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**“THE LEAST OF THESE:”¹
A CONSTITUTIONAL CHALLENGE TO
NORTH CAROLINA’S SEXUAL OFFENDER
LAWS AND N.C. GEN. STAT. §14-208.18**

BRIAN P. LiVECCHI

INTRODUCTION

In our society, individuals whose actions fail to conform to accepted patterns of behavior are sent away to prisons or “correctional facilities” to contemplate the error of their former ways and to become “rehabilitated.” The non-conformist is allowed to re-assimilate into society only after they have “paid their debt” by serving the sentence society has imposed. Upon their release some of these non-conformists, deemed to still pose a substantial threat to society, are provided with a list of places where they may not live or work. These offenders are often required to wear a monitoring device that serves the dual purpose of alerting observers that a dangerous, vile criminal is in their midst, and of monitoring the offenders’ location with hopes of ensuring that they do not venture into a forbidden zone.

In addition to lists of zones in which they may not live or be employed, newly freed offenders are provided with another list that informs them of places where they may not even “be;” a prohibition so vague that even law enforcement is not sure what it means.² According to some, that list includes churches and houses of worship as forbidden areas.³ The released offender, having “paid their debt” to society, may neither legally go to the North Carolina General Assembly, the legislative body that has burdened them with these restrictions, to make their voice heard and seek redress of their grievances, nor enter the North Carolina Supreme Court, the building that houses

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1. “And the King will answer them, ‘Truly, I say to you, as you did it to one of the least of these my brothers, you did it to me.’” *Matthew* 25:40 (English Standard Version).

2. See N.C. GEN. STAT. § 14-208.18 (2008).

3. *Id.*

the highest court of the land to seek relief when his rights are ignored,⁴ under pain of felony conviction and a return to prison.⁵

“Sex offender.” The utterance of the appellation conjures images of children snatched from their beds in the dark of night, whisked away to have their innocence stolen by unwashed and foul strangers, murdered or left to die alone in a cold, secluded wilderness. Indeed, the laws passed in the name of protecting innocent children often bear the names of victims: “Megan’s Law, the “Adam Walsh Act” and “Jessica’s Law” are examples. While these torrid circumstances are rarely the case with sex offenses in general and especially not typical in sex offenses committed against children⁶, that makes little difference to the news media. Governed by the old adage, “if it bleeds, it leads,” the media knows that stories of the most vulnerable amongst us caught up in narratives of sex and violence will capture viewers and readers.

That the laws championed actually do little to protect our children⁷ often makes meager difference to the legislators that are faced with a Hobson’s choice: legislators must either vote for the passage of often unconstitutional laws that trample upon the rights of a vulnerable minority to placate an outspoken and justifiably outraged constituency or risk finding the mailboxes of those same constituents stuffed the week before election day with glossy allegations of being the legislator that turned sexual predators loose on our children.⁸ The easier choice

4. See N.C. GEN. STAT. § 14-208.18(a)(2) (2008). The North Carolina General Assembly, located at 16 West Jones Street in Raleigh, North Carolina, is located across the street and within 300 feet of the North Carolina Museum of Natural Sciences and the North Carolina Museum of History. The General Assembly also has an active Legislative Page program that employs students from across the state and is often toured by schoolchildren on field trips. The North Carolina State Supreme Court, located at 2 East Morgan Street in Raleigh, is across the street and within 300 feet of a child care facility located on the premises of the First Baptist Church of Raleigh. Additionally, the North Carolina Department of Justice and the Office of the Attorney General, located at 114 West Edenton Street in Raleigh, is across the street and within 300 feet of child care facilities provided by Edenton Street United Methodist Church and also within 300 feet of a child care center at 99 North Salisbury Street. Under N.C. Gen. Stat. § 14-208.18(a)(2), it is debatable whether a registered sex offender would be permitted at these locations.

5. See N.C. GEN. STAT. § 14-208.18 (2008).

6. See *infra* note 9. (Discussing relevant statistics.)

7. See Jennifer Dacey, Comment, *Sex Offender Residency Restrictions: California’s Failure to Learn from Iowa’s Mistakes*, 28 J. JUV. L. 11, 26 (2007) (quoting Nancy Sabin, representative of the Jacob Wetterling Foundation as saying, “such laws do nothing to protect the more than 90% of abused children who suffer at the hands of people they know”).

8. See Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 340 (2007) (citing Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REGISTER & TRIBUNE, Jan. 22, 2006 (quoting state Sen. Dick Deardon, Dem., commenting that laws relating to sex offenders would be “difficult to change” since “no one wants a postcard to come out two weeks before the election saying they are lax on sex offenders”)). *Id.* at 339 n.3 (citing John Curran, *Sex-Offender Zones Assailed – Critics Say Ordinances Limiting Where Offenders can Live are Ineffective and too Broad*, PHILADELPHIA INQUIRER, Aug. 22, 2005, at B01 (quoting Brick, N.J. Mayor Joseph

of course is to deny rights to a class of citizens that are often not permitted to vote and are shamed into silence.⁹ Indeed, some legislators openly declare their contempt for the idea that sex offenders should have constitutional rights at all, with statements like, “when a person takes advantage of a child, I don’t worry about their constitutional rights.”¹⁰

This article will focus on the recent case of James Nichols, a registered sex offender arrested for attending a Sunday worship service at his Moncure, North Carolina church and charged under a provision of North Carolina’s version of “Jessica’s Law,” which went into effect in December 2008.¹¹ As a backdrop to the examination, this article will explore the evolution of the regulation of sex offenders in general, and the various challenges to the constitutionality of these laws that have been brought in the face of increasingly stringent regulation. The article will also address the unconstitutionality of recent additions to North Carolina’s approach to sex offender regulation, specifically N.C. Gen. Stat. §14-208.18. This article will expose heavily engrained myths regarding sex offender recidivism and “stranger danger” myths which often serve as the basis for laws affecting sex offenders. Finally, this article will provide recommendations for North Carolina’s legislators and judicial officials in the hopes that they may make the changes necessary to North Carolina’s regulatory framework and bring it into compliance with the requirements of the Constitution.

I. *The Statute*

Section 14-208.18, of the North Carolina General Statutes, titled “Sex Offender Unlawfully on Premises,” reads as follows:

- (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (b) [subsection (c)] of this section, to knowingly be at any of the following locations:

Scarpelli, “It’s pretty tough, if someone introduces an ordinance like this, to vote no. I know they’ll probably have a case that tests all these ordinances, and there’s a good possibility a lot will be thrown out as unconstitutional. But it makes a town feel that they care about their children”).

9. See Jesse James Deconto, *Arrested for Going to Church*, CHARLOTTE OBSERVER (Aug. 22, 2009), http://www.bishop-accountability.org/news2009/07_08/2009_08_22_Deconto_Arrested_For.htm (quoting North Carolina Sen. David Hoyle, Dem., sponsor of the North Carolina law as saying, “as far as I’m concerned, they’ve lost all their rights — to go to church . . . to go to McDonald’s to get a cheeseburger if they’ve got the slides. They have made that choice. They have imposed that on themselves. I didn’t”).

10. See Bonnie Rochman, *Should Sex Offenders be Barred from Church?*, TIME (Oct. 14, 2009), <http://www.time.com/time/nation/article/0,8599,1929736,00.html> (quoting North Carolina Sen. David Hoyle, Dem., sponsor of the North Carolina law as saying, “We feel it is a good law. When a person takes advantage of a child, I don’t worry about their constitutional rights”).

11. See *infra* note 16.

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(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

(b) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is the parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.

(c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:

(1) Any offense in Article 7A of this Chapter.

(2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

(d) A person subject to subsection (a) of this section who is a parent or guardian of a student enrolled in a school may be present on school property if all of the following conditions are met:

(1) The parent or guardian is on school property for the purpose for one of the following:

a. To attend a conference at the school with school personnel to discuss the academic or social progress of the parents' or guardians' child; or

b. The presence of the parent or guardian has been requested by the principal or his or her designee for any other reason relating to the welfare or transportation of the child.

(2) The parent or guardian complies with all of the following:

a. Notice: The parent or guardian shall notify the principal of the school of the parents' or guardians' registration under this Article and of his or her presence at the school unless the parent or guardian has permission to be present from the superintendent or the local board of education, or the principal has granted ongoing permission for regular visits of a routine nature. If permission is granted by the superintendent or the local board of education, the superintendent or chairman of the local board of education shall inform the principal of the school where the parents' or guardians' will be present. Notification includes the nature of the parents' or guardians' visit and the hours when the parent or guardian will be present at the school. The parent or guardian is responsible for notifying the principal's office upon arrival and

upon departure. Any permission granted under this sub-subdivision shall be in writing.

b. Supervision: At all times that a parent or guardian is on school property, the parent or guardian shall remain under the direct supervision of school personnel. A parent or guardian shall not be on school property even if the parent or guardian has ongoing permission for regular visits of a routine nature if no school personnel are reasonably available to supervise the parent or guardian on that occasion.

(e) A person subject to subsection (a) of this section who is eligible to vote may be present at a location described in subsection (a) used as a voting place as defined by G.S. 163-165 only for the purposes of voting and shall not be outside the voting enclosure other than for the purpose of entering and exiting the voting place. If the voting place is a school, then the person subject to subsection (a) shall notify the principal of the school that he or she is registered under this Article.

(f) A person subject to subsection (a) of this section who is eligible under G.S. 115C-378 to attend public school may be present on school property if permitted by the local board of education pursuant to G.S. 115C-391(d)(2).

(g) A juvenile subject to subsection (a) of this section may be present at a location described in that subsection if the juvenile is at the location to receive medical treatment or mental health services and remains under the direct supervision of an employee of the treating institution at all times.

(h) A violation of this section is a Class H felony.¹²

II. *The James Nichols Case*

James Nichols ("Nichols") is a registered sex offender. He was convicted of the crime of indecent liberties with a minor in 1999 and again in 2001,¹³ following events involving the same teenage girl that both occurred when he was twenty years old.¹⁴ Most recently, in 2003, he was charged with and convicted of attempted second-degree rape.¹⁵ According to Nichols, the victim was a willing and consenting adult, but authorities claimed that the victim was mentally handicapped and the charge was predicated on the assertion that the victim suffered from a mental defect making her incapable of consenting to sexual activity.¹⁶ For this conviction, Nichols served six years and two

12. N.C. GEN. STAT. § 14-208.18 (2008).

13. See N.C. Offender Registry, *James David Nichols*, NCDJ (Sept. 19, 2008), <http://sexoffender.ncdoj.gov/details.aspx?SRN=005668S9>.

14. See Bryan Mims & Anne Johnson, *Law Challenged After Sex Offender Arrested for Going to Church*, WRAL (Oct. 29, 2009), <http://www.wral.com/news/local/story/6310732/>.

15. See Bryan Mims & Kathy Hanrahan, *Sex Offender Arrested for Going to Church*, WRAL (Oct. 8, 2009), <http://www.wral.com/news/local/story/6165168/>.

16. Interview with James Nichols, in Pittsboro, N.C. (Oct. 29, 2009).

months in state prison.¹⁷ Because of his multiple convictions, Nichols is classified as a “recidivist” as defined in § 14-208.6(2b)¹⁸ and is subject to satellite monitoring for the remainder of his life.¹⁹ In September 2008, Nichols was released from prison, where he says he found God, and began attending a small Baptist church in Moncure, North Carolina.²⁰ According to the Pastor of the church, Matt Garrett, who testified on Nichols’ behalf, Nichols attended services regularly and even assisted with services, including collecting offerings and reading scripture.²¹ In his testimony, Nichols’ Pastor stated, “‘James seemed very sincere in everything he said’ about turning his life over to God.”²²

When the North Carolina General Assembly passed §14-208.18 in December 2008, Chatham County Sheriff’s Office Lieutenant Steve Maynor, who was and has remained in charge of the Office’s sex offender enforcement section, consulted with the State Attorney General’s Office to help determine if the law would prevent sex offenders from attending church.²³ According to Lt. Maynor’s testimony, the Attorney General’s Office informed him that its interpretation of the law was that churches were off-limits to offenders.²⁴ Lt. Maynor stated in his testimony that he warned Nichols (and other monitored

17. Mims & Hanrahan, *supra* note 15.

18. See N.C. GEN. STAT. § 14-208.6(2b) (2008) (noting that “‘Recidivist’ means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)”). The referenced subdivision, titled “Reportable Conviction,” defines that term as:

a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.

b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.

c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.

d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.

19. Memorandum Opinion and Order at 3, *State v. Nichols*, No. 09CRS50686 (Dec. 17, 2009).

20. *Id.* at 4.

21. See Jesse James Deconto, *Case to Test Sex Offender Rules*, NEWS & OBSERVER (Raleigh, N.C.) (Oct. 30, 2009), <http://www.newsobserver.com/2009/10/30/165247/case-to-test-sex-offender-rules.html#storylink=misearch>.

22. Mims and Johnson, *supra* note 14.

23. See Jesse James Deconto, *Sex Offenders’ Charges Defended*, NEWS & OBSERVER (Raleigh, N.C.) (Nov. 13, 2009), <http://www.newsobserver.com/2009/11/13/189243/sex-offenders-charges-defended.html#storylink=misearch>.

24. *Id.*

offenders) several times, as early as December 2008 (when the law went into effect) and up until Nichols was arrested in March 2009, that he was in violation of § 14-208.18 for attending the church.²⁵

In a bizarre and ironic twist, Nichols was arrested after he and his girlfriend reported what appeared to be another man's inappropriate touching of a twelve-year-old girl in the church parking lot.²⁶ The girl was picked up from behind, in what appeared to be a playful manner, by another church attendee, Frankie DeMaio, who, as it turned out, was also a convicted sex offender.²⁷ When law enforcement authorities conducted an investigation, both men were arrested for being present at the church, pursuant to the statute.²⁸ In response to his arrest Nichols said, "I thought I was doing the right thing, and they hit me with charges."²⁹ Specifically, Nichols was indicted on May 11, 2009 for two counts of violating North Carolina General Statute § 14-208.18, Sex Offender Unlawfully on Premises; one count for being within 300 feet of the church nursery and the other for being present in a place where children regularly gather for educational, recreational, or social programs — namely, the church premises in general.³⁰ No charges were ever brought against DeMaio for the suspected assault or any conduct, other than being present at the church.³¹

Nichols' attorney, Glenn Gerding,³² filed two motions in Chatham County Superior Court arguing that § 14-208.18 was unconstitutional on several grounds.³³ Gerding argued that the statute violated Nichols' procedural due process and equal protection rights as well as prohibitions against *ex post facto* laws and presented a substantive due process claim that the law violated Nichols' right to intrastate travel.³⁴

After hearing arguments on Gerding's motions, Superior Court Judge Allen Baddour ruled that the statute was unconstitutional on the grounds of overbreadth and vagueness and that the statute did not comply with the requirement of *mens rea* or an element of intent nec-

25. *Id.*

26. Deconto, *supra* note 21.

27. *Id.*

28. *Id.*

29. Rochman, *supra* note 10.

30. Indictment of James Nichols, State v. Nichols, No. 09CRS50686 (May 11, 2009). On file with author.

31. Deconto, *supra* note 23.

32. Glenn Gerding is a criminal defense attorney in Chapel Hill, North Carolina. He received his J.D. from the Norman Adrian Wiggins School of Law at Campbell University, an LL.M. from George Washington University School of Law, and served in the U.S. Navy JAG Corps at the trial and appellate levels.

