

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
GOVERNMENT LAW ONLINE

**Residency Restrictions for Convicted Sex
Offenders: A Popular Approach on Questionable
Footing**

January/February 2009



ALBANY LAW SCHOOL

80 New Scotland Avenue
Albany, NY 12208
www.albanylaw.edu

© 2006 Albany Law School

GOVERNMENT LAW ONLINE publications are available at www.governmentlaw.org

*Reprinted from the New York Zoning Law and Practice Report, January/February 2009, Vol. 9, No. 4,
published by Thomson Reuters/West, 50 Broad Street East, Rochester, NY 14694.*

Residency Restrictions for Convicted Sex Offenders: A Popular Approach on Questionable Footing

January/February 2009

Dwight H. Merriam and Patricia E. Salkin

These materials are copyright by Albany Law School on behalf of its Government Law Center or Albany Law School licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

NEW YORK ZONING LAW AND PRACTICE REPORT



JANUARY/FEBRUARY 2008

Vol. 9, No. 4

In This Issue

- Residency Restrictions for Convicted Sex Offenders: A Popular Approach on questionable footing 1

Editor-in-Chief

Patricia E. Salkin, Esq.

Managing Editor

Mary Ann Snyder, Esq.

Publishing Editor

Betzaida Stanwix

Electronic Composition

Specialty Composition/Rochester DTP

Published six times a year by West

Editorial Offices:

50 Broad Street East, Rochester, NY 14694

Tel.: 585-546-5530 Fax: 585-258-3768

Customer Service:

610 Opperman Drive, Eagan, MN 55123

Tel.: 800-328-4880 Fax: 612-340-9378

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

RESIDENCY RESTRICTIONS FOR CONVICTED SEX OFFENDERS: A POPULAR APPROACH ON QUESTIONABLE FOOTING

Dwight H. Merriam and Patricia E. Salkin¹

Introduction

Municipalities across the country are adopting residency restrictions prohibiting convicted sex offenders from living in close proximity to places that children are likely to frequent. The number of sex offenders is large—by one report there are some 550,000 registered sex offenders nationally.² As more and more local and state governments adopt residency restrictions, municipal lawyers and planners are increasingly finding themselves at the center of the debate. The literature and most studies suggest that residency restrictions do not reduce recidivism, do not offer any real protection for potential victims, are generally not legally defensible, and thwart efforts to reform offenders and return them to society. This however, is ignored by the emotional demands of community residents to enact such laws to “protect vulnerable children” from convicted offenders. From the developing body of case law, it is apparent that municipalities may have difficulty defending residency restrictions.

An impediment to adopting effective public policy for dealing with convicted sex offenders is widespread acceptance of incorrect information and faulty assumptions about sex offenses and the potential for sex offenders reoffending after conviction and release. A literature review reveals four significant misperceptions:

1. The victim is usually a stranger

The reality is that most victims are family, friends or acquaintances of the sex offender. While statistics vary, the general consensus is that about 75% of the victims are known to the sex offender. More often than not, it is not strangers who seek out victims at schoolyards, playgrounds, and bus stops. While the most shocking of sex crimes involves the abduction of a young child—a complete stranger to the sex offender—who is then sexually abused and murdered, statistically this is an outlier. About 93% of victims of sex offenders know the perpetrator. About 34% are members of the family and another 59% are acquaintances, according to the Bureau of Justice Statistics.³ This most common misperception, which many commentators refer to as “stranger danger,” can create the counterintuitive effect of having parents focus more on protecting their children from strangers, rather than protecting them from family and acquaintances.

2. Recidivism is high among sex offenders

Sex offender legislation is driven by the public perception that high recidivism rates require the isolation of sex offenders. However, major studies by the federal governments in the United States and Canada have found that sex offense recidivism rates are substantially lower than most people believe. The U.S. Department of Justice reviewed recidivism rates among 9,000 offenders three years following their release from prison and found that only 5.3% reoffended. The Canadian government found a 14% average rate of recidivism among sex offenders from a sample of 30,000 followed over a four to six year period after their release.⁴ Even studies for periods as long as 15 years after release show the rate of recidivism to be remarkably low—76% were not rearrested for sex crimes. According to the Bureau of Justice Statistics, sex offenders have rates of recidivism among the lowest of all criminals;⁵ yet when asked what percent of

sex offenders commit another sex offense, the public offered a mean percentage of 74% and a median of 80%, virtually the inverse of the reality.⁶

