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The Law and Policy of Sex Offender Residency Restrictions: An Analysis of Proposition 83

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The Law and Policy of Sex Offender Residency Restrictions: An Analysis of Proposition 83

by Jodi Schwartzberg and Annie Lo[*]

I. Introduction

Twenty-one states currently have laws that restrict where convicted sex offenders can live.[1] On November 7, 2006, Californians will vote on Proposition 83, which contains one of the nation's broadest residency restrictions.[2] This working paper analyzes the legal and policy implications of Proposition 83's residency restrictions.

Proposition 83 would amend § 3003.5 of the California Penal Code to provide:

> (b) Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.
> (c) Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290.[3]

Compared to residency restrictions adopted in other states, California's proposed residency restriction is notable particularly for its breadth. Proposition 83 potentially applies to *all* sexual offenders convicted of a sexual offense since July 1, 1944,[4] from those convicted of indecent exposure to those convicted of child molestation, and

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[1] Marcus Nieto and David Jung, *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review* (August 2006), *available at* http://www.library.ca.gov/crb/06/08/06-008.pdf (last visited October 12, 2006) ("As of April of 2006, there were 87,060 registered sex offenders in California who are in compliance with registration requirements, while 17,764 were not because they either moved or failed to report their whereabouts.").

[2] Jordan Rau, *A Bid to Toughen Stance on Sex Offenses*, L.A. TIMES (February 19, 2006) ("[The initiative will give] California voters their first chance to weigh in on how to handle sex offenders.").

[3] S.B. 588, 2005-2006 Sen. Comm., Reg. Sess. (Cal. 2005-2006) (pending bill).

includes sexual offenders who have committed sexual offenses only against adults.[5] The Proposition's 2,000 foot ban is significantly more restrictive than many other states' bans. Particularly if the terms "school" and "park" – which are nowhere defined in the statute – are given a broad construction, the ban could effectively exclude offenders from entire cities and counties in California. Finally, unlike many other states' residency restrictions, Proposition 83 contains no grandfather provisions to exempt sexual offenders presently living within restricted areas or areas that become restricted due to the construction of schools or parks.

So far, seven states' residency restrictions have been challenged in court.[6] Each has been upheld against a variety of constitutional attacks. While Proposition 83's residency restriction is similar to the residency restriction laws that have been upheld by other state courts, it is not identical in scope and there are reasons to believe that it could be successfully challenged, particularly under the California Constitution.

After reviewing the policy implications of residency restrictions on sex offenders, this Working Paper will analyze Proposition 83's constitutionality under both the federal and state constitutions.

II. Policy Implications of Sexual Offender Residency Restrictions

Legislation that restricts where sexual offenders can live is intended to serve several purposes. By reducing sexual offenders' proximity to children, residency restrictions seek to increase public safety, reduce opportunity and temptation, and

[4] Proponents of Proposition 83 have disavowed any intent to have the residency restriction apply "retroactively" to offenders convicted before its passage. The Proposition's language plainly applies to all offenders, however. Cal. Pen. Code § 290(a)(2)(A).
[5] *See id.*
[6] *See* State v. Seering, 701 N.W.2d 655 (Iowa, 2005); Weems v. Little Rock Police Dept., 453 F.3d 1010 (8th Cir. 2006); People v. Leroy, 357 Ill. App. 3d 530 (Ill. App. Ct. 2005); Coston v. Petro, 398 F.Supp.2d

increase each community's overall sense of safety. But while these goals are compelling, residency restrictions may also have consequences that increase the danger posed by sexual offenders.

Sexual offenders generally require certain resources and a support network to minimize the likelihood of recidivism. By effectively banishing sexual offenders from most communities, residency restrictions will push them into less densely populated areas that are less equipped to deal with the influx of sexual offenders, and increase the likelihood of recidivism. California has approximately 87,060 registered sexual offenders.[7] In 2000-2001, there were approximately 8,700 public schools and approximately 648,000 private school children in California.[8] The size of restrictive zones combined with the number of schools and parks in metropolitan areas effectively make some cities completely off limits to sexual offenders.[9] For example, due to the density of schools and parks in some metropolitan areas such as San Francisco and Los Angeles, the residency restrictions will be the functional equivalent of banishment.[10]

Removing sexual offenders from their original communities leads to significant consequences. Forced to move away from friends and family, sexual offenders become disconnected from important financial and emotional support systems. The situation simultaneously creates a detrimental support system by pushing sexual offenders into de

878 (D. Ohio 2005); Lee v. State, 895 So. 2d 1038 (Ala. Crim. App. 2004); Mann v. State, 278 Ga. 442 (Ga. 2004); ACLU of N.M. v. City of Albuquerque, 2006 NMCA 78 (N.M. Ct. App. 2006).

[7] Nieto, *supra* note 1.

[8] S.B. 588, 2005-2006 Sen. Comm., Reg. Sess., J (Cal. 2005-2006) (Proposed bill analysis).

[9] At least both Los Angeles and San Francisco will be off limits to sexual offenders if California passes restrictive legislation. S.B. 588, 2005-2006 Sen. Comm., Reg. Sess. K (Cal. 2005-2006) (Proposed bill analysis).

[10] *Id.* at K.

facto sexual offender communities[11] without rehabilitative resources, producing a group identity that makes recidivism more likely even for those less prone to re-offend.[12]

Banishing sexual offenders from metropolitan areas or even entire states will not solve the problem – it merely pushes it onto other cities[13] and states.[14] Rural areas that are ill-equipped to monitor, treat, and employ sexual offenders will suffer the consequences of having such scarce resources.[15] Furthermore, the California measure also permits communities experiencing negative consequences caused by the influx of sexual offenders to enact laws that enlarge the prohibited zones,[16] thereby pushing sexual offenders into increasingly smaller areas and communities. Other states may respond in kind, which will inevitably result in escalating legislation.

Banishing sexual offenders from restricted areas will also likely lead to increased homelessness.[17] Sexual offenders already have difficulty finding housing without restrictive residency laws.[18] Residency laws further reduce the areas in which sexual

[11] After laws were passed in Iowa prohibiting sexual offenders from residing within 2,000 feet of a school or day care center, many "flocked" to motels and trailer parks. One such motel currently houses 26 sexual offenders in its 24 rooms. *Id*.

[12] Lisa Henderson, *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, 803-04 (2005) ("It is likely unsupervised surroundings such as these will actually encourage an offender to act on his urges and indulge his compulsion to reoffend.").

[13] In Iowa, passage of a law prohibiting sexual offenders from living within 2,000 feet of a school or day care center has set off a chain reaction, with towns and cities racing to enact larger and larger restrictive areas. People located in areas where sexual offenders have been forced to congregate have spoken of moving due to the unsafe conditions of living near so many sexual offenders. Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, March 15, 2006, at A1.

