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## **Sex Offender Registration in New York: The Dangers of State Law Preemption of Local Residency Restriction Laws and Its Implications for Communities and Sex Offenders Alike**

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**SEX OFFENDER REGISTRATION IN NEW YORK: THE  
DANGERS OF STATE LAW PREEMPTION OF LOCAL  
RESIDENCY RESTRICTION LAWS AND ITS IMPLICATIONS  
FOR COMMUNITIES AND SEX OFFENDERS ALIKE**

*Megan Forbes*\*

There are approximately 1,663 registered sex offenders living in New York's Nassau and Suffolk Counties.<sup>1</sup> Community members are mistaken if they believe their town or village governments on Long Island are permitted to regulate the proximity in which registered sex offenders may reside in relation to their homes, schools, or playgrounds.<sup>2</sup> New York State's sex offender registry laws currently preempt local governments from enforcing more stringent residence restrictions on sex offenders, though New York State's sex offender registry laws do not regulate the entire area, such as the residences of low risk sex offenders.<sup>3</sup> New York State should continue to allow local governments to legislate their own sex offender residency restrictions despite the negative effect on the sex offender population,<sup>4</sup> because citizens should have a say in who is residing in their communities,<sup>5</sup> and localities are best situated to respond to community needs.<sup>6</sup>

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<sup>1</sup> Informational Brochure, N.Y. State Division of Criminal Just. Serv., Registered Sex Offenders by County as of January 19, 2016, [http://www.criminaljustice.ny.gov/nsor/stats\\_by\\_county.htm](http://www.criminaljustice.ny.gov/nsor/stats_by_county.htm) (last visited Jan. 16, 2016).

<sup>2</sup> See e.g., Town of Brookhaven Code, §55 (2005); Village of Massapequa, N.Y. Code § 279-3 (2009). Long Island, New York town codes will be discussed in Section IV.

<sup>3</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 365.2 (2009).

<sup>4</sup> Denise M. Bonilla & Emily Ngo, *700 Registered Sex Offenders Concentrated in Few LI Communities*, *NEWSDAY* (Nov. 25, 2013), <http://www.newsday.com/long-island/towns/700-registered-sex-offenders-concentrated-in-few-li-communities-1.6496539>.

<sup>5</sup> Glenn Blain, *Local Governments Cannot Restrict Sex Offenders from Living Near Schools, Court Says*, *NEW YORK DAILY NEWS* (Feb. 17, 2015),

## I. OVERVIEW

In the case of *People v. Diack*,<sup>7</sup> the defendant, Michael Diack, was convicted in 2001 of possessing child pornography,<sup>8</sup> and served twenty-two months in prison, as well as time on parole.<sup>9</sup> The defendant was classified as a level one sex offender under the Sex Offender Registration Act (hereinafter “SORA”).<sup>10</sup> After his release from parole, Diack began living near the Lawrence Woodmere Academy in Woodmere, New York.<sup>11</sup> Diack was living within 500 feet of the school, and was thus in violation of Nassau County’s Local Law No. 4-2006, a residency restriction of for sex offenders.<sup>12</sup> Diack reported his change of address to New York State, and when Nassau County Police Department received the information regarding where Diack was living, they arrested him for violating the local law.<sup>13</sup> The District Court granted Diack’s motion to dismiss under the theory that New York State’s sex offender registry laws preempt the local laws of Nassau County.<sup>14</sup> On Nassau County’s appeal, the Appellate Term, Second Department held that the state law does not preempt the local laws, and it is “implausible that there could be a need for state-wide uniformity for residency restrictions for such sex offenders given the fact that housing in rural areas is not necessarily in as high demand as it is in urban areas.”<sup>15</sup>

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<http://www.nydailynews.com/news/politics/local-gov-restrict-sex-offenders-live-court-article-1.2118406>.

<sup>6</sup> Brief for Respondent at 7, *People v. Diack*, 26 N.E.3d 1151 (N.Y. 2015) (APL-2014-00041) [hereinafter “Brief for Respondent”].

<sup>7</sup> 974 N.Y.S.2d 235 (Sup. Ct. Nassau Cnty. 2013).

<sup>8</sup> Diack’s crime, possessing an obscene sexual performance by a child, is in violation of New York Penal Law § 263.11- “knowing the character and content thereof, he knowingly has in his possession or control, or knowingly accesses with intent to view, any obscene performance which includes sexual conduct by a child less than sixteen years of age.” N.Y. PENAL LAW § 263.11 (McKinney 2012). This crime is classified as a class E felony. *Id.*

<sup>9</sup> *Diack*, 974 N.Y.S.2d at 236.

<sup>10</sup> *Id.* SORA will be addressed in Section II.

<sup>11</sup> *Court of Appeals Tosses Local Laws Restricting Where Sex Offenders Can Live*, CBS NEW YORK (Feb. 18, 2015), <http://newyork.cbslocal.com/2015/02/18/court-of-appeals-tosses-local-laws-restricting-where-sex-offenders-can-live/>.

<sup>12</sup> *Diack*, 974 N.Y.S.2d at 236.

<sup>13</sup> *People v. Diack*, 26 N.E.3d 1151, 1153 (N.Y. 2015).

<sup>14</sup> *Diack*, 974 N.Y.S.2d at 237.

<sup>15</sup> *Id.* at 238.

On the defendant's appeal in February of 2015, the New York Court of Appeals reversed the Appellate Term's decision.<sup>16</sup> The New York Court of Appeals found that the State's "ongoing monitoring, management and treatment of registered sex offenders" constitutes a "detailed and comprehensive regulatory scheme" showing the State's intent to regulate the field.<sup>17</sup> The court also stated that local laws such as Nassau County's "hinder State-wide uniformity concerning sex offender placement."<sup>18</sup>

This note will explore the reasons local residency restrictions laws, such as Nassau County's Local Law No. 4-2006, are invalidated by state law preemption, and the problem this lapse in legislation creates for the public and for sex offenders. More specifically, the note will analyze how New York State's laws regarding sex offender registration do not address the level of concern that localities have in regulating the field.<sup>19</sup> Although the state government has regulatory control and a valid interest in regulating sex offender registration, this kind of power would be best situated in a locality's hands.<sup>20</sup> The local laws can conform to the specific desires and unique safety needs of each town, village, or county, while the state law seeks to achieve blanket uniformity over a largely diverse state.<sup>21</sup> As long as New York State sex offender registration laws preempt the local laws, communities will be unable to address their unique interests and needs.<sup>22</sup>

Section II of this note will discuss the history of sex offender laws in the country as a whole, as well as the federal laws regarding sex offender registration. Section III of this note will explore the details of New York's sex offender registry law, the process of assessing and applying level designations to sex offenders, and the social stigma sex offenders face. Section IV of this note will analyze New York's preemption of local residency restriction laws and the

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<sup>16</sup> *Diack*, 26 N.E.3d at 1151. After Nassau County District Court granted Diack's motion to dismiss, the Appellate Term reversed and held it could not discernibly state that local governments are unauthorized to legislate stricter residency restrictions on sex offenders than the state currently does. *Id.* at 1153-54. Diack then appealed this judgment to the New York Court of Appeals. *Id.*

<sup>17</sup> *Id.* at 1158-59.

<sup>18</sup> *Id.* at 1159.

<sup>19</sup> Brief for Respondent, *supra* note 6.

<sup>20</sup> Brief for Respondent, *supra* note 6.

<sup>21</sup> Brief for Respondent, *supra* note 6.

<sup>22</sup> Brief for Respondent, *supra* note 6.

reasons why local government laws should not be preempted because New York's legislation is not comprehensive. Section V of this note will provide examples of Long Island, New York communities that have enacted regulations that are more stringent than New York State's, and the effect these restrictions have on sex offenders. Lastly, Section VI of this note will compare the arguments of sex offenders and local governments in regard to the interest of stringent residency restrictions.