3. All sex offenders are equally dangerous

Gertrude Stein’s “A rose is a rose is a rose is a rose”⁷ does not apply to sex offenders. There are horrible, violent, and despicable pedophiles, such as John Couey, who murdered nine-year-old Jessica Lunsford, to teenagers experimenting with sex, such as Wendy Whitaker.⁸ Wendy Whitaker was a 17-year-old high school sophomore who had oral sex with a 15-year-old male classmate. In 1997, she pleaded guilty, received five years probation, and ended up on the state’s sex offender registry. Now, because of the state’s residency restrictions, at age 28 she can not live in many places. She has already had to move twice and has just been told by the local sheriff that she has to move a third time because the house she owns with her husband is within one of the restricted areas. As she says: “It’s a recurrent nightmare. It’s like a roller coaster. One minute, I’m okay, and then, I’m not. This time, I really thought everything was going to be all right.”⁹ Other offenses involving nonviolent and consensual sexual behavior may also be swept up with the broad brush of reporting requirements. After New York enacted penalties for “sexually motivated felonies”—or felonies committed for the purpose of “sexual gratification”—in 2007,¹⁰ the Montgomery County District Attorney sought to bring sex offense charges against a man who used a stolen credit card to pay for a stripper.¹¹ Other sex offenders continue to be subject to registration requirements decades after their offenses and sometimes when their age and health conditions make recidivism unlikely.¹²

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West’s Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

New York Zoning Law and Practice Report (USPS# pending) is issued bimonthly, six times per year; published and copyrighted by Thomson/West, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at Periodical rate is pending at St. Paul, MN. POSTMASTER: Send address changes to **New York Zoning Law and Practice Report**, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

4. Community notification is highly effective in reducing recidivism

In one study of the public's perceptions of nine strategies for reducing sexual offenses, community notification scored the highest with 83% of those questioned saying they believed it would be effective.¹³ Unfortunately, there have been very few studies about the effectiveness of registration; but, of the studies published, most could not identify any significant reduction in the rate of reoffending as a consequence of community notification.¹⁴

Government Responses to Concerns about Convicted Sex Offenders

There have been various government approaches to address community concerns about convicted sex offenders. Although registration laws are the most popular, the authors of the most recent analysis of the literature conclude:

In sum, thus far there is little empirical evidence that notifying communities about the presence of sex offenders results in enhanced community safety or that it aids in the prevention of child sexual abuse. An additional concern is the ability of state registries to maintain up to date records that can be helpful in prevention efforts.¹⁵

While registration may not be effective in reducing recidivism or in preventing child sexual abuse, the public's perception is that most sex offenders will reoffend and that Megan's Laws¹⁶ will protect the public by providing the community with notice of the presence of convicted sex offenders. Some studies suggest that citizens do feel safer with such notification, but others report greater anxiety in having the information.¹⁷ In addition, at least 16 states (Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, South Carolina, Texas, Virginia, Washington, and Wisconsin) have enacted civil commitment laws since 1990 that enable confinement and treatment of sex offenders following their incarceration;¹⁸ other states impose tracking requirements for convicted sex offenders;¹⁹ and at least 21 states and over 400 local governments have adopted residency restrictions.²⁰

Residency Restrictions Across New York State

Municipalities throughout New York State have been adopting residency restrictions in response to community demand. For example, Albany County prohibits registered sex offenders from residing within 1,000 feet of a public or nonpublic elementary or secondary school or child care facility. Broome County's law prohibits registered sex offenders from maintaining a residence, either permanently or temporarily, within 1,000 feet of any school grounds, any facility or institution primarily used for the care or treatment of persons under the age of 18, or any public park. The Town of Chenango, located in the County, also adopted this language. The Village of Franklinville in Cattaraugus County provides that sex offenders shall not newly occupy any real property, acquire any real property by lease or otherwise, or establish a place of lodging within a quarter mile of a school, daycare center or playground, park or school grounds. The City of Dunkirk in Chautauqua County prohibits registered level 2 and 3 sex offenders²¹ from residing within 1,000 feet of a public or private school, a nursery school, pre-school, child care facility, playground or park. The Town of Amherst in Erie County has a similar law. The Village of Depew and the Town of Aurora in Erie County drew the line at 1,500 feet rather than 1,000 feet for minimum distancing. The Town of Lancaster, also in Erie County, uses 1,500 feet for the residency restriction and, in addition to schools listed above, it prohibits sex offenders from residing near teen clubs, teen centers, Boy & Girls Clubs, YMCA facilities, town parks and playgrounds and any other structure or open space where minors congregate for sponsored, programmed activities and any community centers where minors congregate. Restrictions in the Town of Cheektowaga and the Village of Sloan include dance halls and skating rinks, and the Town of Elma chose to use 2,000 feet for its distance requirement. The Towns of Brandt and Eden as well as the Village of Blasdell add a prohibition on residency within 1,500 feet of a church which operates any child or youth centered program, and the Town of Hamburg restricts residency within 1,500 feet of swimming pools. The Village of East Rockaway in Nassau County prohibits registered sex of-

fenders from living within 1,000 feet of any school, place of worship, child day-care center, community center, public library, public park, playground and other recreational facility as well as another registered sex offender. The Village of Waterloo in Seneca County adds a residency restriction near land operated as a camp. Several local laws, including laws in Rockland County and Saratoga County, also prohibit registered sex offenders from being employed within 1,000 feet of specified areas where children are likely to congregate. As of last count, at least 86 municipalities in New York have adopted some form of residency restrictions.^{21,1}

