2,000-foot buffer zones was a difficult and uncertain process.¹³⁴ The court rejected this challenge, stating that potential problems do not render the entire statute unconstitutional on its face.¹³⁵ The court reasoned that while individual sex offenders may, in practice, have a legitimate challenge as applied to them, the possibility that a sex offender may unknowingly violate the statute because of incomplete information was not enough to invalidate the entire statute.¹³⁶

The *Miller* court next addressed the claim that the Iowa statute violated procedural due process safeguards by depriving sex offenders of a hearing to consider the dangerousness of individuals before subjecting them to residence restrictions.¹³⁷ Ordinarily, an individual must be given an opportunity to be heard before he is deprived of a property or liberty interest.¹³⁸ However, in *Connecticut Department of Public Safety v. Doe*,¹³⁹ the Supreme Court stated that “due process does not entitle [a sex offender] to a hearing to establish a fact that is not material under the statute.”¹⁴⁰ Furthermore, procedural due process does not prohibit states from creating classifications among sex offenders.¹⁴¹ Since the Iowa statute applied equally to all sex offenders convicted of crimes against minors regardless of present or future dangerousness, the court found that providing individuals with an opportunity for a hearing would be unnecessary.¹⁴²

Opponents of residence restrictions argue that the limitations placed upon sex offenders’ housing options and the strain on familial relations amount to a deprivation of liberty and require significant procedural

132. *Miller*, 405 F.3d at 708.

133. *Id.*

134. *Id.* Respondents argued that measuring distances between potential residences and restricted areas “as the crow flies”—as provided in the state statute—created uncertainty in application. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 709.

138. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

139. 538 U.S. 1 (2003).

140. *Id.* at 7.

141. *Miller*, 405 F. 3d at 709 (citing *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003)).

142. *Id.* Assuming that the classification created by the state legislature is legitimate, the court asserted that the state legislature was not required to create exemptions to the legislative classification. *Id.* The court did suggest that an exemption might be necessary if respondents could establish that the creation of this classification infringed upon a substantive right under another provision of the Constitution. *Id.*

safeguards.¹⁴³ Commentators point to *Kansas v. Hendricks*¹⁴⁴ in arguing that a conviction for one of a wide range of sex offenses standing alone should not be enough to satisfy procedural due process.¹⁴⁵ However, the statute at issue in *Hendricks* imposed civil commitment on sex offenders, thus depriving them of their total liberty interest.¹⁴⁶ Residence restrictions may force sex offenders to look for housing in less desirable areas,¹⁴⁷ but these laws do not restrict offenders from engaging in daily activities nor do they prevent offenders from living with family members in homes located outside of established buffer zones.

Opponents of residence restrictions have made a stronger argument regarding the failure of state statutes to provide adequate notice. First, both sex offenders subject to restrictions and local officials have had difficulty in ascertaining which areas are off-limits to sex offenders.¹⁴⁸ Second, opponents argue that vague language included in state statutes fails to provide adequate notice of restricted areas.¹⁴⁹ For example, statewide restrictions in Texas prohibit sex offenders from residing “within 1,000 feet of a premises where children commonly gather.”¹⁵⁰ Left to the imagination, these areas could encompass a variety of community facilities, including shopping centers, gymnasiums, and churches.

Recognition by the Eighth Circuit in *Miller* that statewide residence restrictions may be invalid as applied leaves statewide restrictions vulnerable in the future. Clearly, this language is dicta. However, another circuit may borrow this sentiment to strike down residence restrictions elsewhere that fail to provide clear information regarding the parameters of prohibited conduct.

B. *Substantive Due Process*

The Supreme Court has recognized that the Fourteenth Amendment protects the substantive aspects of liberty against arbitrary and unreasonable government action regardless of the fairness of procedures

143. *Id.* at 706.

144. 521 U.S. 346 (1997).

145. Duster, *supra* note 123, at 762 (suggesting that the Court in *Hendricks* upheld the civil commitment statutes because there were provisions in place to commit only those offenders found to be most likely to reoffend, and that the Court would not have upheld the Kansas statute had it applied across the board to all offenders with convictions).

146. *Hendricks*, 521 U.S. at 356.

147. *Miller*, 405 F.3d at 706 (stating that plaintiffs testified they had difficulty finding suitable housing outside of the 2,000-foot restricted areas, and that many of the available housing units were in rural parts of the state).

148. Duster, *supra* note 123, at 765-66 (summarizing the difficulties in knowing which areas are subject to residence restrictions because of a lack of current maps and other resources).

149. *Id.* at 766 (discussing vague language in the Georgia statute).

150. TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2005).

used.¹⁵¹ Under the doctrine of substantive due process, courts grant broad deference to legislative judgments and typically require that laws be merely rational in relation to a legitimate purpose.¹⁵² But when legislation infringes on fundamental rights, the state must narrowly tailor regulations “to serve a compelling state interest.”¹⁵³ Opponents of residence restrictions against sex offenders have asserted that these laws infringe on the right to privacy, the right to travel, and the right to live where one chooses.¹⁵⁴ In *Miller*, the Eighth Circuit determined that the Iowa restrictions did not implicate any fundamental rights,¹⁵⁵ and upheld the statute under the rational basis test.¹⁵⁶

1. Right to Privacy Regarding Family Life

The *Miller* court rejected the claim that Iowa’s residence restrictions intrude on the right to privacy concerning family life.¹⁵⁷ Respondents relied on a line of Supreme Court cases that have found “intimate human relationships” to be so central to the concept of freedom that they deserve the utmost protection from government interference.¹⁵⁸ Recognizing that the doctrine of judicial restraint requires caution in extending the arena of fundamental rights,¹⁵⁹ the court rejected respondents’ claim, stating that the Iowa statute did not directly intrude on “the family relationship.”¹⁶⁰

While the Supreme Court has recognized a fundamental right in personal choices relating to marriage and family life, strict scrutiny is not

151. See *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (describing the substantive component of the Due Process Clause that protects individual liberty against “certain government actions regardless of the fairness of the procedures used to implement them.”) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

152. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 222 (1953) (stating that due process provides broad deference to government in choosing the ways and means by which it carries out its policies).

153. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Only fundamental rights and liberties which are “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed’” qualify for the protection of strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

154. *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005).

155. *Id.* at 710.

156. *Id.* at 714-16.

157. *Id.* at 709.

158. See *id.* at 709-10 (summarizing the development of the fundamental right to privacy regarding family relationships). Respondents leaned heavily on the ruling in *Moore v. City of East Cleveland*, in which the Court, in rejecting a law that prevented a grandmother from residing with her two grandsons, stated that “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Moore v. City of E. Cleveland*, 431 U.S. 494, 498-99 (1977).

159. *Miller*, 405 F.3d at 710 (citing *Flores*, 507 U.S. at 302).

160. *Id.* at 710.

required when a regulation merely has “an incidental or unintended effect on the family.”¹⁶¹ In *Griswold v. Connecticut*,¹⁶² the Court applied strict scrutiny to a state statute that directly imposed on the privacy of marriage by forbidding the use of contraceptives by a married couple.¹⁶³ Conversely, in *Miller*, the court stated that the Iowa statute did not directly operate to regulate family life nor did it prevent families from living together.¹⁶⁴ While the court recognized that some sex offenders were prevented from living in preferred locations,¹⁶⁵ the court asserted that the statute does not restrict who may live together.¹⁶⁶

2. Right to Travel

The Eighth Circuit, in *Miller*, rejected respondents’ claim that the Iowa residence restrictions violate any fundamental right to travel.¹⁶⁷ Leaning on Supreme Court recognition of the right to interstate travel,¹⁶⁸ respondents argued that because the Iowa residence restrictions substantially infringe on the ability of sex offenders to establish residences, the law erects an unconstitutional barrier to offenders’ right to migrate from other states to Iowa.¹⁶⁹ The court disagreed, stating that the Iowa statute did not erect a barrier to interstate movement.¹⁷⁰

The *Miller* court refused to extend the fundamental right to travel beyond its strict application.¹⁷¹ In *Saenz v. Roe*,¹⁷² the Supreme Court

161. *Id.* (citing *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir. 1985)).

162. 381 U.S. 479 (1965).

163. *Id.* at 485.

164. *Miller*, 405 F.3d at 711 (distinguishing the Iowa statute from the regulations involved in *Moore* and *Griswold*).

165. *Id.* The court acknowledged that some offenders could not reside with family members who had established residences within restricted buffer zones while others were forced to move as far as forty-five miles from a preferred location. *Id.* However, the court found these to be merely incidental results of the statute. *Id.*

166. *Id.* at 710. The Iowa Supreme Court rejected a similar challenge to the Iowa residence restrictions, finding that the law did not “absolutely prevent” husband and wife from living together. *State v. Seering*, 701 N.W. 2d 655, 663 (Iowa 2005). While the *Seering* court purported to be sympathetic to the difficulties arising out of the residence restrictions on sex offenders and their families, the court stated that “the difficulties result from a social or political judgment that must be made by the legislature and not this court.” *Id.* at 664.