## II. THE HISTORY OF SEX OFFENDER REGISTRY LAWS IN THE UNITED STATES

### A. What Sparked the Concern?

Society's view of sex offenders, historically, has been "one of intolerance rather than compassion."<sup>23</sup> The concept of creating a sex offender registry began in the 1930s, with Florida adopting the first sex offender registration laws in 1937.<sup>24</sup> This first registration law only required the registration of people convicted of felonies "involving moral turpitude."<sup>25</sup> Even as recently as 1989, only twelve states had some type of sex offender registration laws.<sup>26</sup> In the early 1990s, the movement for revision and implementation of sex offender registry laws gained momentum, following a "handful of high-profile sexual assaults of children by ex-offenders."<sup>27</sup> In 1990, the state of Washington was responsive in regard to registration and community notification laws when it enacted legislation "permitting dissemination of identifying information on registrants to communities in which registrants lived."<sup>28</sup>

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<sup>23</sup> Melissa Wangenheim, Note, *'To Catch a Predator,' Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559, 568 (2010).

<sup>24</sup> Jennifer N. Wang, Note, *Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act*, 59 N.Y.L. SCH. L. REV. 681, 686 (2014/2015).

<sup>25</sup> Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## B. Federal Sex Offender Registry Law

In 1989, eleven year-old Jacob Wetterling, his brother, and their friend went to a convenience store in their town of St. Joseph, Minnesota, and were riding their bikes home.<sup>29</sup> On their way home, a masked gunman approached the boys, and ordered them to “throw their bikes into a ditch, turn off their flashlights, and lie face down in the ground.”<sup>30</sup> The gunman then told Jacob’s brother and friend to run away, and “threatened to shoot them if they looked back.”<sup>31</sup> When the two boys did look back, they saw the gunman take Jacob away.<sup>32</sup> Despite the tireless efforts of Jacob’s family, friends, the community, and law enforcement, “Jacob has never been found.”<sup>33</sup> State statutes due to the public response to this horrific incident led to a federal act, which “served as the backbone and catalyst” for federal sex offender registry legislation.<sup>34</sup>

The first provisions for federal sex offender registration were enacted in 1994 as part of the Jacob Wetterling Act with “overwhelming bi-partisan political support,”<sup>35</sup> in response to Jacob’s tragic disappearance in 1989.<sup>36</sup> This Act “directed states to register sex offenders and offenders whose victims were children” and allowed for community notification of such sex offenders.<sup>37</sup> When President Bill Clinton signed the law, he remarked:

[f]rom now on, every State in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people’s rights, but today America proclaims there is no greater right than a parent’s right to raise a child in safety and love.<sup>38</sup>

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<sup>29</sup> RICHARD G. WRIGHT, *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 79 (2009).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Richard A. Paladino, Note, *The Adam Walsh Act As Applied to Juveniles: One Size Does Not Fit All*, 40 *HOFSTRA L. REV.* 269, 274-75 (2011).

<sup>35</sup> Logan, *supra* note 25, at 5.

<sup>36</sup> 42 U.S.C. § 14071 (1994) (repealed 2006).

<sup>37</sup> Logan, *supra* note 25, at 5.

<sup>38</sup> Wang, *supra* note 24, at 686.

States that did not implement the program would not receive ten percent of federal funding that would otherwise be given to the state.<sup>39</sup> With the threat of losing federal funds, most states were quick to comply, and by 1996, all states implemented these sex offender registration laws.<sup>40</sup>

Although the states complied with Congress's sex offender registration law, states were "slow to accept Congress's invitation to implement community notification regimes."<sup>41</sup> In fact, by 1996, only seventeen states had implemented community notification requirements.<sup>42</sup> This prompted Congress's enactment of Megan's Law that same year.<sup>43</sup> Megan's Law amended the Jacob Wetterling Act, and mandated community notification of sex offenders' information acquired through the states' registration systems.<sup>44</sup> Megan's Law requires the release of registry information in order to "protect the public," and any of the information can be disclosed for "any purpose" permitted under state law.<sup>45</sup> Megan's Law was in response to a high-profile murder case in New Jersey in 1994.<sup>46</sup> Megan Kanka, then seven-years old, was "abducted, raped, and murdered near her home."<sup>47</sup> The man who confessed to Kanka's murder lived across the street from her home, and had twice "been convicted of sex offenses involving young girls."<sup>48</sup> Two weeks after Kanka's body was discovered, bills for community notification were introduced in the New Jersey General Assembly, which named these bills an emergency.<sup>49</sup> Kanka's murder provided the "impetus and model" for notifications laws throughout the country.<sup>50</sup>

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<sup>39</sup> Logan, *supra* note 25, at 5-6.

<sup>40</sup> Logan, *supra* note 25, at 6.

<sup>41</sup> Logan, *supra* note 25, at 6.

<sup>42</sup> Logan, *supra* note 25, at 6.

<sup>43</sup> 42 U.S.C. § 14071(d) (repealed 2006).

<sup>44</sup> Logan, *supra* note 25, at 6.

<sup>45</sup> Susan Oakes, *Megan's Law: Analysis on Whether it is Constitutional to Notify the Public of Sex Offenders via the Internet*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1133, 1139 (1999).

<sup>46</sup> *Id.* at 1133.

<sup>47</sup> *Id.*

<sup>48</sup> E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997).

<sup>49</sup> *Id.*

<sup>50</sup> Christopher King, Note, *Sex Offender Registration and Notification Laws at Home and Abroad: Is an International Megan's Law Good Policy?*, 15 N.Y. CITY L. REV. 117, 122 (2011).

In 2006, Congress enacted the “harshest and toughest set of federal laws against sex offenders,”<sup>51</sup> known as the Adam Walsh Act.<sup>52</sup> On July 27, 1981, six year-old Adam Walsh was abducted from a mall in Hollywood, Florida.<sup>53</sup> In response, his parents initiated a massive hunt for Adam, but unfortunately, on August 10, 1981, his remains were found approximately 100 miles from Hollywood, Florida, in a canal.<sup>54</sup> John Walsh, Adam’s father, “channeled his grief into advocacy work for crime victims” and pushed for the enactment of this legislation by Congress.<sup>55</sup>

The Adam Walsh Act replaced the Jacob Wetterling Act in order to create a “comprehensive sex offender supervision and management scheme.”<sup>56</sup> The new act sought to enforce “more rigorous punishments upon sex offenders who fail to register or do so inaccurately and also requires more intensive information gathering and dissemination.”<sup>57</sup> The Adam Walsh Act makes it a felony for sex offenders to knowingly fail to register and/or verify their registration when moving across state lines.<sup>58</sup> This was a substantial change from the now repealed Jacob Wetterling Act, which did not “impose independent federal criminal liability” for a sex offender who failed to register under the appropriate state regulations.<sup>59</sup> The Adam Walsh Act also established the federal government’s three-tier classification system for registrants.<sup>60</sup> The tier designation is intended to “determine the time intervals at which registration information must be verified and the duration of registration itself.”<sup>61</sup>

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<sup>51</sup> Paladino, *supra* note 34, at 278.

<sup>52</sup> 42 U.S.C. § 16901 (2006).

<sup>53</sup> *This Day in History: Adam Walsh is Abducted*, HISTORY, <http://www.history.com/this-day-in-history/adam-walsh-is-abducted> (last visited Jan. 19, 2016).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Caitlin J. Monjeau, Note, *All Politics is Local: State Preemption and Municipal Sex Offender Residency Restrictions in New York State*, 91 B.U. L. REV. 1569, 1576 (2011).

<sup>57</sup> *Id.*

<sup>58</sup> Logan, *supra* note 25, at 7 (citing 18 U.S.C. § 2250(a)(2-3) (2006)).

<sup>59</sup> *United States v. Kapp*, 487 F. Supp. 2d 536, 538-39 (M.D. Pa. 2007).

<sup>60</sup> 42 U.S.C. § 16911 (2006).

<sup>61</sup> Logan, *supra* note 25, at 10.

The tiers correspond to the severity of the individual’s prior offense supporting conviction, with tier III including (1) persons convicted of state offenses punishable by imprisonment for more than one year, and comparable to, or more severe than, a list of specified aggravated sexual offenses, or (2) recidivist tier II registrants.

Logan, *supra* note 25, at 10.



