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Wayne A. Logan
Florida State University College of Law

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* Visiting Professor of Law, College of William and Mary School of Law (Fall 2006); William Mitchell Research Professor of Law, William Mitchell College of Law. Special thanks to Kim Dayton, Brannon Denning, Neal Devins, Dave Douglas, Jim Dwyer, Roderick Hills, Eric Janus, Alexandra Klass, Roxanne Lieb, David Logan, Paul Marcus, Ronald Rotunda, Norman Williams, and Ron Wright for their helpful comments. Also, many thanks to Robin Dull, of the *Iowa Law Review* staff, for his input and suggestions.

I. INTRODUCTION

Among the most notable accomplishments in America's ongoing evolution is a definitional one: the transformation of the nation's denizens, initially disposed to identify with their states, into "Americans." This development, of course, was not the result of mere chance or inadvertence: the nation's Constitution itself was born of a recognized need to bind residents more tightly than permitted by the Articles of Confederation,[1] as evidenced in the Preamble's invocation of "We the People of the United States."[2] Almost a century later, in the wake of a regionally inspired Civil War,[3] the need to fortify the nation's collective identity was again made manifest, inspiring a constitutional amendment expressly making Americans citizens both of the "States wherein they reside" and "of the United States."[4] As a result, national citizenship came to serve as "the dominant and paramount allegiance among us" to a greater extent than ever before.[5]

Throughout the nation's history one premise has thus held firm: "that the peoples of the several states must sink or swim together."[6] First

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1. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 449 (Max Farrand ed., 1911) (letter of James Madison to J.G. Jackson) ("[M]ost of us carried into the Convention a profound impression produced by the experienced inadequacy of the old Confederation . . . as to the necessity of binding the States together by a strong Constitution."); *id.* at 455 (General Remarks on the Convention by James Madison) (expressing hope that the Constitution would exercise a "restraining influence . . . on the aberrations of the States . . . . stifl[ing] wishes & inclinations which would otherwise ripen into overt & pernicious acts"). Hamilton condemned the "unneighborly regulations of some States," which were "contrary to the true spirit of the Union," and posited that, if left unchecked, state conflicts would cause citizens of each state "to be considered and treated by the others in no better light than that of foreigners and aliens." THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins Paperbacks 1981) (2d ed. 1966).

2. U.S. CONST. pmbl.

3. *See generally* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988).

4. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); *see also* ERIC FONER, THE STORY OF AMERICAN FREEDOM 106 (1998) (observing that in the wake of the Civil War there emerged a "newly empowered national state and the idea of a national citizenship enjoying equality before the law").

5. Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring); *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 510 (1939) ("The first sentence of the [Fourteenth] Amendment settled the old controversy as to citizenship . . . . Thenceforward citizenship of the United States became primary and citizenship of a State secondary."); MELINDA LAWSON, PATRIOT FIRES: FORGING A NEW AMERICAN NATIONALISM IN THE CIVIL WAR NORTH 3 (2002) (noting that in the wake of the Civil War "a 'Union' of states had become a 'nation' of Americans"); MCPHERSON, *supra* note 3, at 859 (observing that before the Civil War "the United States" was often a plural noun and that in its aftermath it was regarded as singular).

6. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (Cardozo, J.); *see also* Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("'For all the great purposes for which the Federal government was formed, we are one people, with one common country.'" (quoting Smith v.

jeopardized by primarily commercial conflict (late 1700s) and later political conflict (mid-1800s), national solidarity today faces a new threat, one of a social nature: state efforts to ban ex-criminal offenders, in particular those convicted of sex offenses, from their bounds.

At this time, eighteen states and hundreds of localities have adopted laws preventing convicted sex offenders from living in prescribed areas,[7] affecting thousands of individuals.[8] Given the enormous political appeal of exclusion laws,[9] and the reluctance of the judiciary thus far to invalidate them,[10] there is every reason to expect that they will continue to proliferate, and if past experience holds, inspire efforts to target other ex-offender subpopulations as well. This expansion, however, will come at the expense of the nation's collectivist tradition, for while the individuals targeted by the laws are despised and feared, they ineluctably also constitute part of the "people[]" with whom all Americans must "swim."[11]

This Essay addresses how such subnational efforts at social control undermine American constitutional collectivism. Part II provides an overview of the current wave of residence exclusion laws, examining the broad range of constraints the laws impose on individuals. The discussion then situates the laws in the context of other governmental strategies to use geographic limits to achieve social control goals, an impulse the Supreme Court once deemed "founded . . . in the sacred law of self-defense."[12] Residence exclusion laws, however, differ from these kindred efforts in important ways, most importantly because the laws can effectively result in

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Turner (The Passenger Cases), 48 U.S. (7 How.) 283, 492 (1849))); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43 (1867) ("The people of these United States constitute one nation. They have a government in which all of them are deeply interested.").