33. Defendant's Motion to Declare N.C. Gen. Stat. § 14-208.18 Unconstitutional at 1, State v. Nichols, No. 09CRS50686 (Aug. 10, 2009).

34. *Id.* at 11.

essary to make the prohibited conduct criminal.³⁵ Judge Baddour also dismissed the charges against Nichols.³⁶ However, Judge Baddour declined to address the remainder of the arguments advanced on Nichols' behalf, leaving them unresolved.³⁷ A notice of appeal, on behalf of the people of North Carolina, was filed immediately by the Assistant District Attorney.³⁸ In an interesting recent development, the State has elected to not appeal the ruling of Judge Baddour and the law will remain unenforceable in the single judicial district affected.³⁹ Meanwhile, the law will continue to be applied in the rest of North Carolina.⁴⁰

THE EVOLUTION OF SEX OFFENDER LAWS GENERALLY

Before addressing the unconstitutionality of North Carolina's approach to the punishment and regulation of sexual offenders, specifically the constitutionality of §14-208.18, it is first necessary to discuss the statutory framework that North Carolina, other states and the federal government have created in an effort to protect society from sexual offenders.

I. REGISTRATION REQUIREMENTS

A. General Trends

The first widespread sex offender laws in recent times stemmed from the abduction of eleven-year-old Jacob Wetterling, in response to which Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in 1994.⁴¹ Under this law, sex offenders and persons who victimize children must provide law enforcement with information including addresses and telephone numbers for their residences and places of employment.⁴²

35. Memorandum Opinion and Order at 13, *State v. Nichols*, No. 09CRS50686 (Dec. 17, 2009).

36. *Id.* at 14.

37. *Id.* at 15.

38. See Jesse James Deconto, *Sex Offender Ban Too Vague*, NEWS & OBSERVER (Raleigh, N.C.) (Dec. 18, 2009), <http://www.newsobserver.com/2009/12/18/246537/sex-offender-ban-too-vague.html#storylink=misearch>.

39. See Jesse James Deconto, *DA Won't Appeal Sex Offender Case*, NEWS & OBSERVER (Raleigh, N.C.) (Sept. 18, 2010), <http://www.newsobserver.com/2010/09/18/687947/da-wont-appeal-sex-offender-case.html>.

40. *Id.* One has to wonder if this decision was motivated, at least in part, by the fear that the statute would be struck down as unconstitutional by the Court of Appeals affirming Judge Baddour's ruling, which would effectively preclude enforcement statewide. Of particular concern are comments made by legislators that the General Assembly would be unlikely to re-write the law absent a ruling from an appellate court giving guidance. Currently, there is no challenge pending to the law in North Carolina courts.

41. See 42 U.S.C. § 14071 (1994).

42. *Id.*

Requirements vary from state to state. Some states require offenders to also provide fingerprints, DNA samples, or a photograph, and information on vehicles owned by the offender.⁴³ However, nearly every state requires that the type of offense, age of the victim, dates of conviction and punishment received be reported.⁴⁴ States are required to forward this information to the National Sex Offender Registry, and failure of a state to comply with the statute would result in the withholding of federal grants that benefit state law enforcement.⁴⁵ All fifty states now maintain a compliant registry.⁴⁶ The stated purpose of the registry is to assist law enforcement in investigating sexually based crimes by compiling what essentially amounts to a list of likely suspects.⁴⁷

B. North Carolina Law

There are four types of individuals required to register as a sex offender under current North Carolina law: (1) residents of the state that have a “reportable conviction,” including new residents as they move into the state; (2) persons that have a “reportable conviction” and move into and remain in the state for a period of fifteen days; (3) non-resident students who have a “reportable conviction” or are required to register in their state of residency; and (4) non-resident workers that have a “reportable conviction” or are required to register in their state of residency.⁴⁸

What constitutes a “reportable conviction” is a question with no simple answer. The current law specifies a list of offenses, many of which one would expect to find on such a list, such as rape and indecent liberties with children.⁴⁹ The General Assembly has provided an “effective date,” or “triggering date” for each offense listed.⁵⁰ This date is either the date of conviction for the crime or the date of release from incarceration imposed as a result of the conviction.⁵¹ Different crimes have different effective dates, and two crimes for which one would potentially have to register may not both “trigger” the registration requirement, even if committed on the same day.⁵² For ex-

43. Amber Leigh Bagley, Comment, “*An Era of Human Zoning: Banishing Sex Offenders from Communities Through Residence and Work Restrictions*,” 57 EMORY L.J. 1347, 1352 (2008).

44. *Id.*

45. 42 U.S.C. § 14071 (1994).

46. Bagley, *supra* note 43.

47. *Id.*

48. LAW ENFORCEMENT LIAISON SECTION, N.C. DEP’T OF JUSTICE, THE NORTH CAROLINA SEX OFFENDER & PUBLIC PROTECTION REGISTRATION PROGRAMS, at 2 (Rev. 2009).

49. *Id.* at 4-5.

50. *Id.*

51. *Id.* at 3.

52. *Id.*

ample, a conviction for first degree rape⁵³ will trigger the registration requirement if the date of conviction or release from custody occurred on or after January 1, 1996.⁵⁴ A conviction for sexual battery⁵⁵ only triggers registration if the effective date is on or after December 1, 2005.⁵⁶ A conviction for statutory rape or sexual offense of a person who is 13, 14, or 15 years-of-age, where defendant is at least six years older⁵⁷ has an effective date of December 1, 2006,⁵⁸ and a conviction for sexual offense with a child⁵⁹ only requires registration if the effective date is on or after December 1, 2008.⁶⁰

Additionally, it is not only a conviction for a sexually based offense that triggers the registration requirement, but also offenses that are included because of the age of the victim; for example abduction of children.⁶¹ There are other offenses that are not sexually based at all and have nothing to do with the age of the victim,⁶² such as felonious restraint⁶³ and kidnapping.⁶⁴

Current North Carolina law utilizes a “tiered” registration program that places different registration requirements on offenders depending on their applicable tier.⁶⁵ Offenders are grouped according to several factors, including the severity of their offenses, their intended targets and their recidivism risk.⁶⁶ There are essentially two tiers made up of four categories. Those categories are: (1) offenders; (2) aggravated offenders; (3) recidivists; and (4) sexually violent predators.⁶⁷ For most practical purposes, “offenders” make up the first tier, with the remaining three categories making up the second tier.⁶⁸

Offenders assigned to the first tier, or Part 2 of the statute (“Part 2”), known as the “Sex Offender and Public Protection Registration Program,”⁶⁹ are required to register as a sex offender for thirty years, if their offenses were committed on or after December 1, 2008, but can petition the court to be removed after ten years.⁷⁰ Individuals

53. N.C. GEN. STAT. § 14-27.2 (2009).

54. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 4.

55. N.C. GEN. STAT. § 14-27.5A (2009).

56. LAW ENFORCEMENT LIAISON SECTION, *supra* note 54.

57. N.C. GEN. STAT. § 14-27.7A(a) (2009).

58. LAW ENFORCEMENT LIAISON SECTION, *supra* note 54.

59. N.C. GEN. STAT. § 14-27.4A (2009).

60. LAW ENFORCEMENT LIAISON SECTION, *supra* note 54.

61. N.C. GEN. STAT. § 14-41 (2009).

62. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 3.

63. N.C. GEN. STAT. § 14-43.3 (2009).

64. N.C. GEN. STAT. § 14-39 (2009).

65. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 8-9.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 18.

70. *Id.* at 18-19.

who committed offenses prior to December 1, 2008 are required to register for life, with the ability to petition for removal after ten years.⁷¹⁷² A Superior Court Judge may grant the request for removal if a showing can be made that the offender has not been convicted of another sex offense and if the court is satisfied that the offender is not a “current or potential threat to public safety.”⁷³

Those registrants subject to Part 2 are required to verify their registration information in person every six months, and must provide the sheriff in their county of residence their name, date of birth, sex, race, hair color, eye color, height, weight, home address and driver’s license number.⁷⁴ The sheriff also collects fingerprints, a photograph and any “online identifiers” that the offender uses or intends to use, such as email addresses and screen names.⁷⁵ Upon initial registration, the local sheriff will forward all information to the Criminal Information and Identification Section of the State Bureau of Investigation (“CIIS”) for inclusion in the statewide sex offender registry.⁷⁶ CIIS then mails a verification form to the address that the registrant provided.⁷⁷ The registrant has three days to report, again, in person to the local sheriff’s office to complete the verification process.⁷⁸ For Part 2 registrants, this process takes place every six months.⁷⁹ The registrant is also under a duty to update his information in the registry if the registrant changes address, employment, student status and other changes in information specified by statute.⁸⁰

Part 3 of the statute governs the remaining three types of offenders under the “Sexually Violent Predator Registration Program.”⁸¹ These offenders are required to register for life, with no opportunity to petition to have their information removed from the registry at any time.⁸² They are subject to all of the same registration requirements as Part 2 offenders, but must supply additional information, including identifying factors, offense history and records of treatment received

71. *Id.* at 18.

72. *Id.*

73. *Id.* at 19.

74. *Id.* at 14.

75. *Id.* at 15.

76. *Id.* at 14.

77. *Id.* at 15.

78. *Id.*

79. *Id.*

80. *Id.* at 16.

81. N.C. GEN. STAT. § 14-208.6A (2009). Despite the title of the act, this “tier” also encompasses “aggravated offenders” and “recidivists,” not only those offenders deemed to be “sexually violent predators.”

82. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 18-19.

for mental illnesses or personality disorders.⁸³ Part 3 offenders must also verify their registration information every 90 days.⁸⁴

II. Notification Requirements

A. General Trends

The next evolution in the laws regulating sex offenders post-release was Megan's Law, named for Megan Kanka who was abducted, raped, and murdered by a twice convicted, registered sex offender who lived across the street from Kanka's New Jersey home.⁸⁵ Outrage followed what was seen as a crime that could easily have been prevented had the community known about the presence of the offender in their midst.⁸⁶ Megan's parents began an ultimately successful lobbying campaign to make the information on the sex offender registries accessible to the public. The result was Megan's Law: a 1996 amendment to the Jacob Wetterling Act mandating community access to the Federal Sex Offender Registry, and conditioning funds to the states on their allowing public access to the state registries as well.⁸⁷ No longer was the emphasis on *registration* for the purpose of assisting law enforcement in solving crimes already committed, but on *notification* of the communities in which the offenders live, in an effort to promote prevention.⁸⁸ Every state has adopted a version of Megan's law; North Carolina adopted its version⁸⁹ in 1997, known as the Amy Jackson Law.⁹⁰

Unfortunately, notification requirements have, on several occasions, resulted in a need for a present-day "mark of Cain" for sex offenders.⁹¹ There are at least three instances of vigilantes who have, at random, killed or attempted to kill sex offender registrants after hav-

83. *Id.* at 14.

84. N.C. GEN. STAT. § 14-208.24 (2009).

85. Richard G. Wright, *Parole and Probation: Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 N.E. J. ON CRIM. & CIV. CON. 17 (2008).

86. History of *Megan's Law*, <http://megans-law.net/Megans-Law.asp> (last visited Nov. 1, 2010).

87. See 42 U.S.C. § 14071 (2000 & Supp. IV 2004).

88. Wright, *supra* note 85, at 30.

89. N.C. GEN. STAT. §§ 14-208.5 – 208.15 (Supp. 1997).

90. Nikki Gfellers and Kimberly Ann Lewis, Comment, *The Amy Jackson Law – A look at the Constitutionality of North Carolina's Answer to Megan's Law*, 20 CAMPBELL L. REV. 347, 348 (1997).

91. After murdering his brother Abel, Cain was cast out of the Garden of Eden and out of the presence of God. "But Cain answered the Lord, 'My punishment is too great to bear! Since you are banishing me today from the soil, and I must hide myself from Your presence and become a restless wanderer on the earth, whoever finds me will kill me.' Then the Lord replied to him, 'In that case, whoever kills Cain will suffer vengeance seven times over.' And He placed a mark on Cain so that whoever found him would not kill him." Genesis 4:13-15 (Holman Christian Standard Bible).

ing obtained the names and addresses of sex offenders through the registries.⁹²

In 2006, the Jacob Wetterling Act was amended again by the Adam Walsh Child Protection and Safety Act.⁹³ The Adam Walsh Act took notification a step further, creating “tiers” of sex offenders, organized according to the severity of their offense, and establishing corresponding registration and notification requirements.⁹⁴ The Act also created new minimum sentences for sex offenders, and required the states to make failure to comply with registration a felony offense.⁹⁵ The most important aspect of notification created by the Adam Walsh Act was the requirement that states make the information contained in their registries available to the public through the internet.⁹⁶ The state-maintained websites must allow for simple searching for offenders by geographic zone and zip code.⁹⁷

B. North Carolina Law

North Carolina passed its version of Megan’s Law, known as the Amy Jackson Law in 1997. It requires not only that the information contained in the registry be available to the public upon request, but that, in keeping with federal requirements, it is available and searchable on the internet.⁹⁸ The CIIS is also charged with notifying law enforcement and certain segments of the public whenever certain registration information regarding an offender changes, such as enrollment in an institution of higher education or change of address.⁹⁹ CIIS must inform “need to know” law enforcement agencies under these circumstances.¹⁰⁰ CIIS is responsible for ensuring public access to all information contained in the registries through the website it maintains.¹⁰¹ Citizens are able to search by area to locate offenders, and are provided with a photograph, address, map, and other information regarding the offender.¹⁰² Citizens may also sign up to receive email notifications when an offender moves into their neighborhood by registering at www.ncfindoffender.gov.¹⁰³ By registering with the

92. Wright, *supra* note 85, at 31.

93. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

94. Wright, *supra* note 85, at 32-33.

95. *Id.* at 33.

96. *Id.* at 34.

97. *Id.*

98. N.C. GEN. STAT. § 14-208.15 (2009).

99. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 32.

100. *Id.*

101. *Id.*

102. *Id.*

103. <http://www.ncfindoffender.gov/>

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North Carolina Statewide Automatic Victim Assistance Notification (SAVAN) program, citizens will receive automated phone calls alerting them if an offender registers an address within a certain area.¹⁰⁴ Despite its name, citizens need not have any “victim status” to sign up for this free service, and any person may sign up to receive alerts.¹⁰⁵

III. *Satellite Based Monitoring / GPS Tracking*

A. General Trends

During the same period as the expansion of the registries and the increased ability of the public to access them, the era of tracking sex offenders through satellite based monitoring (SBM), or Global Positioning Systems (GPS), began. By February 2006, twenty-three states were in the process of implementing a plan to track at least certain sex offenders using satellite based monitoring.¹⁰⁶ According to a 2008 report by the Pennsylvania Department of the Auditor General, at that time, there were twenty-four states that *required* that certain sexual offenders be tracked by GPS, fourteen of which required that they be monitored for life.¹⁰⁷ The report stated that of those states where state law did not specifically mandate the tracking of offenders, nine states did so in the absence of any statutory requirement.¹⁰⁸

The basic purpose of these laws is the enforcement of the registration regime, and the state’s interest in not losing track of offenders that should be registered.¹⁰⁹ The tracking devices are not effective for the prevention of actual acts of violence, and are often not monitored by authorities in real time.¹¹⁰ They are typically tools used to locate an offender that should have registered, but that the state has lost track of.¹¹¹ Presumably, they do serve as something of a deterrent, because an offender that knows that police can verify his whereabouts may think twice before committing an offense. However, there is at least one reported case of an offender committing a rape and murder while being monitored.¹¹²

104. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 33.