Legal challenges to residency restrictions

There are only a few reported cases dealing with residency restrictions. While none of the cases are from New York, the lessons from other jurisdictions are instructive. The constitutionality of sex offender residency restrictions was addressed by the U.S. Court of Appeals for the Eighth Circuit in *Doe v. Miller*.²² The Eighth Circuit reversed the trial court's judgment invalidating registry requirements for Iowa's sex offenders. Registration is, as a practical matter, essential to implementing residency restrictions. The court, while finding the registration requirements lawful, still acknowledged that they prevented sex offenders from living anywhere in some Iowa towns, with 77% of the residential units in the state rendered unavailable for sex offenders by action of the state law. The small proportion of residential units not off-limits were largely on farms in rural areas.²³ The court rejected several legal theories attacking the restrictions, including *ex post facto* claims, substantive due process, and procedural due process. Just how controversial the opinion was is reflected in the fact that five of the Eighth Circuit judges voted to hear the case *en banc*.

In July 2005, the Iowa Supreme Court reversed the Iowa District Court's decision that had declared Iowa's restrictions unconstitutional.²⁴ In *State v. Seering*, the Iowa Supreme Court held that the State's interest in protecting its citizens superseded a sex offender's right to freedom of residency. The 2,000-foot buffer zone imposed statewide remains

in effect today, and it was upheld again in September 2008.²⁵

In the most recent Iowa case, Willard, a convicted sex offender, attempted to purchase a house that was located within 2,000 feet of a school, a violation of State statute (Iowa Code section 692A.2A). Willard refused to move, and following criminal charges, filed a motion to dismiss alleging that the statute violated his right to procedural due process, constituted a bill of attainder, violated his right to equal protection, and violated his right to travel (the last claim was not briefed so it was not preserved for appeal). The district court denied his motion to dismiss the criminal charges, found that he violated the residency restrictions, and imposed a \$500 fine.

The Iowa Supreme Court affirmed the lower court ruling, noting that the State's 2,000-foot rule has withstood constitutional challenge a number of times. Although Willard claimed that he entered into a contract to purchase the home at a time when he could legally reside there due to ongoing litigation over the statute, the court found this allegation untrue since the State had merely agreed for a period of time to postpone enforcement of the statute, not to make the law ineffectual. "Willard should not have been under any illusion that he was entitled to live in the house when he purchased it," said the court.²⁶ The court rejected Willard's argument that the law constituted a "bill of attainder," which is a legislative act that inflicts a punishment on a particular individual or readily identifiable group without a trial. The court said that while the statute did identify a class of individuals – sex offenders whose victims were minors – the residency restrictions were not a punishment. In this case, Willard was not punished for being a member of this group. Rather, he was punished for violating the statute, which, the court said, was adopted for the legitimate purpose of protecting children. Further, in denying the claim, the court noted that Willard was afforded all of the protections of the judicial process when charged with violating the statute. Willard's equal protection claim failed because he could not identify the classes of similarly situated people singled out for a different treatment by the statute. Although Willard argued that the statute impaired his abil-

ity to make a home with his family, which he argued was a fundamental right, the court found this without merit, concluding that the statute did not prevent him from living with his family. Rather, the 2,000-foot rule merely prevented him from living in a house of his choosing. In finding the 2,000-foot rule rational, the court noted that although the rule “is not necessarily the perfect protection against the danger posed by sex offenders, ‘perfection is not necessary to meet the rational basis standard.’”²⁷ The court next rejected Willard’s procedural due process argument. He alleged that the statute interfered with his right to contract (for the house) and that he was therefore entitled to a predeprivation hearing. The court said that his right to contract was not directly affected by the statute, only his right to live there.

Takings claim

Residency restrictions may also be subject to other constitutional challenges. In November 2007, the Georgia Supreme Court ruled that the State Registered Sex Offender Law prohibiting registered offenders from residing within 1,000 feet of any child care facility, church, school or area where minors congregate effected an unconstitutional regulatory taking.²⁸ The part of the statute that prohibits registered sexual offenders from being employed by any business or entity that is located within 1,000 feet of the same did not, however, amount to a taking. The appellant, a registered sex offender, purchased a home with his wife, and at the time of purchase, he was not in violation of the distance restriction. In addition, the appellant became the half-owner and day-to-day operator of a restaurant, that when he entered into the lease, was not within 1,000 feet of any child care facility, church or school. However, child care facilities later were established within 1,000 feet of both appellant’s home and business. After being told he had to move from his residence and quit the premises of his business upon penalty of arrest and revocation of probation, the appellant alleged that the State law effected an unconstitutional regulatory taking of his property without compensation.