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

168. *See Saenz v. Roe*, 526 U.S. 489, 500 (1999) (stating that the right to interstate travel encompasses “the right of a citizen of one State to enter and to leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”).

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

170. *Id.* at 712.

171. *See id.* at 712 (asserting that to recognize an implication of the fundamental right to

found that a regulation violated the fundamental right to travel because it denied non-residents the same welfare benefits that were afforded to in-state residents.¹⁷³ In distinguishing the Iowa residence restrictions from the regulation in *Saenz*, the Eighth Circuit reasoned that Iowa's statute did not treat visitors to Iowa differently than residents, nor did it treat potential residents differently than current residents.¹⁷⁴ The court rejected an alternative claim that the statute intruded on the right to intrastate travel, stating that even if the court acknowledged such a dubious right,¹⁷⁵ the right to intrastate travel is correlative to the right to interstate travel, and therefore would fail under the court's analysis.¹⁷⁶

Opponents argue that a literal interpretation of statewide restrictions prohibits visiting sex offenders from sleeping even a single night within a residential buffer zone and therefore these restrictions present a more significant intrusion on the right to travel than recognized by the *Miller* court.¹⁷⁷ Under Iowa's statute, the term "residence" is defined as "the place where a person sleeps, which may include more than one location, and may be mobile or transitory."¹⁷⁸ A literal application could potentially place homeless shelters and rehabilitation centers off limits or simply scare sex offenders into avoiding the state altogether.¹⁷⁹ The *Miller* court discarded these claims, pointing to the fact that respondents were current and potential residents rather than travelers.¹⁸⁰ However, the court implied that this line of argument could be effective should another group of sex offenders challenge Iowa's restrictions or other state restrictions that have included temporary residences through statutory language.¹⁸¹

interstate travel in considering the Iowa residence restrictions would be an unwarranted extension beyond the Supreme Court's previous case law).

172. 526 U.S. 489 (1999).

173. *Id.* at 505-07.

174. *Miller*, 405 F.3d at 712. The court stated that all offenders were treated equally as harsh. *Id.*

175. While the right to interstate travel has consistently been recognized as a fundamental right, there is a circuit split on the status of the right to intrastate travel. Compare *Lutz v. City of York*, 899 F.2d 255, 265-66 (3d Cir. 1990) (holding that a city ordinance that prohibited cruising on certain streets violated a fundamental right to intrastate travel), with *Doe v. City of Lafayette*, 377 F.3d 757, 770-71 (7th Cir. 2004) (holding that a city ordinance banning sex offenders from entering public parks did not implicate any right to intrastate travel).

176. *Miller*, 405 F.3d at 713.

177. Duster, *supra* note 123, at 750-51.

178. IOWA CODE § 692A.1(8) (2005).

179. Duster, *supra* note 123, at 750-51 ("A sex offender simply wanting to travel through the State might be compelled to avoid Iowa altogether lest he stop for the night at an acquaintance's home or a motel and thereby establish an unlawful residence by unwittingly falling asleep.").

180. *Miller*, 405 F.3d at 712 n.3.

181. *See id.* (questioning whether concerns over temporary housing were applicable to the Respondents in the class action before the court).

3. Right to Live Where One Chooses

Reviving an argument that the Eighth Circuit had previously rejected some thirty years ago in *Prostrollo v. University of South Dakota*,¹⁸² respondents in *Miller* argued that residence restrictions intruded on the fundamental right to live where one chooses.¹⁸³ The *Miller* court noted that courts should proceed with caution in deciding whether to expand the arena of fundamental rights.¹⁸⁴ Declining to overturn *Prostrollo*, the court stated that respondents failed to show that the right to live where one chooses was either “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty” in accordance with the test established by the Supreme Court in *Washington v. Glucksberg*.¹⁸⁵

But while the *Miller* court rejected this most intriguing substantive due process challenge, commentators have continued to press the issue.¹⁸⁶ First, commentators claim that aside from discriminatory housing laws that have long been abandoned, there is no historical precedent permitting states from restraining individuals from living in homes they can otherwise afford to own.¹⁸⁷ Additionally, the right to live where one pleases is said to be implicit in the concept of ordered liberty because of the basic role that private property rights play in American democracy¹⁸⁸ and because of

182. 507 F.2d 775 (8th Cir. 1974). The Eighth Circuit stated that “we cannot agree that the right to choose one’s place of residence is necessarily a fundamental right.” *Id.* at 781.

183. *Miller*, 405 F.3d at 713.

184. *Id.* at 713-14. The Supreme Court has placed great caution on the way in which courts proceed in matters concerning substantive due process because “[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.” *Id.* at 714 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

185. *Id.* at 714 (quoting *Glucksberg*, 521 U.S. at 720-21).

186. See Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Control*, 38 SAN DIEGO L. REV. 693, 696 (2001). In criticizing smart growth techniques—recent land use policies that restrict suburban development in favor of high-density urban development—Professor Siegan states that government bodies should not be allowed to infringe on individuals’ “fundamental freedom to move and settle where they choose.” *Id.*

187. See Lior Strahilevitz, *Sex Offender Residency Restrictions and the Right to Live Where You Want*, PRAWFSBLAWG, Aug. 3, 2005, http://prawfsblawg.blogs.com/prawfsblawg/2005/08/sex_offender_re.html (stating that aside from banishment laws and restraining orders, there is “little historical precedent for states preventing citizens from living in homes they can afford to buy, let alone rendering entire cities off limits to undesirables”).

188. See Richard Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 187 (1992) (stating that in many circles, property rights are considered fundamental to our society). Professor Epstein cites Justice Bushrod Washington’s opinion in an early nineteenth century case in which Justice Washington states, riding circuit, that fundamental rights under the Privileges and Immunities Clause may include “the enjoyment of life and liberty, with the right to acquire and possess property of every kind . . . , [and] to take, hold and dispose of property.” *Corfield v.*

the inherently undemocratic nature of government-mandated housing.¹⁸⁹

This argument misapplies both prongs of the *Glucksberg* test. Regarding the first prong, commentators incorrectly attempt to shift the burden onto the government to prove that there is a long history of restrictions against choice of residence. Secondly, judicial approval of zoning and land use regulations¹⁹⁰ has long confirmed that private property rights are not recognized by the Court as fundamental rights under the U.S. Constitution.¹⁹¹ While the right to continued enjoyment of private property is one that the framers surely considered in drafting the Takings Clause,¹⁹² as well as the Due Process Clause,¹⁹³ nowhere in the Constitution does it create a right to enjoy property that one does not yet own. If states and local governments are capable of crafting zoning ordinances in such a way to prohibit the future use of property for residential purposes altogether, then it seems highly unlikely that restrictions on sex offenders shopping for a new neighborhood would be so egregious such that “neither liberty nor justice would exist.”¹⁹⁴ Surely then, the right to choice of residence cannot be inherent in the concept of ordered liberty. Furthermore, opponents of residence restrictions, including respondents in *Miller*, cite no case law to support the notion that this right is fundamental.¹⁹⁵

4. Rational Basis Review

After finding no basis to elevate scrutiny under substantive due process analysis, the *Miller* court analyzed Iowa’s residence restrictions to see if the restrictions “rationally advance some legitimate governmental purpose.”¹⁹⁶ Respondents had contended that even if the court declined to

Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).

189. See Strahilevitz, *supra* note 187 (stating that “[g]overnment-mandated ghetto-ization is . . . a hallmark of unfree societies”).

190. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that the Village of Euclid’s zoning ordinance was valid because it was not unreasonable or arbitrary in relation to its police powers).

191. See Michael Allan Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?*, 30 U. RICH. L. REV. 961, 994 (1996) (stating that courts do not view the right to own and use private property as a fundamental right under the Federal Constitution).

192. U.S. CONST. amend. V (“Nor shall private property be taken for public use, without just compensation.”).

193. U.S. Const. Amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

194. See *Palko v. Connecticut*, 302 U.S., 319, 325-26 (1937).

195. See *Doe v. Miller*, 405 F.3d 700, 713-14 (8th Cir. 2005). As the Supreme Court stated in *Flores*, “[t]he mere novelty of such a claim is reason enough to doubt that substantive due process sustains it.” *Reno v. Flores*, 507 U.S. 292, 303 (1993).