7. *See infra* notes 26–48 and accompanying text.

8. *See* Parents for Megan's Law: Nationwide Registries & Links, http://www.parentsformeganslaw.com/html/links.lasso (last visited Aug. 31, 2006) (providing state-by-state count of registered individuals).

9. *See, e.g.*, Charles Toutant, *Zoning Out Sex Offenders*, N.J. L.J., Nov. 21, 2005, at A1 (observing that residence exclusion laws "are usually passed with little debate and zero opposition, since sex offenders are the pariahs of modern society").

10. *See infra* notes 70–113 and accompanying text. On November 28, 2005, the Supreme Court refused to reconsider the most significant decision to date on the issue, *Doe v. Miller*, which upheld the constitutionality of Iowa's residence exclusion law. Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757, 757–58 (2005).

11. *Baldwin*, 294 U.S. at 523; *see also* NAT'L DIST. ATT'YS ASSOC., POLICY POSITIONS ON PRISONER REENTRY ISSUES, stmt. 1, at 1 (2005), *available at* http://www.ndaa-apri.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf (acknowledging that "prisoner reentry has become a crucial criminal justice issue"). The literature emphasizing the importance of successful reentry and the constellation of challenges it presents is expansive and growing by the day. For notable examples, see generally JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005).

12. R.R. Co. v. Husen, 95 U.S. 465, 471 (1877).

indefinite status-based banishment from entire states, backed by threatened criminal sanctions.

Part III examines the state and federal judicial decisions that have thus far addressed residence exclusion laws. Showing characteristic deference to the police power of states, in each instance courts have rebuffed challenges. Missing from these decisions, which focused on the residence restrictions of the particular provisions challenged, however, is critical concern for the actual in-state and out-of-state consequences of exclusion laws. While the laws do not impose de jure banishment,[13] they do, in conjunction with already acutely limited housing options for ex-offenders, impose limits that result in de facto banishment. Individual state efforts to expel and repel ex-offenders, in turn, ultimately have broader systemic effects; other states, fearful of an invasion of ex-offenders, respond by adopting their own exclusion laws, domino-effect style. As a consequence, as the laws gain favor, a classic tragedy of the commons problem is now taking shape, with states exporting negative externalities in the form of increased social welfare costs associated with offender reentry, and, ultimately, the prospect for criminal recidivism.

Part IV discusses how residence exclusion laws defy the collectivist traditions on which the nation was founded and threaten the destructive interstate discord the federal union was designed to avoid. After canvassing the many textual manifestations of constitutional collectivism, the Essay focuses on its prime jurisprudential manifestations, singling out two of the Supreme Court's Dormant Commerce Clause decisions in particular. The first, *Edwards v. California*,[14] addressed a state effort to exclude the poor, a subclass of the nation's citizenry that, like ex-offenders, has historically been regarded with disdain. The second, *City of Philadelphia v. New Jersey*,[15] addressed a state effort to bar solid and liquid waste from its territory, an impulse that again parallels modern American correctional policy, aptly referred to as a system of "waste management."[16]

In both instances, the Court, while acknowledging the exigencies motivating state isolationism, invalidated the laws because they betrayed the collective imperative of dealing with challenges (the poor and waste) faced by all states. By analogy, the states cannot be permitted to eschew the social and economic challenges presented by ex-offenders, who today reenter

13. Interstate banishment itself has traditionally resisted successful federal constitutional challenge. *See* Stephanie Smith, Comment, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461, 1480–81 (2000). Courts have, however, invalidated banishment laws on public policy grounds. *See infra* note 148 and accompanying text.

14. Edwards v. California, 314 U.S. 160 (1941).

15. City of Phila. v. New Jersey, 437 U.S. 617 (1978).

16. *See* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 470 (1992).

society in unprecedented numbers. In sum, just as the nation recognized the need to quell state isolationism vis-à-vis economic and commercial matters, so too must it recognize the need to limit state efforts to isolate themselves from the collective social responsibility of ex-offender reentry.