With respect to the residency restriction, the Georgia Supreme Court noted that it was apparent

that there was no place in Georgia where registered sex offenders could live without being continually at risk of being uprooted and forced to abandon their homes. Applying the guidelines from *Penn Central Transp. Co. v. New York City*,²⁹ the court determined that the residency restriction was an unconstitutional taking of the appellant’s property. The court found that the appellant’s interest in the property was significant, and that the regulation in effect mandated the appellant’s immediate physical removal from this residence, a functional “equivalent to the classic taking in which government directly...ousts the owner from his domain.”³⁰

The court dismissed the State’s arguments that the appellant could rent or sell his house, eliminating or minimizing the economic impact of the statute, since he did not purchase the property for rental purposes. Further, the court said that even if a purchaser could be found, it would involve numerous expenses, closing costs, attorney fees and real estate broker commissions, plus escrow deposits and utility transfers. This, said the court, demonstrated a significant economic impact from the application of the statute. The court also found that the statute not only interfered with, but precluded the appellant from having, any reasonable investment-backed expectation in any property purchase as a private residence since there would always be the potential that some third party will choose to establish one of the many uses or facilities triggering the distancing requirement. Although the court acknowledged that the residency restriction advanced a strong governmental interest, the court could not “overlook the significant, adverse economic impact of [the statute] on appellant, the physical ouster that it effects or its elimination of any investment backed expectations in appellant’s residence.” The court concluded that “justice requires that the burden of safeguarding minors from encounters with registered sexual offenders must be spread among taxpayers through the payment of compensation.”

However, the court did not find the employment restriction to be an unconstitutional taking. Although the appellant could not work on-site due to the restriction, his one-half interest in the business did not require his physical presence on the premises. The appellant was not able to show that the

regulation unduly burdened him financially or adversely affected his reasonable investment-backed expectations in his business

Preemption claim

a. New Jersey

A three-judge panel of the New Jersey Appellate Division of the Superior Court ruled on July 15, 2008, that New Jersey towns cannot ban sex offenders from living near schools, parks or other places where children gather. The Townships of Galloway and Cherry Hill each adopted a zoning ordinance that prohibited convicted sex offenders (CSOs) from living within 2,500 feet of any school, park, playground or day care center in the townships. The ordinances provided for penalties of fines and imprisonment if the CSO failed to move within 60 days of notice from the Township. Convicted sex offenders in both townships challenged the ordinances.

The New Jersey appellate court concluded that the ordinances were preempted by State statute and were therefore invalid. Specifically, the court explained that Megan's Law³¹ was a compilation of laws that pertained to CSOs, requiring, among other things: registration; notification as to residence in the community by the CSO; and Department of Corrections (DOC) parole supervision, usually for life, of the CSO including matters of residence, rehabilitation, and employment. In determining that the Legislature intended to preempt local control, the court looked at five factors. First, the court found that the ordinances conflicted with Megan's Law because: (1) in prohibiting CSOs from residing on nearly all the land located within the townships, they interfered with the ability of parole officers to carry out their duty under Megan's Law to find the most appropriate housing for CSOs with goals of rehabilitation and reintegration into the community; (2) they had no termination clause, while Megan's Law relieved CSOs from notification and community supervision provisions after 15 crime-free years; (3) Megan's Law specifically prohibited private and public entities from denying "housing or accommodations" to CSOs, yet the ordinances denied housing; and (4) New Jersey's criminal code, including Megan's Law, prohibited local governments from

enacting ordinances that conflicted with or preempted provisions of the code.

Second, the court found the Legislature's intent to exclusively regulate the activities of CSOs living in the community was clearly demonstrated by: (1) the Legislature's enactment of comprehensive legislation in Megan's Law; (2) the development of Attorney General Guidelines for law enforcement for the implementation of Megan's Law; and (3) the adoption of DOC regulations governing parole supervision of CSOs living in the community. Third, the court found that the oversight of CSOs living in the community required uniform treatment. The court said this was because protecting children from CSOs who might reoffend and rehabilitating CSOs were matters of statewide concern, not a problem particular to a municipality. The court also found that locally-imposed residency restrictions hampered a CSO's ability to be near family and employment, and without family support and employment recidivism risks could be greater. Fourth and fifth, the court concluded that Megan's Law was so pervasive that it precluded the coexistence of municipal regulation, and local ordinances were an obstacle to the accomplishment of the full purpose and objectives of the Legislature.³²