196. *Miller*, 405 F.3d at 714-16 (quoting *Flores*, 507 U.S. at 306).

strictly scrutinize the Iowa statute, the restrictions were irrational.¹⁹⁷ While admitting that the State had identified a highly legitimate interest in attempting to protect the safety of children,¹⁹⁸ respondents argued that there was no scientific evidence to demonstrate that prohibiting sex offenders from living within 2,000 feet of a school or child-care facility would further this interest.¹⁹⁹ The court rejected this contention, stating that the chosen residency restrictions were reasonable in light of the serious threat posed by sex offenders to the safety and welfare of children.²⁰⁰

The court's reasoning confirms that even when a statutory regulation is suspect, courts will defer to legislative judgment as long as there is a shred of reasonableness present.²⁰¹ Considering that twelve other states had enacted residence restrictions at the time, the court found that although there was evidence doubting the link between residential proximity and a sex offender's likelihood of reoffending,²⁰² the Iowa Legislature acted with proper authority in weighing the credibility of the evidence.²⁰³ In evaluating the classification created by the statute, the court noted that the legislature was properly situated to arrive at a distance requirement to be used in the creation of buffer zones,²⁰⁴ and found nothing wrong with grouping sex offenders together given evidence of sex offenders' high rate of recidivism.²⁰⁵ The court concluded by summarizing the essence of rational basis review: that courts will not find a regulation when, as in *Miller*, policymakers employ "common sense" in imposing means to

197. *Id.* at 714.

198. *Id.*

199. *Id.*

200. *Id.* The court stated that "where precise statistical data is unavailable and human behavior is necessarily unpredictable," the state legislature has the authority to determine the best course of action to protect the interests of its citizens. *Id.*

201. *See id.* at 714-16 (concluding that the residence restrictions created by the Iowa Legislature were not without a rational basis despite a lack of evidence as to their potential effectiveness). Furthermore, in *Jones v. United States*, the Supreme Court stated that when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." 463 U.S. 354, 370 (1983).

202. *Miller*, 405 F.3d at 714-16. The court acknowledged that a Minnesota Department of Corrections study found no evidence that residential proximity had any correlation with a sex offender's likelihood to commit another offense. *Id.* at 714.

203. *Id.*

204. *Id.* The court noted that the decision to provide for 2,000-foot buffer zones was the sort of task for which the legislature was well suited. *Id.*

205. *Id.* at 715-16. The court looked specifically at recent Supreme Court opinions addressing restrictions placed on sex offenders in light of high rates of recidivism. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) ("When convicted sex offenders reenter society, they are much more likely than any other offender to be re-arrested for a new rape or sexual assault.").

effectuate a legitimate interest.²⁰⁶

Did the *Miller* court turn a blind eye to evidence that residence restrictions have no effect on reducing recidivism? The court declined to give much weight to evidence of lower-than-expected recidivism rates, noting that residence restrictions had not been in place long enough to collect adequate empirical evidence and characterizing the evidence brought forth as speculative at best.²⁰⁷ Though recent studies have suggested rates of recidivism for sex offenders are much lower than once believed, as discussed further in Part V, courts are extremely deferential to legislative decision-making under the rational basis test.

C. Self-Incrimination

The Self-Incrimination Clause of the Fifth Amendment protects persons against providing testimonial information that may be used against them in a criminal prosecution.²⁰⁸ While a court will invalidate a law that “compels testimony by threatening to inflict . . . sanctions unless the . . . privilege is surrendered,”²⁰⁹ it must also be clear that a real and appreciable danger of incrimination exists.²¹⁰

Respondents in *Miller* argued that Iowa’s residence restrictions, in combination with state registration requirements, violated the Fifth Amendment because they forced sex offenders to incriminate themselves or face punishment for failure to register.²¹¹ The court rejected this challenge, stating that while Iowa’s registration requirements allegedly compel testimonial statements that could incriminate a sex offender living in a restricted zone,²¹² Iowa’s residence restrictions merely limit where a sex offender may reside.²¹³ Rather than treat these two laws as a uniform

206. *Miller*, 405 F.3d at 716. Noting that there was no evidence that the Iowa legislature acted “merely on negative attitudes toward . . . or a bare desire to harm a politically unpopular group,” the court found no reason to deviate from deference to legislative decisions under rational basis review. *Id.*

207. *Id.* at 714. Interestingly, the court also suggested that Iowa’s decision to pass residence restrictions was rational considering the fact that twelve other states had enacted their own set of restrictions. *Id.* While Iowa may have truly believed that residence restrictions would help prevent sex crimes against children, the fact that “every other state is doing it” is not a convincing justification.

208. U.S. CONST. amend. V.

209. *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-05 (1977) (holding that a state may not compel testimony by a defendant concerning the conduct of his public office, although a state may use evidence derived from other sources in the prosecution).

210. *Marchetti v. United States*, 390 U.S. 39, 48 (1968).

211. *Miller*, 405 F.3d at 716.

212. Under a separate statute, Iowa requires sex offenders to register their address with the appropriate county sheriff’s office. IOWA CODE § 692.2 (2005).

213. *Miller*, 405 F.3d at 716.

regulatory scheme, the court treated residence restrictions separately. Under this strict interpretation, the court distinguished previous cases in which the Supreme Court had found violations of the Self-Incrimination Clause.²¹⁴ The court discerned that while courts may invalidate registration requirements that create a real and appreciable hazard of self-incrimination, the underlying substantive law is not, by itself, unconstitutional.²¹⁵

After suggesting that the intended target should have been the registration requirements, the *Miller* court asserted that a self-incrimination challenge to the registration requirements would be premature.²¹⁶ Evidence showed that local officials had taken a flexible approach to enforcement by giving sex offenders time to find alternative housing;²¹⁷ consequently, sex offenders would have difficulties proving that there is a real and appreciable hazard of self-incrimination.

While the *Miller* court rejected the self-incrimination challenge, the court left the door open for future challenges. Hypothetically, if a sex offender registers an address that violates residence restrictions and is then prosecuted based on the information provided, without being given a chance to move to an unrestricted area, the issue of self-incrimination becomes ripe.²¹⁸ Considering that all fifty states now have registration requirements,²¹⁹ each state would be wise to ensure that its local law enforcement officials continue to provide sex offenders with an opportunity to move out of non-conforming residences before charging offenders with violating the statute.

D. *Ex Post Facto* Laws

Article I, § 10 of the U.S. Constitution prevents states from enacting laws that seek to retroactively increase the punishment for a crime that has already been committed.²²⁰ In analyzing whether a state law violates the *Ex Post Facto* Clause, courts look at whether the law operates as a

214. *Id.* at 716-17. For example, the court distinguished a case in which the Supreme Court held that requirements for payment of tax on marijuana imports violated the Self-Incrimination Clause, but did not suggest that laws criminalizing possession of marijuana were illegal. *See Leary v. United States*, 395 U.S. 6, 29 (1969).

215. *See Miller*, 405 F.3d at 716-17 (asserting that in previous cases, the Supreme Court narrowly tailored the holdings in Self-Incrimination Clause challenges to merely prohibit compulsion of registration and tax payment provisions for persons engaged in illegal activities). The court stated that in all of these cases the Supreme Court did not mean to imply that the Self-Incrimination Clause rendered the substantive law illegal. *Id.*

216. *Id.* at 717.

217. *Id.* at 717 n.5.

218. *Id.* at 717-18.

219. *See supra* note 39 and accompanying text.

220. *Miller*, 405 F.3d at 718.

punishment. If the legislature intended to enact a criminal punishment, that law is automatically deemed to be punitive and unconstitutional.²²¹ However, if the legislature intended to create a civil regulatory measure, then the law will be presumed to be valid unless it is excessively punitive.²²²

While conceding that the Iowa Legislature intended to enact a civil statutory scheme, respondents in *Miller* argued that residence restrictions against sex offenders were so punitive as to amount to retroactive punishment.²²³ A majority of the three-judge panel rejected this contention, concluding that respondents failed to carry their burden of proof.²²⁴ After acknowledging that the purpose behind the statewide residence restrictions was to protect the health and safety of Iowa's citizens, the majority used the five guideposts from *Smith v. Doe*²²⁵ to dismantle the notion that the Iowa statewide restrictions were excessively punitive.²²⁶

First, the majority rejected the argument that the restrictions amounted to banishment,²²⁷ a traditionally recognized form of punishment.²²⁸ The majority reasoned that unlike banishment, residence restrictions do not expel offenders from their communities,²²⁹ and because of the novelty of residence restrictions, there was no historical basis for finding these laws to be traditionally punitive.²³⁰ Second, the majority stated that the restrictions did not act primarily to promote the traditional aims of punishment.²³¹ While the majority agreed that the law could have both a deterrent and retributive effect, the primary purpose of the residence

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

222. *Id.* Laws that are civil will nevertheless be invalidated when found to be “‘so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

223. *Miller*, 405 F.3d at 718.

224. *See id.* at 718-23 (finding that the residence restrictions withstood the five-factor Ex Post Facto Clause analysis).

225. 538 U.S. at 92.

226. *Miller*, 405 F.3d at 719. The court detailed the five factors adopted by the Supreme Court in *Smith* to determine whether a law has a punitive effect: “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.” *Id.*

227. *Id.* In *Smith*, the Supreme Court stated that historically, banished offenders were “expelled from the community” and not allowed to return. *Smith*, 538 U.S. at 98.

228. *Miller*, 405 F.3d at 719 (citing *Smith*, 538 U.S. at 98).

229. *Id.* Under the Iowa statute, sex offenders are not prevented from going about their daily activities, traveling through, or conducting business transactions in areas surrounding schools or child-care facilities. *Id.*

230. *Id.* at 720.