Part IV examines the prospects for a means to stem the proliferation of exclusion laws. Ideally, the states themselves, in the face of the obvious no-win, comity-based problems associated with exclusion, would resist the temptation to enact the laws. However, the potent political appeal of exclusion weighs heavily against this likelihood. Courts provide another possible avenue; however, the absence of a specific constitutional basis for intervention makes judicial relief equally improbable. Finally, given that the laws present a collective action problem generated by self-interested states, federal congressional intervention has significant appeal. However, federal political leaders, who themselves must stand for reelection before state voters, likely will be disinclined to contravene the politically popular impulse to exclude, resulting in the continued enactment and application of the laws by states.

II. FEAR AND LOATHING (IN ONE'S OWN BACKYARD)

In addition to being the world's sole political superpower, modern America enjoys preeminent distinction as a punisher. In recent years, the nation has been engaged in an unprecedented experiment in mass penality,[17] regularly leading the world in imprisonment rates.[18] America's penchant for the death penalty, likewise, remains an enduring basis of distinction among Western countries.[19] As recognized by Michael Tonry, "[W]e live in a repressive era when punishment policies that would be unthinkable in other times and places are not only commonplace but also

17. At year-end 2004, nearly seven million individuals were incarcerated or on probation or parole in the United States, amounting to more than 3% of the population. LAUREN E. GLAZE & SERI PALLA, U.S. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2004, at 1 (2005). In 2004, the national inmate population grew by 2.6%, to roughly 2.2 million. PAIGE M. HARRISON & ALLEN J. BECK, U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004, at 1–2 (2005). For data on the rapid growth of the U.S. prison population over the past quarter century, see THOMAS P. BONCZAR, U.S. BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003) (projecting that if rates remain constant, 6.6% of persons born in the United States in 2001 will go to prison during their lives, up from 1.9% in 1974).

18. ROY WALMSLEY, BRITISH HOME OFFICE, WORLD PRISON POPULATION 1 (5th ed. 2003) (noting that the United States leads the world in per capita imprisonment rates, followed by Russia and Belarus). For discussion of America's comparative punitive position vis-à-vis Western Europe, see generally JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

19. *See* Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1337 (2002) (reviewing AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001)).

are enthusiastically supported by public officials, policy intellectuals, and much of the general public."[20]

Foremost among the targets for the nation's punitive zeal have been sex offenders.[21] Beset by a "moral panic" in the 1990s,[22] states significantly increased prison terms for convicted sex offenders[23] and took renewed interest in long-dormant provisions permitting their involuntary commitment upon release from prison.[24] These measures, while achieving the desired goal of physical confinement, failed to assuage public concerns over ex-offenders subject to community release. To address this gap, states in the mid-1990s (at the urging of the federal government) enacted sex offender registration and community notification laws, now in effect nationwide.[25]

With the dawn of the new millennium, however, another community-based strategy has gained popularity—laws prohibiting convicted sex offenders from living in specified locations. Eighteen states now prohibit such individuals from living near schools and other places where children potentially congregate.[26] The spatial limits range from 500 feet[27] to 2,000

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20. Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1752 (1999).

21. *See* ADAM SAMPSON, ACTS OF ABUSE: SEX OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM 124 (1994) ("The vehemence of the hatred for sex offenders is unmatched by attitudes to any other offenders.").

22. PHILLIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 6 (1998); *see also* Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452, 455–56 (1998) (discussing the powerful political allure of "popular punitiveness" and its impact on sex offender-related legislation).

23. *See* Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 571–74 (2002) (surveying national increases in sex offender penalties). For instance, as a result of this emphasis, during the period 1980–1995 the number of sex offenders in Minnesota state prisons increased 230%. *See Community Notification*, SESS. WKLY., vol. 12, No. 13, at 7 (Minn. H.R. 1995). During this time, one out of every five Minnesota prisoners was incarcerated for a sex offense. *Id.*

24. *See* Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 323–25 (2003).

25. *See* Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, *in* 989 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES, SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT 337–38 (Robert A. Prentky et al. eds., 2003).