b. Texas

However, the Texas Attorney General recently opined that the State's prohibitions on sex offenders entering school property do not preempt home rule municipalities from enacting local residency restrictions.³³ The Attorney General reasoned that, "The statutory duty to register as a sex offender does not conflict with a municipal ordinance limiting the area in which a sex offender must live."³⁴ The Attorney General declined to opine on the issue of whether residency restrictions violated the State constitution, commenting that such determination must be made on a fact-intensive basis.³⁵

c. New York

In New York State, more than a dozen proposals were introduced in the last Legislative Session designed to: restrict sex offenders from residing within a quarter mile of any school or licensed daycare facility;³⁶ restrict certain sex offenders, including those

whose victims were under the age of eighteen, from residing within 1,000 feet of a school;³⁷ restrict level three sex offenders from residing within 500 feet of any school building regularly used for instruction;³⁸ restrict level two and three sex offenders from residing within one-half mile of the residence of the victim of their abuse;³⁹ address overconcentration, or too many registered sex offenders from residing in a municipality;⁴⁰ and allow the sentencing court to impose certain residency restrictions upon sex offenders.⁴¹ In addition, proposals were introduced to: prohibit any registered sex offenders from using or being within 500-feet of any state or municipally-owned park;⁴² prohibit sex offenders from entering school grounds or other facilities where children are cared for;⁴³ and prohibit registered sex offenders from entering amusement parks.⁴⁴ Despite the growing interest on the part of local governments to legislate in this area, the State Legislature seemingly has no interest in preempting the field at this time as all of the bills failed to move out of Committee. Therefore, unless deemed unconstitutional on other grounds, and despite lack of evidence that local residency restrictions will actually achieve the desired level of protection, the preemption argument is not likely to succeed in New York unless the State Legislature enacts a uniform statewide policy.

Are Residency Restrictions Ineffective?

The major indictment of residency restrictions for sex offenders is that they do not reduce recidivism or provide any substantial additional protection for potential victims. One of the definitive studies is the Colorado State Judiciary Committees of the Colorado Senate and House of Representatives "Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community."⁴⁵ The report concluded that high risk sexual offenders living in shared living arrangements had significantly fewer violations than those living in other arrangements, even though this type of residence had significantly more high-risk sex offenders. Though the study did not specifically analyze the location of residences relative to their proximity to schools and child care centers, it observed that, in urban areas, children are everywhere. There are

few places where an offender can be physically isolated, and sex offenders without residential restrictions appear to be widely dispersed with no effect on reoffending. The study concluded that "placing restrictions on the location of correctionally 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."

The Minnesota Department of Corrections undertook a study on residential proximity and recidivism.⁴⁶ The study tracked 224 recidivists released between 1990 and 2002 who were reincarcerated for a sex crime prior to 2006. Four criteria were used for the study: the re-offenders had to initiate contact directly with the victims, not through family relationships or acquaintances; the contact had to be within a mile of the offender's residence; the first contact location had to be near a school, park, day care center, or other prohibited area; and the victim had to be under age 18. One sentence from the executive summary provides the dramatic conclusion of the study of 224 sex offenses by previously convicted sex offenders: "not one of the 224 sex offenses would likely have been deterred by a residency restrictions law."⁴⁷

First, the report concluded that it is not residential proximity but rather social or relationship proximity that matters with respect to sexual recidivism. Second, direct contact offenders are more likely to go to an area relatively close to their home (within 20 miles), but far enough away (more than a mile) so that they will not be recognized. The study added some important details to the literature already available. Only 15% of the offenses took place in a public location; the rest were in the offender's home or similar residential location. Most of the victims, some 79%, were someone known to the offender. Half of the sex offender recidivists gained access to the victims through a collateral contact such as a girlfriend, wife, coworker, friend, or acquaintance, and 14% were biologically related to the victims. The last sentence of the report stated: "therefore, by making it more difficult for sex offenders to successfully re-enter society, housing restrictions might promote conditions that work against the goal of reducing the extent to which they recidivate sexually."⁴⁸

Kansas and Florida each commissioned studies on the efficacy of general residency restrictions and both concluded that blanket residency restrictions are not effective and do not enhance community safety.⁴⁹ The Kansas reports stated: “A tight web of supervision, treatment and surveillance may be more important in maintaining community safety than where a sex offender resides.” Florida similarly concluded:

Despite widespread support and popularity, there is no evidence that residence restrictions prevent crimes or increase public safety. These laws may ironically interfere with their stated goals of enhancing public safety by exacerbating the psychosocial stressors that can contribute to reoffending.... Sex offenders rouse little public sympathy, but exiling them may ultimately increase their danger.