Title I of the Adam Walsh Act is the Sex Offender Registration and Notification Act (hereinafter “SORNA”).<sup>62</sup> SORNA gives “a comprehensive set of minimum standards for sex offender registration and notification in the United States.”<sup>63</sup> SORNA seeks to “close potential gaps and loopholes that existed under prior law” and to strengthen the nationwide network of sex offender registry.<sup>64</sup> The federal government declared its purpose for establishing SORNA was in response to predators’ vicious and violent attacks against victims, seventeen of which are named and described in the Code.<sup>65</sup> SORNA also created a National Sex Offender Registry, in which the Attorney General maintains a national database with the Federal Bureau of Investigation, for “each sex offender and any other person required to register in a jurisdiction’s sex offender registry.”<sup>66</sup> In addition, SORNA mandates a community notification program, which requires the appropriate officials to “notify the U.S. General, law enforcement agencies, schools, and public housing agencies in the state where the offender resides,” where the offender is employed, or where the offender is a student.<sup>67</sup>

Congress acted quickly to respond to the undisputed recidivism rate of sex offenders when it enacted both the Jacob Wetterling Act and the Adam Walsh Act, “reacting to public outrage and fear.”<sup>68</sup> Because of its quick enactment and response, the state legislatures hastily created laws that are far-reaching, in order to target all sex offenders.<sup>69</sup> The laws have created a broad, all-encompassing definition of a sex offender, so that it is not just the popularly perceived image of a “lecherous old man preying on little boys and girls.”<sup>70</sup> Rather, the “nineteen year-old who has consensual sex with his fifteen-year-old girlfriend who claims to be eighteen,” a

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<sup>62</sup> 42 U.S.C. § 16901 (2006).

<sup>63</sup> Wang, *supra* note 24, at 688.

<sup>64</sup> Informational Brochure, Office of Justice Programs, SMART: Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking- SORNA, <http://ojp.gov/smart/sorna.htm> (last visited Feb. 18, 2017).

<sup>65</sup> 42 U.S.C. § 16901 (2006).

<sup>66</sup> 42 U.S.C. § 16919 (2006).

<sup>67</sup> Paladino, *supra* note 34, at 280. The community notification program also allows this information to be provided to any organization, company, or individual who requests the information. Paladino, *supra* note 34, at 280.

<sup>68</sup> Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notifications Laws*, 74 N.Y.U. L. REV. 1451, 1452 (1999).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1454.

woman convicted of prostitution, and a man who has consensual sodomy with a woman could all be labeled sex offenders, though these individuals are not necessarily the vicious predators that are most feared by community members.<sup>71</sup>

### III. NEW YORK STATE'S SEX OFFENDER REGISTRATION LAW

#### A. The Different Types of Sex Offender Registry Laws in New York

In 1996, in response to Congress's enactment of Megan's Law, the New York State legislature enacted SORA.<sup>72</sup> Under SORA, the State keeps a record of personal and residency information of sex offenders.<sup>73</sup> New York State maintains a file with the registrant's information, such as his name, aliases, birthday, physical features such as height and weight, eye color, address, and any internet accounts the offender uses.<sup>74</sup> This file also includes a photograph, fingerprint information, description of conviction, employment or school information, and "any other information deemed pertinent by the division."<sup>75</sup> Sex offenders are designated a level 1 through 3, correlated to a risk of reoffending, and depending on the designated level, the registrant may have to update his or her photograph with New York State yearly or once every three years.<sup>76</sup> SORA also has a provision indicating the duration of registration and verification of a sex offender in New York.<sup>77</sup> Dependent on the sex offender's designated level, the sex offender may be required to register annually for a period of twenty years, or for higher-risk recidivists, annually for the rest of his life.<sup>78</sup> Those that are of the highest level of risk to reoffend must "personally verify his or her address every ninety calendar days with local law enforcement agency having jurisdiction where the offender resides."<sup>79</sup>

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<sup>71</sup> *Id.* at 1456.

<sup>72</sup> N.Y. CORRECT. LAW § 168 (McKinney, Westlaw through 2016).

<sup>73</sup> N.Y. CORRECT. LAW § 168-b (McKinney 2013).

<sup>74</sup> *Id.* at § 168-b(1)(a).

<sup>75</sup> *Id.* at § 168-b(1)(b)-f).

<sup>76</sup> *Id.* at § 168-b(1)(b). Sex offender registration designation will be discussed in Section III (B).

<sup>77</sup> N.Y. CORRECT. LAW § 168-h(1) (McKinney 2006).

<sup>78</sup> *Id.* at § 168-h(1-2).

<sup>79</sup> *Id.* at § 168-h(3).

In addition, in 2007, New York State also enacted the Sex Offender Management and Treatment Act (hereinafter “SOMTA”).<sup>80</sup> SOMTA governs sex offender supervision through “continuing treatment for a mental abnormality” for the “protection of the public.”<sup>81</sup> The interest in enacting this statute was to protect citizens from the predictable and uncontrollable recidivism of sex offenders.<sup>82</sup> SOMTA recognizes that some sex offenders may have mental abnormalities that increase likelihood of recidivism, and that these people may need longer, specialized treatment to address their individual risk to reoffend.<sup>83</sup> SOMTA’s three ultimate goals are to “protect the public, reduce recidivism, and ensure offenders have access to proper treatment” while incarcerated and post-incarceration.<sup>84</sup> Through SOMTA, New York State treats sex offenders while they are incarcerated, and continues to treat them after the incarceration period comes to an end.<sup>85</sup> Post incarceration, the sex offender is evaluated in a “notice and case review” where a panel of three members reviews his or her case.<sup>86</sup> The panel is made of various professionals in the fields of mental health and developmental disabilities, with “experience in the treatment, diagnosis, risk assessment or management of sex offenders.”<sup>87</sup> It is this panel that decides whether the sex offender requires civil management.<sup>88</sup>

Under SOMTA, if the sex offender is determined to require civil management, notice must be given to the Attorney General, “accompanied by a written report from a psychiatric examiner that includes a finding as to whether the respondent has a mental abnormality.”<sup>89</sup> The Attorney General may file a Sex Offender Civil Management Petition in the Supreme Court or County Court where the sex offender is located, and shall serve the sex offender with the petition, containing statements “alleging facts of an evidentiary

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<sup>80</sup> 2007-3318 N.Y. Consol. Laws Adv. Legis. Serv. 7, art. 10 (LexisNexis).

<sup>81</sup> 83 N.Y. JUR. 2D PENAL AND CORRECTIONAL INSTITUTIONS § 45 (Westlaw 2016).

<sup>82</sup> State of New York v. Maurice G., 928 N.Y.S.2d 162, 169 (Sup. Ct. Bronx Cnty. 2011).

<sup>83</sup> 2007-3318 N.Y. Consol. Laws Adv. Legis. Serv. 7, § 10.01(B) (LexisNexis).

<sup>84</sup> *Id.* at § 10.01(C).

<sup>85</sup> *Id.* at § 10.01(B).

<sup>86</sup> *Id.* at § 10.05(A). There must be a case review panel consisting of at least fifteen members in total. *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 2007-3318 N.Y. Consol. Laws Adv. Legis. Serv. 7, § 10.05(A) (LexisNexis).

<sup>89</sup> *Id.* at § 10.05(G).

character tending to support the allegation that the respondent is a sex offender requiring civil management.”<sup>90</sup>

### **B. The Mechanics of Registration Designation Under SORA**

Pursuant to SORA, there are three levels of risk, dependent on the individual sex offender’s threat and danger to the public: “level 1 (low risk), level 2 (moderate risk), and level 3 (high risk).”<sup>91</sup> The Board of Examiners of Sex Offenders (hereinafter “BOE”) determines these designations.<sup>92</sup> The BOE takes into account numerous factors in determining the risk of a convicted sex offender, including his criminal history, the term served, if the crime was against a child, if this crime was his or her first sex offense, relationship to the victim, use of a weapon, psychiatric profiles, and various other facts pertaining to the sex offender.<sup>93</sup> The BOE looks at two major factors: the person’s likelihood of recidivism and the harm that would result from the re-offense.<sup>94</sup> The sex offender’s designated level “determines the amount of information that can be disseminated about him to the public under the Act’s notification procedures.”<sup>95</sup> Further, the BOE may designate the person as a “Sexually Violent Offender, Predicate Sex Offender, Sexual Predator, or no such designation.”<sup>96</sup> The risk level and possible designation also determine the length of time for which an offender needs to

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<sup>90</sup> *Id.* at § 10.06(A).