231. *Id.*

restrictions was to protect the safety of children.²³² Next, the majority considered whether the restrictions “impose[d] an affirmative disability or restraint.”²³³ While the majority found residence restrictions to have a disabling effect,²³⁴ it balanced the degree of restraint against the legislature’s non-punitive purpose,²³⁵ and ultimately deferred to the final, dual-factor inquiry of rationality.²³⁶ The majority concluded that the restrictions were rationally related to a legitimate purpose²³⁷ and were not excessive in relation to that purpose.²³⁸ Specifically, the majority validated the categorical regulation of sex offenders²³⁹ and the legislature’s decision to apply 2,000-foot buffer zones.²⁴⁰

In his dissent from the holding regarding the ex post facto challenge, Judge Melloy concluded that Iowa’s residence restrictions were excessively punitive in effect, and should not be applied to sex offenders who committed crimes prior to enactment of the law.²⁴¹ Judge Melloy took

232. *Id.* The majority first asserted that while Iowa’s residence restrictions could have a deterrent effect, the primary purpose behind the law was to reduce the temptation for sex offenders to reoffend. *Id.* Similarly, the majority found that while the restrictions may have a retributive effect if they happened to parallel a sex offender’s degree of wrongdoing in application, this effect would merely be incidental. *Id.* Furthermore, the Supreme Court has warned against giving too much weight to this factor, considering that despite their purpose, many, if not most, regulations have a deterrent effect. *See Smith*, 538 U.S. at 102.

233. *Miller*, 405 F.3d at 720.

234. *Id.* at 721. Respondents presented evidence that the statute prohibited some sex offenders from otherwise living with family members and spouses in areas covered by the residence restrictions. *Id.*

235. *Id.* As the Supreme Court did in *Smith* and *Hendricks*, the majority “considered the degree of the restraint involved in light of the legislature’s countervailing nonpunitive purpose.” *Id.*

236. *Id.*

237. *Id.* Leaning on findings in *Smith* that sex offenders have a high risk of recidivism, the majority asserted that the legislature could reasonably believe that residence restrictions would be an effective measure for preventing new sex offenses against children. *Id.*

238. *Id.* at 721-23. In addressing what the majority titled “the most significant factor,” the court concluded that “the Does have not established the ‘clearest proof’ that Iowa’s choice is excessive in relation to its legitimate regulatory purpose, such that a statute designed to be nonpunitive . . . should be considered retroactive criminal punishment.” *Id.* at 723.

239. *Id.* at 721. The majority asserted that “[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.” *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)). The majority concluded that a categorical rule against sex offenders would not be excessive because among other reasons, the legislature is not required to narrowly tailor the restrictions to meet the “‘excessiveness’ prong of the ex post facto analysis.” *Id.* at 722.

240. *Id.* at 722-23. Noting that the Iowa statute was one of the first of its kind in the nation and the difficulties in determining a proper distance requirement, the majority chose not to disturb the legislature’s decision. *Id.*

241. *Id.* at 723-25 (Melloy, J., dissenting) (finding four out of five factors weighed in favor of an ex post facto violation).

a more liberal approach to the historical punishment inquiry. He found that while Iowa's residence restrictions did not expel sex offenders completely, the restrictions amounted to partial banishment because sex offenders were stigmatized²⁴² and could not find housing at all in certain cities.²⁴³ He then determined that Iowa's law effectuated the traditional notion of deterrence.²⁴⁴ Unlike the majority, Judge Melloy argued that the affirmative disability imposed by the restrictions could not be overlooked.²⁴⁵ Finally, while Judge Melloy agreed that there was a rational connection at play,²⁴⁶ he argued that the restrictions were excessive in relation to the legitimate purpose of protecting the public.²⁴⁷ He stated that because of the severe limitations placed upon sex offenders, the uniform application of these restrictions without regard to individual dangerousness, and their lifetime application, Iowa's restrictions were excessively punitive.²⁴⁸

The fate of these laws appears to be, at least partially, at the mercy of empirical battles. Throughout its opinion, the *Miller* majority leaned heavily on findings by the Supreme Court that sex offenders have a higher risk of recidivism than other types of offenders.²⁴⁹ Recent studies paint a different picture, suggesting that sex offenders do not reoffend as often as previously thought.²⁵⁰ Because courts recognize the fifth factor as the most significant,²⁵¹ future challenges under the Ex Post Facto Clause may hinge on the results of future empirical studies and sources of evidence considered by courts.

242. *Id.* at 724 (comparing the stigma attached to sex offenders to colonial punishments such as "shaming, branding, and banishment").

243. *Id.* The effect of the residence restrictions was to force sex offenders to leave their communities and live in rural areas or leave the state altogether. *Id.*

244. *Id.* at 725.

245. *Id.* Judge Melloy stated that it is impossible to distinguish between the legislative purpose of reducing the opportunity to reoffend and the increase in negative consequences of an action effectuated by the residence restrictions. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 726.

249. *See supra* note 205. For example, the majority cited this notion in concluding that Iowa's residence restrictions were rationally related to the nonpunitive purpose of reducing the risk of future sex offenses against minors. *Miller*, 405 F.3d at 721.

250. *See supra* note 13 and accompanying text.

251. *See Miller*, 405 F.3d at 721 (stating that the fourth and fifth factors, relating to whether a regulation is excessive in relation to a rational purpose, are the most significant factors in the analysis).

V. ANALYZING FLORIDA'S APPROACH TO RESIDENCE RESTRICTIONS

A. *Lessons from Miller: Upholding Florida's Statewide Restrictions Under the Eighth Circuit's Analysis*

In analyzing the validity of statutes enacted by the Florida Legislature, the Florida Supreme Court has recognized that statutes are “clothed with a presumption of constitutionality.”²⁵² The State of Florida has discretion under its “police powers” to enact policies for the health and safety of its constituents.²⁵³ As long as the exercise of the police powers is not arbitrary and capricious,²⁵⁴ the State may enact legislation reasonably related to safeguarding its children from harm when the potential harm outweighs the interests of individuals targeted by the regulation.²⁵⁵ Drafted with a reasonable belief that buffer zones will reduce the temptation and opportunities for sex offenders to commit new crimes against children, Florida's statewide residence restrictions are a rational extension of this authority. In considering the constitutional validity of these restrictions, it may be helpful to analyze the Florida Legislature's approach under the framework used by the Eighth Circuit in *Miller*.

On their face, Florida's statewide restrictions do not contravene principles of procedural due process guaranteed by the Federal Constitution. The *Miller* court rejected the notion that sex offenders had a constitutionally guaranteed right to an individual hearing.²⁵⁶ As in *Miller*, the classifications drawn by the Florida Legislature, in drafting the statewide restrictions, do not require a special procedure for individual determinations of dangerousness.²⁵⁷ Both of Florida's statewide restrictions impose blanket prohibitions against a group of offenders who have previously committed crimes against children.²⁵⁸ Since proof of future dangerousness is not material to the application of these provisions, due process does not entitle sex offenders to any hearing to prove otherwise.²⁵⁹

252. *City of Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002).

253. *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483, 486 (Fla. 1947).

254. *McInerney v. Irvin*, 46 So. 2d 458, 463 (Fla. 1950) (holding that a statute regulating the use of communication wires by public utilities was not arbitrary or capricious, and therefore, was a valid exercise of the state's police power).

255. *Jones v. State*, 640 So. 2d 1084, 1086 (Fla. 1994) (holding that Florida's statutory rape provision was constitutional, despite intrusion on privacy interests).

256. *Miller*, 405 F.3d at 709 (concluding that individualized hearings were not required because the statute did not provide for exemptions to the classification based on dangerousness).

257. *See* FLA. STAT. § 794.065 (2005).

258. *See id.*; *id.* § 947.1405(7)(a)(2).

259. *See Conn. Dept of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (stating that “due process does not entitle [the sex offender] to a hearing to establish a fact that is not material under the

In addition, Florida's statewide restrictions likely provide sex offenders with adequate notice. In *Miller*, the court rejected the claims that potential problems with interpretation of restricted areas of residence and variations in enforcement amounted to inadequate notice in the Iowa statute.²⁶⁰ Like Iowa's statute, § 794.065 establishes the offenders to which the restrictions apply,²⁶¹ a finite number of facilities from which offenders are restricted,²⁶² and the distance required for offenders to adequately separate from such facilities.²⁶³

There is a legitimate argument that Florida's restrictions against sexual predators have the potential to be overbroad in application. Section 947.1405 prohibits sexual predators from living within 1,000 feet of public school bus stops and "other place[s] where children regularly congregate."²⁶⁴ These restricted areas are not clearly defined like the Iowa statute in *Miller*, nor are they identifiable to the common observer. However, since sexual predators are supervised and placed in housing by the Department of Corrections (DOC),²⁶⁵ the DOC is responsible for compliance with the statute. Thus, a sexual predator is not denied due process by this provision.