[14] Since Iowa passed restrictive measures, six neighboring states have also enacted similar legislation in order to keep sexual offenders from moving away from restrictive Iowa and into their cities and towns. *Id*.

[15] *Id.*

[16] S.B. 588 (Cal. 2005) (proposed senate bill).

[17] Since the 2,000 foot restriction was passed in Iowa, many sexual offenders have found themselves homeless or are living out of the trunks of their cars. Davey, *supra* note 13.

[18] In some states landlords are faced with a choice between sexual offenders and all other tenants and often choose the latter. MINNESOTA DEPARTMENT OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE, at 4 (2002). California currently prohibits discrimination based on an individual's status as a sexual offender. DOUG GILL, THE SEX OFFENDER AS A PROTECTED CLASS? 2 (2005), *available at* http://www.mmhaonline.org/SexOffenderWhitePaperFinal.pdf (last visited Jan. 26, 2007). However, such legislation leaves landlords open to litigation brought by

offenders can live and therefore, the number of opportunities for available housing. Thus, not only do residency restrictions shift the problem onto others, they potentially create a problem of increased homelessness.

An increase in homelessness may lead to an increase in crime, and reduces the effectiveness of existing registration laws. When sexual offenders have no home, they cannot accurately register.[19] Their subsequent anonymity reduces the communities' ability to track them and eliminates a check that serves to hold sexual offenders accountable for their actions.[20] Furthermore, the condition of being homeless increases stress and severs already weak ties[21] to the community, two factors that increase the likelihood of recidivism.[22] Realistically, residency restrictions that force sexual offenders away from housing and towards homelessness, and push them away from family and friends and towards exile, will likely decrease sexual offenders' already low adherence to registration requirements.[23]

The societal costs of residency restrictions might be defensible if the restrictions were proven effective. Unfortunately, the few studies done on the controversial

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tenants. Landlords thus sometimes use informal means to prevent sexual offenders from moving in. Currently, a proposed amendment to AB 438 seeks to permit lessors to refuse housing or evict registered sex offenders. GILL, at 4.

[19] GILL, *supra* note 18, at 4 (stating that transients are virtually untraceable under the 30-day registration requirement).

[20] "Could Prop 83 Create New Problems For Law Enforcement?" KTVU.com, available at http://www.ktvu.com/politics/9986348/detail.html (last visited Nov. 11, 2006) ('For law enforcement, the Iowa law has presented different problems. Linn County Sheriff Don Zeller says that dozens of sex offenders who were unable to find new housing simply went off the grid and stopped registering. "We went from knowing about where 90 percent of the people were to now, we're lucky if we know were 50-55 percent of the people were. It's pretty much been a nightmare," says Zeller.'); *see also* Nieto, *supra* note 1.

[21] *See* LEIGH BAKER, PROTECTING YOUR CHILDREN FROM SEXUAL PREDATORS 26 (2002). Note that this argument could go the other way. Because sexual offenders already have weak ties to the community, banishing them from the community may not sever any ties.

[22] Amicus Brief for Petition for Writ of Certiorari at 4, Doe v. Miller, 2005 U.S. Lexis 8630 (U.S., Nov. 28, 2005) (No. 05-428).

[23] In Iowa approximately three times as many registered sexual offenders are now missing than before the restrictive law took effect. Davey, *supra* note 13.

residency laws have been, at best, inconclusive. Both a Minnesota[24] study and a Colorado[25] study examining paroled sexual offenders found no correlation between new sexual offenses and proximity to schools and parks. In fact, the sexual offenders who did re-offend at a school or park tended to go outside the area in which they lived in order to ensure anonymity.[26] In contrast, an Arkansas study found a correlation between sexual offenders and residency near schools and parks, but could not establish a connection with recidivism.[27] Such contrary conclusions make it difficult for courts to determine the actual effectiveness of residency restrictions.

In addition, the proposed California law is so broad that it will likely do more harm than good. Proposition 83 requires *all* sexual offenders to register – including sexual offenders who have never actually harmed children.[28] The inclusion of sexual offenders who do not pose a threat to children only increases the numbers forced upon communities, further burdening already strained resources. A more narrow law would minimize some of the costs involved, while ultimately having a similar effect on crimes against children committed by strangers.[29]

While the overarching goal of protecting children is clearly important, whether the residency restrictions will ultimately meet that goal is unclear. However, legally, courts do not often address the question of whether particular legislation is wise. In

[24] *See generally* MINNESOTA DEP'T OF CORRECTIONS, *supra* note 18.
[25] *See generally* Colorado Dep't of Public Safety, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community* (2004)
[26] *Id.*; MINNESOTA DEP'T OF CORRECTIONS, *supra* note 18.
[27] Jeffrey T. Walker, James W. Golden, & Amy C. VanHouten, 3 *The Geographic Link Between Sex Offenders and Potential Victims: A Routine Activities Approach* (2001).
[28] S.B. 588 (Cal. 2005) (proposed senate bill).
[29] R. Karl Hanson, *What Do We Know About Risk Assessment?, in* 1 THE SEXUAL PREDATOR 8-19 (Anita Schlank & Fred Cohen eds., 1999).

analyzing the law, courts will first have to determine what provisions of the federal and state constitutions the legislation may or may not violate.

III. The Constitutionality of Sexual Offender Residency Restrictions

Constitutional analysis of residency statutes first requires determining whether residency restrictions are a form of punishment or a regulation that protects the public. If residency restrictions are a form of punishment, they may violate the Cruel and Unusual Punishment Clause, or, as to offenders whose convictions predate the restriction, the Ex Post Facto Clause. If, on the other hand, residency restrictions are a form of civil regulation intended primarily to prevent future offenses, whether they are constitutional will depend on whether they violate some fundamental right, deprive offenders of due process, or are arbitrary.

So far, courts have concluded that residency restrictions are not intended to – and do not have the effect of – punishing the offender for a past offense. Rather, the argument goes, they protect the public by regulating the offender's post-conviction behavior. Because the statutes are not punitive, they do not violate the prohibitions on ex post facto laws, cruel and unusual punishments or double jeopardy.[30]

In *Doe v. Miller*, the Eighth Circuit Court of Appeals considered the constitutionality of an Iowa statute that prohibited those convicted of certain sexual offenses against minors from living within 2,000 feet of a school or registered child daycare facility.[31] The statute did not apply to those "who established a residence prior to July 1, 2002, or to schools or child care facilities that are newly located after July 1,

[30] David Jung, "Testimonial Statement to Senate and Assembly Public Safety Committees on Proposition 83" (Oct. 10, 2006).
[31] Doe v. Miller, 405 F.3d 700 (8th Cir. 2005).