The Iowa County Attorneys Association’s (ICAA) criticism of Iowa’s residency restrictions provides a useful summary of the arguments against generalized restrictions and offers suggestions for a more targeted approach.⁵⁰ In its “Statement on Sex Offender Residency Restrictions in Iowa,” the Association “strongly” urged the General Assembly and the Governor to amend the state statute to include measures which would be more effective in protecting children and reduce the “unintended unfairness to innocent persons.”⁵¹ The ICAA, in reviewing the research and literature, observed that there is no correlation between residency restrictions in reducing sex offenses against children or improving the safety of children, and there is no support in the literature for the view that children are more likely to be victimized by strangers in the locations from which separation is required. The statement noted that 80 to 90% of sex crimes against children are committed by a relative or acquaintance, and are not against strangers in the types of places from which residency restrictions are based. The report also noted increasing homelessness among sex offenders and the disappearance of sex offenders from state registries as a consequence of the residency restrictions.

The county attorneys expressed concern about the extraordinary demands on limited law-enforcement resources as a consequence of these restric-

tions. Part of the problem, they noted, was that the categories of crimes to which these restrictions apply are too broad. Interestingly, they point out that “a significant number of offenders have married or have been reunited with their victims; and, in those cases, the residency restrictions are imposed on the victims as well as the offenders.”⁵²

The county attorneys were also concerned that sex offenders could not live with family members on whom they depended for help in their daily needs. The 2,000-foot zones were found to be “so extensive that realistic opportunities to find affordable housing are virtually eliminated in most communities,” a situation that is exacerbated by the lack of transportation in more rural areas to which sex offenders are forced and even more strict regulations by cities and counties. According to the Iowa County Attorneys Association, one unintended consequence of the severe residency restrictions is that alleged offenders are less likely to confess to their crimes. Such plea agreements are often driven by the need to protect youthful victims from having to testify at trials. As a consequence of these agreements, sex offenders are often not held fully accountable and do not get into rehabilitation programs.

The county attorneys gave several suggestions:

- state and local governments should create “child safe zones” such as around schools and child care centers and prohibit offenders from going there except with approval, such as when their own children are there;
- restrictions should be based on offenses against children under age 14, not minors under 18;
- state statutes should provide that they control over local ordinances;
- any restrictions should be based on classification of offenders and should apply only to those most likely to pose an actual risk;
- treatment during an incarceration and afterward should be adequately funded; and
- education and enforcement should endeavor to keep all children safe and should refocus on keeping victims with their families and circle of acquaintances.⁵³

Other modifications might be made to residency restriction laws to help ensure their constitutionality. Some laws, for example, make residency restrictions

inapplicable if an offender's residence was lawful at the time it was established, but was later made illegal by the construction of a new school, park or church nearby.⁵⁴ This type of exemption would seem to remedy the constitutional defect in the Georgia legislation challenged in *Mann v. Georgia Dept. of Corrections*.⁵⁵

Conclusion

Sex offenses are abhorrent. They often involve violence and many victims are children. It is human and normal that we should react so viscerally to the truly shocking reports of the worst of these crimes. Policymakers have responded to the public's concerns about sex crimes by, among other things, imposing residency restrictions on convicted offenders. However, residency restrictions may be subject to serious challenge. Based on studies and legal opinions to date, there has been no convincing evidence proffered that they have any effect in reducing recidivism. Some courts in other states that have reviewed local residency restriction laws have found them unconstitutional or preempted by State statute. The State Legislature in New York has so far resisted efforts at establishing statewide residency restrictions. This places municipal lawyers and planners in the position of educating public officials and the general citizenry as to the facts of sex offenses, recidivism among convicted sex offenders, effective post-conviction actions that can be taken to reduce recidivism and to protect potential victims, and, absent case law, an uncertain legality of local sex offender residency restrictions.