105. *Id.*

106. Jack Wagner, Using GPS Technology to Track Sex Offenders: What Should Pennsylvania Do?, Pennsylvania Department of the Auditor General (2008), *available at* <http://www.auditorgen.state.pa.us/Reports/Performance/Special/speGPS072108.pdf>.

107. *Id.*

108. *Id.*

109. Elliott C. McLaughlin & Patrick Oppman, Sex Offender Kills Teen While Under GPS Monitoring, Police Say, CNN.com, (March 12, 2009) *available at* <http://www.cnn.com/2009/CRIME/03/12/sex.offender.gps/#cnnSTCOther1>.

110. *Id.*

111. *Id.*

112. *Id.*

B. North Carolina Law

North Carolina's SBM provisions were created through N.C. Sess. Laws 2006-247, § 1(a) which states: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'" ¹¹³ North Carolina law requires that registrants identified as aggravated offenders, recidivists or sexually violent predators be subject to satellite based monitoring for the remainder of their lives. ¹¹⁴ In addition, an offender convicted of a violation of rape of a child or sexual offense with a child will be subject to the lifetime monitoring requirement. ¹¹⁵ Some Part 2 registrants may be subject to the lifetime monitoring requirement if it is determined by a court that "they committed an offense involving the physical, mental, or sexual abuse of a minor, and, who, based on the Department of Corrections risk assessment program, require the highest possible level of supervision and monitoring." ¹¹⁶ The Department of Correction (D.O.C.) is charged with making the initial determination regarding SBM in the cases of those inmates that were convicted prior to the SBM requirements becoming law and are scheduled to be released. ¹¹⁷ Those offenders initially determined by the D.O.C. to require SBM have their ultimate determination regarding SBM made by a judge at a D.O.C. scheduled court hearing. ¹¹⁸

IV. Civil Commitment

A. General Trends

Civil commitment is the term given to the state laws that provide for the hospitalization or incarceration of sexual offenders that are "expected" to reoffend. ¹¹⁹ Civil commitments have their roots in the "sexual psychopath laws" enacted during the mid-twentieth century, when the then-burgeoning, modern psychiatric movement identified a link between sexual crime and mental illness. ¹²⁰ It was also during this period that homosexuality was considered a mental illness, and was linked to child sexual assault. ¹²¹ By the late 1960s, the laws allowing civil commitment generally faded into the background. ¹²²

113. *An Act to Protect North Carolina's Children/Sex Offender Law Changes*, 2005 N.C. Sess. Laws 2006-247, § 1(a).

114. N.C. GEN. STAT. § 14-408.40(a)(1) (2009).

115. N.C. GEN. STAT. § 14-408.40(a)(3) (2009).

116. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 25.

117. *Id.*

118. *Id.*

119. Wright, *supra* note 85, at 38.

120. *Id.*

121. *Id.*

122. *Id.*

Civil commitments surged again to the forefront in the mid 1990s, when several states explored the possibilities of civil commitments, in response to the media attention given to several high-profile sexual assault homicides.¹²³ The U.S. Supreme Court held in *Kansas v. Hendricks* that the civil commitment laws of that state were constitutional, and, according to a 2007 *New York Times* feature length series, at the time of publication, over 2700 sex offenders were being held indefinitely in nineteen states.¹²⁴

B. North Carolina Law

North Carolina does not have a civil commitment regime targeted solely at sex offenders as some states do. Under North Carolina law, however, any person found to be a danger to him or herself, or others, can be subject to involuntary, civil commitment.¹²⁵ Additionally, North Carolina law provides for the designation of an offender as a “sexually violent predator,” which is taken into account at sentencing, and determines into which tier an offender falls for registration purposes.¹²⁶ This designation is based, at least in part, on a psychiatric diagnosis of the offender as suffering from mental illness or a personality disorder.¹²⁷

V. Residency, Employment, and Other Restrictions

A. General Trends

Many states codified their GPS tracking with laws commonly known as Jessica’s Laws.¹²⁸ The law was named for Jessica Lunsford, a nine-year old girl that was abducted from her bedroom, held captive for three days, raped, and buried alive by a convicted sex offender living less than a hundred yards from her home.¹²⁹ The offender had been required to register, but authorities had been unable to locate him after he failed to do so.¹³⁰

These laws are the latest trends in sex offender statutory regimes, including heightened mandatory minimum sentences, and, in many

123. *Id.*

124. *Id.*

125. Lou A. Newman et al., UNC School of Government, *North Carolina Civil Commitment Manual* (John Rubin, et al eds., 2006).

126. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 10 (this designation is taken into account at the time of sentencing to determine which tier an offender falls for registration purposes).

127. *Id.*

128. Wright, *supra* note 85, at 36.

129. Drifter Says He Held Girl Three Days, CNN.com, June 24, 2005., <http://www.cnn.com/2005/LAW/06/23/lunsford.report/index.html>.

130. *Id.*

cases, GPS tracking.¹³¹ Coupled with the tracking of offenders are residency and work restrictions, prohibiting certain classes of offenders from living or working within certain distances from schools, playgrounds, arcades, museums and other places at which children are known to “gather.”¹³² These residency and employment restrictions are generally the most recent and controversial of the restrictions on sex offenders. Some states, including North Carolina, extend these restrictions to prohibiting the mere presence of offenders at these types of locations, or prohibiting their approach within a certain number of feet.¹³³ The argument has been advanced, and in some cases readily admitted by lawmakers, that the effect (and often intent) of these laws is to “banish” sex offenders from our communities.¹³⁴ In many cases, the creation of “pedophile free zones” has resulted in entire cities and metropolitan areas that are off-limits to offenders.¹³⁵ This has created a surge in the number of offenders that are listing themselves as “transient,” as they are unable to locate housing.¹³⁶ The restrictions have created something of a backlash in some cases because “transient” offenders are much more difficult to monitor, and those that are pushed to the brink of society are far more likely to reoffend.¹³⁷

B. North Carolina Law

North Carolina legislators passed the state’s version of Jessica’s Law, now codified in N.C. Gen. Stat. § 14-208, in July of 2008.¹³⁸ Representative Tim Moore¹³⁹ proclaimed that the law “makes North Carolina one of the toughest states, if not the toughest state, when it comes to dealing with these child predators.”¹⁴⁰ In addition to creating tough mandatory minimum sentences for offenders, the law also provides for satellite based monitoring of offenders and establishes

131. Wright, *supra* note 85, at 42.

132. Lester, *supra* note 8, at 351-52.

133. *Id.*

134. *See generally*, Bagley, *supra* note 43.

135. Denise Zapata & Kevin Crowe, *Jessica’s Law too Vague to Enforce?*, SAN DIEGO UNION-TRIBUNE, Nov. 29, 2009, available at <http://www.signonsandiego.com/news/2009/nov/29/jessicas-law-too-vague-enforce> (citing a 2007 San Diego County District Attorney’s Office Study stating that residency restrictions prevented sex offenders from residing at 72 percent of the residential parcels in the county).

136. *Id.* (citing a December 2008 report of the Sex Offender Management Board stating that, among California parolees, the number of sex offenders listed as transient rose from 88 in November 2006 to 1,056 in June 2008).

137. *Id.*

138. Whitney Woodward, *State Legislators Approve “Jessica’s Law,”* GREENSBORO NEWS AND RECORD, July 17, 2008 available at www.news-record.com/content/2008/07/17/article/state_legislators_approve_jessicas_law.

139. Representative Moore is a Republican representing Cleveland County.

140. Woodward, *supra* note 138.

zones into which certain offenders cannot enter, similar to some of the most restrictive legislation in other states.¹⁴¹

North Carolina law provides that a registered offender may not knowingly reside within 1,000 feet of the property of any public or non-public school or child care facility.¹⁴² Unlike some states, North Carolina does not permit changes in the use of property that occurs after a registrant has established residency to place the offender in violation.¹⁴³ For example, if a child care facility opens within the prohibited range of a sex offender's established residency, he or she is not forced to move.¹⁴⁴ Also unlike some states, North Carolina does not attempt to apply the law retroactively to offenders who had established a residence prior to the effective date of the new restrictions.¹⁴⁵ However, North Carolina applies the law to offenders that committed or were convicted of their crimes prior to the effective date of the law, thus raising potential *ex post facto* issues that have led other state supreme courts to invalidate residency restrictions on *ex post facto* grounds.¹⁴⁶

The law also prohibits the use of the offender's residence for the care of a minor, and prohibits the offender from engaging in any activities, for compensation or not, at any location, where their duties would include instruction, supervision or care of minors.¹⁴⁷ Offenders are also prohibited by the statute from accessing social networking internet sites such as MySpace or Facebook, and must register any "online identifiers" as part of their required registration information.¹⁴⁸

Lastly, and the main focus of this article, registrants are prohibited from "being" at or going to premises intended primarily for the care of minors, such as schools and child care facilities, and from being within 300 feet of any "location intended primarily for the use, care, or supervision of minors" where that location is located on premises that are not intended primarily for that purpose.¹⁴⁹ Common examples are the play areas found at fast food restaurants or in shopping malls, areas where parents may drop off children for supervision at exercise facilities, or, in the case that is the focus of this article, nurseries in churches.¹⁵⁰ In the event that these restrictions do not fully

141. *Id.*

142. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 19.

143. *Id.* at 20.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 21.

148. *Id.* at 22.

149. *Id.* at 23.

150. *Id.*

embrace locations at which an offender might encounter a child, the General Assembly has prohibited them from being at any place where minors “gather for regularly scheduled educational, recreational or social programs.”¹⁵¹ This appears to include sports fields, skating rinks, museums, arcades and popular child-themed restaurants such as “Chuck E. Cheese’s.”¹⁵² The legislature chose not to define “regularly scheduled,” or include any explanation of what constitutes “educational, recreational, or social programs.”¹⁵³ Under this statute, it is questionable whether a sex offender could enter the General Assembly building itself, as there are regularly scheduled tours of the building where school children are presumably engaged in an “educational program.”¹⁵⁴

CHALLENGES TO THE CONSTITUTIONALITY OF SEX OFFENDER LAWS

As they have been passed into law, each of the registration, monitoring, and exclusionary schemes have been challenged in the courts, bringing a variety of Constitutional challenges.¹⁵⁵

I. *Registration and Notification Requirements*

A. *Ex Post Facto Challenges*

Registration programs were challenged primarily as violating the *ex post facto* clause of the U.S. Constitution and the applicable state constitutions, most of which contain similar language, in that the laws applied additional punishment to the offender retroactively, after his crime had been committed.¹⁵⁶ The *ex post facto* clause of the U.S. Constitution states, simply, that “[n]o bill of attainder or *ex post facto* law shall be passed.”¹⁵⁷ The U.S. Supreme Court has defined an *ex post facto* law as “one which imposes punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed.”¹⁵⁸

The chief argument for the constitutionality of registration requirements has been that the requirements are mere civil regulation, and

151. *Id.*

152. *Id.*

153. *Id.* (a fair reading of the North Carolina Sex Offender & Public Protection Registration Programs manual suggests that the legislature did not intend to define “regularly scheduled” or explain what would constitute “education, recreational, or social programs”).

154. *Id.*

155. *Id.*

156. *Id.*

157. U.S. CONST. Art. 1 Sec. 9.

158. *Burgess v. Salmon*, 97 U.S. 381 (1878)(quoting *Carpenter v. Com. Of Pennsylvania*, 58 U.S. 456 (1854)).

not punitive in nature.¹⁵⁹ When examining these regulations, in cases where the legislature states that its intent is to punish, the analysis need go no further.¹⁶⁰ However, in cases in which the legislature claims a regulatory intent, courts must look to the effects of the law in determining whether the statutory scheme is “so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”¹⁶¹ The U.S. Supreme Court in *Kennedy v. Mendoza-Martinez* established seven “guideposts” for determining whether a burden is in fact regulatory or punitive.¹⁶² In *Smith v. Doe*,¹⁶³ the Court, applying five of these guidelines upheld the Alaska sex offender registration statute as constitutional.¹⁶⁴ Those five factors

“most relevant to [the Court’s] analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.”¹⁶⁵

In its analysis, the Court determined that the registration requirement in Alaska’s version of Megan’s Law was not punitive in nature because it did not satisfy these five factors.¹⁶⁶ Specifically rejecting the claim that the requirement was of a nature typically regarded as punishment, in that it resembled “shaming punishments” of the colonial period, the Court found that the burden on the offenders “result[ed] not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.”¹⁶⁷ Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.¹⁶⁸

In dealing with the second factor, the Court also found that the registration requirements did not impose any physical restraints on sex offenders, and did not prevent offenders from obtaining employment or choosing where to live.¹⁶⁹ The petitioners also pointed out that they were required under the law to regularly update their informa-

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

160. *Id.* at 92.

161. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

162. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

163. *Smith*, 538 U.S. at 84.

164. *Id.*

165. *Id.* at 97.

166. *Id.*

167. *Id.*

168. *Id.* at 98.

169. Maureen S. Hopbell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present, and Future of Megan’s Law*, 42 DUQ. L. REV. 331, 350 (2004) (citing *Smith*, 538 U.S. at 100).

tion, and argued that this requirement placed a restraint on their liberty.¹⁷⁰ The Court rejected this argument as well, because there was no requirement that the updates be made in person, and the offenders were not actually required to “go” anywhere.¹⁷¹ The Court found that the “offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision.”¹⁷²

When the Ninth Circuit Court of Appeals held that the statute was unconstitutional in violation of the *ex post facto* clause, it relied on the fact that the statute “promotes the traditional aims of punishment—retribution”¹⁷³ The Ninth Circuit found crucial that the required length of registration was keyed to the offense committed, rather than to any likelihood of future danger, and that the statute did not place limits on the dissemination of the information.¹⁷⁴ The court found that the act implicated the traditional aims of punishment of retribution and deterrence, and for that reason met the requirements of the third *Mendoza-Martinez factor*.¹⁷⁵ The Supreme Court rejected this notion, holding that “the broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.”¹⁷⁶ The Court stated that “the Act’s rational connection to a nonpunitive purpose is a “[m]ost significant” factor in our determination that the statute’s effects are not punitive” concluding that, “the Act has a legitimate nonpunitive purpose of ‘public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].’”¹⁷⁷ The Court went on to recognize that states have the ability to identify crimes for which recidivism requires special consideration, and that the Act was not excessive in relation to its purpose, thus fulfilling the last factor.¹⁷⁸

North Carolina’s law was challenged in *State v. White*,¹⁷⁹ where the North Carolina Court of Appeals relied almost entirely on the U.S. Supreme Court’s decision in *Smith* in upholding the validity of the statute.¹⁸⁰

170. Hopbell, *supra* note 169, at 351 (citing *Smith*, 538 U.S. at 101).

171. *Id.*

172. *Smith*, 538 U.S. at 101. See Hopbell, *supra* note 169, at 351.

173. *Doe I v. Otte*, 259 F.3d 979, 989-90 (9th Cir. 2001).

174. *Id.* at 990, 992.

175. *Id.* at 990-91.