Civil commitment to a secure treatment facility is required if the court finds . . . that the respondent ‘has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.

*Matter of State of New York v. Enrique T.*, 937 N.Y.S.2d 203, 207 (App. Div. 1st Dep’t 2012).

<sup>91</sup> Act Report, N.Y. Unified Court System, Sex Offender Registration Act: Risk Assessment Guidelines and Commentary 1 (2006), [http://www.nycourts.gov/reporter/06\\_SORAGuidelines.pdf](http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf) [hereinafter “*Guidelines and Commentary*”].

<sup>92</sup> N.Y. CORRECT LAW § 168-1 (McKinney 2011) (“Such board shall consist of five members appointed by the governor. All members shall be employees of the department and shall be experts in the field of the behavior and treatment of sex offenders.”).

<sup>93</sup> *Id.* at § 168-1(5)(a-b).

<sup>94</sup> *Guidelines and Commentary*, *supra* note 91, at 2.

<sup>95</sup> *Guidelines and Commentary*, *supra* note 91, at 1.

<sup>96</sup> *Guidelines and Commentary*, *supra* note 91, at 1.

register.<sup>97</sup> The BOE uses a numerical point system to assess each risk factor.<sup>98</sup> The points are then added together and the offender is designated with a level: “if the total score is 70 points or less, the offender is presumptively level 1; if more than 70 but less than 110, he is presumptively level 2; if 110 or more, he is presumptively level 3.”<sup>99</sup>

The risk-level designation in New York State differs from the federal classification system under the Adam Walsh Act.<sup>100</sup> New York’s classification system not only assesses the crime that the sex offender has previously committed, but rather looks at his likelihood to reoffend in the future by assessing his “current dangerousness.”<sup>101</sup> Thus, the level determines the risk of recidivism, as well as the amount of time that he must register annually— whether it is for twenty years or for the rest of his or her life.<sup>102</sup> Level one sex offenders who have not been designated as a “sexual predator,” “sexually violent offender,” or a “predicate sex offender” must register annually for a period of twenty years from the first date of registration.<sup>103</sup> Those who are designated as level two or three, or those who are labeled as a sexual predator, sexually violent offender, or a predicate sex offender, must register annually for the rest of his life.<sup>104</sup>

A level two or three registered sex offender must have his residence evaluated by the probation department in order to be in compliance with SORA.<sup>105</sup> Under 9 N.Y.C.R.R. § 365.4, the probation department must consider a variety of factors when

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<sup>97</sup> *Guidelines and Commentary*, *supra* note 91, at 1.

<sup>98</sup> *Guidelines and Commentary*, *supra* note 91, at 3. For example, 20 points for two victims; 30 points for three or more victims.

<sup>99</sup> *Guidelines and Commentary*, *supra* note 91, at 3.

<sup>100</sup> 42 U.S.C. § 16915 (2006).

<sup>101</sup> Logan, *supra* note 25, at 10.

<sup>102</sup> N.Y. CORRECT. LAW § 168-h(1-3) (McKinney 2006).

<sup>103</sup> *Id.* at § 168-h(1).

<sup>104</sup> *Id.* at § 168-h(2). Under §168-o,(1) a level two sex offender who has not been designated as a sexual predator, sexually violent offender, or a predicate sex offender, and who has registered for a minimum of thirty years may be relieved of his or her duty to register “upon the granting of a petition for relief by the sentencing court or by the court which made the determination regarding duration of registration and the level of notification.” *Id.* Through this petition, the sex offender bears the burden of proving by “clear and convincing evidence” that his or her risk to reoffend no longer exists and the “verification is no longer necessary.” *Id.*

<sup>105</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 365.4 (2009).

evaluating the registered sex offender's choice of residence. These factors include:

(1) the location of other sex offenders required to register under SORA, specifically whether there is a concentration of registered sex offenders in a certain residential area or municipality; (2) the number of registered sex offenders residing at a particular property; (3) the proximity of entities with vulnerable populations; (4) accessibility to family members, friends, or other supportive services including, but not limited to, locally available sex offender treatment programs with preference for placement of such individuals into programs that have demonstrated effectiveness in reducing sex offender recidivism and increasing public safety; and (5) the availability of permanent, stable housing in order to reduce the likelihood that any such probationer will be transient.<sup>106</sup>

In addition, the probation department may also consider the addresses, ages, and relationships of victims to the registered sex offenders, as well as the "known presence of persons under the age of 18 in the residence or proposed residence."<sup>107</sup> The probation department is also responsible for avoiding a concentration of offenders in neighborhoods and communities.<sup>108</sup> Though what may constitute a concentration depends on the circumstances such as housing availability, in some cases, it may be safer to house registered sex offenders together.<sup>109</sup> Further, since sex offenders reside all over the state, residency restrictions should not be enforced so that one community bears "an inappropriate burden in housing sex offenders because another community has attempted to shift its responsibility for those offenders onto other areas of the State."<sup>110</sup>

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<sup>106</sup> *Id.* at § 365.4(a)(1-5).

<sup>107</sup> *Id.* at § 365.4(1)(a)(5)(i-iii).

<sup>108</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 365.3(d)(2) (2009).

<sup>109</sup> *Id.* at § 365.3(d)(ii). When sex offenders reside together, law enforcement officers "may more efficiently monitor offenders, and service providers may more easily offer transitional services to offenders in these congregate settings." *Id.*

<sup>110</sup> *Id.* at § 365.3(d)(5).

### C. Social Stigma of Sex Offenders Post-Registration

Sex offender registration is intended to protect and inform communities, not to be an additional punishment, but convicted sex offenders have claimed that registration under SORA and SOMTA is unconstitutional because it violates their fundamental rights.<sup>111</sup> Sex offenders claim registration violates the right to have a damage-free reputation, and this violation causes sex offenders to suffer potential loss of employment and additional special conditions of parole.<sup>112</sup> When legislation restrains the liberty and rights of an individual, the act's language must be strictly construed.<sup>113</sup> Thus, under this strict scrutiny standard, "there must be a compelling state interest" to subject the sex offender to SORA's regulations.<sup>114</sup> Sex offender fundamental rights claims are prevalent throughout the country even though the Supreme Court has held that "injury to reputation alone is not a deprivation of liberty."<sup>115</sup> The following three cases are examples of sex offender fundamental rights claims that have failed because though SORA implicates sex offenders' rights, courts hold community concerns as a higher priority.

In *Doe v. Miller*,<sup>116</sup> an Iowa case, the respondents claimed that sex offender residency restrictions infringed on their substantive due process and fundamental rights.<sup>117</sup> These sex offenders committed a wide range of offenses, such as sexual exploitation of minors, lascivious acts with a child, second and third degree sexual abuse, and indecent exposures.<sup>118</sup> Iowa enacted a code that restricted the of persons convicted of certain criminal offenses, such as the ones the plaintiffs committed, from living within 2,000 feet of a school or child-care facility.<sup>119</sup> The respondents claimed the statute infringed their right to privacy regarding family life, right to travel, and right to live where one chooses, stating all of these rights are fundamental.<sup>120</sup>

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<sup>111</sup> *People v. Cintron*, 827 N.Y.S.2d 445, 446-47 (Sup. Ct. Bronx Cnty. 2006).

<sup>112</sup> *Id.* at 450.

<sup>113</sup> *State v. Mack*, 900 N.Y.S.2d 615, 623 (Sup. Ct. Bronx Cnty. 2010).

<sup>114</sup> *Cintron*, 827 N.Y.S.2d at 450-51.

<sup>115</sup> WRIGHT, *supra* note 29, at 81.

<sup>116</sup> 405 F.3d 700 (8th Cir. 2005).

<sup>117</sup> Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residency Restrictions in Florida*, 58 FLA. L. REV. 1147, 1171 (2006).