2002."[32] Plaintiffs challenged the residency restriction under several constitutional theories, including procedural and substantive due process, the Self-Incrimination Clause, and the Ex Post Facto Clause, but the *Doe* court found the statute to be constitutional.[33]

The case of *Coston v. Petro* challenged an Ohio statute that prohibited all registered sexual offenders from living within 1,000 feet of school premises. Although the court there did not reach many of the substantive constitutional questions because the plaintiffs lacked standing, the court did hold that the residency restriction did not constitute punishment and thus did not violate the Ex Post Facto Clause.[34]

In *People v. Leroy*, the defendant challenged an Illinois statute that prohibited child sex offenders from residing within 500 feet of a playground or facility providing programs or services exclusively directed towards persons under age 18.[35] The statute did not apply to those who owned property within the restricted area before the statute was enacted. The *Leroy* court found the statute constitutional despite challenges based on substantive and procedural due process, equal protection, the Ex Post Facto and Cruel and Unusual Punishment Clauses, overbreadth, and the Self-Incrimination Clause.[36]

Although no statute challenged has precisely matched California's proposed residency restriction, individual components of the statutes have been similarly worded. Although Iowa's statute only applies to sexual offenders who have committed offenses against minors, the 2,000-foot restrictive area is the same as California's. Ohio's restrictive area is less than California's, but the Ohio statute applies to all registered sexual offenders, as does California's. This next section will examine the position of the

[32] *Id.* at 705.
[33] *Id.*
[34] Coston v. Petro, 398 F.Supp.2d 878 (D. Ohio 2005).
[35] People v. Leroy, 357 Ill. App. 3d 530.

courts on the constitutional theories advanced by plaintiffs challenging the constitutionality of residency restrictions, and whether such analysis differs when applied to the proposed California law.

[36] *Id.*

1. Fourteenth Amendment Due Process

Sexual offenders have challenged residency restrictions under both substantive and procedural due process clause theories.[37]

A. Substantive Due Process

Sexual offenders have primarily advanced three arguments under the doctrine of substantive due process, arguing that residency restrictions infringe on three liberty interests so fundamental that the restrictions must be narrowly tailored to infringe on such liberty interests to the least extent possible. First, plaintiffs have argued that the statutes violate their constitutional right to interstate and intrastate travel. Second, plaintiffs have argued that the statutes violate their right to personal choice regarding family. Third, plaintiffs have argued that the statutes violate their constitutional right to live where you want.[38]

i. The Right to Personal Choice Regarding Family

Plaintiffs have asserted that residency restrictions infringe upon their right to personal choice regarding family. In *Doe v. Miller*, the Court of Appeal acknowledged Supreme Court decisions recognizing unenumerated rights relating to personal choice in matters of marriage and family, but stated that such decisions have construed such rights narrowly. For example, in *Griswold*, the Court recognized the "intimate relation of husband and wife" and in *Moore*,[39] the Court recognized the right to be free from intrusive regulations of family living arrangements. The Court of Appeal thus refused to

[37] Doe v. Miller, 405 F.3d at 707.
[38] *Id.* at 709-15.
[39] In *Moore*, the city limited what relatives could live together and thus made it a crime for a grandmother to live with her grandson. Moore v. East Cleveland, 431 U.S. 494 (1977)

recognize the broad characterization of a right to personal choice regarding family, which it cautioned would open up the floodgates to litigation on all sorts of regulations affecting family.[40]

Courts have found that even if residency restrictions touch upon constitutional rights relating to family, they are not unconstitutional because the infringement does not have a "direct and substantial impact on the familial relationship."[41] Residency restrictions do not dictate with whom sexual offenders may live, but instead only dictate where they may live.[42] Because the residency restrictions do not directly impact the family relationship and only have an incidental effect on familial rights, the residency restrictions are not subject to strict scrutiny, and will likely survive rational basis review.[43]

ii. The Right to Travel

Plaintiffs have argued that the residency restrictions violate their right to travel both interstate and intrastate. The Court of Appeal in *Doe v. Miller* addressed the right to interstate and intrastate travel. The *Doe* court held that because the law does not treat in-state and out-of-state offenders differently, and only indirectly makes migration to the state by sex offenders more difficult because residence is harder to find, the residency restrictions do not implicate the right to interstate travel.[44]

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[40] Doe v. Miller, 405 F.3d at 709.
[41] State v. Seering, 701 N.W.2d 655, 663 (Iowa 2005). *See also* Doe v. Miller, 405 F.3d at 709-10; People v. Leroy, 357 Ill. App. 3d at 533-34 (App. Ct. Ill. 5th Dist. 2005) ("[T]he statute does not dictate with whom a child sex offender may live; to the contrary, it merely restricts where, geographically, a child sex offender may live.").
[42] Doe v. Miller, 405 F.3d at 709-10.
[43] This analysis of a "right to personal choice regarding family" does not differ when applied to the California regulation. The California residency restriction is no different than those of other states with respect to family. Although residency restrictions may have the effect of making it unworkable for sexual offenders to live with their families, the statute itself does not directly intrude on family living arrangements.
[44] Doe v. Miller, 405 F.3d at 709-10.

The Court of Appeal also held that the residency restrictions do not implicate a right to intrastate travel. Assuming the recognition of a right to intrastate travel, the Court of Appeal analogized the case to Supreme Court analysis in interstate travel cases and held that, since the residency restrictions do not interfere with movement to and from certain parts of the state and do not treat new residents less favorably than old residents, only rational basis review is required.[45]

Under the federal Constitution, courts have held that while residency restrictions inconvenience offenders, they do not directly prohibit anyone from traveling from state to state or associating with others. Because their effect on the right of association and the right to travel is indirect at best, and because the right to choose where to live is not one of the fundamental rights the United States Constitution protects, a residency restriction statute that burdens this right must only be rationally related to a legitimate state interest.[46]

However, decisions by several California appellate courts suggest that unlike the federal Constitution, the California Constitution may protect the right to live where you want as part of the right to travel within the state.

iii. The Right to Live Where You Want

In other states, courts have refused to extend the right to travel to encompass a right to live where you want. In *Doe v. Miller*, the plaintiffs asserted that residency restrictions infringe upon their right to live where they want. The Court of Appeal reiterated the Supreme Court's admonition against recognition of unenumerated rights in the area of substantive due process, and stated:

[45] *Id.* at 712-13.
[46] Jung, *supra* note 30.