176. *Smith*, 538 U.S. at 102.

177. *Id.* at 102-03 (quoting *Otte*, 259 F.3d at 991).

178. *Smith*, 538 U.S. at 103.

179. *State v. White*, 590 S.E.2d 448 (N.C. Ct. App. 2004).

180. *Id.* at 191-98.

The majority of courts to consider whether registration regimes are *ex post facto* laws have decided cases along the lines of *Smith v. Doe*, although, interestingly, following the decision by the U.S. Supreme Court, the petitioner in *Smith* brought a claim in the Alaska state courts which resulted in the very same Act being declared unconstitutional by the Alaska Supreme Court on *ex post facto* grounds.¹⁸¹ The Alaska court stressed that, in interpreting Alaska's own constitution, the court was not bound by the U.S. Supreme Court's holding.¹⁸²

In 1996, the Supreme Court of Kansas upheld the registration portions of the Kansas statute for purposes of law enforcement use, but held that the public notification aspect was unconstitutional as a punitive, *ex post facto* law.¹⁸³

Other states have also found that registration requirements in some cases constitute punishment, and are thus not constitutionally applicable to those offenders who committed their crimes prior to the statutes' enactment.¹⁸⁴ These cases most often are related to changes that states make in their registration regimes that purportedly apply to already-convicted offenders.¹⁸⁵ In a very recent federal district court decision in Nebraska, the court partially granted an injunction forbidding the State of Nebraska from requiring that registrants submit to searches of their computers, and from prohibiting registrants from accessing certain websites.¹⁸⁶ Nebraska attempted to pass amendments to the statutes in place that would force registrants to comply with the above requirements.¹⁸⁷ The District Court Judge enjoined the state from enforcing the amendments, noting that "[l]uckily for Nebraska, both amendments appear to be severable."¹⁸⁸ The Judge stated in his analysis that

[b]y adding two provisions to the registry framework that are entirely foreign to SORNA, Nebraska has come perilously close to voiding the entire law for offenders who have served their time and who are no longer subject to probation, parole, or other court-ordered supervision. These two provisions, when taken together, threaten to take a civil regulatory scheme and turn it into a punitive endeavor. For those

181. *Doe v. State*, 189 P.3d 999, 1000, 1018 (Alaska 2008).

182. *Id.* at 1007.

183. *State v. Myers*, 923 P.2d 1024 (Kan. 1996).

184. See *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); see *United States v. Sallee*, No. 07-152, 2007 U.S. Dist. LEXIS 68350, at *8-10 (W.D. Okla. Aug. 13, 2007); see *United States v. Stinson*, 507 F. Supp. 2d 560, 570-71, (S.D. W.Va. 2007); see *United States v. Smith*, 481 F. Supp. 2d 846, 853-54, (E.D. Mich 2007); see *United States v. Muzio*, No. 4:07CR179(CDP), 2007 U.S. Dist. LEXIS 54330, at *19 (E.D. Mo. July 26, 2007).

185. *Id.*

186. *Doe v. Nebraska*, No. 8:09CV456, 2009 U.S. Dist. LEXIS 121104, at *20-21, 30-31 (D. Neb. Dec. 30, 2009).

187. *Id.*

188. *Id.*

that have done their time, the Ex Post Facto Clause of the Constitution very likely bars retroactive application of these changes. Moreover, and looking at each amendment separately, one change unquestionably violates the Fourth Amendment (as Nebraska concedes), and the other has the potential to adversely implicate the First Amendment.¹⁸⁹

The Judge specifically declined to address these First and Fourth Amendment concerns and enjoined enforcement based on the retroactive application to offenders that had served their sentences.¹⁹⁰ It is worth noting that North Carolina recently enacted, as part of its version of “Jessica’s Law,” very similar prohibitions on sex offenders accessing “social networking” internet sites.¹⁹¹ It was these restrictions that the District Court Judge found to be very likely violative of the First Amendment rights of the registrants under the Nebraska statute.¹⁹²

In December 2009, the Supreme Court of Maine struck down amendments to the State’s registration requirements that attempted to increase the extent of restrictions on previously convicted offenders and the amount of time that they would be subject to registration.¹⁹³ The court, applying the *Mendoza-Martinez* factors, declared that the enhanced requirements of registration, namely that offenders must report in person within five days of receiving a letter from law enforcement, did impose “a disability or restraint that is neither minor nor indirect.”¹⁹⁴

These very recent cases may be suggestive of a trend in courts finally reaching a breaking point when it comes to *ex post facto* registration requirements.

B. Other Challenges to Registration Requirements

The U.S. Supreme Court rejected the argument that sex offender registration requirements infringes upon an individual’s reputation, a protected liberty interest, in *Connecticut Dept. of Public Safety v. Doe*.¹⁹⁵ The Court stated, “mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest.”¹⁹⁶ The Supreme Court in overruling the Second Circuit held that the registration requirements, labeling the offender a “dangerous offender” did not deprive the offender of a liberty interest, but also, that the of-

189. *Id.* LEXIS 121104 at*19-20.

190. *Id.* LEXIS 121104 at *30-31.

191. N.C. GEN. STAT. § 14-202.5 (2010).

192. *Nebraska*, 2009 U.S. Dist. LEXIS 121104, at *27.

193. *State v. Letalien* 985 A.2d 4, 26 (Me. 2009).

194. *Id.* at 18.

195. *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

196. *Id.* at 6-7 (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

fender had received proper procedural due process.¹⁹⁷ The Court went on to state that if the offender could not point to any substantive defect in the constitutionality of the statute he was not entitled to procedural due process.¹⁹⁸ In his concurrence Justice Scalia stated: “[a]bsent a claim (which respondent has not made here) that the liberty interest in question is so fundamental as to implicate so-called ‘substantive’ due process, a properly enacted law can eliminate it.”¹⁹⁹ He went on to say, unless the fundamental liberty interest can be found, a validly enacted law “suffices to abrogate that liberty interest.”²⁰⁰ “[A] convicted sex offender has no more right to additional ‘process’ enabling him to establish that he is not dangerous than a 15-year-old has a right to ‘process’ enabling him to establish that he is a safe driver.”²⁰¹

Substantive due process claims advancing the argument that offenders have a right to privacy guaranteed by the Constitution have fared no better. Three distinct lines of cases have emerged among the state courts and split circuits: (1) cases in which courts have found that offenders did not have a legitimate privacy interest in information that was already available in the public domain; (2) cases that determined that the dissemination of the information did not violate a privacy right that was “inherent in the concept of ordered liberty”; and (3) cases that found a protected privacy interest in some of the information, namely the offenders’ home addresses, but held that the state’s legitimate interest in public safety outweighed the offenders’ interests in privacy.²⁰²

Registrants have at times brought other claims regarding registration requirements, including Federal 8th Amendment claims arguing that imposition of such requirements amount to cruel and unusual punishment; however, these arguments have been nearly universally rejected.²⁰³

II. *Satellite Based Monitoring*

The constitutionality of SBM has been attacked mainly on *ex post facto* grounds; there have also been several cases that have asserted

197. *Id.*

198. *Id.* at 7-8.

199. *Id.* at 8 (Scalia, J., concurring).

200. *Id.*

201. *Id.* at 9.

202. Melissa Blair, *Comment: Wisconsin’s Sex Offender Registration and Notification Laws: Has the Wisconsin Legislature Left the Criminals and the Constitution Behind?*, 87 MARQ. L. REV. 939, 963 (2004).

203. *In re Alva*, 92 P.3d 311, 313 (Cal. 2004) (holding that, because sex offender registration regimes are not punitive in nature, they by definition cannot be considered cruel and unusual punishment under the 8th Amendment).

that the imposition of SBM is unconstitutional because it subjects offenders to “double jeopardy,” or a second punishment for the same offense.²⁰⁴ A number of courts facing the issue have found that SBM does not constitute “punishment,” but is merely a civil regulatory scheme, and thus is unassailable under either theory.²⁰⁵ North Carolina Courts have decided both of these issues in a similar fashion.²⁰⁶

In *State v. Bare*,²⁰⁷ the North Carolina Court of Appeals rejected the *ex post facto* claim of a registrant required to submit to SBM.²⁰⁸ The court first determined that the intention of the General Assembly was to create a civil regulatory scheme and applied the *Mendoza-Martinez* factors.²⁰⁹

The court examined whether the requirement was of a type historically regarded as punishment, and considered the appellant’s argument that the requirement was a “shame sanction” akin to those employed in the colonial period.²¹⁰ The court relied heavily on the Sixth Circuit case *Doe v. Bredesen*.²¹¹ That court found that wearing the SBM device was not necessarily a shame sanction because it was not certain that wearing the device communicated the fact that the offender had committed a sex crime.²¹² In *Bredesen*, the court reasoned that “the appearance of the device was not dissimilar to other electronic devices such as a walkie-talkie or a personal organizer.”²¹³ In similar fashion, the court in *Bare* articulated: “the defendant has presented no affidavits or other evidence demonstrating that the device is recognizable as a monitor assigned to sex offenders as opposed to an ordinary electronic device such as a cell phone, personal data assistant, or walkie-talkie.”²¹⁴

In analyzing whether the restriction burdened the appellant with an affirmative disability or restraint, the court in *Bare* held that any effects were “‘minor’ or ‘indirect’ restraints and did not rise to the level of punishment.”²¹⁵ The court reasoned that “despite restrictions on

204. Fern L. Kletter, *Validity and Applicability of State Requirement That Person Convicted or Indicted of Sex Offenses Be Subject to Electronic Location Monitoring, Including Use of Satellite or Global Positioning System*, 57 A.L.R.6th 1 (originally published in 2010, last accessed October 31, 2010) [

205. *Id.*

206. *Id.*

207. *State v. Bare*, 677 S.E.2d 518(N.C. Ct. App. 2009).

208. *Id.* at 531, 2009 N.C. App. LEXIS at 33.

209. *See Bare*, 677 S.E.2d at 527-28; *Kennedy*, 372 U.S. at 168-69 .

210. Brief for Appellant at 15, *State v. Bare*, 677 S.E.2d 518 (2009) (No. 09-818).

211. *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) (holding that SBM did not violate the *ex post facto* clause.).

212. *Id.* at 1005.

213. *Id.*

214. *Bare*, 677 S.E.2d at 528.

215. *Id.* at 529 (quoting *State v. White*, 590 S.E.2d 448, 456 (N.C. Ct. App. 2004)).

his daily activities as a result of wearing the GPS device, because the Monitoring Act did not increase the length of his incarceration, or prevent him from changing jobs, residences or traveling, it was not a punitive restraint.”²¹⁶

The court acknowledged that the regulation could promote a traditional aim of punishment, in that it could serve as a deterrent to the offender, subject to monitoring, from committing a like crime.²¹⁷ However, using the rationale of the U.S. Supreme Court’s holding in *Smith v. Doe*,²¹⁸ the court in *Bare* summarily dismissed this argument in a single sentence, “this factor alone is not enough to override a nonpunitive purpose.”²¹⁹ In *Smith*, the court reasoned that “[a]ny number of governmental programs might deter crime without imposing punishment. To hold the mere presence of a deterrent purpose renders such sanctions ‘criminal’ . . . would severely undermine the Government’s ability to engage in effective regulation.”²²⁰

The appellant argued that the SBM provisions were excessive relative to their non-punitive purpose.²²¹ In rejecting this argument, the court noted that the SBM provisions were not applied to all offenders, only those deemed by the legislature to be especially dangerous.²²² The court further acknowledged the ability of offenders to petition to be relieved of the monitoring requirement.²²³ For the court, these factors were evidence that the legislature had attempted to tailor the requirements to be less restrictive.²²⁴ The court pointed out that

[t]he excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.²²⁵

Accordingly, the court held that the requirements were not excessive and determined that SBM does not constitute punishment, and therefore cannot violate the *ex post facto* clause.²²⁶

216. *Bredesen*, 507 F.3d at 1005.

217. *Bare*, 677 S.E.2d at 529.

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

219. *Bare*, 677 S.E.2d at 529.

220. *Smith*, 538 U.S. at 102 (quoting *Hudson v. U.S.*, 522 U.S. 93, 105 (1997)).

221. *Bare*, 677 S.E.2d at 530.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* (quoting *Smith*, 538 U.S. at 105).

226. *Id.* at 531.

III. *Civil Commitment*

The “civil commitment” of offenders deemed too dangerous to be released from prison has also been recently challenged.²²⁷ The Federal Government and some states have enacted procedures which allow prison officials to make a determination whether certain sexual offenders run such a high risk of recidivism that they can be kept in the custody of the government for treatment.²²⁸ In *Kansas v. Hendricks*, the United States Supreme Court held that states have the authority to continue to hold those prisoners for treatment who pose a threat to society due to mental illness; sex offenders are included in this category.²²⁹ The U.S. Supreme Court held:

[T]he Act’s definition of “mental abnormality” satisfies “substantive” due process requirements Although freedom from physical restraint “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,” that liberty interest is not absolute. The Court has recognized that an individual’s constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context: “[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.”²³⁰

The Court concluded the discussion of the issue by stating: “[i]t thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.”²³¹

A more recent challenge involves the constitutionality of federal civil commitment of sexually violent offenders. Care of the mentally ill has always been an area solely reserved to the states, and the federal government arguably has no authority to legislate in this arena.²³² While the Adam Walsh Act provides financial incentives for states to “enhance” their own civil commitment regimes, the Act also allows the U.S. government to retain custody of selected prisoners,²³³ and

227. 18 U.S.C.A. § 4248 (West Supp. 2009).

228. See *id.* at § 4248(e).

229. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

230. *Id.* at 356-57 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).

231. *Hendricks*, 521 U.S. at 357.

232. Greg Stohr, *Sex Offender Commitment Law Gets Support at U.S. Supreme Court*, Bloomberg Businessweek (Jan. 12, 2010, 3:53 PM), <http://www.businessweek.com/news/2010-01-12/sex-offender-commitment-law-gets-support-at-u-s-supreme-court.html>.

233. *Id.*

since its enactment, approximately 100 prisoners have been held after their sentences have run.²³⁴ This practice has been challenged on federalism grounds, and the matter was heard before the U.S. Supreme Court on January 12, 2010.²³⁵ The Justices signaled support for the law, which they compared to the quarantining of inmates with tuberculosis.²³⁶ Inmates challenging the statute often argue that they can be held indefinitely, even after they have completed the sentences imposed upon them, until a government doctor determines that they are acceptable to society.²³⁷ While North Carolina does not have a civil commitment scheme directly targeted at sex offenders, practitioners in this state are affected nonetheless, because the Federal Correctional Institution in Butner, North Carolina houses the Sex Offender Treatment Program (SOTP), where offenders, labeled as “Special Needs Offenders,” are housed and treated.²³⁸

IV. Residency Restrictions

A. Ex Post Facto

Alongside the recently emerging trend of courts striking down portions of registration schemes as *ex post facto* is a recent and still developing trend of state supreme courts striking down the residency restrictions imposed on offenders by state legislatures on *ex post facto* grounds. At the time of writing, two state high courts, those of Kentucky and Missouri, have struck down their respective state’s statutes within the last three months.²³⁹ In 2009, the Indiana Supreme Court held that residency restrictions were unconstitutional as an *ex post facto* law when applied to a sex offender that committed his crime prior to the enactment of the restrictions.²⁴⁰

Courts have held that the residency restrictions constituted punishment of offenders and could not be applied retroactively.²⁴¹ Specifically, the Kentucky Supreme Court, after applying *Mendoza-Martinez* factors, found that, although the Kentucky legislature did not intend the residency restrictions to be punitive, they were so punitive in ef-

234. James Vicini, U.S. Justices Question Sex Offender Confinement Law, Reuters (Jan. 12, 2010, 1:47 PM), <http://www.reuters.com/article/idUSTRE60B4NY20100112>

235. United States v. Comstock, 130 S.Ct. 1949 (2010).

236. Stohr, *supra* note 232.

237. See, e.g., Brief for Respondents, *United States v. Comstock*, 130 S.Ct. 1949 (2010) (No. 08-1224); 18 U.S.C.A. § 4248 (West Supp. 2009).