26. ALA. CODE § 15-20-26(a) (1995 & Supp. 2005); ARK. CODE ANN. § 5-14-128(a) (2006); FLA. STAT. § 794.065 (2004); GA. CODE ANN. § 42-1-13(b) (Supp. 2006); IDAHO CODE ANN. § 18-8329 (2004 & Supp. 2006); 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (2004); IND. CODE ANN. § 35-42-4-11(c) (West Supp. 2006); IOWA CODE § 692A.2A(2) (2005); KY. REV. STAT. ANN. § 17.495 (West 2003 & Supp. 2006); LA. REV. STAT. ANN. § 14:91(A)(2) (2004 & Supp. 2006); MICH. COMP. LAWS §§ 28.734(1), 28.735(1) (2004 & Supp. 2006); MISS. CODE ANN. § 45-33-25(4) (2000 & Supp. 2006); MO. REV. STAT. § 566.147 (2000 & Supp. 2005); N.C. GEN. STAT. § 14-208.16 (Supp. 2006); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis Supp. 2005); OKLA. STAT. tit. 57, § 590 (2001 & Supp. 2005); S.D. CODIFIED LAWS § 22-24B-23 (2004 & Supp. 2006); TENN. CODE ANN. § 40-39-211(a) (2003 & Supp. 2005).

feet,[28] with most states setting the ban at 1,000 feet.[29] All laws use schools and parks as geographic anchor points, but some sweep more broadly. Louisiana, for example, also specifies "any playground, public or private youth center, public swimming pool or free standing video arcade facility,"[30] while Georgia's newly adopted law also prohibits residency within 1,000 feet of any church or "area where minors congregate"[31]—defined to include, inter alia, school bus stops, parks, neighborhood centers, playgrounds, gymnasiums, and swimming pools.[32] In addition, many states augment residence restrictions with limits on where targeted individuals can loiter[33] or prohibit them from working within the designated zone.[34] Finally, most states treat violations of the laws as felonies,[35] with Georgia punishing violations with prison terms between ten and thirty years.[36]

In addition, several states impose residency limits on registrants subject to release pursuant to probation and parole conditions. *See, e.g.*, CAL. PENAL CODE § 3003(g) (West 2005); OR. REV. STAT. §§ 144.642(1)(a), 144.643 (2004); WASH. REV. CODE § 72.09.340(3)(a) (2003). While the discussion here focuses mainly on individuals required to register who are otherwise legally free to move about, limits placed on probationers and parolees are also at issue because such individuals can and often do leave states subject to the Interstate Compact for the Supervision of Adult Offenders. *See* Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71, 73 (2003) (discussing the Act, codified at 4 U.S.C. § 112(a) (2000), and noting that it is in effect in forty-eight states and the District of Columbia).

27. IDAHO CODE ANN. § 18-8329 (Supp. 2006); 720 ILL. COMP. STAT. 5/11-9.3(b-5) (2004); S.D. CODIFIED LAWS § 22-24B-22(1) (Supp. 2006).

28. ALA. CODE § 15-20-26(a) (Supp. 2005); ARK. CODE ANN. § 5-14-128(a) (2006); IOWA CODE § 692A.2A(2) (2005); OKLA. STAT. tit. 57, § 590 (Supp. 2005).

29. FLA. STAT. § 794.065(1) (2004); GA. CODE ANN. § 42-1-15(a) (Supp. 2006); IND. CODE § 35-42-4-11(c) (Supp. 2006); LA. REV. STAT. ANN. § 14:91.1(A)(2) (2004); MICH. COMP. LAWS § 28.733(f) (Supp. 2006); MO. REV. STAT. § 566.147(1) (Supp. 2005); N.C. GEN. STAT. § 14-208.16 (Supp. 2006); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis Supp. 2005); TENN. CODE ANN. § 40-39-211(a) (Supp. 2005). Mississippi's recently enacted law adopts a middle position: 1,500 feet. MISS. CODE ANN. § 45-33-25(4) (2000 & Supp. 2006).

30. LA. REV. STAT. ANN. § 14: 91.1(a)(2) (2004).

31. GA. CODE ANN. § 42-1-15(a) (Supp. 2006).

32. *Id.* § 42-1-12(a)(3). As of this writing, Georgia's school bus stop provision in particular is being challenged in federal court. Although the lawsuit is in its early stages, the district court judge has certified the class and enjoined the law's enforcement. *See* Whitaker v. Perdue, No. 06-0140 (N.D. Ga. July 28, 2006) (separate orders certifying class and enjoining enforcement).