> Some thirty years ago, our court said "we cannot agree that the right to choose one's place of residence is necessarily a fundamental right," […] and we see no basis to conclude that the contention has gained strength in the intervening years. […] [T]he Does have not developed any argument that the right to "live where you want" is "deeply rooted in this Nation's history and tradition," […] or "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed."[47]

Other states have further elaborated on the argument, by distinguishing the right to travel from a right of residency. The Ohio court held that an ability to enter and exit an area suffices to uphold the constitutional right to interstate travel, despite the prohibition against residency.[48] "[S]ex offenders are free to move about within the zone, but they cannot establish a permanent residence there. Therefore, the Court cannot conclude that this relatively limited restraint on sex offenders constitutes punishment."[49]

Therefore, a broad right to live where you want will not likely be recognized under the federal Constitution.

iv. California Decisions

[47] Doe v. Miller, 405 F.3d at 713-714. This analysis does not differ for California's residency restriction since it does not differ from other state residency restrictions with regard to "the right to live where you want" and since California law does not differ from its federal counterpart on this substantive due process issue; *see also* People v. Leroy, 357 Ill. App. 3d at 534 ("The plain language of [the residency restriction statute] […] does not dictate with whom a child sex offender may live; to the contrary, it merely restricts where, geographically, a child sex offender may live in relation to a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age. […] Accordingly, we agree with the State that the essence of the defendant's argument is that he has a fundamental right to live with his mother and enjoy her support within 500 feet of a school. We also agree with the State that no such fundamental right exists.").

[48] Coston v. Petro, 398 F. Supp. 2d at 886; *see also* Weems v. Little Rock Police Dep't, 453 F.3d at 1017 ("There is no indication in this record that the State has moved to enforce the residency restriction to prohibit sex offenders from working or studying within 2000 feet of a school or daycare center, and we see no good reason to create more difficult constitutional questions by adopting a broad construction that the State itself eschews. We thus employ the normal rule that terms are given "their ordinary and usually accepted meaning," […] and we construe "reside" to mean "to dwell permanently or continuously." *Webster's Third New International Dictionary* 1931 (2002). On this understanding, the residency restriction in Arkansas is no broader than the restriction at issue in *Miller*, and for the same reasons discussed there, we conclude that the Arkansas law does not infringe on a constitutional right to intrastate travel.")

[49] Coston v. Petro, 398 F. Supp. 2d at 886.

Although the right to live where you want is not explicitly recognized, some form of the right to live where you want seems encompassed by the right to travel under the California Constitution. Several California decisions have addressed the right to live where you want under the rubric of the right to travel.

In *In re Marriage of Fingert*, a court ordered a parent to move to another county as a condition of continued child custody. The *Fingert* court held that "[c]ourts cannot order individuals to move to and live in a community not of their choosing. To attempt to do so is inconsistent with both the federal and California Constitutions."[50]

Similarly, California courts have held that a probationary condition that prohibits the defendant from living in certain areas is unconstitutional. In *People v. Beach*, an elderly woman was convicted of involuntary manslaughter when she shot a home intruder.[51] Because the neighborhood had degenerated and grown increasingly dangerous, the court imposed the probationary condition that she move out of her home of twenty-four years to prevent possible retaliation and future incidents. In *Beach*, the appellate court found that the probationary condition violated the defendant's "constitutional rights of freedom of travel, speech, association, assembly and to the possession and enjoyment of her property."[52] The *Beach* court weighed the value to the public against the impairment of constitutional rights, and held that the probationary condition was an overbroad application. The court held, "Simply causing appellant to move from one geographical area to another is of minimal value to the public when compared with the infringement of appellant's basic constitutional rights."[53]

[50] In re Marriage of Fingert, 221 Cal. App. 3d 1575, 1581 (Cal. Ct. App. 1990).
[51] People v. Beach, 147 Cal. App. 3d 612, 622 (Cal. Ct. App. 1983).
[52] *Id.* at 623.
[53] *Id.*

In *People v. Bauer*, the defendant was convicted of false imprisonment and simple assault, and as a probation condition, his choice of residence required the approval of his probation officer.[54] The Court of Appeal found the probationary condition to be void because it infringed on defendant's constitutional right to travel and freedom of association, and was unrelated to any future criminality. As the *Bauer* court stated, "The condition gives the probation officer the discretionary power […] to forbid appellant from living with or near his parents -- that is, the power to banish him. It has frequently been held that a sentencing court does not have this power."[55]

Restricting an individual's choice of residence is arguably the equivalent of banishment, by forcing individuals out of their chosen communities. Accordingly, other California probation cases have held that banishment, as a condition of probation, is unconstitutional.[56] As stated in *People v. Blakeman*, "banishment is proscribed by the fundamental policy of not permitting one political division to dump undesirable persons upon one another."[57] There, the court rejected the argument that banishment served the public policy function of "rehabilitating the defendant by removing him for a time from the temptations to which he was subjected in his old habitat."[58] Similarly, courts could find Proposition 83 invalid despite policy arguments that it serves to reduce recidivism among sexual offenders.

Like the court in *Fingert*, the courts in these probation cases came to the similar conclusion that the government cannot, as an element of probation, place restrictions on where people live without a legitimate justification. Thus, the net effect of these court

[54] People v. Bauer, 211 Cal. App. 3d 937 (Cal. Ct. App. 1989)
[55] *Id.* at 944 (Cal. Ct. App. 1989)
[56] *See* People v. Blakeman, 170 Cal. App. 2d 596 (Cal. Ct. App. 1959) (***summary***); In re Scarborough, 76 Cal. App. 2d 648 (Cal. Ct. App. 1946) (***summary***).

decisions appears to be a de facto right to live where you want under the California Constitution.

The relevance of these cases to Proposition 83, however, may be limited. First, in the probation cases, the courts were examining residency restrictions that were imposed by a court or probation officer, rather than restrictions that were explicitly authorized by a statute.[59] For purposes of due process analysis, a restriction placed on a single individual may be entitled to less presumptive validity than a statute enacted through the initiative process. Statutory authorization carries greater weight and invokes greater deference on the part of the judiciary. As such, California courts have yet to address a residency restriction that involves statutory authorization, and the statutory basis of Proposition 83 may affect how courts interpret the law**.**

In addition, unlike *Fingert*, Proposition 83 does not require the applicable individuals to live in a particular place, a distinction that may also limit the court's interpretation in that particular case. And while the scenario created by a residency restriction law appears similar to that in *Beach*, the situation in *Beach* is also distinguished by property ownership, which would appear to create a stronger argument for an individual's constitutional rights. Therefore, it is unclear how much the California courts can rely on this particular set of cases.

B. Procedural Due Process

i. Vagueness

[57] People v. Blakeman, 170 Cal. App. 2d at 597.
[58] *Id.*
[59] *Id.* ("The question whether the Legislature could modify this policy is not before us, for it has not undertaken to do so.")