238. Mandy Locke, N.C. Unprepared for Sex Offenders, The News & Observer (Raleigh, N.C.), Jan. 15, 2010, at B1.

239. Commonwealth v. Baker, 295 S.W.3d 437, 447 (Ky. 2009); F.R. v. St. Charles County Sheriff’s Dep’t, 301 S.W.3d 56, 66 (Mo. 2010).

240. State v. Pollard, 908 N.E.2d 1145, 1154 (Ind. 2009).

241. See, e.g., *Id.* at 1147.

fect that they were in fact punishment.²⁴² In applying the first factor, the court found that the residency restrictions were of the type that had been regarded in our history and traditions as punishment, specifically the colonial period punishment of banishment.²⁴³ It observed that, while the punishments inflicted were not identical, “such restrictions [are] decidedly similar to banishment.”²⁴⁴ The court noted the lower court’s observation that “courts reviewing residency restrictions have avoided or sidestepped the issue of whether these restrictions constitute banishment, and ‘dissenting judges have been far more intellectually honest concluding that residency restrictions constitute banishment.’”²⁴⁵ The court found that the requirements “prevent the registrant from residing in large areas of the community. It also expels registrants from their own homes, even if their residency predated the statute or arrival of the school, daycare, or playground,” and that these restrictions were sufficient to hold that they were regarded traditionally as punishment.²⁴⁶

In applying the second factor, whether the statute promoted traditional aims of punishment, the court found that the application of the restrictions to all offenders, without any individual assessment of dangerousness, “that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.”²⁴⁷ Noting Justice Souter’s concurring opinion in *Smith v. Doe*, and concluding that the statute did promote traditional aims of punishment, the court stated that “[b]y imposing restraints based solely upon prior offenses, [the statute] promotes and furthers retribution against sex offenders for their past crimes.”²⁴⁸

The court then addressed whether the statute imposed an affirmative disability or restraint, and stated that “[w]e find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint.”²⁴⁹ The court went on to describe what it called “significant collateral consequences,” in that the restrictions could “impact where an offender’s children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender.”²⁵⁰

242. *Baker*, 295 S.W.3d at 443-47.

243. *Id.* at 444.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 445.

249. *Id.*

250. *Id.*

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In determining whether the statute had a rational connection to a legitimate nonpunitive purpose, the court noted that the residency restrictions

prohibit . . . residing in a home within the protected zone. It does not regulate contact with children. It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present.²⁵¹

The court held that the statute was “connected to public safety. However, [its] inherent flaws prevent that connection from being rational.”²⁵²

In addressing whether the statute was excessive with respect to a nonpunitive purpose, the court held that it was the lack of any individual determination of dangerousness that made the statute excessive in relation to the interest in public safety. While noting the U.S. Supreme Court’s opinion in *Smith*, dealing with registration, that the “determination to legislate with respect to convicted sex offenders as a class, rather than require an individual determination of dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause,”²⁵³ the court also pointed out that the opinion stated that “[t]he magnitude of the restraint made individual assessment appropriate”²⁵⁴ in *Hendricks*, when the restraint in question was civil commitment.²⁵⁵ The Kentucky court held that “the ‘magnitude of the restraint’ involved in residency restrictions [was] sufficient for a lack of individual assessment to render the statute punitive.”²⁵⁶ The Kentucky court summed up by stating that “[o]f the five *Smith* factors, all five weigh in favor of concluding that [the statute] is punitive in effect”²⁵⁷ and “negate any intention to deem them civil.”²⁵⁸

However, in *Doe v. Miller* the 8th Circuit Court of Appeals upheld Iowa’s sex offender residency and employment restrictions against an *ex post facto* challenge.²⁵⁹ The U.S. Supreme Court tacitly approved of the holding of the appeals court by denying review.²⁶⁰ The court applied the *Mendoza-Martinez* factors, and in a shock to many scholars, determined that the restrictions did not impose an affirmative dis-

251. *Id.*

252. *Id.* at 445-46.

253. *Id.* at 446 (quoting *Smith*, 538 U.S. at 104).

254. *Id.* at 446 .

255. See *Hendricks*, 521 U.S. 346 .

256. *Baker*, 295 S.W.3d at 446.

257. *Id.* at 447.

258. *Id.*

259. *Doe v. Miller*, 405 F.3d 700, 704-05 (8th Cir.), *cert. denied*, 546 U.S. 1034 (2005).

260. *Id.*

ability or restraint, and thus were not punishment.²⁶¹ In so holding, the court effectively insulated the statute from constitutional attack on *ex post facto* grounds, as well as on the grounds of double jeopardy or a deprivation of fundamental rights. The primary reason that this decision and the denial of certiorari by the U.S. Supreme Court were so shocking is based mainly on the Supreme Court's holding in *Smith v. Doe*, discussed above. In *Smith*, the court upheld Alaska's registration requirements as non-punitive, specifically noting that the reason this was so was because "the Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences."²⁶²

As other courts have found, the restrictions upheld by the 8th Circuit in *Doe v. Miller* clearly affect an offender's ability to find adequate housing and gainful employment, yet the court did not find them to be an affirmative restraint, and thus not punishment retroactively applied.²⁶³ The U.S. Supreme Court has yet to directly confront the issue of residency restrictions, and scholars disagree on whether the Court will uphold residency restrictions as non-punitive regulatory schemes, or find them to be punitive in nature as state supreme courts are apparently beginning to do.²⁶⁴

North Carolina courts have also not yet truly considered residency restrictions. However, in *State v. Bare*, in conducting an *ex post facto* analysis and holding that SBM requirements did not constitute punishment, the court stated that

[w]hile SBM results in electronic monitoring of an offender's whereabouts, the record does not indicate that it *restricts an offender's liberty in matters such as where to live and work*. SBM is therefore similar to registration requirements in this regard and is distinguishable from probation, parole, and post-release supervision.²⁶⁵

Though dicta, this indicates, at least, that the North Carolina Court of Appeals is prepared to consider whether restrictions on where a registrant may live or work implicate a liberty interest, and would be considered an affirmative disability or restraint in the application of the *Mendoza-Martinez* factors.²⁶⁶

261. *Miller*, 405 F.3d at 723.

262. *Smith*, 538 U.S. at 100.

263. *Miller*, 405 F.3d at 719-23.

264. Wright, *supra* note 86, at 44-45. (noting that the opinions of scholars differ on the likely result of the Court's application of the *Mendoza-Martinez* test to residency restrictions).

265. *Bare*, 677 S.E.2d at 529.

266. *See id.*

B. Substantive Due Process and Fundamental Rights

The *Miller* court also considered other challenges to residency restrictions, rooted in “substantive due process.”²⁶⁷ “[C]ertain liberty interests are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is ‘narrowly tailored to serve a compelling state interest.’”²⁶⁸ The offenders challenging the statute argued that the residency restrictions infringed upon their fundamental rights, including the “right to privacy and choice in family matters, the right to travel, and the fundamental right to live where you want.”²⁶⁹

The court rejected the “family autonomy” claim as not falling within the realm of those fundamental rights associated with the “intimate relation of husband and wife,”²⁷⁰ or with “‘intrusive regulation’” of ‘family living arrangements.’”²⁷¹ The court reasoned that the statute did not interfere with these rights that the Supreme Court had identified, because

[a]lthough the law restricts where a residence may be located, nothing in the statute limits who may live with the Does in their residences. . . . Similarly, the Court in *Griswold* disclaimed authority to determine “the wisdom, need, and propriety” of all laws that touch social conditions, but held unconstitutional a state statute that “operated directly on an intimate relation of husband and wife.”²⁷²

The court then moved to deal with the argument advanced by the offenders that the statute impermissibly violated their rights to interstate travel. The court rejected this claim as well, holding that

[t]he Iowa statute imposes no obstacle to a sex offender’s entry into Iowa, and it does not erect an “actual barrier to interstate movement.” There is “free ingress and regress to and from” Iowa for sex offenders, and the statute thus does not “directly impair the exercise of the right to free interstate movement.” Nor does the Iowa statute violate principles of equality by treating nonresidents who visit Iowa any differently than current residents, or by discriminating against citizens of other States who wish to establish residence in Iowa.

Thus, the court held that the residency restrictions did not infringe on any right of the offenders to interstate travel.²⁷³

The court also considered the argument that the restrictions infringed a right to intrastate travel. The court specifically declined to

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

268. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 301-02 (1993)).

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

270. *Id.* at 709-10.

271. *Id.* at 710.

272. *Id.* at 710-11.

273. *Id.* at 712.

decide whether the constitution protected such a right, as other circuits had held. The court did, however, hold that even if such a right existed, it would be a corollary to the right to interstate travel, and that

the Iowa statute would not implicate a right to intrastate travel for the same reasons that it does not implicate the right to interstate travel. The Iowa residency restriction does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility, and it does not erect any actual barrier to intrastate movement.²⁷⁴

The court lastly addressed the claim of a substantive due process right to “live where you want.”²⁷⁵ It rejected the argument in the same way that it rejected the claim regarding family autonomy: by finding that no fundamental rights were implicated, and thus applying only a rational basis review. Pointing to the Supreme Court’s guideposts for finding a fundamental right, the court stated that the challengers had “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.’”²⁷⁶

Doe v. Miller remains the leading federal case on the issue of residency restrictions. However, at least some scholars believe that the U.S. Supreme Court will declare them largely unconstitutional should the issue be brought before it.²⁷⁷

THE UNCONSTITUTIONALITY OF N.C. GEN. STAT. § 14-208.18

The James Nichols case supplies the fundamental rights that courts like the Eighth Circuit have been unable to find in upholding the constitutionality of other sex offender laws such as SBM and residency restrictions.²⁷⁸ North Carolina’s courts will be hard pressed to deny that laws that restrict movement and activities as severely as § 14-208.18 do not pass constitutional muster.

I. *The Ruling*

North Carolina General Statute §14-208.19 is both unconstitutionally overbroad and vague, as noted by Judge Baddour in his ruling.

274. *Id.* at 713.

275. *Id.* at 713-14.

276. *Id.* at 714.

277. Wright, *supra* note 85, at 44.

278. See *Miller*, 405 F.3d; *State v. Nichols*, 09 CRS 50686, Memorandum Opinion and Order (N.C. Super. Ct. Dec. 17, 2009).

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A. Section 14-208.18 is Unconstitutionally Overbroad

Courts that have considered restrictions on sex offenders have struggled to find that any fundamental rights of the offenders were impacted.²⁷⁹ In the *Nichols* case, there are fundamental rights that cannot be denied. The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²⁸⁰ It is clear, at least to Judge Baddour, that the statute as drawn implicates the First Amendment guarantees of the right to free exercise of religion and freedom of association.²⁸¹

A statute is overbroad, and thus void on its face, “if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right.”²⁸² “[The doctrine] permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’”²⁸³ The statute must be subjected to analysis because it attempts to prohibit activity that is protected by the First Amendment in addition to activity that the government would be within its province to regulate. The statute could and does prohibit offenders from being in certain areas or at certain locations, and does so permissibly.²⁸⁴ There is no constitutionally protected right to be present at a child care facility. However, when a statute attempts to prohibit a person from practicing his or her religion, or from associating with others of like mind, it reaches into protected territory.²⁸⁵

In addition to the protections afforded by the First Amendment to the U.S. Constitution, religious expression is also protected by the North Carolina Constitution, which in its “Declaration of Rights” provides that “[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or inter-

279. See *Miller*, 405 F.3d 700 ; *Smith* , 538 U.S. 82.

280. U.S. CONST. amend. I.

281. *Nichols*, 09 CRS 50686, Memorandum Opinion and Order at 10 (N.C. Super. Ct. Dec. 17, 2009).

282. *Id.* (citing *Clark v. City of L.A.*, 650 F.2d 1033, 1039 (9th Cir. 1981), *cert. denied*, 456 U.S. 927 (1982)).

283. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)).

284. N.C. GEN. STAT. § 14-208.18 (2008).

285. U.S. CONST. amend. I.

fere with the rights of conscience.”²⁸⁶ The activities that the statute purports to regulate, namely attending a worship service of the offender’s choosing and associating with fellow congregants in corporate worship, plainly falls within those activities protected by both the U.S. and North Carolina constitutions.²⁸⁷ Because these activities are protected rights, the government must show that it has adopted means that limit the impact on abridgement of those freedoms in order for the statute to pass constitutional muster.²⁸⁸ “[O]nly a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms.”²⁸⁹ “The State must also ‘[employ] means closely drawn to avoid unnecessary abridgment of associational freedoms’ in achieving its objectives.”²⁹⁰

In considering the case, Judge Baddour found that, while the State had an interest in protecting children and providing for the public safety, the statute was not narrowly tailored to achieve those objectives.²⁹¹ Judge Baddour specifically noted that the statute itself provides exceptions for other activities, but not for offenders to attend church.²⁹²

Judge Baddour also found the statute overbroad because it sweeps under the ambit of protected activities that do not serve the compelling government interest at all.²⁹³ He raised the example of a Sunday morning church service with “no segregated child care of any kind.”²⁹⁴ The Judge posed the question, “[w]ould this not be a ‘place where minors gather for regularly scheduled educational . . . programs?’”²⁹⁵ He pointed out that “[t]he statute’s overbreadth places within its ambit religious services in which parents maintain direct supervision over their minor children, and surely falls outside the compelling governmental interest.”²⁹⁶

In ruling, Judge Baddour seems to suggest that if the setting is one in which minor children are, or should be, under the direct supervision of their parents, the State cannot assert a compelling government interest in their protection. This raises implications outside of the church aspect of the statute’s application, and seems to preclude appli-

286. N.C. CONST. art. I, § 13.

287. Deconto, *supra*, note 23.

288. *Treants Enter., Inc. v. Onslow County*, 380 S.E.2d 602, 605 (1989).

289. *Id.* (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963)).

290. *Treants Enter., Inc.*, 380 S.E.2d at 605 (quoting *Buckley v. Valeo*, 424 U.S. 1, (1976)).

291. *State v. Nichols*, 09 CRS 50686, Mem. Op. at 10 (N.C. Super. Ct. Dec. 17, 2009).

292. *See id.*

293. *Id.* at 11-12.

294. *Id.* at 11.