33. *See, e.g.*, 720 ILL. COMP. STAT. 5/11-9.3(b) (2004). While eschewing an outright residency restriction, in 2006 the Washington Legislature banned "convicted child sex offenders" from the premises of schools, playgrounds, parks, and swimming pools. Under the provision, personnel at such premises are authorized to serve written notice on targeted individuals directing them to leave, with felony prosecution threatened if they do not comply. WASH. REV. CODE § 9A.44 (2005 & Supp. 2006).

34. *See, e.g.*, ALA. CODE § 15-20-26(a) (Supp. 2005); GA. CODE ANN. § 42-1-15(b)(1) (Supp. 2006); TENN. CODE ANN. § 40-39-211(a) (Supp. 2005); *see also* MICH. COMP. LAWS §§ 28.734(1), 28.735(1) (Supp. 2006) (precluding employment and loitering).

35. *See* ALA. CODE § 15-20-26(h) (Supp. 2005); ARK. CODE ANN. § 5-14-128(d) (2006); GA. CODE ANN. § 42-1-15(d) (Supp. 2006); 720 ILL. COMP. STAT. 5/11-9.3(d) (2004); IND. CODE ANN. § 35-42-4-11(c) (West Supp. 2006); MISS. CODE ANN. § 45-33-33(2) (2000); MO. REV. STAT.

The laws cast a broad net, tying eligibility to state registration criteria, which can be expansive, sweeping up serious and nonserious and sexual and nonsexual offenders alike,[37] with eligibility trigger dates often dating back many years.[38] Only five states limit their laws to persons convicted of sexual offenses involving child victims, the subpopulation the laws ostensibly seek to protect.[39] Two other states draw classification distinctions among classes of registrants: Louisiana targets only "sexually violent predators"[40] and Arkansas singles out the most serious offender subpopulations under the state's tiered risk classification scheme.[41] Presumably mindful that forcing individuals from their homes would present constitutional takings and due process problems,[42] most (but not all) states prescribe that exclusion is to apply to newcomers.[43]

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§ 566.147(3) (Supp. 2005); N.C. GEN. STAT. § 14-208.16(f) (Supp. 2006); OKLA. STAT. tit. 57, § 590 (Supp. 2005); TENN. CODE ANN. § 40-39-211(e) (Supp. 2005). Five states punish violations as misdemeanors. *See* IDAHO CODE ANN. § 18-8329 (Supp. 2006); IOWA CODE § 692A.2A(3) (2005); KY. REV. STAT. ANN. § 17.495 (West Supp. 2006); LA. REV. STAT. ANN. § 14:91.1(e) (2004); MICH. COMP. LAWS §§ 28.734(1), 28.735(1) (Supp. 2006). In Florida, punishment depends on the seriousness classification of the prior criminal misconduct that triggers application of the law. *See* FLA. STAT. § 794.065(1) (2004). Ohio, alone, sanctions violations of its law civilly, permitting suits for injunctive relief against registrants. *See* Coston v. Petro, 398 F. Supp. 2d 878, 885 (S.D. Ohio 2005) (citing and discussing OHIO REV. CODE ANN. §§ 2950.031, 2950.02(B) (LexisNexis Supp. 2005)). Of late, however, some Ohioans have voiced frustration over what they see as the slow and onerous process entailed and the lack of a criminal penalty for violators. *See generally* Robin Erb, *Ohio's Sex-Offender Law Tough to Enforce: Toledo Law Director Pushes Ordinance to Protect School Zones*, BLADE (Toledo, Ohio), July 17, 2006.

36. GA. CODE ANN. § 42-1-15(d) (Supp. 2006).

37. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 281–83 (2005) (discussing the broad range of predicate offenses that can trigger registration under state laws); *see also* Brian Dickerson, *Overhaul Sex Registry or Cause More Damage*, DETROIT FREE PRESS, Feb. 20, 2006, at 1 ("Michigan lawmakers cast their nets wide, subjecting thousands of low-risk, non-violent offenders to mandatory registration."); Leigh Woosley, *Modern-Day Scarlet Letter*, TULSA WORLD, Apr. 17, 2005, at D1 (discussing exclusion of ex-prostitute convicted of indecent exposure, based on exposing her breast to an undercover officer).