NOTES

1. Dwight H. Merriam is a Partner in Robinson & Cole LLP, in the Hartford, Connecticut office. He represents developers, local governments, landowners, and advocacy groups in land development and conservation issues. He is a Fellow and past president of the American Institute of Certified Planners, a former director of the American Planning Association (APA) and a previous chair of APA's Planning & Law Division. He is also a member of the American College of Real Estate Lawyers, the Anglo-American Real Property Institute, and The Counselors of Real Estate. He teaches land use law at Vermont Law School.
Patricia E. Salkin is the Raymond & Ella Smith Distinguished Professor of Law at Albany Law School where she serves as Associate Dean and Director of the Government Law Center of Albany Law School. Salkin is the author of *New York Zoning Law & Practice*, 4th edition (Thomson Reuters-West) and *American Law of Zoning*, 5th edition (Thomson Reuters-West).
Parts of this article are excerpted with the permission of the American Planning Association from Dwight Merriam's article, "Residency Restrictions for Sex Offenders: A Failure of Public Policy," *Planning & Environmental Law*, Vol. 60, No. 10 (October 2008).
2. National Center for Missing and Exploited Children, "Sex Offender Laws," 2006 (available at www.missingkids.com).
3. Levenson, Brannon, et al., "Public Perceptions about Sex Offenders and Community Protection Policies," in *Analyses of Social Issues and Public Policy*, Vol. 7, No. 1, at 7.
4. Levenson, Brannon, et al., "Public Perceptions about Sex Offenders and Community Protection Policies," in *Analyses of Social Issues and Public Policy*, Vol. 7, No. 1, at 6.
5. Levenson, Brannon, et al., "Public Perceptions about Sex Offenders and Community Protection Policies," in *Analyses of Social Issues and Public Policy*, Vol. 7, No. 1, at 6.
6. Levenson, Brannon, et al., "Public Perceptions about Sex Offenders and Community Protection Policies," in *Analyses of Social Issues and Public Policy*, Vol. 7, No. 1, at 13.
7. Sacred Emily (1913) in *Geography and Plays* (1922).
8. "Woman sues over ongoing sanctions for sex as a teen," *The Atlanta Journal-Constitution*, 07/14/08 (available at <http://www.ajc.com/metro/content/printedition/2008/07/14/sexoffender.html>). *See also* This American Life, Show No. 344, The Competition (discussing the difficulties faced by a man with a 10 year old statutory rape conviction when he started working at an ice skating rink, available at http://thislife.org/Radio_Episode.aspx?episode=344).
9. "Woman sues over ongoing sanctions for sex as a teen," *The Atlanta Journal-Constitution*, 07/14/08 (available at <http://www.ajc.com/metro/content/printedition/2008/07/14/sexoffender.html>).
10. L.2007, c. 7, s; 29, eff. Apr. 13, 2007; 2007 Sess. Law News of N.Y. Ch. 7 (S. 3318) (McKinney's).
11. Edward Munger Jr., *Case is First Under New Sex Law; Defendant Must Register as Offender*, *The Daily Gazette* (Schenectady, NY), Dec. 13, 2007, at A1.
12. *See* Peter Whoriskey, *Some Curbs on Sex Offenders Called Ineffective, Inhumane*, *The Washington Post*, Nov. 22, 2006, at A01 ("As convicted sex offenders go,