Under procedural due process, plaintiffs have contended that residency restrictions are impermissibly vague and therefore deprive sexual offenders of adequate notice because it is difficult to determine which areas are restricted. Courts, however, have held that this problem does not render statutes unconstitutional on their face because the possibility that some individuals may be prosecuted despite their best efforts to abide by the statutes does not make the statutes impermissibly vague in all applications.[60]

ii. Individualized Assessments

Plaintiffs have also argued that residency restrictions violate procedural due process because they: 1) do not provide individual assessments of dangerousness, even though their purpose is to reduce danger; and 2) do not provide individualized assessments based on the sexual offenders' length of residency in the home. Individuals asserting such procedural due process claims must show that "the facts the individual seeks to establish in the hearing are relevant to the statutory scheme."[61]

As a regulatory statute, the only procedural element relevant to sexual offenders under residency statutes is whether there is a prior conviction for a sex offense. Because this determination is already safeguarded by the criminal trial, residency statutes are not required to provide for procedural safeguards regarding dangerousness or length of residency in a home under procedural due process.[62]

2. Ex Post Facto, Double Jeopardy & Cruel and Unusual Punishment Clauses

[60] *Id.* Although it remains to be seen whether sexual offenders will be able to obtain maps in order to abstain from living an prohibited areas, assuming that there are no maps provided the analysis does not differ from that in other cases considering vagueness challenges to residency restrictions.
[61] People v. Leroy, 357 Ill. App. 3d at 536 (holding that the residency restriction statute need not provide for a hearing on length of residency at present address).

Proposition 83 is broader in several respects than the residency laws that have been challenged in court so far. Unlike the Iowa and Illinois statutes, which specify that the residency restrictions apply only to child sexual offenders, the California law applies to all sexual offenders. Because the California statute applies to offenders who arguably pose no risk to children, the statute may violate the substantive due process clause or the prohibition against cruel and unusual punishment. If the proposition is overbroad, its punitive effect may violate the Ex Post Facto clause when applied to offenders whose violations predate the statute

To determine whether a law imposes punishment - a threshold question for all the above listed constitutional clauses - a court must look at whether the legislature intended the statute to establish criminal or civil proceedings. If the legislature intended the statute to establish civil proceedings, then the court must determine whether the law is "so punitive either in purpose or effect as to negate the state's non-punitive intent."[63] The second inquiry overrides the legislature's intent and requires the clearest proof.[64]

A. Punishment

i. Legislative Intent

So far, courts have generally found that residency restrictions are intended to create "'a civil, non-punitive statutory scheme to protect the public.'"[65] In so holding, courts have looked primarily at the fact that states have only declared a non-punitive, regulatory goal of protecting society. Because protecting public health and safety is an

[62] *Id.* California's residency restrictions are also applicable based only on past conviction of a sexual offense regardless of dangerousness or length of residence in the home. Therefore, the analysis here does not differ.
[63] State v. Seering, 701 N.W.2d at 717.
[64] *Id.*
[65] *Id.*

incident of a state's regulatory power, such a purpose is considered to evince the intent to exercise regulatory power, rather than the intent to add punishment.[66]

Courts not only look at the declared purpose of a statute, but also at other indicators of legislative intent, such as the location of the statute. However, even where residency restrictions have been located in the criminal section of a state's statutes, courts have held that such a location is not dispositive of the legislature's intent. In *Petro,* the court held that the statute's location alongside other civil provisions, such as victims' rights provisions and post-conviction relief procedures, is indicative of a non-punitive intent.[67]

ii. Punitive Effect

Upon finding that residency restrictions are not intended to be punitive, courts then turn to the question of whether residency restrictions are so punitive in effect as to negate that intent. In making this determination, the courts have looked to what the Supreme Court has called "useful guideposts" in this inquiry. Under *Kennedy v. Mendoza-Martinez,*[68] it is particularly relevant whether: 1) the law has been regarded in our history and traditions as punishment; 2) it promotes the traditional aims of punishment; 3) it imposes an affirmative disability or restraint; 4) it has a rational connection to a non-punitive purpose; and 5) it is excessive with respect to that purpose.

a. Historical and Traditional Punishment

[66] *Id.*
[67] Coston v. Petro, 398 F. Supp. 2d at 885. Although Plaintiffs lacked standing in *Petro*, the court did reach analysis of whether the residency restrictions constituted punishment.
[68] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (U.S. 1963).

The courts have unanimously held that residency restrictions have not been considered punishment in America's history and traditions.[69] Because residency restrictions most closely resemble the historical punishment of banishment, courts have first looked at whether residency restrictions are the effective equivalent of banishment.

Banishment has been defined as "punishment inflicted on criminals by compelling them to quit a city, place, or country for a specified period of time, or for life."[70] Courts have distinguished residency restrictions from laws that banish, however, because residency restrictions only restrict where offenders can live; they do not expel offenders from the area. Courts have thus concluded that residency restrictions do not constitute the traditional punishment of banishment.[71] One court went so far as to say that "only a tortured reading of the term banishment could lead [it] to conclude otherwise."[72] Courts have also noted that residency restrictions are fairly unique, which suggests that they do not comprise a traditional means of punishment.[73]

b. Deterrence and Retribution

Courts have held that a residency restriction law does not promote the traditional aims of punishment – i.e. deterrence and retribution – in a way that provides for a strong inference that the restriction is punishment. It is important to note that courts do not give much weight to this second factor because most regulations will have some deterrent and retributive effects.

[69] *Id.;* Doe v. Miller, 405 F. 3d 700; State v. Seering, 701 N.W.2d 655; People v. Leroy, 357 Ill. App. 3d 530.
[70] United States v. Ju Toy, 198 U.S. 253 (U.S. 1905) (Brewer, J., dissenting) (quoting *Black's Law Dictionary*).
[71] State v. Seering, 701 N.W.2d at 667-68.
[72] People v. Leroy, 357 Ill. App. 3d at 540.
[73] *Miller*, 405 F.3d at 719.

In terms of deterrence, courts have stated that the primary purpose of the residency restrictions is to reduce the opportunity and temptation to re-offend, not to "alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a new offense."[74] Furthermore, courts have held that although the law seeks to deter future crimes by lessening opportunity, such a deterrent aim alone does not render such statutes criminal.[75]

In terms of retribution, courts have held that any restraint on sexual offenders has a potentially retributive effect, but a residency law is more in line with the regulatory objectives of protecting health and safety.[76] Legislatures are looking to protect children, not looking to further the aims of retribution.[77]

c. Affirmative Disability or Restraint

Courts have next focused on the question of whether residency restrictions impose an affirmative disability or restraint. Although courts have found that the restrictions impose an affirmative restraint, they have noted that while the restraint is greater than that of registering, it is less than that of civil commitment. The courts have therefore gone on to the next factor in order to determine whether that restraint is excessive in light of the legislative purpose.[78]

d. Rationality and Excessiveness

Lastly, courts consider whether the regulatory scheme has a rational connection to a non-punitive purpose and whether the regulatory scheme is excessive in relation to that purpose. Courts have found that although residency restrictions apply to all sexual

[74] *Id.*
[75] *Leroy*, 357 Ill. App. 3d at 540-41.
[76] *Miller*, 405 F.3d at 719.

offenders regardless of dangerousness, based on the high rate of recidivism, residency restrictions are rationally related to the goal of protecting society by minimizing the risk of re-offense.