295. *Id.*

296. *Id.*

cation at places where parents are present. This would run contrary to interpretations of the statute that claim that areas such as a playground at a fast food restaurant or a play area in a shopping center are off-limits to offenders.²⁹⁷

B. Section 14-208.18 is Unconstitutionally Vague

In his ruling, Judge Baddour also determined that § 14- 208.18 was unconstitutionally vague. “A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”²⁹⁸ In examining the statute, Judge Baddour found fatal that the General Assembly had failed to define three words: “location,” “place,” and “premises.”²⁹⁹ It is the confusion surrounding these words, which Judge Baddour noted at times seemed to be used interchangeably, that creates the vagueness inherent in the statute.³⁰⁰ He pointed out that an offender might be in violation of the statute for driving down an interstate that was within 300 feet of a play area in a shopping center, or for travelling a road that had a church on each side, thus passing between and within 300 feet of the respective church nurseries.³⁰¹

Judge Baddour also examined the meaning of “recreational,” “educational,” and questioned whether an offender could be at a place where these types of programs were regularly conducted even at times when they were not in session.³⁰² He questioned whether an offender subject to the statute could seek medical care at a hospital emergency department that was within 300 feet of a long-term care unit for children at the hospital.³⁰³

Consequently, Judge Baddour held that the statute was simply too vague for offenders subject to the statute to know where they were prohibited from going, and for law enforcement to interpret the law adequately enough to enforce it uniformly.³⁰⁴

II. *The Remaining Arguments*

Because he found that the statute was overbroad and vague, Judge Baddour did not address the *ex post facto* or due process arguments in

297. *Id.* at 6.

298. *Nichols*, 09 CRS 50686, Memorandum Opinion and Order at 13 (quoting *Connally v. General Construction Co.*, 269 U.S. 385 (1926)).

299. *Nichols*, 09 CRS 50686, Memorandum Opinion and Order at 14 .

300. *Id.*

301. *Id.*

302. *Id.* at 14-15.

303. *Id.*

304. *Id.* at 15.

ruling on the constitutionality of the statute. There are two arguments for the unconstitutionality of the statute that should be addressed, and most likely will be by future courts as the laws of North Carolina are tested going forward. Section 14-208.18 is an *ex post facto* law, and should not be applied retroactively. The law also likely violates a fundamental right to intrastate travel. The U.S. Supreme Court has not yet specifically elaborated a fundamental right to intrastate travel, although several circuit courts have done so.³⁰⁵ The appellate courts of North Carolina are not likely to take up this issue, although it is extremely relevant to the discussion of the statute.

A. Section 14-208.18 is Unconstitutional as an Ex Post Facto Law

The law is void as an *ex post facto* law because it attempts to apply the restrictions to sex offenders that committed their crimes prior to its enactment and imposes an affirmative disability or restraint. The Kansas Supreme Court in *State v. Myers* upheld the constitutionality of its registration regime in part because it did not impose such disability or restraint.³⁰⁶ In so holding, the court specifically noted that “[the] registration requirement imposes no affirmative disability or restraint, because the offender’s movements within or without the community are not restricted.”³⁰⁷ Implicit in this statement by the court is that if the statute *did* restrict the movements of the offender within the community, the statute would impose a disability or restraint, and thus be one factor in rebutting the presumption that the regulations were civil in nature. The Kentucky Supreme Court, in determining that the residency restrictions of that state were void as *ex post facto*, the court noted that it had previously upheld registration requirements, also because “registration does ‘not place limitations on the activity of the offender’”³⁰⁸ The court also noted that “the U.S. Supreme Court [in *Smith*] found it significant that ‘offenders subject to the Alaska [registration] statute are free to move where they wish and to live and work as other citizens, with no supervision.’”³⁰⁹

Since the statute in question does place limitations on the activities of the offender, it fulfills the *Mendoza-Martinez* factor analysis that courts have traditionally found lacking in analyzing sex offender regulations in the *ex post facto* context. It has also been significant to courts analyzing the *ex post facto* issue that statutes that restrict of-

305. *Formaro v. Polk County*, 773 N.W.2d 834, 838-39 (Iowa 2009).

306. *Myers*, 923 P.2d at 1041.

307. *Id.*

308. *Baker*, 295 S.W.3d at 445 (quoting *Hyatt v. Commonwealth*, 72 S.W.3d 566, 572 (Ky. 2002)).

309. *Baker*, 295 S.W.3d at 445 (quoting *Smith v. Doe*, 538 U.S. 84, 101 (2003)).

fenders without individualized assessments of dangerousness can exceed their nonpunitive purpose. Specifically, in *State v. Pollard*,³¹⁰ the Supreme Court of Indiana found that applying residency restrictions to an offender with the aim of preventing the victimization of children was excessive when those restrictions applied to offenders that had not committed crimes against minors.³¹¹ The court held that because the law had the effect of:

[r]estricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes. We are persuaded this factor favors treating the effects of the statute as punitive³¹²

These two factors of the *Mendoza-Martinez* test, when applied to §14-208.18, weigh heavily in favor of a finding that the law is in effect punitive in nature; therefore, § 14-208.18 should not survive an *ex post facto* analysis, and should not be applied retroactively.

B. Section 14-208.18 Unconstitutionally Infringes on the Right to Intrastate Travel

The U.S. Supreme Court has yet to conclusively address whether there is a fundamental right to intrastate travel, or the “right to remove from one place to another according to inclination.”³¹³ The court in *Doe v. Miller* did, however, agree that

Protecting a right to intrastate travel comports with the principles behind the right to interstate travel. Whether an individual travels across many states or a single county, the right to be free to enter, leave, or remain in a place, and to be treated as an equal with current denizens, is a fundamental liberty guaranteed by our constitution.³¹⁴

The North Carolina Court of Appeals has observed that “the United States Court of Appeals for the Fourth Circuit noted the division on the issue of whether intrastate travel is a fundamental right, but did not reach a conclusion.”³¹⁵ North Carolina courts have addressed the issue of a registered offender seeking access to a particular place, namely a public park.³¹⁶ In that case, the court seemed to recognize a right to intrastate travel, but declined to extend that right to include the right to enter a public park.³¹⁷ The court stated that “[t]he ordinance does not infringe upon plaintiff’s fundamental right to in-

310. *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009).

311. *Id.* at 1153.

312. *Id.*

313. *Williams v. Fears*, 179 U.S. 270, 274 (1900).

314. *Miller*, 298 F. Supp. 2d at 874.

315. *Standley v. Town of Woodfin*, 650 S.E.2d 618, 621 (N.C. App. 2007).

316. *Id.*

317. *Id.*

trastate travel because it does not impair his daily functions.”³¹⁸ Because they did not find that the ordinance affected any fundamental right, only a rational basis test was applied, and the court held that the ordinance was rationally related to the legitimate government interest in public safety.³¹⁹ In the case of § 14-208.18 however, a court could reasonably find that the law does impair an offender’s daily functions, and could thus apply a strict scrutiny test. To satisfy strict scrutiny, the statute would need to be narrowly tailored to meet the government’s objective, and it is arguable that § 14-208.18 would be unable to achieve this high standard.³²⁰

CONCLUSIONS: UNCONSTITUTIONAL, UNNECESSARY, AND INEFFECTIVE

I. Section 14-208.18 is Unconstitutional

Because it is overbroad and affects a fundamental right, the statute must be redrawn to allow offenders to worship. What defines worship is not for the state to decide, but is a “matter of conscience,” and must be left up to the individual.³²¹ Clearly, no person may claim adherence to a worship practice that violates other generally applicable laws, such as those addressing drug use or animal cruelty. However, as long as the activities that the offender chooses to participate in are otherwise legal for non-offenders, their participation may not be limited by statute.³²²

Furthermore, although not addressed by Judge Baddour, § 14-208.18 does impose an affirmative disability and restraint upon offenders, and thus it may not be applied retroactively without becoming void as an *ex post facto* law. The law as written attempts to restrict the ability of offenders to travel and worship, and thus imposes a restraint. An application of the *Mendoza-Martinez* factors reveals the punitive nature of the statute, and prohibits its application to offenders that committed their crimes prior to its enactment.

Moreover, the law infringes on the offender’s right to intrastate travel. North Carolina courts have an opportunity to recognize this right conclusively and incorporate it into the jurisprudence of the State, and secure it to all North Carolina citizens.

318. *Id.*

319. *Id.* at 623.

320. Motion to Declare N.C.GEN. STAT. § 12-208. 18 Unconstitutional, *Nichols*, 09 CRS 50686, Memorandum Opinion and Order at 14 .

321. N.C. CONST. art. I, § 13.

322. *Nichols*, 09 CRS 50686, Memorandum Opinion and Order at 15.

II. Section 14-208.18 is Unnecessary

A. The Recidivism Myth

In addition to its unconstitutionality, § 14-208.18 is unnecessary. The law rests on the conclusion that sexual offenders experience higher rates of recidivism than other criminals.³²³ The General Assembly articulated this belief as its primary purpose for enacting every sex-offender law contained in Article 27A of the General Statutes when it said: “The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.”³²⁴ This assumption is flawed, and recent data suggests that sex offenders experience no higher rates of recidivism than do other criminal offenders, and some studies show that they, in fact, experience less.³²⁵

According to a study of 17,000 sex offenders in Illinois, conducted by Sample and Bray, fewer than 10 percent of sex offenders were re-arrested for a sex offense in the five years after their release and less than six percent were re-arrested for the *same* sex offense.³²⁶ In a nation-wide study of sex offender recidivism, Miethe, Olson, and Mitchell found that “sex offenders tend to have lower recidivism rates than property offenders, public order offenders, and nonsexual violent offenders.”³²⁷ Most significantly, they also reported that the “vast majority of sex offenders *are never arrested for another sex offense*.”³²⁸ This finding is in keeping with the study of sex offenders in seventeen states conducted by Michelle L. Meloy, which found that sex offenders were re-arrested for another sex offense only in 4.5 percent of cases.³²⁹

323. See N.C. GEN. STAT. § 14-208.5 (1997).

324. See *id.*

325. Wright, *supra* note 85, at 26.

326. *Id.* (citing Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Re-arrest Patterns*, 17 CRIM. JUST. POL’Y REV. 83, at 93, 95 (2006))

327. Wright, *supra* note 85, at 26 (citing Terance D. Miethe, Jodi Olson, and Ojmarrh Mitchell, *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types*, 43 J. RES. CRIME and DELINQ. 204, 213 tbl.1 (2006)). (Terance D. Miethe is a professor of Criminal Justice at the University of Nevada, Las Vegas whose research interests in part include criminal punishments and the application of alternative comparative methods for studying crime events; Jodi Olson holds a master’s degree in criminal justice at the University of Nevada, Las Vegas and wrote her master’s thesis on the criminal history of sex offenders; Ojmarrh Mitchell, PhD, is an assistant professor at the University of Cincinnati in the Division of Criminal Justice, where his research in part includes corrections and measurement theory).

328. Wright, *supra* note 85, at 26 (citing Terance D. Miethe ET AL., at 224) (emphasis added).

329. Wright, *supra* note 85, at 26 (citing Michelle L. Meloy, *The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors, and Deterrence of Sex Offenders on Probation*, 16 CRIM. JUST. POL’Y REV. 211, 227 (2005)).

There are, on the other hand, studies that suggest the opposite. As the saying goes, “statistics never lie, but liars [always] use statistics.”³³⁰ Statistics can certainly be manipulated in a variety of ways. For example, one Department of Justice report crows that “sex offenders are four times more likely to be arrested for a new sex crime” than non-sex offenders.³³¹ This is, of course, based on the fact that only 1.3 percent of the “non-sex offenders” committed the first sex crimes!³³² “Looking at the raw numbers, the actual incidences of sexual recidivism is much greater for the non-sex offenders than the sex offenders. So, with all the focus on the convicted sex offenders, we miss approximately 86.5 percent of the new sex crimes.”³³³

To gain perspective, the statistics regarding sex offender recidivism should be compared to studies of criminal recidivism in general. The results of such studies are often shocking to members of the general public, likely because of the constant bombardment with statistics like those of the Department of Justice provided by the news media. For example, the same Department of Justice report claimed a “reconviction rate for . . . sex offenders was 24.0%”³³⁴ This is touted as an extremely high number, while 67% of drug offenders are rearrested within three years.³³⁵ According to a summary of the above referenced study, nearly 300,000 prisoners released in 1994, 67.5%, were re-arrested within three years.³³⁶ “Released prisoners with the highest re-arrest rates were robbers (70.2%), burglars (74.0%), larcenists (74.6%), motor vehicle thieves (78.8%), those in prison for possessing or selling stolen property (77.4%), and those in prison for possessing, using, or selling illegal weapons (70.2%).”³³⁷ The same study showed that of those convicted of rape, *only two and one-half percent were convicted of another rape* within three years.³³⁸

These statistics have implications for any court conducting an *ex post facto* analysis of any and all laws aimed at sex offenders utilizing the *Mendoza-Martinez* factors. The increased risk of recidivism amongst sexual offenders may be a reflection that the laws are not

330. Posting of Doug Loots to FlowingData, <http://www.flowingdata.com/2010/08/22/harvard-scientist-found-guilty-of-misconduct/> (last visited Aug. 22, 2010, 9:38 EST) .

331. Lester, *supra* note 8, at 350 (citing Patrick A. Langan, et al., U.S. DEP'T of JUST., *Recidivism of Sex Offenders Released from Prison in 1994*, at 24 (2003)).

332. *Id.*

333. *Id.*

334. *Id.* at 349.

335. *Id.*

336. Bureau of Justice Statistics, *Recidivism*, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (last visited Oct. 30, 2010).

337. *Id.*

338. *Id.* (It is important to note that the statistics for non-sex crimes refer to re-arrest rates, while the statistic for rape is a re-conviction rate. While this certainly impacts the numbers somewhat, the data is still relevant and compelling.).

“excessive in relation to [their] non-punitive purpose[s].”³³⁹ Given that data is available that invalidates much of that rationale, courts should consider such data into their calculations when balancing the relation of the laws’ effects against their permissible purpose.

B. The Wrong Targets and Wasted Resources

The North Carolina General Assembly’s second stated purpose for the enactment of North Carolina General Statute § 14-208.18 was that “[t]he General Assembly [recognized] that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest.”³⁴⁰ This unsupported and incorrect assertion is the cause of the second reason that the law is unnecessary, as the law, at least in part, targets the wrong “offenders” and sweeps them under its prohibitions. While the law attempts to draw a finer line than merely applying the law to all sex offenders, unlike some other statutory schemes, it falls seriously short of targeting only sexual predators.³⁴¹ Although North Carolina General Statute § 14-208.18 addresses those convicted of the most serious sex offenses such as rape, any individual convicted of certain offenses in which the victim is under the age of sixteen, qualifies as an offender under the statute.³⁴² This means that the law sweeps under its control non-sexually based offenses, provided only that the victim was under sixteen. Presumably, a seventeen year old boy convicted of “feloniously restraining” a fifteen year old boy in a school yard altercation would fall under the rule and be prohibited from being at places “where minors gather.”³⁴³ Unfortunately, at such a young age children offenders are subject to harsh consequences. Sanctions under this statute would prevent him from attending church, participating in church youth programs, attending high school football games or participating in any non-mandatory extra-curricular activities at school, such as sports teams, and would prevent him from participating in community activities such as Boy Scouting.³⁴⁴

The law does, however, provide for an exception allowing offenders subject to the prohibitions to attend public school, where this hypothetical offender would undoubtedly reencounter the victim.³⁴⁵ Thus,

339. *Smith v. Doe*, 538 U.S. 84, 97 (2003).