38. Logan, *supra* note 37, at 298 n.208.

39. *See* FLA. STAT. § 794.065 (2004); 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (2004); IND. CODE ANN. § 35-42-4-11(c) (West Supp. 2006); IOWA CODE § 692A.2A(1) (2005); TENN. CODE ANN. § 40-39-211(a) (Supp. 2005). Alabama's 2,000 foot general residence exclusion zone does not single out specific ex-offenders, but its subprovision prohibiting loitering within 500 feet of a broader range of locales is limited to persons convicted of sexual offenses involving minors. ALA. CODE § 15-20-26(f) (Supp. 2005).

40. LA. REV. STAT. ANN. § 14:91.1(A)(2) (Supp. 2006). The category includes such offenses as "crimes against nature" and "video voyeurism." LA. REV. STAT. ANN. § 15:541(14.1) (2004).

41. ARK. CODE ANN. § 5-14-128(a) (2006).

42. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 11.12, 13.5 (7th ed. 2004).

43. Residence exclusion laws in Florida, Georgia, Indiana, Kentucky, Louisiana, and Ohio apply to all targeted individuals. In the other twelve states, laws exempt individuals who owned

In addition to states, local governments have shown significant interest in residence exclusion provisions. Localities in states without such laws have quickly and enthusiastically approved ordinances,[44] politically popular efforts custom-made to draw the attention of state legislators.[45] Likewise, localities in jurisdictions adjacent to states with exclusion laws, fearful of an influx of sex offenders, have seized the initiative and enacted their own laws.[46] Finally, in states with exclusion laws, local governments have often imposed more onerous restrictions,[47] which, while possibly vulnerable to

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or leased their residences before the effective date of the law or lived there before the school or other designated entity moved into the exclusion zone.

44. *See, e.g.*, James W. Prado Roberts, *Home of Megan's Law Still Has Gaps in Sex Offender Notification*, GANNETT NEWS SERV., Mar. 7, 2006, at B1 (noting that at least 108 New Jersey municipalities have enacted residence exclusion ordinances); Steve Wartenberg, *Quakertown Bars Child Molesters: Council OKs Law Giving Convicted Offenders No Place to Stay*, MORNING CALL (Allentown, Pa.), May 4, 2006, at B1 (noting unanimous approval by Quakertown, Pennsylvania City Council of ordinance barring ex-offender residences within 2,500 feet of "any school, child-care facility, park or playground"). Moreover, in states without residence exclusion laws, the private sector has shown interest in exclusion, with developers enjoying increased sales by imposing sex offender exclusion provisions. *See* Wendy Koch, *Developments Bar Sex Offenders*, USA TODAY, June 16, 2006, at 3A (quoting developer of homes in Texas and Kansas to the effect that exclusion has "probably increased our sales three to four times . . . . fight[s] sex offenders head on"). To date, such common-interest residential community provisions have survived legal attack. *See* Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1192–94 (N.J. Super. Ct. App. Div. 2001) (rejecting challenge brought by homeowner, who was not a sex offender, in part due to insufficient information on the extent of such covenants in the state housing market). For additional discussion of private homeowner efforts in this regard, see generally Brett Jackson Coppage, *Balancing Community Interests and Offenders Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood*, 38 URB. LAW. 309 (2006).

45. *See, e.g.*, Maria Cramer, *Fitchburg Joins Effort to Restrict Sex Offenders; Proposal Would Limit Where They Could Live*, BOSTON GLOBE, June 22, 2006, at B1 (noting that local officials in Fitchburg, Massachusetts, "hope enough towns pass their own rules to pressure the Legislature into enacting a statewide law"); James A. Quirk, *Sex Offender Ban Eyed by Town*, ASBURY PARK PRESS (N.J.), Aug. 14, 2005, at B1 ("'It's a little like a pebble rolling down the road . . . . If we start making enough noise in Manalapan, Trenton will have to start listening to us.'" (quoting Miracle Torregrossa)). Under the Manalapan ordinance, individuals are barred from living "within 2,500 feet of any school, day care center, day camp, library, park, playground, recreational facility or convenience store." James A. Quirk, *Manalapan Approves Sex-Offender Ordinance*, ASBURY PARK PRESS (N.J.), Aug. 26, 2005, at B8.