The existence of separate ordinances in some municipalities could complicate enforcement efforts for local law enforcement agencies charged with carrying out the statewide restrictions. However, as the court in *Miller* suggested, the potential for varied enforcement in Florida will not be sufficient to invalidate the statute.²⁶⁶ Therefore, any successful challenge under procedural due process would likely be limited to an as-applied challenge.

Under a substantive due process analysis, Florida's statewide residence restrictions are clearly a rational extension of the State's authority under the police powers. In following the reasoning of *Miller*, while § 794.065 and § 947.1405 may create obstacles in the day-to-day life of sex

statute").

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

261. Iowa's statute applies broadly to a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense. IOWA CODE § 692A.2A(1) (2005). In comparison, Florida's statute of general application is more precise, noting four specific crimes that make up the classification of offenders under the statute. *See supra* note 78 and accompanying text.

262. Compare IOWA CODE § 692.2A(2) (2005) (including public and non-public elementary and secondary schools as well as child-care facilities), with FLA. STAT. § 794.065 (2005) (including schools, day-care centers, parks, and playgrounds).

263. Compare IOWA CODE § 692.2A(2) (2005) (dictating 2,000-foot buffer zones), with FLA. STAT. § 794.065 (2005) (requiring 1,000-foot buffer zones).

264. FLA. STAT. § 947.1405(7)(a)(2) (2005).

265. *Id.*

266. *See Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005) (stating that "due process does not require that independently elected county attorneys enforce each criminal statute with equal vigor").

offenders, the restrictions do not intrude upon any fundamental rights.²⁶⁷ Despite Florida's express recognition of fundamental rights in areas where the U.S. Supreme Court has refrained from recognition,²⁶⁸ none of these rights are implicated by the buffer zones. As with Iowa's statute, Florida's statute of general application, § 794.065, does not expressly dictate with whom a sex offender may live²⁶⁹ and therefore, effects upon family life are indirect and incidental to the personal circumstances of a sex offender. Similarly, § 794.065 imposes no obstacle on the free movement of citizens of other states who wish to enter and exit the State of Florida. Finally, the notion that Florida courts would recognize a fundamental right to live where one chooses has absolutely no basis. Considering that Florida has long been a leader in the area of state-powered land use regulation,²⁷⁰ it is highly unlikely that the right to choose one's future neighborhood would be afforded any heightened interest.

Because no fundamental rights are implicated, Florida's statewide restrictions are sustainable under rational basis review.²⁷¹ Though the wisdom of placing residence restrictions against sex offenders may be debatable, these laws clearly have some grounding in the legitimate purpose of ensuring the safety of children.²⁷² As noted in *Miller*, the Supreme Court has recognized that "victims of sexual assault are most often juveniles" and "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault."²⁷³ Despite arguments that recidivism is much lower than once perceived, experts still assert that limiting temptation is an important factor in reducing the likelihood that sex offenders will

267. See *id.* at 709-13 (finding that incidental burdens placed upon family life and the ability to travel between states do not amount to intrusions on fundamental rights).

268. For example, the U.S. Supreme Court has held that public education is not a fundamental right under the Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973). However, in 1998, Florida amended the state constitution to make education a "fundamental value." FLA. CONST. art. IX, § 1 (amended 1998).

269. Compare IOWA CODE § 692A.2A (2005), with FLA. STAT. § 794.065 (2005).

270. See Julian Conrad Juergensmeyer, *Florida's Private Property Rights Protection Act: Does it Inordinately Burden the Public Interest?*, 48 FLA. L. REV. 695, 706 (1996) (describing Florida's strong system of environmental and land use planning).

271. See *Miller*, 405 F.3d at 714-16 (upholding Iowa's residence restrictions under rational basis review, in the absence of "a constitutional liberty interest that has been raised to the status of fundamental right").

272. See Recent Legislation, *Criminal Law—Sex Offender Notification Statute—Alabama Strengthens Restrictions on Sex Offenders*, 119 HARV. L. REV. 939, 945 (2006). While not convinced that sex offender laws are effective, the editors of the Harvard Law Review posited that "[g]iven their popularity, their potential deterrent value, and the possibility that they may prevent even a small number of crimes, tough sex offender laws appear to be rational . . . public policy." *Id.*

273. *McKune v. Lile*, 536 U.S. 24, 32-33 (2002).

reoffend.²⁷⁴ Therefore, Florida lawmakers, many of whom have children of their own, may perceive a risk that sex offenders convicted of harming children may harm children again if they have easy access to children.

Moreover, in its decision in *Doe v. Moore*, the Eleventh Circuit Court of Appeals demonstrated that it will not interfere with reasonable regulations placed on sex offenders for the benefit of the state's citizens.²⁷⁵ In rejecting appellants' claim that the Sex Offender Act infringed on fundamental rights to privacy²⁷⁶ and interstate travel,²⁷⁷ the Eleventh Circuit stated that the mere burdens imposed by registration and notification requirements do not suggest that these regulations are unreasonable in light of their rational connection to the legitimate purpose of preventing future sex offenses.²⁷⁸ There is, undoubtedly, at least some logic in preventing sex offenders from having easy access to children. Accordingly, the rulings in *Moore* and *Miller* suggest that opponents of residence restrictions in Florida will have to look to a constitutional basis other than substantive due process to challenge the rationality of these laws, at least in federal court.

Self-incrimination challenges to Florida's statewide restrictions deserve some consideration. Sex offenders in Florida are required to register their address and location with local law enforcement under the Florida Sex Offender Act.²⁷⁹ But under the *Miller* analysis, because Florida's statewide residence restrictions do not expressly require a sex offender to provide any information to law enforcement,²⁸⁰ the substantive rule prohibiting residence within designated buffer zones of 1,000 feet stands independently.²⁸¹ While law enforcement agencies in Florida have taken a deliberate approach to enforcing these restrictions,²⁸² the possibility that registration could be used as the sole evidence of a violation would raise concerns about Florida's statewide restrictions as applied to that offender.²⁸³ While § 794.065, on its face, does not compel offenders to

274. Some sex offenders have admitted that restricting access to children will help reduce impulsive temptations to commit an offense. Levenson & Cotter, *supra* note 13, at 173.

275. See *supra* note 51 and accompanying text.

276. *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) ("We can certainly understand how a person may be shunned by a person or group that discovers his past offense . . . but, a state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy.").

277. *Id.* at 1348-49.

278. *Id.*

279. *Supra* notes 43 & 46 and accompanying text.

280. FLA. STAT. § 794.065 (2005).

281. See *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005).

282. See *Ives*, *supra* note 1, at A1 (stating that Ocala police officers gave William Smith Jr. several warnings before arresting him for violating the residence restrictions).

283. See *Duster*, *supra* note 123, at 768-69 (stating that registration of the address provides

incriminate themselves, it seems unlikely that both the registration requirement and residence restrictions can constitutionally coexist if local law enforcement agencies immediately act to arrest sex offenders who fail to register new addresses.

While the ex post facto challenge in *Miller* was the most serious attack on Iowa's residence restrictions, Florida's current statewide residence restrictions are better suited to withstand attacks under the Ex Post Facto Clause.²⁸⁴ First, Florida's statewide restrictions impose less restrictive buffer zones than those upheld in *Miller*. While Iowa's statute provides for buffer zones of 2,000 feet,²⁸⁵ both § 794.065 and § 947.1405 limit the restricted areas to 1,000 feet.²⁸⁶ Second, and more significantly, while Iowa's statute applied retroactively, § 794.065 only applies to those offenders convicted after the laws were enacted.²⁸⁷ Admittedly, § 947.1405 applies retroactively to those sexual predators committing offenses between October 1, 1995 and September 30, 2004.²⁸⁸ However, the restriction is a term of conditional release.²⁸⁹ Because a sexual predator remains under the control of the State, residence restrictions do not increase the term of confinement.²⁹⁰ Thus, the Florida Legislature has likely protected the statewide restrictions against ex post facto attacks.²⁹¹

law enforcement with evidence of the only element of the offense and is enough to support a conviction).

284. A finding that Florida's statewide restrictions survive a facial attack under the Ex Post Facto Clause would automatically prevent any as-applied challenge. *See Seling v. Young*, 531 U.S. 250 (2001) (holding that a state statute found to be civil in nature, cannot be deemed punitive "'as applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses").

285. IOWA CODE § 692A.2A (2005).

286. FLA. STAT. § 947.1405(7)(a) (2005); *id.* § 794.065. Under the Eighth Circuit's reasoning in *Miller*, there is no reason to think that this policy choice is excessive. *See Miller*, 405 F.3d at 723.

287. *See* FLA. STAT. § 794.065(2) (2005) ("This section applies to any person convicted of a violation . . . for offenses that occur on or after October 1, 2004."). While § 947.1405 applies retroactively to any sexual predator convicted of a crime committed after October 1, 1995, the restriction is a term of conditional release. *Id.* § 947.1405(7)(a).

288. *Id.* § 947.1405(7)(a).