- they seem to pose little danger. One is 100 years old. Another can barely walk and is in the late stages of Alzheimer's disease. Another is dying of heart disease in a nursing home").
13. Levenson, Brannon, et al., "Public Perceptions about Sex Offenders and Community Protection Policies," in *Analyses of Social Issues and Public Policy*, Volume 7, Number 1, at 14.
 14. Levensen, D'Amora and Hern, "Megan's Law and its Impact on Community Re-Entry for Sex Offenders," *Behavioral Sciences and the Law* (July 2007) at 588.
 15. Levensen, D'Amora and Hern, "Megan's Law and its Impact on Community Re-Entry for Sex Offenders," *Behavioral Sciences and the Law* (July 2007) at 589.
 16. See Stephen R. McAllister, *Megan's Laws: Wise Public Policy or Ill-Considered Public Folly?*, 7 Kan. J.L. & Pub. Pol'y 1 (1998) (discussing the federal and state sexual offender reporting laws, which are commonly referred to as Megan's laws).
 17. Levensen, D'Amora and Hern, "Megan's Law and its Impact on Community Re-Entry for Sex Offenders," *Behavioral Sciences and the Law* (July 2007) at 590.
 18. Levenson, "Sexual Predator Civil Commitment: a Comparison of Selected and Released Offenders," *International Journal of Offender Therapy and Comparative Criminology*, Vol. 48, No. 6, at 638-48.
 19. See http://www.npr.org/programs/morning/features/2006/oct/prop83/nclsl_gps.pdf.
 20. "Sex Offenders' Residency Restrictions, OLR Research Report 2007-R-0380, May 23, 2007 (available at <http://www.cga.ct.gov/2007/rpt/2007-R-0380.htm>).
 21. These are medium and high risk registered sex offenders. See <http://criminaljustice.state.ny.us/nsor/index.html>.
 - 21.1 <http://lawoftheland.wordpress.com/2008/12/23/residency-restrictions-for-convicted-sex-offenders-continuing-subject-of-attention-in-New-York/>.
 22. Doe v. Miller, 405 F.3d 700, 25 A.L.R.6th 695 (8th Cir. 2005).
 23. See generally http://prawfsblawg.blogs.com/prawfsblawg/2005/08/sex_offender_re.html.
 24. State v. Seering, 701 N.W.2d 655 (Iowa 2005).
 25. State v. Willard, 756 N.W.2d 207 (Iowa 2008).
 26. State v. Willard, 756 N.W.2d 207 (Iowa 2008).
 27. State v. Willard, 756 N.W.2d 207 (Iowa 2008).
 28. Mann v. Georgia Dept. of Corrections, 282 Ga. 754, 653 S.E.2d 740 (2007).
 29. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Env'tl. L. Rep. 20528 (1978).
 30. Citing to *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Env'tl. L. Rep. 20106 (2005).
 31. See New Jersey Stat. Ann. §§ 2C:7-1 to 2C:7-19, and 2C:43-6.4.
 32. G.H. v. Township of Galloway, 401 N.J. Super. 392, 951 A.2d 221 (App. Div. 2008).
 33. Tex. Att'y Gen. Op. No. GA-0526 (2007) (available at: <http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2007/htm/ga-0526.htm>).
 34. Tex. Att'y Gen. Op. No. GA-0526 (2007) (available at: <http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2007/htm/ga-0526.htm>).
 35. Tex. Att'y Gen. Op. No. GA-0526 (2007) (available at: <http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2007/htm/ga-0526.htm>).
 36. A. 1662/S.266 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A01662>).
 37. A.4836 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A04836>).
 38. A.5017-B/S.172-B (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A05017>) ; see also, A.6244 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A06244>, restricts level two and level three sex offenders from residing within one-half mile of any public or private elementary, middle or High School or licensed day care facility) and A.6750 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A06750> , prohibits a sex offender from establishing a residence within 1000 feet (500 feet in cities with a population of 1 million or more, i.e. New York City) of the boundaries of any school, day care or similar educational Institution, any youth treatment facility or any recreational facility); A. 7247 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A07247>, prohibits sex offenders from residing within 500 feet of a school); A.10298 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A10298> , prohibits sex offenders from residing within 1,000 feet of a school).
 39. A.6243 (2008)(available at: <http://assembly.state.ny.us/leg/?bn=A06243>).
 40. A.6245 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A06245>).
 41. A.11751 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A11751>).
 42. A.1970/S.4480 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A01970>).
 43. A.2392 (2008) (available at: <http://assembly.state.ny.us/leg/?bn=A02392>).
 44. A.2453 (2007) (available at: <http://assembly.state.ny.us/leg/?bn=A02453>).

45. Colorado Department of Public Safety, Division of Criminal Justice, Sex Offender Management Board (available at <http://dcj.state.co.us/odvsom>).
46. Minnesota Department of Corrections, "Residential Proximity & Sex Offense Recidivism in Minnesota," April 2007 (available at www.doc.state.mn.us).
47. Minnesota Department of Corrections, "Residential Proximity & Sex Offense Recidivism in Minnesota," April 2007, at 2 (available at www.doc.state.mn.us).
48. Minnesota Department of Corrections, "Residential Proximity & Sex Offense Recidivism in Minnesota," April 2007, at 2 (available at www.doc.state.mn.us).
49. See Report from Kansas Department of Corrections (available at <http://www.dc.state.ks.us/publications/sex-offender-housing-restrictions>); there is a comprehensive report to the Florida State Legislature on "Sex Offender Residency Restrictions," (available at [http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/\\$FILE/Levinson_FL.pdf](http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/$FILE/Levinson_FL.pdf)). A review of the literature is found in <http://www.library.ca.gov/crb/06/08/06-008.pdf>. The National Association of Criminal Defense Lawyers (NACDL) has a website with information, including the NACDL Sex Offender Task Force Policy Report (Feb. 24, 2007) http://www.nacdl.org/sl_docs.nsf/issues/SexOffenderResources#factsheets.
50. "Statement of Sex Offender Residency Restrictions in Iowa," (Feb 2006) (available at: <http://www.cacj.org/PDF/2006/Statement%20on%20Sex%20Offender%20Residency%20Restrictions.pdf>).
51. Iowa County attorneys Association, "Statement on Sex Offender Residency Restrictions in Iowa," December 11, 2006.
52. Iowa County attorneys Association, "Statement on Sex Offender Residency Restrictions in Iowa," December 11, 2006.
53. Iowa County attorneys Association, "Statement on Sex Offender Residency Restrictions in Iowa," December 11, 2006.
54. See, e.g., Village of Malone, NY, Village of Valley Stream, NY, Village of Chateaugay, NY, Village of Antwerp, NY.
55. Mann v. Georgia Dept. of Corrections, 282 Ga. 754, 653 S.E.2d 740 (2007).

Visit West on the Internet! <http://www.west.thomsonreuters.com>