<sup>118</sup> *Doe*, 405 F.3d at 705.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 708. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding a fundamental right of parents and guardians to direct the upbringing and education of their

The court held that residency restrictions do not “operate directly on the family relationship” because though respondents are restricted as to where they may live, the statute does not limit who may live with them in their residences.<sup>121</sup> The court also held that residency restrictions do not implicate a violation of “the right to personal choice regarding family,” and found this argument too general -- “it would trigger strict scrutiny of innumerable laws and ordinances that influence ‘personal choices’ made by families on a daily basis.”<sup>122</sup> Further, the right to travel argument was also rejected by the court, stating this guarantee of interstate travel protects against erection of barriers from movement and difference in treatment from intrastate and interstate travelers.<sup>123</sup> The court held that Iowa’s statute does not impose an obstacle on sex offenders to travel within the state, and that sex offenders have “free ingress and regress” in and out of Iowa.<sup>124</sup>

In *People v. Cintron*,<sup>125</sup> a New York case, five petitioners sought to be relieved from registering as sex offenders, claiming SORA’s registration requirements to be unconstitutional as applied to them.<sup>126</sup> The five petitioners committed various crimes such as drug possession, attempted murder, burglary, kidnapping, and promotion of prostitution.<sup>127</sup> The petitioners argued that it is unfair to require them to register as sex offenders under SORA where the applicable crimes were not sexually motivated.<sup>128</sup> The petitioners claimed the fundamental rights involved are the “liberty interests associated with the stigma of being labeled as sex offenders, the limiting of employment opportunities and the possibility of public disclosure of

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children); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (finding a fundamental right to choose who lives in a home, and not just limiting home occupants to just nuclear families).

<sup>121</sup> *Doe*, 405 F.3d at 710. Note this case is from Iowa. There may be restrictions in other states that would prohibit registered sex offenders from living with certain family members, such as if he or she is the victim, or is under a certain age.

<sup>122</sup> *Id.* at 709-10.

<sup>123</sup> *Id.* at 711.

<sup>124</sup> *Id.* at 712.

<sup>125</sup> 827 N.Y.S.2d 445 (Sup. Ct. Bronx Cnty. 2006).

<sup>126</sup> *Id.* at 447.

<sup>127</sup> *Id.* There were no allegations of sexual harms to the victims of these cases, but the defendants’ crimes such as unlawful imprisonment of a minor by a nonparent, kidnapping in the second degree, and attempted kidnapping the second degree of a child by a nonparent fall under sex offenses and require registration under SORA. *Id.*

<sup>128</sup> *Id.* at 456.



their status.”<sup>129</sup> Although the court ruled that SORA may affect a sex offender’s liberty interest, “the fact that a liberty interest triggers the protection of procedural due process does not mean that a fundamental right is implicated for purposes of substantive due process.”<sup>130</sup> The court stated that the “right to avoid stigmatization as a sex offender where defendant has not engaged in any express sexual conduct” does not rise to the status of a fundamental right.<sup>131</sup> Fundamental rights must be deeply rooted in the country’s history, and since SORA has only recently become widespread, the rights implicated by SORA cannot rise to the fundamental level.<sup>132</sup>

In *People v. Fuller*,<sup>133</sup> an Illinois case, the court stated there may be a connection between crimes such as attempted murder, burglary, kidnapping, and promotion of prostitution and the purpose of SORA, mostly because these crimes are “often a precursor offense” to a generally labeled sexually oriented offense, such as rape, sexual assault or pimping.<sup>134</sup> In this case, the defendant’s story provides the perfect example of the rational relationship between the two types of crimes.<sup>135</sup> The arresting police officer stated that when he asked the defendant what he planned on doing with the children he kidnapped, he stated he was “going to find a hotel room and ask the girl if she had any friends.”<sup>136</sup> In these instances, SORA aims to “punish behavior that creates a risk to public safety, even absent any actual injury.”<sup>137</sup> These sex offenders have acted in such a way that

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<sup>129</sup> *Cintron*, 827 N.Y.S.2d at 452.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 453.

<sup>132</sup> *Id.* See *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (“In determining which rights are fundamental, judges...must look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there]...as to be ranked as fundamental.’”).

<sup>133</sup> 756 N.E.2d 255 (Ill. 2001).

<sup>134</sup> *Id.* at 260.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Cintron*, 827 N.Y.S.2d at 459.

For example, section 1192 (2) of the Vehicle and Traffic Law makes it illegal to drive with more than 0.08% blood alcohol, regardless of whether defendant’s driving actually is affected by the consumption of alcohol. By contrast, section 1192 (3) of the Vehicle and Traffic Law, so called ‘common-law intoxication,’ requires that defendant’s driving abilities substantially be impaired by the consumption of alcohol. Both sections are punishable by up to one year in jail. Clearly, the Legislature determined that driving with 0.08% blood alcohol creates a risk of harm comparable to driving while actually affected by alcohol.

creates a risk of sexual abuse to a victim.<sup>138</sup> This case contrasts greatly from *Cintron*, where the petitioners' crimes were not sexually motivated.<sup>139</sup> When using the rational relationship test between a crime and the threat of recidivism and harm to the community, the petitioners in both *Cintron* and *Fuller* were treated similarly, though they had completely different motivations in regard to their crimes.<sup>140</sup>

SORA's constitutionality has been upheld for a number of reasons, one being that the public notification requirement is not imposed "in lieu of incarceration or fines" but rather because it serves the "goals of protecting the public and facilitating future law enforcement efforts."<sup>141</sup> SORA's unambiguous language makes it clear that if there is a sexually oriented offense, or the offense is rationally related to a "legitimate governmental objective" underlying SORA's adoption, the sex offender must register, regardless of the stigma it may cause him in society.<sup>142</sup> Residence restrictions may make it more difficult for sex offenders to find housing, and "may force sex offenders to look for housing in less desirable areas, but these laws do not restrict offenders from engaging in daily activities."<sup>143</sup> But as stated in *Cintron*, "if petitioners are unhappy with being stigmatized as sex offenders, their remedy is to...refrain from committing crimes that create a risk of sexual abuse."<sup>144</sup> Further, in the legislative history of SORA, a New York assembly member indicated that stigmas attach to all criminal convictions, not just sex offender registration.<sup>145</sup> Rather, the registration is something "incurred as a result of what he/she has actually done" and not as a "badge of disgrace thrust upon him by [the] government or the public."<sup>146</sup>

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*Id.*

<sup>138</sup> *Id.* at 459.

<sup>139</sup> *Id.* at 455-56.

<sup>140</sup> *Id.* at 456.

<sup>141</sup> *Doe v. Pataki*, 120 F.3d 1263, 1283-84 (2d Cir. 1997).

<sup>142</sup> *Cintron*, 827 N.Y.S.2d at 450.

<sup>143</sup> Wernick, *supra* note 117, at 1170.

<sup>144</sup> *Cintron*, 827 N.Y.S.2d at 460.

<sup>145</sup> Letter from Daniel L. Feldman, New York State Assembly Member, 45<sup>th</sup> District, to Honorable Michael Finnegan, Counsel to the Governor, 4 (July 7, 1995).

<sup>146</sup> *Id.*

#### IV. STATE SEX OFFENDER REGISTRATION LAWS PREEMPT LOCAL LAWS AND LOCAL INTEREST IN RESIDENCY RESTRICTIONS

Article IX of the New York State Constitution vests local governments of the state with their authority.<sup>147</sup> New York's "home rule" has two parts: the first restricts the state government intrusion on local government matters, and the other is "an affirmative grant of powers to local governments to manage their affairs."<sup>148</sup> The State's Constitution gives local governments the ability to adopt local laws that are consistent with the laws the state legislature enacts.<sup>149</sup> The problem is the State Constitution does not give a standard as to what is considered consistent or inconsistent.<sup>150</sup>

Conflict between state and local government occurs when a state legislature expressly declares its intent to occupy a field, excluding local laws, or when a locality "adopts a law that directly conflicts" with state legislation.<sup>151</sup> One of the most fundamental principles of home rule is that a local law cannot be preempted because it merely adds to an existing state law, rather, the local law is actually furthering the state's interest.<sup>152</sup> If a local government's law merely incidentally infringes on a state law, it will not be preempted and the local law stays in place.<sup>153</sup> Further, the mere fact that state and local laws "touch" the same area is "insufficient to support a determination that the State has preempted the entire field or regulation in a given area."<sup>154</sup> As the Appellate Term, Second Department in *People v. Diack* reasoned before reversal, since the state legislature chose not to enact laws restricting level one sex offenders not on "parole, probation, subject to conditional discharge or seeking public assistance," Nassau County did not reasonably

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<sup>147</sup> N.Y. CONST. art. IX, § 1.