289. *Id.*

290. *See Mayes v. Moore*, 827 So. 2d 967 (Fla. 2002), *cert. denied sub nom.*, *Mayes v. Crosby*, 539 U.S. 904 (2003) (holding that the conditional release program was not a recidivist program that imposed an enhanced criminal penalty or sentence); *see also* Cal. Dep't of Corrs. v. Morales, 514 U.S. 499, 512-14 (1995) (rejecting an ex post facto challenge to a California law postponing parole hearings).

291. However, the Florida Legislature may want to revisit bus stop provisions within § 947.1405 and proposed amendments to § 794.065. Recent decisions in Eleventh Circuit district courts suggest that prohibiting sex offenders from living within a certain distance from public school bus stops may give rise to a legitimate ex post facto challenge. *See Doe v. Baker*, No. Civ.A. 1:05-CV-2265, 2006 WL 905368, at *4 (N.D. Ga. Apr. 5, 2006) (upholding Georgia's current sex offender law, but finding that "[a] more restrictive act that would in effect make it impossible for

Under the Eighth Circuit's analysis in *Miller*, Florida's statewide restrictions should withstand judicial scrutiny. The State has wide latitude in the use of its police powers to protect its citizens.²⁹² While these restrictions do present potential procedural due process and self-incrimination concerns on an as-applied level, they are not facially invalid under the *Miller* analysis. As drafted, the current restrictions are surely not the end-all solution to preventing future sex crimes. Nevertheless, Florida lawmakers should not be prohibited from zoning out sex offenders from areas heavily trafficked by children.

B. *Unintended Consequences*

Regardless of the constitutional validity of these restrictions, the greater concern may lie in their effectiveness, or lack thereof. Both commentators and local officials have pointed out a number of unintended consequences associated with residence restrictions that may inhibit their utility.²⁹³ These include problems with enforcement, the potential that residence restrictions may prove counterproductive, negative impacts on the families of sex offenders, and effects on the interrelations between local governments.

1. Problems with Enforcement

A number of law enforcement and other local governmental agencies have described the difficulties associated with enforcing residence restrictions. First, many communities lack the resources to effectively monitor the movement of sex offenders.²⁹⁴ Enforcement has been made

a registered sex offender to live in the community would in all likelihood constitute banishment"); *see also* Whitaker v. Perdue, No. Civ.A. 4:06-CV-0140-CC (N.D. Ga. June 27, 2006), *available at* http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/LegalDocuments/CooperORDER.6.27.06.pdf (issuing an injunction to prevent the enforcement of new legislation in Georgia preventing general sex offenders from living within 1,000 feet of a public school bus stop).

292. *Supra* notes 253-55 and accompanying text.

293. Duster, *supra* note 123, at 771-75 (stating that residence restrictions may have negative consequences, including creating clusters of sex offenders, compromising rehabilitation efforts, deflating real estate values, frustrating the job of parole officers, and encouraging sex offenders to avoid registration requirements); IOWA COUNTY ATT'YS ASSOC., STATEMENT ON SEX OFFENDER RESIDENCE RESTRICTIONS IN IOWA 1-4 (2006), *available at* <http://spd.iowa.gov/filemgmt/visit.php?lid=284> [hereinafter IOWA CAA] (stating that residence restrictions in Iowa are difficult to enforce, contribute to homelessness and a decrease in sex offender registration, frustrate efforts to prosecute sex offenders, punish the innocent families of sex offenders, and put efforts to rehabilitate sex offenders into jeopardy).

294. Sonji Jacobs & Jill Young Miller, *Sex Offender's Tough Bill Gets Panel's Approval: Sheriffs Leery of 1,000-Foot Ban Around Bus Stops*, ATLANTA JOURNAL-CONSTITUTION, Mar. 22, 2006, at B1 (stating that while sheriffs in Georgia support residence restrictions, they foresee

even more difficult when sex offenders avoid registering their addresses with local authorities.²⁹⁵ Considering that Florida has the nation's third highest population of sex offenders living within its borders,²⁹⁶ monitoring these offenders may prove daunting.²⁹⁷ Additionally, local ordinance provisions prohibiting landlords from renting to sex offenders may be extraordinarily difficult to enforce, considering that sex offenders are not required to divulge information about the ownership of their residence in fulfilling the statutory registration requirement.²⁹⁸

Residence restrictions may also impede prosecutorial efforts to obtain confessions and negotiate plea bargains with sex offenders. Prosecutors in Iowa have claimed that these effects may lead to a decrease in the number of sex offenders who are held accountable for their crimes.²⁹⁹ Because Florida's statewide buffer zones operate indefinitely,³⁰⁰ sex offenders in Florida may be less inclined to cooperate with prosecutors. Then again, the threat of longer sentences imposed under the Jessica Lunsford Act³⁰¹ may encourage offenders to come to the table.

2. Potential Increase in Rates of Recidivism

If Florida lawmakers are truly concerned with preventing sex crimes against children, they should be mindful that current residence restrictions might actually result in higher rates of recidivism among sex offenders. Particularly, opponents argue that these restrictions compromise the rehabilitation efforts of sex offenders.³⁰² Schools, parks, playgrounds, and

themselves being overwhelmed "trying to keep track of who lives and works too close to a bus stop"). Lucky for these Georgia sheriffs, a federal judge sitting in the norther district of Georgia felt their pain. *See supra* note 291.

295. Davey, *supra* note 18, at A1 (stating that the number of registered sex offenders in Iowa now listed as "whereabouts unconfirmed" or living in "non-structure locations" has risen from 140 in the summer of 2005 to over 400 as of March 2006). In addition to searching out those offenders who have avoided registration, the Iowa County's Attorney Association has found enforcing the restrictions "nearly impossible" against those sex offenders who are no longer required to register under Iowa law. IOWA CAA, *supra* note 293, at 3.

296. Carlson, *supra* note 98.

297. However, Florida's residence restrictions against general sex offenders only apply to those who have been convicted as of October 1, 2004. FLA. STAT. § 794.065(2) (2005). Since that excludes a large proportion of those convicted offenders living in Florida already, and many of the offenders subject to the statute are likely currently imprisoned, enforcing these restrictions has not presented the same challenges for law enforcement agencies in Florida.

298. *See id.* § 943.0435(2).

299. IOWA CAA, *supra* note 293, at 3.

300. *See* FLA. STAT. § 794.065 (2005).

301. *See supra* note 55 and accompanying text.

302. *See* Levenson & Cotter, *supra* note 13, at 174 (discussing the negative impact of residence restrictions on efforts to rehabilitate sex offenders); *Doe v. Miller*, 405 F.3d 700, 707-08 (8th Cir. 2005) (pointing to the concerns of psychologists for both the State of Iowa and the

child-care facilities are typically located in those same areas where sex offenders work, socialize and receive treatment.³⁰³ Opponents claim that sex offenders are least likely to reoffend when they have access to treatment and stability in their lives.³⁰⁴

By forcing sex offenders to move to the fringe of their communities, Florida's statewide restrictions, coupled with tougher local restrictions in some places, may cause these offenders to suffer emotional distress and heightened temptation to reoffend.³⁰⁵ Should this be true, even those people who argue that the interests of society always trump the interests of sex offenders would likely question the wisdom of residence restrictions. While sex offender treatment centers can certainly relocate to better serve their clients, treatment alone does not prevent recidivism in some offenders.³⁰⁶ Thus, state and local officials should track the impact of these restrictions closely to ensure that they are not making a difficult problem worse.

3. Impact on Families

Sex offenders, despite their behavior, often have families. Opponents argue that families of sex offenders are unnecessarily harmed by residence restrictions when offenders have to pull children out of schools and force their spouses to find new employment.³⁰⁷ The resulting lack of suitable housing available to sex offenders forces offenders to either uproot their families from the community or separate themselves from their families altogether.³⁰⁸ While Florida's current statewide restrictions are not as exclusive as Iowa's, those cities with tougher local ordinances may leave few suitable options for family housing.³⁰⁹ With the number of 2,500-foot

respondents that residence restrictions "might be counterproductive" to treatment of offenders).

303. Levenson & Cotter, *supra* note 13, at 172-73.

304. IOWA CAA, *supra* note 293, at 4 ("Efforts to rehabilitate offenders and to minimize the rate of reoffending are much more successful when offenders are employed, have family and community connections, and have a stable residence.").

305. *See supra* note 13.

306. ATSA Policy Statement, *supra* note 13 (stating that "treatment does not work well for all offenders").

307. IOWA CAA, *supra* note 293, at 2.

308. *See Davey, supra* note 18, at A1 (stating that many offenders in Iowa have left their families to live with clusters of sex offenders in cheap motels). The clustering of sex offenders is a fascinating issue in and of itself. *See Jennifer Warren, Sex Offender Colony Proposed if Proposition Passes*, L.A. TIMES, Sept. 30, 2006, WLNR 16921672 (reporting on one sex offender's view that California's ballot initiative—Proposition 83—"threatens to create chaos and wandering bands of rootless men" and that the state should create a colony for sex offenders and their families in rural California to deal with displacement issues resulting from new residence restrictions).