Courts have also found that residency restrictions are not excessive. In so finding, the court in *Doe v. Miller* emphasized expert testimony, which stated that even where a sex offender commits an offense with a 14 or 15-year-old victim, there is no guarantee that the offender will not cross over to children. Although acting on a slight chance that a sexual offender might offend against children seems arbitrary, the courts have found that the unpredictability of re-offense, the nature of the crime, and high recidivism rates necessitate that legislatures make judgments about how to reduce danger absent evidence to the contrary. Thus even in *Petro,* where the law applied to all sexual offenders regardless of whether they had offended against children, the court held that the legislature may make "categorical judgments that conviction of specified crimes carries specific consequences without any corresponding risk assessment."[79] Experts have also testified that sexual offenders are a risk for life and even a sexual offender convicted of statutory rape would be a concern around a daycare, although admittedly a reduced concern. It is not clear, however, that in either *Petro* or *Doe,* a substantial effort to introduce expert testimony to the contrary was made.

[77] It should be noted that it seems inconsistent to look at legislative intent when determining whether a law is so punitive in effect as to negate the legislature's intent.
[78] *Miller*, 405 F.3d at 720-21.
[79] *Petro*, 398 F. Supp. 2d at 886-87 (holding based on the *Mendoza* factors that the residency restrictions do not have a punitive affect). *See also* Ohio Rev. Code Ann. § 2950.031. The Ohio statute provides:
(A) No 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 sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school or premises.

Courts have also rejected the contention that the restrictive area itself is excessive. "Given the challenge in determining precisely what distance is best suited to minimize risk to children without unnecessarily restricting sex offenders, and the difficult policy judgments inherent in that choice," the court could not say that the state's choice was excessive.[80]

e. Conclusion

Since courts have held that residency restrictions are not punitive, they have accordingly concluded that the residency restrictions do not implicate the Ex Post Facto Clause. Although courts have not fully analyzed the question of whether residency laws implicate constitutional prohibitions against double jeopardy or cruel and unusual punishment,[81] all such inquiries first require the determination that the statutory scheme is punitive.[82] So far, courts have found that such restrictions are not punitive, and to the extent that those decisions are correct, Proposition 83 would similarly not violate these constitutional prohibitions that require a punitive statutory scheme.

B. California's Residency Restrictions: Punishment

i. Intent

In California, Section 290's registration requirements are located in the Penal Code. However, other state courts have found this reasonable because failure to register leads to criminal penalties and thus does not evince a punitive intent.[83] Because

[80] *Miller*, 405 F.3d at 721-22.
[81] *Id.* at 722. *See also* People v. Leroy, 357 Ill. App. 3d at 544-45 (holding that since residency restrictions do not amount to banishment, they also do not inflict cruel and unusual punishment).
[82] Lee v. State, 895 So. 2d 1038, 1042 (Ct. of Crim. Appeals Al. 2004).
[83] *See* State v. Seering, 701 N.W.2d 655, 667 (Iowa 2005) ("The intent of the Iowa legislature in enacting Iowa Code § 692A.2A (2003) was not punitive. The purpose of Iowa Code ch. 692A is to require registration of sex offenders and thereby protect society from those who because of probation, parole, or other release are given access to members of the public. Thus, the restrictions of Iowa Code § 692A.2A are predominately clothed with the earmarks of legislation to protect the health and safety of individuals,

residency restrictions are intended to protect children and not to punish offenders, and because courts can reasonably see a rational connection between the goal and the law, courts have generally found that such statutes do not impose punishment even when they are located in the state's penal code.[84]

There is evidence that Proposition 83 was meant to be civil and non-punitive. The purpose of the statute is to reduce the temptation to commit another crime, allow children to learn and play in safe neighborhoods, and increase California residents' sense of security.[85] These purposes stem from the state's regulatory power to protect public health and safety, rather than from an intent to punish sexual offenders for their prior offenses. Although the proposed bill will be located in California's Penal Code, its location among parole provisions rather than penal statutes, as well as its overriding public safety rather than punitive purpose, lead to the conclusion that the proposition is intended as a civil, non-punitive measure.

ii. Punitive Effect

a. Historical and Traditional Punishment

Although no court to consider sexual offender residency restrictions has yet found that such statutes constitute banishment, California case law may lead to a different

especially children, not to impose punishment."); Coston v. Petro, 398 F.Supp.2d 878 (S.D. Oh. 2005) ("Section 2950.031 does not, however, impose punishment and accordingly is not a criminal statute. Section 2950.031 on its face imposes no criminal sanctions - it only grants a right to bring a civil action for injunctive relief against a sex offender - and the expressed intent of the sex offender registration statute is to protect the safety and general welfare of the public.").

[84] People v. Leroy, 357 Ill. App. 3d at 538 (holding that legislature intended the statute to be regulatory rather than punitive even though the statute was located in Illinois criminal code).

[85] S.B. 588 (accompanying analysis).

analysis. In California, many cases involving probation conditions have found that certain conditions constitute impermissible banishment.[86]

In *In re Scarborough*, a condition of parole provided that the defendant leave the city and county for two years. When he violated the condition by remaining with his wife and father in his home in the city, his probation was revoked. The *Scarborough* court held that the condition was, in effect, "an unlawful increase of punishment by banishment not provided for by statute, and therefore void."[87] The court stated that:

> "[t]o permit one state to dump its convicted criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy."[88]

The court further stated that "[t]he same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city."[89] California courts have thus viewed prohibitions against living in a particular area as banishment, a form of punishment.

The court may find that the California residency restriction banishes sexual offenders in two ways. First, sexual offenders will be banished from their homes or places of residence because there are no grandfather provisions allowing those who already live within the restricted areas or those who live in areas that become restricted

[86] *See* People v. Beach, 147 Cal. App. 3d 612 (2d Dist., Div. 5 1983); People v. Bauer, 211 Cal. App. 3d at 944-45 (1st Dist., Div. 2 1989).
[87] In re Scarborough, 76 Cal. App. 2d 648, 649 (Cal. Ct. App. 1946).
[88] *Id.*, quoting People v. Baum, 251 Mich. 187 (Mich. 1930).

due to construction of a new school or park to remain. Second, sexual offenders will be banished from living in particular areas, although they may still enter such areas. As discussed earlier, California courts have held that forcing probationers from their places of residence based on their past crimes constitutes banishment. However, Proposition 83 is distinguished by the fact that the restriction, if it were to constitute banishment, would be authorized by statute. Depending on how the court chooses to distinguish the lack of statutory authority in probation cases, the California court may apply the same reasoning and find that residency restrictions similarly constitute banishment.