<sup>148</sup> James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 713 (1985).

<sup>149</sup> N.Y. CONST. art. IX, § 2(c).

<sup>150</sup> *Id.* ("In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government. . . .").

<sup>151</sup> *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 190 (N.Y. 2001).

<sup>152</sup> *Vatore v. Comm'r of Consumer Affairs*, 634 N.E.2d 958, 960 (N.Y. 1994).

<sup>153</sup> *DJL Rest. Corp.*, 749 N.E.2d at 191.

<sup>154</sup> *Jancyn Mfg. Corp. v. County of Suffolk*, 518 N.E.2d 903, 907 (N.Y. 1987).

believe the state law preempted the local law that imposed more restrictions.<sup>155</sup>

Even if the state legislature does not expressly state its intent to occupy a field such as sex offender registration, the Legislature may “do so by implication.”<sup>156</sup> Implied intent by the State Legislature may be evident in state policy or “from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area.”<sup>157</sup> When the Legislature does enact detailed regulatory schemes in a certain field, the local government may not legislate on the same topic unless it receives “clear and explicit authority” to do so.<sup>158</sup> This is designed to prevent a “head-on collision” between a local law and a state law.<sup>159</sup> The New York State sex offender laws do not contain a statement regarding the need for uniformity throughout the state, and the belief that there should be uniformity is “irrelevant to the preemption analysis” where the legislature “has not actually indicated such an intent.”<sup>160</sup>

The goal of residency restrictions on sex offenders “is to increase public safety protection by limiting sex offenders’ access” to areas that children frequent.<sup>161</sup> Historically across the country, residency restrictions “have been implemented on a local rather than state level” because localities are better able to hear the desires of their community members.<sup>162</sup> The New York State statutes affecting the residences of registered sex offenders explicitly articulate what they purport to cover.<sup>163</sup> It states that the housing procedural guidelines are applicable “to the supervision of any individual designated a Level 2 or 3 sex offender” pursuant to SORA and “sentenced to a period of probation.”<sup>164</sup> The unambiguous language shows that the state did not intend to include level one sex offenders in its regulatory scheme of SORA.<sup>165</sup> The Legislature does not

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<sup>155</sup> *Diack*, 974 N.Y.S.2d at 238.

<sup>156</sup> *Doe v. County of Rensselaer*, 2009 WL 2340873 at \*4 (Sup. Ct. Rensselaer Cnty. 2009).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Lansdown Entm’t Corp. v. N.Y.C. Dep’t of Consumer Affairs*, 543 N.E.2d 725, 726 (N.Y. 1989).

<sup>160</sup> Brief for Respondent, *supra* note 6, at 46.

<sup>161</sup> *WRIGHT*, *supra* note 29, at 88.

<sup>162</sup> *WRIGHT*, *supra* note 29, at 88.

<sup>163</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 365.2 (2009).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (articulating the coverage of solely level 2 and level 3 sex offenders).

clearly forbid the regulation of level one sex offenders to the same extent as levels two and three, and as stated earlier, merely adding to an existing state legislation should not be considered to be inconsistent, and therefore invalid and preempted.<sup>166</sup> Even if a local ordinance addresses the same matter as a state law, when the “ordinance complements the goals furthered by the state law,” it may not be preempted.<sup>167</sup>

Despite the fact that the State Legislature has deemed local ordinances preempted by SORA, localities have “declined to repeal sex-offender residency restrictions even in the face of state court rulings” that voided the local ordinances.<sup>168</sup> This is primarily due to the vast differences in demographics and circumstances throughout the state.<sup>169</sup> Local governments are in a much better position to make decisions to suit their citizens’ needs, such as residency.<sup>170</sup> Local laws that merely seek to further the purpose of the general, state law should be regarded as supplementary and beneficial to the state law and should not be preempted.<sup>171</sup>

#### V. LOCALITY INTEREST IN LEGISLATING SEX OFFENDER RESIDENCY REGULATION

The ultimate goal of sex offender residency restrictions “is to protect the community.”<sup>172</sup> Though SORA does not impose residency restrictions on sex offenders, other New York laws work to limit where the offender may live.<sup>173</sup> The New York State Division of Criminal Justice Services has not since updated its website after the *Diack* decision, and even states “there may be local laws in a particular county, city, town or village that restrict where a sex offender may live,” acknowledging that the state legislature has left a gap for localities to fill with their own desired residency

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<sup>166</sup> *Vatore*, 634 N.E.2d at 960.

<sup>167</sup> Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 43 (2014).

<sup>168</sup> *Id.* at 44.

<sup>169</sup> Brief for Respondent, *supra* note 6, at 7.

<sup>170</sup> Brief for Respondent, *supra* note 6, at 7.

<sup>171</sup> Brief for Respondent, *supra* note 6, at 33.

<sup>172</sup> WRIGHT, *supra* note 29, at 93.

<sup>173</sup> FAQ, N.Y. St. Division of Criminal Just. Serv., Frequently Asked Questions, <http://www.criminaljustice.ny.gov/nsor/faq.htm#1> (last visited Feb. 18, 2017).

restrictions.<sup>174</sup> As recently as 2008, The New York State Division of Criminal Justice Services' Commissioner stated, "the management of sex offenders is one of the most vexing issues that local communities face."<sup>175</sup> This was in a press release announcing that New York State was to sponsor training to localities with the "development of effective sex offender management strategies."<sup>176</sup> The following subsections will provide examples of Long Island villages, towns, and counties that have taken steps to enact ordinances to restrict sex offender residences in accordance with the desires of their community members.

#### A. New York's Nassau and Suffolk Counties

##### i. Nassau County

Nassau County's sex offender residency restriction prevents "any registered sex offender" from residing in three such places:

- 1) one thousand feet of the property line of a school;
- or 2) five hundred feet of the property line of a park;
- or 3) knowingly establishes a residence or domicile where the property line of such residence or domicile lies within two thousand feet of the property line of the residence or the workplace of such sex offender's victim(s), unless otherwise ordered by a court having jurisdiction over said offender.<sup>177</sup>

Title K of Chapter VIII of the Nassau County Administrative Code indicates that the legislative intent of that local law is meant to cover more ground than SORA, in that the "legislature finds that it can be made more effective by requiring the county's law enforcement agencies to notify entities with vulnerable populations about such offenders residing in their vicinity."<sup>178</sup> Further, the Nassau County Legislature stated its concern regarding the

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<sup>174</sup> *Id.*

<sup>175</sup> Janine Kava, *State to Sponsor Training Designated to Assist Communities with Development of Effective Sex Offender Management*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES (May 23, 2008), [http://criminaljustice.ny.gov/pio/press\\_releases/2008-05-23a\\_pressrelease.html](http://criminaljustice.ny.gov/pio/press_releases/2008-05-23a_pressrelease.html).

<sup>176</sup> *Id.*

<sup>177</sup> Nassau County Local Law § 8-130.6(a)(1-3) (2009).

<sup>178</sup> *Id.* at §8-130.1

interaction of sex offenders and the youth, stating that it is part of the county's "compelling governmental interest in ensuring that children do not become victims of sex crimes" and the best way to do so is to impose residency restrictions on sex offenders.<sup>179</sup> Nassau County imposes an even more stringent restriction on level two and three sex offenders.<sup>180</sup> This section provides that the offender must give oral notification that he or she is a registered sex offender to "the proprietor of any hotel, motel or shelter within the County at the time said offender initially establishes a residence or domicile at said hotel, motel or shelter."<sup>181</sup>

## ii. *Suffolk County*

The Suffolk County Local Law 12-2006 is similar to Nassau County's law in that its purpose is to protect "the most vulnerable residents of the county," namely for the "well-being of children."<sup>182</sup> Suffolk County's Local Law places a residency restriction for all registered sex offenders, unlike the New York State Law that is merely applicable to levels two and three sex offenders.<sup>183</sup> The law states that all registered sex offenders may not reside "within ¼ mile of the property line of any school...any public or private nursery, elementary, middle, or high school...licensed day-care...playground...amusement park; or the residence or principal place of enjoyment of the victim(s) of their crime(s)."<sup>184</sup> The Suffolk Legislature stated that the County has "gone to great lengths to protect the children of this County from sex offenders, such as the requiring certain sex offenders to wear ankle bracelets so that law enforcement can determine their whereabouts" and that Suffolk must "take all steps necessary" to protect citizens of the county.<sup>185</sup> Suffolk expressed so much of an interest in regulating its county's sex offenders, that it even has specialized legislation to track homeless sex offenders.<sup>186</sup> Since homeless sex offenders are more difficult for the state and the county to track, the law requires any homeless sex

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at § 8-130.6(b).