309. *See Roberto Santiago & Sara Olkon, Up Front, Sex Crimes: Molestor Ban Poses Risks*,

local buffer zones being enacted in densely populated Broward County, where there are 138 public elementary schools alone,³¹⁰ sex offenders will likely be forced to make a difficult choice.

4. Intergovernmental Competition

The race among local governments in Florida to enact exclusive ordinances has created an urban landscape in which sex offenders are pushed out altogether. For example, because the City of Miami Beach is located on a densely populated, small barrier island, the effect of the 2,500-foot buffer zone is to prohibit sex offenders from living anywhere within the city limits.³¹¹ Regardless of whether these restrictions are rational, municipalities are attempting to beat each other to the punch to prevent any new sex offenders from establishing a residence.³¹² Local officials feel pressure from the community to follow the lead of neighboring municipalities for fear that their city will otherwise become a haven for sex offenders.³¹³

This intergovernmental competition presents both legal and political consequences. The effective banishment of sex offenders from communities provides ammunition for sex offenders, as well as neighboring municipalities, to challenge the constitutional validity of these local ordinances.³¹⁴ Local ordinances that apply retroactively will have trouble fending off an *ex post facto* challenge.³¹⁵ Most notably, the inclusion of temporary residences within local buffer zones may very well intrude on the right to interstate travel, a situation contemplated by the

MIAMI HERALD, Sept. 19, 2005, at A1 (relaying a statement by leaders of the Sex Offender Support Network that roughly 80% of sex offenders who are released from prison return to their families, and local laws that impose tougher restrictions are preventing these offenders from doing so).

310. Broward County Pub. Schs., School Related Information, <http://www.browardschools.com/schools> (last visited Mar. 26, 2006).

311. Susan Anasagasti, *City Rejects County Sex-Offender Law*, MIAMI HERALD, Feb. 12, 2006, at A1.

312. *Id.* (quoting Miami Beach Mayor Alan Dermer) (stating that Miami Beach has reduced its sex offender population from 33 to 23 since enacting the ordinance). "It's a very, very positive step for this city and once again Miami Beach has led the way." *Id.*

313. Rebecca Dellagloria, *Law Restricting Sex Offenders Passes*, MIAMI HERALD, Aug. 28, 2005, at ML. In passing 2,500-foot buffer zones in the City of Hialeah, a local councilman stated that "[w]hat I didn't want was all these other cities passing something and Hialeah becoming a dumping ground for all these [sex offenders]." *Id.*

314. Sherman & Waller, *supra* note 17, at 1B. Hollywood Mayor Mara Giuliani has stated that the city might take legal action against surrounding cities that have enacted local ordinances banning sex offenders, causing them to find refuge in Hollywood. *Id.*

315. *See Smith v. Doe*, 538 U.S. 84, 92 (2003) (stating that retroactive punishment will be considered an invalid *ex post facto* law when it is so excessive in its effects as to negate a non-punitive purpose).

court in *Miller*.³¹⁶ Looking at the political ramifications, these ordinances create ill will among neighboring municipalities. Thus, local residence restrictions could conceivably have negative impacts on dealing with such shared regional issues as transportation and affordable housing.³¹⁷

C. *State v. Local Laws: The Case for Preemption*

The Florida Legislature has conferred broad power upon local governments to govern, provided that the ensuing regulations are not inconsistent with general or special law.³¹⁸ However, a local government's use of that power may be found inconsistent with state law where the State has occupied the field.³¹⁹ Even in those cases where the State has not preempted local governments from acting, a local ordinance must not specifically conflict with state law.³²⁰

The Florida Legislature has not expressly stated, within either § 947.1405 or § 794.065, that municipalities are prohibited from enacting legislation differing from the statewide residence restrictions.³²¹ However, an argument can be made that preemption is implied. Implied preemption should be found to exist in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the area of regulation and where strong public policy reasons exist for finding such an area to be preempted by the legislature.³²² By only prohibiting sex offenders from living within 1,000-foot buffer zones, the State has allowed sex offenders to live outside of that buffer zone. Local governments enacting larger buffer zones are thus intruding on that right. Because Florida's statewide buffer zones apply equally across the state, ostensibly without concern for

316. *See supra* note 181.

317. While the race to the bottom regarding laws against sex offenders may seem beneficial to local politicians currently in power, adding hostility to the climate of regional dysfunction may have dangerous effects on interlocal cooperation, particularly in South Florida, where the borders between municipalities are virtually seamless and problems related to pollution, schools, transportation, and affordable housing are shared by residents between three different counties. *See* LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW 725* (3d ed. 2004) (positing that the "desire for local autonomy" may interfere "with regional decisionmaking even where it is most obviously preferable").

318. *Speer v. Olson*, 367 So. 2d 207, 211 (Fla. 1978). Section 125.01(1) of the Florida Statutes grants counties the power to carry on county government. *Id.* at 211. "Unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power." *Id.*

319. *Id.*

320. *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993).

321. *See* FLA. STAT. § 947.1405(7)(a)(2) (2005); *id.* § 794.065.

322. *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984) (holding that the Public Records Act, which provides for disclosure of information, preempts a local law relating to delay in producing records for inspection).

providing heightened restrictions in any particular geographic areas, the statutory scheme is overtly pervasive.³²³

Additionally, there are a number of negative policy implications arising from the existence of competing ordinances among neighboring local governments. First, the race to push sex offenders out of communities could leave few housing options for sex offenders, causing clustering of offenders or even homelessness.³²⁴ Second, the displacement of sex offenders from one community to another places undue burdens on local governments that choose not to enact their own ordinance.³²⁵

Even if implied preemption is not found, local ordinances specifically conflict with the statewide restrictions in several ways. First, a majority of local ordinances provide for buffer zones of up to 2,500 feet,³²⁶ more than doubling the distance of Florida's statewide restrictions.³²⁷ Second, most local ordinances place residence restrictions on sex offenders for temporary residences of four or more consecutive days.³²⁸ In contrast, a sex offender could interpret § 796.045 to permit temporary living arrangements with friends for weeks at a time, as long as the offender does not establish a residence. Finally, local ordinances impose penalties in conflict with those imposed by the State. In many cases, a sex offender in violation of both the state and local ordinances would be subject to both a criminal punishment imposed by the State and a civil fine imposed by the local government.³²⁹

323. Allowing localities to expand buffer zones to 2,500 feet and beyond would frustrate the purpose of the State's 1,000-foot buffers because locally enacted buffer zones would effectively replace those determined to be appropriate by the Florida Legislature. *See* *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (stating that municipalities are creatures of the state and suggesting that in forming policy, the state is supreme and may legislate for its citizens as it will).

324. *See supra* notes 18 & 309.

325. *See supra* note 313 and accompanying text.

326. *See supra* note 100 and accompanying text.

327. *See* FLA. STAT. § 794.065 (2005) (barring sex offenders from living within 1,000 feet of designated areas).

328. *Supra* note 102 and accompanying text. According to the court in *Miller*, these local prohibitions against temporary residences on their own could be fertile grounds for another court to find a local ordinance unconstitutional. *See supra* note 181 and accompanying text.

329. *Compare* FLA. STAT. § 794.065 (2005) (punishing a violation by an offender either as a felony of the third-degree or a misdemeanor of the first-degree), *with* CITY OF LIGHTHOUSE POINT, FLA., ORDINANCE § 54-11 (2005) (imposing a fine not to exceed \$500 or imprisonment not to exceed sixty days or both).

VI. SUGGESTIONS FOR LEGISLATIVE REFORM

A. *Identifying an Opportunity for Florida Lawmakers*

Florida remains at the forefront of policymaking aimed at the prevention of future sex crimes. In response to both advocacy for tougher laws against sex offenders and criticism that current restrictions are parochial, Florida legislators continue to consider reforms to statewide residence restrictions against sex offenders. In fact, considering that six greatly different proposals to modify residence restrictions against sex offenders failed to make their way out of committee in 2006,³³⁰ a number of bills are likely to come before the Florida Legislature when it meets again in 2007. However, before amending current legislation or enacting new legislation, legislators may benefit from the following model legislation, aimed at clarifying statutory language, expressly preempting local attempts to create separate residence restrictions, and narrowing restrictions to a more dangerous group of offenders.

B. *Model Legislation*

794.065. Prohibited Places of Residence for Designated Sex Offenders

(1) For purposes of this section:

(a) “day-care center” means any child-care facility, as defined under § 402.302(2), family day-care home, as defined under § 402.302(7), or large family child-care home, as defined under § 402.302(8).