Whether prohibiting sexual offenders from living in particular areas constitutes banishment is more tenuous. As other courts to consider the issue have noted, sexual offenders are not entirely banished from areas because they are not exiled from anywhere.[90] They are still "welcome" as long as they do not take up residence. This line of reasoning seems to lead to a question of degree. It seems clear that to form restrictive areas that, combined, make it so that sexual offenders cannot live anywhere in the county or anywhere in a state would constitute banishment even though the laws themselves do not say "leave," and allow sexual offenders to enter the area but not to reside in the area.

Dissenting opinions in other courts have argued that residency restrictions constitute banishment.[91] In *People v. Leroy,* the dissent stated:

> When we understand what constitutes banishment and we consider the essence of its punitive aim, we find at its core the permanent expulsion of a criminal offender from his or her home. When a colonial offender was banished, he was

[89] In re Scarborough, 76 Cal. App. 2d 648 (3d Dist. 1946)
[90] *See* Coston v. Petro, 398 F. Supp. 2d 878 (D. Ohio 2005).
[91] *See* Doe v. Miller, 405 F.3d at 725 (CIRCUIT JUDGE MELLOY, concurring and dissenting)("[P]reventing offenders from making a home in many Iowa communities after they have served their sentence does have substantial similarity to banishment. […] [O]ffenders are effectively banished from their desired places of residence."); People v. Leroy, 357 Ill. App. 3d at 544-556 (JUSTICE KUEHN, dissenting).

> ordered to leave his desired living space and was barred for life from ever returning to it. The underlying penal effect was the permanent loss of companionship and home of choice. […] To indefinitely expel a man from his family home, and separate him from family members with whom he has lived his entire life, seems decidedly similar to a method of punishment employed in colonial times." [92]

Accordingly, such analysis would be a reasonable basis for the California judiciary to find that residency restrictions constitute banishment.

Furthermore, the reasoning articulated by other state courts that criminal residency restrictions do not constitute a historical means of punishment because they are a more recent innovation, is a weak assertion. Such a reading of historical roots is quite narrow. This rationale leads to the conclusion that since lethal injection is a new means to accomplish the end of capital punishment, it does not constitute a historical means of punishment.

The punishment of banishment itself is deeply rooted, and dates back to at least 2285 B.C.[93] A close analogue to the present form of banishment in purpose and effect can be seen in the history of the British criminal justice system. "Unlike most non-capital punishments . . . , [banishment] did not return criminals to the social mainstream. Its overriding purpose was neither rehabilitation nor deterrence, but ridding Britain of dangerous offenders… So long as the rights of Britons were not endangered at home, what happened to convicts abroad mattered little."[94] Based on this analysis, California's residency restriction may constitute a historical and traditional form of punishment.

b. Deterrence and Retribution

[92] *Leroy*, 357 Ill. App. 3d at 548 (Ill. App. Ct. 2005) (JUSTICE KUEHN, dissenting)
[93] Wm. Garth Snider, *Banishment: The History of its use and a Proposal for its Abolition under the First Amendment,* 24 N.E. J. ON CRIM. & CIV. CON. 455 (1998).

The next question is whether the California residency restrictions promote the traditional aims of punishment – deterrence and retribution – in a way that provides for a strong inference that the restriction is punishment. The proposed California law and corresponding legal analysis does not differ from that of other states with regard to deterrence and retribution. As stated above, the courts have found a deterrent aim because the restrictions seek to prevent future crime by reducing opportunity. However, they have found that such a deterrent aim does not negate the non-punitive purpose.

Courts have also found a retributive effect, but have stated that any restraint has a potential retributive effect and not all restraints constitute punishment. Black's Law Dictionary defines retribution as punishment imposed as repayment or revenge for the offense committed. Although there are many effects of residency restrictions that are negative – losing one's residence, job, friends, family – since the purpose itself is not repayment or revenge but instead public safety, this analysis seems limited. Furthermore, courts have found deterrence and retribution to be minimal considerations in balancing whether the statute is so punitive in effect as to negate the non-punitive purpose of the law.

c. Affirmative Disability or Restraint

Proposition 83 clearly imposes an affirmative disability or restraint. Sexual offenders are unable to take up residence wherever they can afford to do so, which also results in disabilities regarding employment and association. They are also limited to residence in areas not encompassed by the restrictive zones. Thus courts are likely to find, as other courts have found, that residency restrictions result in an affirmative

[94] *Id.*

disability or restraint. The question is whether this disability and restraint is excessive in relation to the rationality and goals of the residency restrictions.

d. Rationality and Excessiveness

The last two questions are the most important in deciding whether a law is so punitive in effect as to override the legislature's non-punitive intent: 1) whether the residency restrictions have a rational connection to a non-punitive purpose; and 2) whether the residency restrictions are excessive in relation to that purpose. As stated previously, the non-punitive purposes of Proposition 83 are to reduce temptation, increase child safety, and increase parents' sense of safety. Other state courts to consider residency restrictions have found that residency laws have a rational connection to these purposes, and rational basis review is not a difficult standard to meet. High rates of recidivism, dense child populations around schools and parks, and the role of temptation and opportunity in re-offense suffice to support a legislative judgment deferred to by the courts that residency restrictions make people safer.

However, residency restrictions cannot be excessive in relation to the above stated purposes. California's residency restrictions apply to all registered sexual offenders, regardless of whether the prior offense was against a child or an adult, and subject them to residency restrictions that encompass some entire California cities and make them completely off limits for sexual offenders. Thus the question is whether the residency restrictions are clearly excessive in terms of whom they affect, and in terms of the breadth of the restricted area.

Because Supreme Court precedent has not clarified how narrowly laws must be drawn in the context of excessiveness, it remains unclear whether the residency

restrictions will be found excessive. Pertaining to registration, the Supreme Court has held that requiring all sexual offenders to register, a relatively minimal requirement based on conviction, is not excessive in relation to its purpose of increasing safety.[95] The Supreme Court has also held that as long as there is an individualized assessment of dangerousness, sexual offenders may be civilly committed. Given that civil commitment is a much greater restraint than registration, it is clear that civilly committing all sexual offenders regardless of dangerousness would be excessive, whereas requiring all sexual offenders to register regardless of dangerousness is not. In other words, statutes based on regulatory intent can be excessive because the legislature can define the class more broadly because it is not a punitive measure.