<sup>181</sup> Nassau County Local Law § 8-130.6(b) (2009).

<sup>182</sup> Suffolk County Local Law § 745-1(A)-(D) (2006).

<sup>183</sup> *Id.* at § 745-3(A).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at § 745-1(B)-(D).

<sup>186</sup> *Id.* at § 745-22-27

offender in Suffolk County to “report his or her overnight location” to the Suffolk County Police Department before midnight each day.<sup>187</sup> Any homeless sex offender who does not comply with reporting his or her location may be guilty of a misdemeanor.<sup>188</sup>

### **B. Massapequa Park, New York-A Nassau County Village**

The Village of Massapequa Park is an example of a Long Island community that passed local codes regarding sex offender residency restrictions.<sup>189</sup> The Village passed its local law to restrict registered sex offenders from residing close to schools, in order to “reduce the opportunity and temptation” for sex offender recidivism.<sup>190</sup> Under the Village law, it is unlawful for “any registered sex offender to establish a residence or domicile within a one-mile radius” of any school, park, or another registered sex offender.<sup>191</sup> The Village of Massapequa Park laws states that a sex offender that violates the Village law could face a fine up to \$2,500, and that “each and every day a violation exists or continues shall be a separate violation.”<sup>192</sup> The Village Board states in its legislative intent that it found the recidivism rate of sex offenders to be high, and “programs designed to treat and rehabilitate these types of offenders have been largely ineffective.”<sup>193</sup>

Massapequa Park is a good example of why a locality may desire different residency laws from another area of the state that is demographically diverse.<sup>194</sup> In its 2.2 square mile area are four schools and three parks.<sup>195</sup> Within just one mile of the borders of the village are at least five more schools, in addition to Massapequa Preserve (a Nassau County Park), which “runs along the vast majority of the Village’s western boundary.”<sup>196</sup> Under the Village of

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<sup>187</sup> Suffolk County Local Law § 745-24 (2006).

<sup>188</sup> *Id.* at §745-26. (“Punishable by a fine of up to \$1,000 and/or up to one year’s imprisonment.”).

<sup>189</sup> Village of Massapequa, N.Y. Code § 279-3 (2009).

<sup>190</sup> *People v. Kramer*, 994 N.Y.S.2d 256, 262 (Just. Ct. Nassau Cnty. 2014).

<sup>191</sup> Village of Massapequa, N.Y. Code § 279-3 (2009).

<sup>192</sup> *Id.* at § 279-8.

<sup>193</sup> *Id.* at § 279-1(B).

<sup>194</sup> Brief for Respondent, *supra* note 6, at 7.

<sup>195</sup> *Kramer*, 994 N.Y.S.2d at 265.

<sup>196</sup> *Id.*



Massapequa Park's local law, because it is so densely populated, there is no part of the village where a sex offender may legally reside.<sup>197</sup>

### C. Coram, New York- A Suffolk County Hamlet

The Town of Brookhaven enacted the Child Protection Act in 2005, placing residency restrictions throughout the town.<sup>198</sup> Under the residency restrictions, a registered sex offender may not establish his domicile within one-quarter mile of a school, playground, or park.<sup>199</sup> In 2007, the Hamlet of Coram, located in the Town of Brookhaven, was the “center of the largest cluster of sex offenders” on Long Island.<sup>200</sup> At that time, according to the state sex offender registry list, “there were 45 high-risk sex offenders” living in Coram, “seventeen on a single block.”<sup>201</sup> This is due to numerous landlords that disregard the residency restrictions,<sup>202</sup> and view renting to sex offenders as part of a “religious mission.”<sup>203</sup> Jennifer Gonnerman, writer for *New York Magazine*, interviewed tenants of an infamous sex offender house where seven of the nine tenants had been convicted of a sex offense.<sup>204</sup> According to the tenants, they live in the house because they have been “cast out by society” and they will be cast out for the rest of their lives, which the “nature of their crimes guarantees.”<sup>205</sup>

Though some sex offenders in Coram may have a place to live, the community harshly rejects their presence, and members feel that the landlords who rent to sex offenders are trying to undermine

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<sup>197</sup> *Id.*

<sup>198</sup> Town of Brookhaven Code, § 55-3 (2006).

<sup>199</sup> *Id.* at § 55-3(A)(1) and (2).

<sup>200</sup> Jennifer Gonnerman, *The House Where They Live*, NEW YORK MAGAZINE (Dec. 30, 2007), <http://nymag.com/news/features/42368/>.

<sup>201</sup> *Id.*

<sup>202</sup> Town of Brookhaven Code, §55-3(B) (2006) (stating property owners may not knowingly lease to a registered sex offender, or allow the offender to establish residence/domicile on the premises if the property is within one-quarter mile of a school, park or playground).

<sup>203</sup> Corey Kilgannon, *Threats of Violence as Homes for Sex Offenders Cluster in Suffolk*, NEW YORK TIMES (Oct. 9, 2006), <http://query.nytimes.com/gst/fullpage.html?res=990DEFDD1330F93AA35753C1A9609C8B63>.

<sup>204</sup> Gonnerman, *supra* note 200.

<sup>205</sup> Gonnerman, *supra* note 200.

the ideals of the community.<sup>206</sup> One community member, Donald Keegan, took matters into his own hands, prepared road flares and paint thinner with intentions on burning down a house in which sex offenders resided.<sup>207</sup> When Keegan was arrested for this attempt, he was regarded as a “local hero” because he was “doing what the whole neighborhood wanted to do.”<sup>208</sup> Shortly after, at a homeowners’ meeting in a local library, another community member stated he would burn a sex offender residence down, and in response, fifty people stood and clapped.<sup>209</sup>

## VI. SO, WHERE DO THEY GO?

Some may say keeping sex offenders away from populous areas where children are more heavily concentrated might “keep them from temptation and, concomitantly, protect children.”<sup>210</sup> Residency restriction laws were created under the impression that public knowledge of sex offenders’ whereabouts would in turn, increase public safety.<sup>211</sup> Communities overwhelmingly feel that these laws are “integral to the protection of children from sexual victimization.”<sup>212</sup> This feeling of safety is contrary to scientific studies that show no significant reduction of recidivism against victims due to residency restrictions in communities.<sup>213</sup> Further, these restrictions do not protect the community against the most common type of offender: the “known offender.”<sup>214</sup> The known or “typical” offender is someone that often, the victim knows or who is related to the victim.<sup>215</sup> It is the stranger, “atypical” offender who is

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<sup>206</sup> Kilgannon, *supra* note 203.

<sup>207</sup> Kilgannon, *supra* note 203 (Keegan was arrested before his plan was carried out, was charged with attempted murder and attempted arson, facing a near 25-year sentence).

<sup>208</sup> Kilgannon, *supra* note 203.

<sup>209</sup> Kilgannon, *supra* note 203.

<sup>210</sup> Monjeau, *supra* note 56, at 1578.

<sup>211</sup> LAURA J. ZILNEY & LISA ANN ZILNEY, *PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS* 123 (Greg Barak eds., 2009) [hereinafter “*PERVERTS AND PREDATORS*”].

<sup>212</sup> LISA ANN ZILNEY & LAURA J. ZILNEY, *RECONSIDERING SEX CRIMES AND OFFENDERS: PROSECUTION OR PERSECUTION?* 126 (2009) [hereinafter “*PROSECUTION OR PERSECUTION*”].

<sup>213</sup> *Id.* at 127.

<sup>214</sup> *PERVERTS AND PREDATORS*, *supra* note 211, at 126.