(b) “residence” means any residential or non-residential dwelling where a restricted sex offender permanently resides, or any residential or non-residential dwelling where a restricted sex offender routinely boards, lodges or resides, including but not limited to any building or structure owned or leased by the restricted sex offender, home of a friend or family member, vacation home, hotel, motel or boarding house.³³¹

330. See H.B. 91, 108th Leg., Reg. Sess. (Fla. 2006) (died in Criminal Justice Appropriations Committee on May 6, 2006); S.B. 768, 108th Leg., Reg. Sess. (Fla. 2006) (withdrawn from further consideration on April 28, 2006); H.B. 83, 108th Leg., Reg. Sess. (Fla. 2006) (withdrawn prior to introduction on March 7, 2006); H.B. 339, 108th Leg., Reg. Sess. (Fla. 2006) (died in Criminal Justice Appropriations Committee); H.B. 591, 108th Leg., Reg. Sess. (Fla. 2006) (died in Messages on May 5, 2006); S.B. 1054, 108th Reg., Sess. (Fla. 2006) (withdrawn prior to introduction on December 19, 2005).

331. The model legislation contemplates a divergence in the state and local approaches of regulating “residence” of sex offenders. Current state legislation prohibits sex offenders from “resid[ing]” within 1,000 feet of designated facilities. FLA. STAT. § 794.065 (2005). Whether intentional or not, § 794.065 fails to elaborate on the meaning of “reside,” leaving the term open

(c) “restricted sex offender” means any person who has been convicted of a violation of § 794.011, § 800.04, § 827.071, or § 847.0145, regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age.

(d) “school” means any public or private elementary or secondary school, or religious institution that provides educational instruction on a daily basis to minors.

(2)(a) It is unlawful for any restricted sex offender to establish a residence within 1,000 feet of any school, day-care center, park, or playground.

(b) The residential buffer requirement in (2)(a) of this section shall be determined by measuring the distance from the outer boundary of the residential property on which the restricted sex offender resides to the outer boundary of the school, day-care center, park, or playground in question, at their closest points. The distance shall be measured as the shortest straight line between the two points without regard to any intervening structures or objects.

(c) A restricted sex offender who violates this section and whose conviction under § 794.011, § 800.04, § 827.071, or § 847.0145 was classified as a felony of the first degree or higher, commits a felony of the third degree, punishable as provided in § 775.082 or § 775.083. A restricted sex offender who violates this section and whose conviction under § 794.011, § 800.04, § 827.071, or § 847.0145 was classified as a felony of the second or third degree, commits a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

(d) A restricted sex offender residing within 1,000 feet of any school, day-care center, park, or playground does not violate this section if any of the following apply:

1. The restricted sex offender established a residence prior to the effective date of this section;
2. The restricted sex offender is a minor;
3. The restricted sex offender was a minor when the restricted

to interpretation. On the other hand, local ordinances more specifically address the meaning of “residence,” bifurcating the term into “permanent residence” and “temporary residence,” and explicitly defining the term “temporary residence” as “abid[ing], lodg[ing], or resid[ing]” in any place for more than fourteen total days in any calendar year, or “abid[ing], lodg[ing], or resid[ing]” in any place for more than four consecutive days in any given month. *See supra* note 102 and accompanying text. Although the model legislation here has taken steps towards clarification, state legislators may want to think about developing even more concrete terms. Determining a period of time for establishing a residence appears somewhat arbitrary to this author, and perhaps is a task more aptly performed by state legislators, who may as a group come to some sort of consensus. Surely though, the more oppressive the time prohibition, the more likely it is for a court to overturn new legislation. *See supra* note 181 and accompanying text (discussing the possibility in *Miller* that restrictions on temporary living arrangements would offend the right to interstate travel).

sex offender committed the offense and was not convicted as an adult;

4. The restricted sex offender subsequently married the victim of the crime, and the restricted sex offender has not been convicted of any other crime listed in (1)(a) of this section;

5. The restricted sex offender is residing in a full-time rehabilitation center or is residing in a jail, prison, or other correctional facility as required by the State of Florida; or

6. The school, day-care center, park, or playground located within 1,000 feet of the restricted sex offender's residence, that would ordinarily cause the restricted sex offender to violate the prohibition in this section, was opened or began operation after the restricted sex offender established his or her residence.³³²

(3) This section applies to any person convicted of a violation of § 794.011, § 800.04, § 827.071, or § 847.0145 for offenses that occur on or after October 1, 2007.

(4) This section preempts any municipality or county from enacting residence restrictions placing more restrictive prohibitions on sex offenders than those restrictions provided in this section.

VII. CONCLUSION

In accordance with a public outcry, state and local governments have enacted laws at a blistering pace to zone out sex offenders from areas where children congregate. Under the broad authority of the police powers, these residence restrictions represent legitimate steps to protect children and their families from sexual violence.³³³ While all governmental efforts are subject to the limits imposed by both the Florida and U.S. Constitutions, courts give great deference to the policy-making decisions of the legislature.³³⁴ So long as traditional notions of sex offenders as

332. Municipalities that have enacted residence restrictions of their own have provided, almost unanimously, identical exceptions to residence restrictions for persons committing offenses as minors, persons who established a residence prior to enactment of residence restrictions, and for persons who established a residence and then would have been in violation because of the relocation or creation of a target facility. *See, e.g.*, CITY OF LIGHTHOUSE POINT, FLA. ORDINANCE § 54-11(d) (2005). In considering the potential for conflict with rehabilitation programs and in an attempt to bring these residence restrictions in line with a more rational approach to crime prevention, the model legislation adds an exception for those sex offenders currently committed to residing in rehabilitation centers or other correctional facilities. *Cf.* IOWA CODE § 692A.2A (2005). Additionally, the model legislation adds an exception for those sex offenders whose status relates solely to an unfortunate crime of statutory rape, where the offender and victim have legitimized the relationship through marriage, as these offenders seem to be far from the intended target of these buffer zones.

333. *See supra* notes 274-75 and accompanying text.

334. *See* Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006) (stating that “[a]s a general rule,

incurable predators of children remain embedded in the minds of Florida legislators and their constituents, courts will likely uphold Florida's current statewide restrictions.

However, with an increasing number of municipalities in Florida passing their own residence restrictions against sex offenders, it is only a matter of time before a legal challenge makes its way through the courts.³³⁵ In foreseeing the potential for confusion and future litigation, state lawmakers have called for new statewide restrictions that would impose stricter regulations to match many of the new local ordinances and would pre-empt local governments from enacting restrictions harsher than those operating statewide.³³⁶

Residence restrictions are a legitimate tool within the constitutional mandate of legislative bodies to protect the safety and welfare of children. Nonetheless, questions remain regarding their effectiveness. Will residence restrictions discourage sex offenders like William Smith Jr. from committing future crimes, or will these laws contribute to destabilizing the lives of sex offenders, thus leading offenders to seek out potential victims? Will some communities successfully rid themselves of sex offenders while others find clusters of sex offenders moving into neighborhoods not covered by residential buffer zones?

Before putting new statewide restrictions in place, Florida lawmakers should recognize the numerous unintended consequences of current residence restrictions and consider modifying these blanket provisions that impose lifetime restrictions on thousands of people without regard to their dangerousness.³³⁷ Specifically, legislators should consider amending legislation to clarify statutory language, expressly preempt local attempts to create separate residence restrictions, and narrow restrictions to a more dangerous group of offenders. In order to protect the validity of statewide

courts may not reweigh the competing policy concerns underlying a legislative enactment.”).

335. See Susan R. Miller, *Doubts Emerge Over Sex Offender Buffers*, PALMBEACHPOST, June 16, 2005, at 1B (“[A]lthough no legal challenges have been filed in Florida, a group of convicted sex offenders in Binghamton, N.Y., sued the city Monday, June 13, 2005, claiming that a similar law is unconstitutional and amounts to banishment.”); Santiago & Olkon, *supra* note 309, at A1 (“Harry Boreth, president of the Broward chapter of the American Civil Liberties Union, said his office is waiting to get the right plaintiff to challenge the ordinances.”).

336. See Saunders, *supra* note 68, at 1C (stating that Florida House members are interested in uniformity because of the “hodge-podge” of restrictions that have contributed to one-upmanship among localities; however, there are concerns over drafting legislation that is too strict and more likely to be overturned by the courts); see also H.R. STAFF ANALYSIS OF H.B. 91, *supra* note 98, at 1.

337. See Colleen Jenkins, *Sex Offender Laws Unfairly Lumps All Together, Some Say*, ST. PETERSBURG TIMES, Nov. 22, 2005, at 3 (stating that critics of Florida's current statewide residence restrictions against sex offenders are pushing for the adoption of a tiered approach that involves “risk assessment that separates low-risk sex offenders from their more violent counterparts”). For an example of this approach, see ARK. CODE ANN. § 5-14-128 (West 2006).

restrictions against general sex offenders, the Florida Legislature should take note of recent decisions in federal courts regarding the limits of acceptable residence restrictions.³³⁸ Legislators should avoid any attempts to create buffer zones around public school bus stops or other moving targets which are potentially overbroad in application and difficult to enforce. If politicians are truly intent on protecting the state's youngest citizens, they must craft meaningful and constitutionally-defensible legislation that reflects more than the anxieties of the voting public.

338. *See supra* note 291.