Therefore, the question of excessiveness seems to require a value judgment. As stated, the residency restrictions apply to 87,060[96] sexual offenders in California ranging from those convicted of indecent exposure, to child molestation, to rape. Based on statistics regarding how many sexual offenders recidivate and whom they re-offend against, it is clear that the statute will affect many innocents. However, affecting those innocents may be legislatively justified or unavoidable. While there are statistical discrepancies regarding recidivism, some studies place recidivism as high as approximately 40%.[97] In the registration context, the Supreme Court has declared that states can find "that a conviction for a sex offense provides evidence of substantial risk of recidivism."[98] Thus, "[t]he Ex Post Facto Clause does not preclude a State from making

[95] Smith v. Doe, 538 U.S. 84 (U.S. 2003)
[96] Nieto, *supra* note 1.
[97] R. Karl Hanson, *What Do We Know About Risk Assessment,* 1 THE SEXUAL PREDATOR (Anita Schlank & Fred Cohen eds., 1999).
[98] Smith v. Doe, 538 U.S. at 103.

reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."[99]

However, regardless of whether a state may make reasonable categorical judgments, the excessiveness prong clearly necessitates some endpoint. Assuming that the high recidivism estimate of 40% is correct, registration requirements in California affect 52,200 sexual offenders who would never re-offend and places an arguably great restraint on these "innocents." In contrast, civil commitment affects much fewer innocents because there must be a threshold determination of dangerousness, but places an even greater restraint on their liberty. The residency restrictions will affect over 83,520 sexual offenders who will never commit a sexual offense against a stranger and who are therefore "innocent" for the purposes of the residency restrictions.[100] But these "innocents" must be balanced against the lives that the residency restrictions might protect. The overall goal of increased safety must consider the degree of restraint on liberty imposed. As discussed *supra*, thus far, courts to examine the issue have not found residency restrictions to be excessive. While California could minimize the excessiveness of the law by only applying the residency restriction to those who have committed crimes against children, it is unclear what kind of fit the excessiveness prong necessitates and whether the California law will be found excessive under *Mendoza*.

[99] *Id.* (holding that sexual offender registration requirements do not constitute punishment in intent, purpose, or effect).

[100] There are approximately 87,060 registered sexual offenders in California. *See supra* note 1. Assuming the high figure, if 40% of them will eventually re-offend, 60% of them will not. So, 52,236 sexual offenders will never re-offend while 34,824 will. It is estimated that 90% of sexual offenders commit sexual offenses against people they know. Assuming that the residency restrictions do not reduce temptation to the point that they prevent re-offense, this means that of the 34,824, the residency restrictions would not prevent 31,342 from re-offending. The 52,236 sexual offenders who will never re-offend, plus the 31,342 sexual offenders who will not be prevented from re-offending by the residency restrictions, comes out to 83,578 "innocent" sexual offenders affected by the residency restrictions.

Furthermore, the area encompassed by the 2,000-foot restriction makes some cities entirely off limits. However, the question is whether 2,000 feet is excessive in itself to accomplish the purpose of increased safety. The legislature could rationally conclude that a 2,000-foot area around schools is the area that is most densely populated and frequented by children, and that in order to enhance safety, sexual offenders should not have quite such easy access. Consequently, the 2,000-foot restriction does not seem excessive in relation to the goal of increased safety.

e. Conclusion

Residency restrictions clearly have some punitive effects. They banish sexual offenders

from areas in which they would otherwise be free to live, they deter sexual misconduct, they have retributive effects, and they impose an affirmative restraint. However, in determining whether they are unreasonable or excessive, it seems unclear whether the residency restriction will, on balance, lead to the conclusion that residency restrictions are so clearly punitive in effect as to negate the legislature's non-punitive intent. Furthermore, no court has found that residency restrictions – whether they apply to all sexual offenders or only those who have committed crimes against minors, or whether they place 1,000 or 2,000-foot restrictions on residence – to be punitive in effect. Due to the high burden of proof required to show that residency restrictions are so clearly punitive as to override the legislative intent, it is uncertain whether the residency restrictions will be found unlawful under the Ex Post Facto, Double Jeopardy, or Cruel and Unusual Punishment Clauses.

3. The Self-Incrimination Clause of the Fifth Amendment

Plaintiffs have also alleged that residency restrictions, in combination with registration requirements, compel sex offenders to incriminate themselves. Courts have rejected this argument for several reasons. First, residency restrictions alone do not require sexual offenders to become witnesses against themselves. While the residency restrictions regulate where sexual offenders may live, they do not require sexual offenders to report where they live.[101] Second, as the *Seering* court aptly noted, even if the Self-Incrimination Clause were violated, the remedy would be the exclusion of incriminating material, not the wholesale invalidation of the statute.[102]

Courts have further distinguished residency restrictions coupled with registration requirements from other registration schemes that the Supreme Court has held violate the Fifth Amendment's privilege against self-incrimination. The Supreme Court, for example, has held that federal gambling tax and registration requirements, marijuana taxes, and required registration of individual members of a communist organization violate the privilege against self-incrimination.[103] In each case, "the disclosures condemned were only those extracted from a 'highly selective group inherently suspect of activities' and the privilege applied only in 'an area permeated with criminal statutes' – not in 'an essentially non-criminal regulatory area of inquiry.'"[104] Thus, in *California v. Byers*, the Court held that a statute requiring drivers involved in accidents to stop and report did not violate the privilege against self-incrimination. The reporting requirements applied to all people, did not involve inherently criminal activities even though some

[101] Doe v. Miller, 405 F.3d at 715-17.
[102] State v. Seering, 701 N.W.2d 655, 669 (Iowa 2005).
[103] People v. Leroy, 357 Ill. App. 3d at 543.
[104] California v. Byers, 402 U.S. 424 (1970).

instances would be criminal, and had regulatory goals.[105] Similarly, residency requirements coupled with registration do not implicate inherently illegal activity (as with gambling or marijuana taxes), apply generally to all sexual offenders, and have regulatory goals.[106] Thus residency restrictions coupled with registration requirements have not been held to violate the Fifth Amendment privilege against self-incrimination.[107]

IV. Conclusion

California's residency restriction is vulnerable to attack based on both policy considerations and the California right to intrastate travel. Challenges to the statute under the Ex Post Facto, Double Jeopardy, and Cruel and Unusual Punishment Clauses should also be brought forth since although courts have yet to find that residency restrictions constitute punishment, this conclusion is not beyond question. Although other challenges under rational basis review, substantive and procedural due process as well as self-incrimination and impairment of contractual obligations[108] theories have and will continue to be brought, these challenges are unlikely to succeed.

[105] *Id.*
[106] *Leroy*, 357 Ill. App. 3d at 543.
[107] Such analysis does not differ when applied to California's residency restrictions and registration requirements. It is thus unlikely that a challenge under the Self-Incrimination Clause would prove successful.
[108] Plaintiffs have also challenged residency restrictions under the prohibition against state impairment of contract obligations. However, examining sixth circuit precedent, the court in *Doe v. Petro* held that even assuming the restrictions would result in a complete abrogation of a lease between landlord and sexual offender, the State's legitimate purpose for impairing these contractual rights in order to protect children is both necessary and reasonable and thus constitutional. Coston v. Petro, 398 F. Supp. 2d 878 (Dist. Ct. Southern District of Ohio, Western Division 2005). This challenge would also be unsuccessful outside of the sixth circuit since the government is not involved in these contractual obligations and does not directly impair the contractual obligations implicated by residency restrictions.