<sup>215</sup> *PROSECUTION OR PERSECUTION*, *supra* note 212, at 33 (“The ‘typical offender’ is the offender who is not reported to law enforcement, the offender who is one’s father, or brother, or uncle, or priest, or cousin, or boyfriend, or neighbor. The ‘typical offender’ is someone we know.”).

reported to the police, and who is affected by residency restrictions of sex offender registration laws.<sup>216</sup> If these restrictions do not protect the public from the most common offenders, and studies show the restrictions have little impact on recidivism rates, what *do* the restrictions do for society?

Many sex offenders believe that the restriction would not impede them from reoffending, if they so desired.<sup>217</sup> Sex offenders feel that these restrictions “serve no purpose but to give some people the illusion of safety.”<sup>218</sup> When sex offenders are released from prison, they already face a significant, deserved social stigma, making their transitions even more difficult.<sup>219</sup> When sex offenders attempt to assimilate back into society, many are unable to return to their own homes after incarceration and live with family members, and if they did not previously live with family, they are unable to rent or renew a lease with their landlords.<sup>220</sup> This inability to find a residence without violating registration laws leads many sex offenders to face homelessness.<sup>221</sup> According to research, residency restrictions cause “instability and transience,” limit the housing opportunities for sex offenders, which leads to homelessness and displacement.<sup>222</sup> Criminology research has shown several factors that deter sex offenders from re-offending: locating himself around a support system of friends and family, employment, a stable residence, and social relationships.<sup>223</sup> These factors are exactly what community residency restrictions prohibit the sex offender from achieving, which may ultimately cause him or her to reoffend.<sup>224</sup>

Bill O’Leary, a licensed social worker with a doctorate degree in clinical psychology, works with sex offenders on Long Island.<sup>225</sup> He has stated that the sex offenders he works with have been living in

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<sup>216</sup> PROSECUTION OR PERSECUTION, *supra* note 212, at 33

<sup>217</sup> PERVERTS AND PREDATORS, *supra* note 211, at 131.

<sup>218</sup> PERVERTS AND PREDATORS, *supra* note 211, at 131.

<sup>219</sup> Monjeau, *supra* note 56, at 1578.

<sup>220</sup> RICHARD G. WRIGHT, SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 183 (Stephanie Drew, eds., 2d ed. 2014).

<sup>221</sup> *Id.*

<sup>222</sup> Denise Womer, *Not in My Backyard: Do Stricter Sex Offender Laws Really Protect Citizens?*, LAW ENFORCEMENT TODAY (May 30, 2013), <http://www.lawenforcementtoday.com/2013/05/30/not-in-my-backyard-do-stricter-sex-offender-laws-really-protect-citizens/>.

<sup>223</sup> PROSECUTION OR PERSECUTION, *supra* note 212, at 128.

<sup>224</sup> PROSECUTION OR PERSECUTION, *supra* note 212, at 128.

<sup>225</sup> Bonilla & Ngo, *supra* note 4.

trailers in locations of “high-concentration,” such as Coram, and many are living in violation of the local ordinances.<sup>226</sup> Suffolk County created this trailer system in 2007 to avoid the “no-not-ever-in-my-backyard” community opinion of sex offenders.<sup>227</sup> These trailers move from town to town, “touching down on the commercial and industrial fringes of communities” so as to not disturb community members.<sup>228</sup> This system was shut down in 2013, as County Executive Steve Bellone stated the trailers have “overburdened these communities for much longer than any community should have to bear.”<sup>229</sup> Though this system was supposed to assist the homeless sex offender population, the trailers only benefitted forty sex offenders, a mere four percent of over one thousand registered sex offenders in the county.<sup>230</sup> O’Leary states that the localities want to make as many sex offenders homeless as possible and they “want to make it so difficult to be homeless that they violate and go back to jail.”<sup>231</sup> In response, local governments have stated the purposes of the residency restrictions are to protect the towns’ families and promote public safety, and that the local governments’ task is not to find sex offenders homes that do not violate the laws.<sup>232</sup>

The local governments of Long Island seek to prevent recidivism of sex offenders by steering them away from where children congregate,<sup>233</sup> but a 2002 study by the U.S. Department of Justice found recidivism rates of sex offenders after the first three years of release was “5.3 percent” which is significantly lower than for other crimes such as robbery.<sup>234</sup> O’Leary has stated that the residency restrictions are “predicated on the notion that sex offenders are likely to reoffend and therefore must be closely monitored,” but

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<sup>226</sup> Bonilla & Ngo, *supra* note 4.

<sup>227</sup> *The Toxic Offender*, NEW YORK TIMES (March 4, 2007), [http://www.nytimes.com/2007/03/04/opinion/nyregionopinions/LITrailers.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2007/03/04/opinion/nyregionopinions/LITrailers.html?pagewanted=all&_r=1).

<sup>228</sup> *Id.*

<sup>229</sup> Paul Larocco, *Sex Offender Trailers Shutting by Tuesday*, NEWSDAY (May 24, 2013), <http://www.newsday.com/long-island/suffolk/sex-offender-trailers-shutting-by-tuesday-1.5333684>.

<sup>230</sup> *Id.*

<sup>231</sup> Bonilla & Ngo, *supra* note 4.

<sup>232</sup> Bonilla & Ngo, *supra* note 4.

<sup>233</sup> Town of Brookhaven Code, §55-3(A)(1) and (2) seek to prohibit sex offenders from residing near playgrounds, schools, and parks, all places where children gather.

<sup>234</sup> Bonilla & Ngo, *supra* note 4.

many are also “heavily” regulated by parole officers.<sup>235</sup> Those in favor of the residency restrictions state that though the laws cannot completely eliminate sexual offenses from occurring, the restrictions can set rules for the community, and limit the offender from having “daily eye-contact view of potential victims.”<sup>236</sup>

Numerous studies have shown little connection between a decrease in recidivism and residency restrictions on sex offenders.<sup>237</sup> Though residency restrictions make it much more difficult for sex offenders to reintegrate into society, the laws are overwhelmingly supported by community members.<sup>238</sup> Residency restrictions appeal to the public even with the knowledge that “the policies may impede the reintegration of offenders into the community” and even if there is no scientific proof that restrictions make communities safer.<sup>239</sup>

## VII. CONCLUSION

The history of sex offender registration laws is not lengthy, with the beginning of a large movement only in the 1990s.<sup>240</sup> Congress showed its teeth when it implemented the Adam Walsh Act, mandating that states enact sex offender registration and notification laws in the interest of public safety.<sup>241</sup> New York responded by enacting SORA, which regulates the higher risk level two and three sex offenders.<sup>242</sup> Though level one sex offenders have a low risk of recidivism, New York State does not regulate their residences once they are released from incarceration.<sup>243</sup> This is where county and town laws have come in to protect the needs of community members.<sup>244</sup> Unfortunately, New York State legislation preempts local residency restriction laws.<sup>245</sup> Though there is little

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<sup>235</sup> Bonilla & Ngo, *supra* note 4.

<sup>236</sup> Bonilla & Ngo, *supra* note 4.

<sup>237</sup> PROSECUTION OR PERSECUTION, *supra* note 212, at 126-27.

<sup>238</sup> PROSECUTION OR PERSECUTION, *supra* note 212, at 126.

<sup>239</sup> PROSECUTION OR PERSECUTION, *supra* note 212, at 126.

<sup>240</sup> Logan, *supra* note 25, at 5.

<sup>241</sup> 42 U.S.C. § 16901 (2006).

<sup>242</sup> N.Y. CORRECT. LAW § 168 (McKinney 1996).

<sup>243</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 365.4 (2009). New York only addresses residences of level two and level three sex offenders.

<sup>244</sup> See e.g., Nassau County Local Law §8-130 (2009); Suffolk County Local Law §745 (2006); Village of Massapequa, N.Y. Code § 279 (2009); Town of Brookhaven Code §55 (2006).

<sup>245</sup> *Diack*, 26 N.E.3d at 1159.

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conclusive research showing the actual threat of sex offenders to society,<sup>246</sup> and though these residency restrictions impose a great burden on sex offenders,<sup>247</sup> if local governments wish to regulate who is living in their communities, so long as the state has not occupied the entire field of regulation, localities should have the final say as to who is living next -door.

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<sup>246</sup> ZILNEY & ZILNEY, PROSECUTION OR PERSECUTION, *supra* note 212, at 126-27.

<sup>247</sup> Worner, *supra* note 222.