340. N.C. GEN. STAT. § 14-208.5 (2010).

341. *Id.*

342. N.C. GEN. STAT. § 14-208.18(c)(2) (2010).

343. *Id.*

344. *Id.*

345. *Id.* at § 14-208.18(f).

the law provides an exception for the offender to attend school, and be in the *very place where the offense occurred, surrounded by the potential victims the law is designed to protect*, while at the same time prohibiting the offender from participating in activities widely considered to be beneficial to young people.³⁴⁶ Certainly, this is an absurd result. And certainly, it does not achieve the stated objective of the legislature in protecting children from sexually violent predators.³⁴⁷ The children of North Carolina would be far better served by a law that addresses the ninety percent of offenses that are committed by acquaintances of the victims.³⁴⁸ By focusing on those that have already committed sex offenses or offenses against children, the law ignores the first time offenders responsible for nearly all sex offenses.³⁴⁹

Again, the argument is of course valid that if we can create a statutory scheme that prevents even one of these heinous crimes, it serves a compelling state interest. However, when the fundamental rights of the offenders are infringed by a law, that law must be narrowly tailored to achieve that interest.³⁵⁰ Including non-sexual offenders simply because their offenses were committed against minors is clearly not necessary to protect children from truly sexually violent predators, and jeopardizes and distracts from that worthy objective. Clinicians can only reliably predict who will commit an offense about 10 percent of the time.³⁵¹ Without the ability to determine who is a potential threat, ostracizing whole classes of people and consuming the resources of the state in enforcing the laws that do so is wasteful when there are true predators to be targeted.

III. *Section 14-208.18 is Ineffective*

A. The Law is Ineffective as a Deterrent

The argument is simple: only law-abiding past offenders are going to be deterred by these laws. A child predator in North Carolina prepared (and preparing) to commit both a B1 and a C felony, namely to kidnap a child and commit a sexual assault upon them, is confronted with the possibility of over forty years in prison if convicted.³⁵² An adult who is convicted of a sexual offense against a child faces the

346. *Id.*

347. N.C. GEN. STAT. § 14-208.5 (2010).

348. Dacey, *supra* note 7, at 26.

349. Melissa D. Grady, *Focusing on Sex Offenders*, Raleigh News and Observer (Feb. 2, 2010, 2:00 AM), <http://www.newsobserver.com/2010/02/02/316063/focusing-on-sex-offenders.html#storylink=misearch> (last visited Oct. 30, 2010).

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

351. Grady, *supra* note 349.

352. N.C. GEN. STAT. § 14-27.4A (2010).

potential of life in prison without a possibility of parole if a court finds that the “conduct of the defendant falls outside the heartland of cases [that] even the aggravating factors were designed to cover.”³⁵³ It is unlikely that an offender prepared to face such punishment is going to be deterred by the prospect of conviction for the Class H felony provided for by § 14-208.18. The maximum punishment for a Class H felony, if the convicted offender is awarded the highest number of “points” under structured sentencing (for prior offenses) and the crime itself is given the highest level of aggravation, is a mere twenty to twenty-five months.³⁵⁴ It seems highly unlikely that a truly motivated “child predator,” the particular class of offender that this statute is meant to deter, would be successfully dissuaded by the prospect of an additional twenty-five months in prison tacked on the end of his potentially life long sentence.

B. The Law is Ineffective as a Preventive Measure

In addition, with no “monitoring” element, the only way we know if sex offenders enter these off-limits areas is if they actually commit an offense while there.³⁵⁵ There are no scanners or detectors to determine whether a person is prohibited because of their status as a sex offender. While oftentimes offenders are required to wear GPS devices that identify them as sex offenders, these could be concealed under clothing. So far efforts to require offenders to display some type of identifying marker, such as a license plate have failed.³⁵⁶ There is no conclusive way to identify whether the person choosing to eat his Big Mac outside by the playground is a sex offender hunting for victims or simply another diner enjoying the fresh air. The offender is just another patron until he or she actually commits an offense that the law purports to protect children from, and abducts or assaults a child. It is only then that law enforcement would be alerted, and the offender potentially charged under the statute. The law in its current form is thus completely reactive, and not preventative.

The case of James Nichols is particularly instructive. It was not until law enforcement was alerted to the possibility of an assault by DeMaio that they intervened and arrested him for his presence in the

353. *Id.* (The statute provides in subsection “c” that “Notwithstanding the [structured sentencing requirements], the court may sentence the defendant to active punishment for a term of months greater than that authorized . . . , up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes . . .”).

354. N.C. GEN. STAT. § 15A-1340.17 (2010).

355. See author’s note, *infra* note 381.

356. Ben Jones, *States May Require Sex Offenders to Use Special License Plates*, USA Today (May 1, 2007, 8:24 AM) http://www.usatoday.com/news/nation/2007-05-01-sex-offender-tags_N.htm.

forbidden zone.³⁵⁷ Nichols, of course, was charged as well, despite being the concerned citizen that reported the conduct.³⁵⁸

RECOMMENDATIONS TO THE NORTH CAROLINA GENERAL ASSEMBLY AND NORTH CAROLINA COURTS

I. *Recommendations to the North Carolina General Assembly*

*“A leader takes people where they want to go. A great leader takes people where they don’t necessarily want to go, but ought to be.”*³⁵⁹ Changing these laws may not be popular, and will certainly not be easy. Legislators must be prepared to acknowledge that the pendulum has swung too far, and have the moral courage to convince their constituents of that fact. Some, like Rep. Rick Glazier, who is leading a legislative work group attempting to “fix” the law, have already stepped forward to acknowledge that preventing sex offenders from attending church was an “unintended consequence of the current law.”³⁶⁰

North Carolina’s children deserve a law that works. Furthermore, North Carolina’s children deserve a law that will actually protect them, not a knee-jerk reaction to a small number of highly publicized media sensations, representing fewer than ten percent of actual victims.³⁶¹ The current scheme not only disregards the rights of the offenders, but ignores ninety percent of the victims of child sexual abuse while creating in parents a false sense of security regarding their children’s safety.³⁶² The argument can, and should, be made that laws protecting that ten percent and targeting those most dangerous offenders are needed, and that if we can protect any potential victims, we should. To ignore that very real threat would be irresponsible. However, ineffective laws that target forty year-old men that, twenty years ago, had consensual sex with their fifteen year old girlfriend as well as targeting those true predators, are not the way to address the issue.³⁶³ These laws simultaneously violate the constitutional rights of all while successfully protecting no one.³⁶⁴

357. Jesse James Deconto, *Sex Offender Can’t Worship*, The News and Observer (Aug. 18, 2009, 4:46 AM) <http://www.newsobserver.com/2009/08/18/41516/sex-offender-cant-worship.html#storylink=misearch>.

358. *Id.*

359. Rosalynn Carter, http://thinkexist.com/quotation/a_leader_takes_people_where_they_want_to_go-a/223600.html.

360. See Deconto, *supra* note 21.

361. Dacey, *supra* note 7, at 26.

362. *Id.*

363. N.C. GEN. STAT. § 14-208.18(c)(2) (2010).

364. This statement is the author’s opinion regarding the constitutionality of N.C. GEN. STAT. §14-208.18.

A. Section 14-208 Must be Amended to Allow Sex Offenders to Worship

Preventing sex offenders from attending the church has been an unintended consequence of the law.³⁶⁵ House Bill H1317 contains an attempt to carve out an exception that will “correct” the problem.³⁶⁶ The bill passed the North Carolina House in May 2009 with a unanimous vote, and at the time of writing, has been delivered to the Senate Judiciary Committee.³⁶⁷ While it attempts to carve out an exception for church attendance, parts of the proposed statute actually expand the places where offenders may not be to include amusement parks and toy stores.³⁶⁸ Registrants are also prohibited from being in a movie theater that is showing a “G” or “PG” rated movie, at a state or county fair or even at any institute of higher education unless enrolled or enrolling there.³⁶⁹

The exception for church attendance reads as follows:

Notwithstanding any provision of this section, a person subject to subsection (a) of this section may attend worship services and participate in religious activities primarily intended for adults that occur within facilities intended primarily as a religious center for religious worship subject to the following conditions: (i) the person has notified the senior religious leader of the religious center of the person’s registration under this Article; and (ii) has received written permission to be present on the premises from the senior religious leader or the governing board of the religious center as appropriate, or the senior religious leader or governing board of the religious center has granted ongoing permission to the person for regular visits of a routine nature. If permission is granted by the senior religious leader or the governing board of the religious center, the senior religious leader or chair of the governing board of the religious center shall inform the other religious staff where the person will be present.³⁷⁰

While this proposed amendment to the law allows offenders to be present on church grounds, it may run afoul of the Establishment Clause of the First Amendment.³⁷¹ The State’s involvement in regulating church membership and attendance in requiring church bodies to approve attendees may constitute “excessive entanglement” with religion.³⁷² Justice Harlan, in the concurring opinion, noted that

365. See Decanto, *supra* note 22.

366. H.B. 1317 Gen. Assemb., Reg. Sess. (N.C. 2009), <http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1317v2.pdf>.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion”)

372. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

"[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief."³⁷³ This argument is mainly outside the scope of this discussion, but the General Assembly would be well advised to examine the constitutionality of this provision.

The North Carolina Constitution is clear: every person must be permitted to worship.³⁷⁴ The General Assembly should let the Constitution speak, and simply clarify the existing law to indicate that it in no way applies to churches or worship activities. Church leaders, perhaps more than anyone else, are on notice that there are elements of society that may be dangerous. Congregants and church leaders must take it upon themselves to ensure that those persons attending worship who may pose a threat to children are isolated from potential victims, as many already do through "safe sanctuary" programs.³⁷⁵ It is not for the State to say that our churches are to be hotels for saints, but not hospitals for sinners. At the very least, a requirement that offenders notify church leaders of their status is sufficient, and may be all that is constitutionally permissible.³⁷⁶

B. Registration/Notification Requirements

As many courts have noted, offense information is already public record, and convicted offenders have no privacy interest in these records not being available to the public.³⁷⁷ Why then not expand the availability of all criminal records, or at least records of serious convictions, available to the public?³⁷⁸ The same rationale that makes registration requirements appealing for sex offenders can apply to many other classes of offender. The general public could no doubt be well served by knowing not only when a sex offender resides in their neighborhood, but a murderer or drug dealer as well. If criminals have no privacy interest in their criminal records and they are public record, why not expand the concept of searchable criminal records too so that citizens may protect their property from thieves and their children

373. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (noting that "government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning" may constitute excessive entanglement).

374. N.C. Const. art. I, § 13.

375. North Carolina Conference United Methodist Church, *Safe Sanctuary Policy for Children and Youth*, <http://oldsite.nccumc.org/childrnmin/conferencepolicy.final05.pdf> (last visited Oct. 30, 2010).

376. H.B. 1317 Gen. Assemb., Reg. Sess. (N.C. 2009), <http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1317v2.pdf>.

377. N.C. GEN. STAT. § 14-208.15 (2010).

378. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis. & Pub. Pol'y 177, 207 (2007).

from drug peddlers?³⁷⁹ If the infrastructure and technology exists for community awareness of the location and relative risk level of local offenders the result could be an increase in the effectiveness of community vigilance and an overall reduction in crime. If homeowners know that their neighbor has been convicted of larceny, they may be more likely to lock their lawnmower in their shed. If they know of a teen down the block convicted of breaking into automobiles they may take the necessary precaution of bringing valuables indoors. There is no reason why this system should not be applied to all violent and property offenders, in addition to sex offenders. The threat that sex offenders pose to children is arguably not any more severe than that of the habitual drug pusher or gang member, especially in light of recidivism data.

C. Monitoring Requirements

Monitoring requirements, too, are in some ways effective, and should be retained; however, there is room for improvement in North Carolina's approach. There is little doubt that the requirements are constitutional, arguably even when applied retroactively. The primary purpose of the monitoring requirements is to locate offenders that are required to register, but for whatever reason, law enforcement has lost track of.³⁸⁰ Many offenders are not actively monitored, and the system does not alert law enforcement in real time if an offender enters an "off-limits" area.³⁸¹ Monitoring requirements cannot facilitate pre-emptive intervention by authorities to prevent crime.

Monitoring can, however, possibly prevent some crime through deterrence. Offenders may be far less likely to commit an offense if it is known that police will be able to pinpoint their locations at the time that the crime was committed. For this reason, SBM of North Carolina's most dangerous sex offenders should be continued. However, if offenders are truly assessed to present a higher level of recidivism, they should be subjected to requirements similar to those that other non-sex offenders are subject to, such as supervised probation-like status, in addition to SBM.

379. *Id.*

380. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48.

381. This statement is true as of the time of writing. There are systems that exist that are capable of sending email alerts to probation officers or other law enforcement officials should a registrant enter an off-limits area. However, the systems are cumbersome and often ineffective due to the constantly evolving landscape. How individual structures are being utilized must be constantly monitored and updated in the system. A newly opened day care or roller rink may not make it into the system immediately, and will not register as an off-limits area. That said, the technology exists and is utilized in some jurisdictions. Undoubtedly, the technology will improve, and become more widespread in use. See *States Move on Sex Offender GPS Tracking*, GPS Monitoring Solutions, <http://gpsmonitoring.com/blog/?p=841> (Apr. 15, 2010).

Keeping track of some criminal offenders is an important goal. The State regularly requires criminal offenders to register with the State through the probation system. Offenders that are deemed to still be in need of some supervision, to ensure that they are abiding by the conditions of their probation, are visited by probation officers and required to provide addresses.³⁸² They are also often required to abide by curfews.³⁸³ The same should be true of sex offenders deemed to require supervision. North Carolina has made the effort to restrict SBM to those offenders that are deemed to pose an increased risk. If the risk is in fact real, then perhaps the offenders should be subject to even more "monitoring."³⁸⁴

The obvious argument in opposition to subjecting sex offenders to probation-like restrictions and supervision is the cost associated with increased supervision. To require the probation system to supervise these offenders for thirty years (or life, as in some cases) would be cost-prohibitive. However, this argument is self-defeating. If the offenders are truly dangerous, no expense should be spared. If, on the other hand, the monitoring requirements include offenders that are not truly a risk, then perhaps they are excessive. Perhaps, the answer is to require monitoring *and* supervision on a case-by-case and open-ended basis, with periodic reviews of an offenders' status.

Currently, courts decide in many cases which "Part Two," or first tier offenders will be subject to SBM.³⁸⁵ This procedure should apply to all sex offenders required to submit to monitoring, in place of blanket requirements that certain crimes necessitate monitoring.³⁸⁶ Offenders should be deemed dangerous enough for monitoring based on an actual assessment of their dangerousness and not simply on the type of crime that they committed.³⁸⁷ After all, not every murderer will kill again, and it is far from the case that every sex offender will reoffend.

Given the data available on recidivism rates, it is clear that not all offenders are recidivism risks.³⁸⁸ Resources could be better spent on ensuring that violent offenders are not committing murders while on probation than on the monitoring of sex offenders that pose a low risk. Given the problems that North Carolina has had with its probation system, and the recent rash of homicides committed by proba-

382. N.C. GEN. STAT. § 15A-1343 (2010).

383. *Id.* at § 15A-1343.2.

384. N.C. GEN. STAT. § 14-208.40 (2010).

385. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48.

386. *Id.*

387. Luis Rosell, *SEX OFFENDERS: PARIAHS OF THE 21ST CENTURY?*, 32 Wm. Mitchell L. Rev. 419, 426 (2005) (reviewing John Q. La Fond, *Preventing Sexual Violence: How Society Should Cope With Sex Offenders* (2005)).

388. Lester *supra* note 8, at 349.

tioners, there are clearly other offenders more in need of electronic monitoring than sex offenders.³⁸⁹ The monitoring of many sex offenders takes away resources that could be better applied to other violent offenders that have demonstrated that they will reoffend.³⁹⁰

On another note, it would be better policy to utilize available technology that can monitor offenders without branding them with a “scarlet letter” that notifies the world that they are subject to monitoring.³⁹¹ If scientists are able to track dolphins around the world with tiny transmitters, surely it can be done with human beings.³⁹² The current technology utilized exposes the offender to ridicule and, in some cases employment issues, that make it more likely that he or she will reoffend.³⁹³ The goal should be to assist offenders in re-entering society, and visibly labeling them as dangerous to all observers does not advance that objective.

D. Residency Restrictions

Residency restrictions, however, are more problematic. The *Nichols* case does not address residency restrictions in North Carolina and the General Assembly has done a far better job than many other state legislatures in creating laws that are not blatantly unconstitutional, by limiting their application.³⁹⁴ However, the application of North Carolina’s residency restrictions to offenders that committed their crimes prior to the enactment of the law poses serious *ex post facto* concerns. North Carolina courts have yet to consider residency restrictions, but should strike down the application of residency restrictions retroactively when the case comes before them, and the General Assembly should strongly consider doing away with many of the residency requirements entirely.

i. Residency Restrictions are Unconstitutional, Ineffective, Counter-Productive and Bad Public Policy

Residency restrictions as applied to offenders that committed their offenses prior to the enactment of the statutory requirements are un-

389. *Perdue, Basnight say probation problems need focus*, WRAL.com, (Dec. 12, 2008), <http://www.wral.com/news/state/story/4126684/>.

390. Megan A. Janicki, *Better Than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sexual Offenders*, 16 B.U. PUB. INT. L.J. 285, 296 (2007).

391. A “scarlet letter” carries with it a negative connotation because Puritan adulterers wore a scarlet A as a punitive mark. *Webster’s Third New International Dictionary of The English Language Unabridged* 2026 (Philip Babcock Gove et al. eds., 3rd ed. 2002).

392. *Tracking Tags Might Tell Just How Far Dolphin Wander*, THE POST AND COURIER (Mar. 1, 2008), http://www.postandcourier.com/news/2008/mar/01/world_travelers32347/.

393. Response to Petition to Require Offender to Enroll in a Satellite Based Monitoring Program N.C.G.S. 14-208.40B at 3, *State v. McKoy*, No. 08CRS5472 (N.C. Sup. Ct. Mar. 2008).

394. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48. .

constitutional as *ex post facto* laws. North Carolina should follow Kentucky's holding in *Commonwealth v. Baker* and cease the retroactive application of these laws.³⁹⁵

Perhaps more importantly, residency restrictions are ineffective. As written, North Carolina's restrictions allow offenders to stay in their homes if they established residency prior to their residence falling within a "restricted zone." Are these offenders somehow less of a threat to the children within that zone than offenders who would seek to move there? If the offenders truly represent the risk that the legislature claims, should their property interests be elevated above the rights of children to avoid predation? Courts have found key that these restrictions apply to all offenders without an individualized assessment of dangerousness in striking them down.

Even more offensive to common sense is the fact that the statute does not prohibit an offender from living in close proximity to where children live and play.³⁹⁶ In schools and day cares, children are supervised behind locked doors, in facilities often patrolled by uniformed police.³⁹⁷ At home, children play outdoors, ride their bicycles, and do all of the things that young children do, often without close supervision.

Megan Kanka was abducted, raped, and murdered by her neighbor who lived across the street.³⁹⁸ Jessica Lunsford was abducted, raped, and murdered by a neighbor residing 100 yards from her home.³⁹⁹

If an abductor can snatch a child walking through the "restricted" zone on her way home from school, could that same offender not snatch the same child at the other end of her journey, as she walked through her own neighborhood? The answer is, of course, yes. The fact that children are most likely to be victimized by a person that they know, such as a neighbor, has been belabored.⁴⁰⁰ The fact that the current residency restrictions do nothing to prohibit an offender from residing in a mobile home community or apartment building full of children belie the knee-jerk and irrational approach to the regulation of these offenders.⁴⁰¹ In writing on the effects of residency restrictions on sex offender recidivism, one noted scholar reports that

there is no empirical support for the idea that residency restrictions actually decrease sex offender recidivism. The Minnesota Department of Corrections explored the subject in depth and found no evidence

395. *Baker*, 295 S.W.3d 437.

396. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 19-20.

397. N.C. GEN. STAT. § 115C-105.47(a) (2010).

398. History of *Megan's Law*, *supra* note 86.

399. Drifter Says He Held Girl Three Days, *supra* note 131.

400. Bagley, *supra* note 43, at 1377.

401. LAW ENFORCEMENT LIAISON SECTION, *supra* note 48, at 19-20.

that “residential proximity [of sex offenders] to a park or school” affects re-offense. Similarly, the Colorado State Judiciary Committees examined the efficacy of sex offender residency restrictions and found that, “placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.” After reviewing the effects of Iowa’s statute, the Iowa County Attorney’s Association found that, “research does not support the belief that children are more likely to be victimized by strangers at the covered locations than at other places.” No study to date has shown any positive effect of these statutes in terms of decreasing recidivism.⁴⁰²

Moreover, studies show that offenders that are pushed out of their communities where they have access to family support systems, treatment and gainful employment are far more likely to re-offend.⁴⁰³ Offenders that are forced into homelessness because of a lack of permissible housing are also more likely to re-offend and are harder to monitor and track.⁴⁰⁴ “One scholar, writing on the subject of former criminals, generally, claimed that ‘to prevent recidivism and afford ex-offenders a second chance, the government must facilitate an ex-offender’s successful transition back into [their] community.’”⁴⁰⁵

Ultimately, if more offenders go underground, then the net result of sex offender residency restrictions will be negative. When an offender is off the radar, then the existing compliance, treatment and monitoring options will have no effect. An offender is also unlikely to find any stability or employment when living underground. Such a scenario is a recipe for recidivism. An offender will be without any social contacts or employment and probably living in transitional housing. Such an outcome will render residency restrictions useless for that offender and the risk of recidivism will only increase.⁴⁰⁶

E. Eliminate the “300 Foot Rule” and Prohibition on Being Where Children “Gather”

There is little hope in drawing a line, regardless of the distance, around areas to create “safe zones” where children will be free of the

402. Corey Rayburn Yung, *BANISHMENT BY A THOUSAND LAWS: RESIDENCY RESTRICTIONS ON SEX OFFENDERS*, 85 Wash. U. L. Rev. 101, 155-56 (2007). Corey Yung is a faculty member at John Marshall Law School. Mr. Yung teaches criminal law, criminal procedure, federal courts, and a sex crimes seminar. His various law review works centered on sex offender laws have been cited by several federal courts. *Faculty Directory; Corey Rayburn Yung*, The John Marshall Law School, http://www.jmls.edu/directory/corey_yung.shtml (last updated Oct. 1, 2010).

403. Bagley, *supra* note 43, at 1381-83.

404. Lester, *supra* note 9, at 360.

405. Bagley, *supra* note 43, at 1381.

406. Yung, *supra* note 402, at 144.

threat of victimization. The only truly adequate provision would be to order offenders to stay 300 feet from children. This, obviously, would be ineffective and unenforceable, without even considering constitutional concerns. Besides the obvious absurdity that only “law-abiding child predators” will conform their actions to the law, the legislature has already received a taste of the nuances required to draft such a rule, and is now attempting to carve out all sorts of exceptions for picking children up from school, attending church, and voting.⁴⁰⁷ The exceptions swallow the rule.

Restrictions should be kept in place on access to schools and child-care facilities for sex offenders that targeted children in committing their crimes. These offenders should not be at those places and these places are clearly defined, providing them with sufficient notice. Any offender knows when he is going into a school or day care.

With any rule meant to protect children from danger in other public spaces the important question is not so much “where are the sex offenders,” but “where are the parents?” Presumably these public places are areas where someone is, or should be, supervising the children that the statute seeks to protect. Children should not be dropped off at the play-space at the mall and left there while parents shop. Any parent’s imagination can conjure images of worst- case scenarios. At Chuck E. Cheese’s, shopping center, and county fairs, it is the responsibility of the parents to monitor their children and ensure their safety. The State does not ban cars from the roads because children need to ride their bicycles there. Parents are charged with watching their children and educating them about cars and associated dangers. As Judge Baddour points out, state efforts at protecting children when they should properly be under the direct supervision of their parents is outside any compelling governmental interest.⁴⁰⁸

Moreover, what the definition of a social program comprises is unclear. If it is a program such as scouting or a church youth group, it too should be supervised by adults. If so, restrictions should apply only when children are present and the program is being conducted.

What about public parks where camps are “regularly conducted” during the summer months? At a hearing in the *Nichols* case, Judge Baddour asked the prosecutor about Kenan Stadium at the University of North Carolina at Chapel Hill, where football camps are held for children during the summer.⁴⁰⁹ Because the statute is vague, the State

407. *Sex Offender Registry Changes – House Bill 1317*, North Carolina General Assembly, <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1317> (May 20, 2009).

408. *Nichols*, Memorandum Opinion and Order, No. 09CRS50686 at 13.

409. *Nichols*, Transcript of the Motions Hearing, No. 09CRS50647 at 73-74.

was unable to answer conclusively whether offenders would be restricted from the premises when camps were not in session.⁴¹⁰

What about a public swimming pool where swimming lessons are conducted? Should offenders be allowed there when it is open to the general public? If so, what is to stop the offender from taking a child from the locker room? Again, Judge Baddour pointed out in his order that the State's effort to protect children in settings where they should be directly supervised by parents is outside the scope of any compelling governmental interest.⁴¹¹

House Bill 1317 attempts to address this issue as well. If passed and signed into law, the statute would read: "For purposes of this subdivision, the prohibition shall only apply to that portion of the place being used for the educational, recreational, or social program for minors while the place is being used for the educational, recreational, or social program for minors."⁴¹²

What is to stop an offender from taking a child from the public restroom at a professional sporting event, concert or church? The answer is that parents must be responsible. The danger of criminals of all stripes that would victimize children exists, and will exist, whether we attempt to keep these offenders away or not. If offenders are so dangerous that they cannot be 300 feet from a child they should be incarcerated. If offenders are not dangerous they should be allowed to re-assimilate into society.

F. Increase Penalties for "Stranger" Offenders

The General Assembly should target those offenders that are true "stranger dangers" by enhancing the penalties for those offenders that commit offenses against children unknown to them. If they represent the legitimate risks to children that sex offender laws are meant to mitigate, and represent such a high risk of recidivism, their sentences should be enhanced so that they will remain incarcerated. The General Assembly should provide for aggravating factors in the text of the statutes that provide for stiffer penalties if the factors are present, such as in the rare cases of actual stranger abduction or assault.

The offenders that commit crimes against step-children or nephews are likely not the offenders that need to be segregated from children and the places where children gather.⁴¹³ These types of offenders are not the "stranger danger" that § 14-208.18 was drafted to dissuade. There is nothing in the statutes that prevents a sex offender from mar-

410. *Id.*

411. *Nichols*, Memorandum Opinion and Order, No. 09CRS50686 at 13.

412. Yung, *supra* note 402.

413. N.C. GEN. STAT. § 14-208.18 (2010).

rying and living with step-children or from having children of his or her own. If the General Assembly wishes to make tough laws targeting “child predators,” they should enhance the penalties for these most dangerous ten percent of offenders, and allow the ninety percent of offenders that have not targeted strangers, and are arguably not a significant threat to them, to re-assimilate into society.⁴¹⁴

G. Create a System of Hearings and Assessments to Monitor and Screen Offenders for “*Dangerousness*,” *Similar to a Parole System*

After conviction for a sex crime, offenders should be given treatment and support instead of a list of forbidden zones. Initially, a judge should conduct a hearing where the “danger level” of an offender can be determined.⁴¹⁵ If the offender was classified as a “stranger danger” at initial sentencing, it should be a long while before a judge should be allowed to assess his or her dangerousness upon release from incarceration.⁴¹⁶ For offenders whose crimes were not aggravated initially, a hearing should be conducted to determine, through the presentation of evidence: what type of support system an offender will have upon his release; what type of treatment he should undergo; and what type of restrictions he should be subject to. The DOC already conducts a similar inquiry when an offender needs to be assessed for enrollment in the SBM program.⁴¹⁷ These assessments should be expanded to cover all sex offenders, and a judicial determination of dangerousness should be made for the purpose of assigning each offender to a registration, monitoring and restrictions regime. Levels of restriction should be based upon the offender, and not the crime that the offender committed. A program of periodic hearings should be conducted where an offender, or the State, may present evidence as to why an offender’s individual restrictions should be enhanced or reduced. These hearings could take place annually or at greater intervals. The hearings would give the truly repentant and rehabilitated offender the opportunity to re-assimilate fully into the community while ensuring that those offenders that continue to pose a threat to society are accorded the highest levels of monitoring and deterrence.⁴¹⁸

414. Lester, *supra* note 8, at 372.

415. Matthew Singer, . . . *And Procedure For All: Rehearings For “Dangerous” Offenders*, 76 U. CIN. L. REV. 1067, 1091 (2008).

416. *Id.*

417. N.C. GEN. STAT. § 14-208.40 (2010).

418. See Yung, *supra* note 402, at 159. (“Instead of a simple lifetime penalty, follow-up policies could play a role. In instances where there are clear indications that an offender is likely to re-offend, a judge could have the discretion to order regular hearings to screen offenders for rehabilitative progress as well as the risk of recidivism. Periodic risk assessments help to address

II. *Recommendations to North Carolina Courts*

North Carolina's appellate courts should force the General Assembly to develop a law that is effective and remains within the bounds of the Constitution by striking down § 14-208.18, and precluding its enforcement statewide. The courts will not now have an opportunity to affirm Judge Baddour's ruling, but should join with the jurists of other states in recognizing that legislatures have run too far with this issue at the earliest presented opportunity.⁴¹⁹ In doing so, the courts should go further than simply upholding a trial court's ruling similar to Judge Baddour's, and should address *de novo* the constitutionality of the statute on the other grounds asserted by offenders as opportunities present themselves.

CONCLUSION

Those in a position to affect policy on these issues must do so, hopefully guided by some of the recommendations contained in this Article. To do so, they must possess the moral courage to stand upon the high ground of the law, regardless of the political consequences. Otherwise, in the name of protecting our precious children, we may be doing them the disservice of leaving to them a compromised constitution and far fewer rights than we inherited from our parents. Liberty, once given up, is tremendously difficult to regain. Allow parents to concern themselves with who is watching over and safeguarding their children in the church nursery, and keep the legislature and the courts where they belong: watching over and safeguarding that which is most precious to us all: the Constitution, the rule of law, and justice for all. Anything less would be a true perversion.

the shortcomings of the existing predictive tools by evaluating offenders over a longer time frame than is usually available in the criminal justice system.”).

419. *Nichols*, Memorandum Opinion and Order, No. 09CRS50686 at 15.