46. *See, e.g.*, John Ferak, *Ashland Puts Limits on Sex Offenders*, OMAHA WORLD-HERALD, Nov. 19, 2005, at 8B (Nebraska border towns); Emily Klein, *Galena to Sex Offenders: Stay Out; City Council Approves Ordinance That Restricts Child Sex Offenders*, TELEGRAPH HERALD (Dubuque, Iowa), Jan. 24, 2006, at A3 (Illinois border towns). Nebraska's newly enacted law, which does not create a statewide exclusion zone, expressly authorizes individual cities to establish limits, setting the maximum distance at 500 feet. Karen Sloan, *Cities Will Be Altering Limits on Offenders: Omaha Is OK, but Some Will Have to Change Ordinance Passed Before a State Law Set Specific Parameters*, OMAHA WORLD-HERALD, Apr. 27, 2006, at 1A.

47. In Orange Beach, Alabama, for instance, elected officials adopted an ordinance that broadens the Alabama 2,000 foot exclusion to four miles. Ryan Dezember, *City Tightens Sex Abuser Restrictions*, MOBILE REG., Sept. 8, 2005, at B3. Officials in Snellville, Georgia, unanimously approved an ordinance that more than doubled (to 2,500 feet) the parameter of the state's exclusion law. John Ghirardini, *Snellville: No Room in the City for Sex Offenders; Council*

preemption challenge,[48] will impose pressure on state politicians to ratchet up extant state laws.

To students of social control, the current wave of residence exclusion laws is neither new nor novel. The laws share an obvious common motivation with other types of Not in My Backyard ("NIMBY") legislation, which seek to deflect activities with adverse community impacts (especially environmental) to other jurisdictions.[49] They also parallel historically accepted efforts to exclude socially undesirable individuals, condoned at the nation's origin in the Articles of Confederation.[50] Sixty years later, the Supreme Court itself backed New York's efforts to exclude paupers arriving by ship, recognizing it "as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts as it is to guard against the physical pestilence, which may arise from unsound and infectious Articles."[51] Over the ensuing decades, governments often saw fit to exclude vagrants[52] and the poor.[53]

Toughens Living Restrictions, ATLANTA J.-CONST., May 21, 2006, at 1J. In Florida, more than sixty local governments have enacted ordinances doubling the state's 1,000 foot exclusion parameter. Todd Leskanic, *More Cities Limit Residences of Sex Offenders*, TAMPA TRIB., May 14, 2006, at Metro 1. Likewise, Florida local officials have shown interest in extending the law to all registrants, not just those convicted of crimes involving minors. Rebecca Dellagloria, *Law Restricting Sex Offenders Passes*, MIAMI HERALD, Aug. 28, 2005, at ML.

48. For discussion of the question of preemption of local criminal provisions in the face of less stringent state laws addressing the same governmental concern, see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1421 (2001). For a recent instance of a rejected preemption challenge concerning a local sex offender registration and community notification law that was stricter than its state law counterpart, see *ACLU of N.M. v. City of Albuquerque*, 137 P.3d 1215 (N.M. Ct. App. 2006).

49. *See generally* BARRY G. RABE, BEYOND NIMBY: HAZARDOUS WASTE SITING IN CANADA AND THE UNITED STATES (1994) (discussing the siting of hazardous waste facilities); Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29, 37–50 (2006) (discussing various responses and approaches to NIMBY).

50. *See* ARTICLES OF CONFEDERATION art. IV (exempting "paupers, vagabonds, and fugitives" from being eligible to exercise the right of state ingress and egress and from enjoying the privileges and immunities available to others).

51. New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837), *overruled in part by* Edwards v. California, 314 U.S. 160, 177 (1941).

52. *See* Papchristou v. City of Jacksonville, 405 U.S. 156, 161 (1972) (recounting history of antivagrancy laws and invalidating local law on due process grounds); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 638–40 (1992). Before being reigned in by *Papachristou* and its progeny, the laws served as widely used, potent tools for police. *See* William J. Stuntz, *Crime Talk and Law Talk*, 23 REV. AM. HIST. 153, 157 (1995) (stating that vagrancy laws "made it possible for police to arrest pretty much anyone, or at least anyone on the street"). For historical accounts of the disdain for and fear of the poor, see NELS ANDERSON, THE HOBO: THE SOCIOLOGY OF THE HOMELESS MAN 163 (1923) ("The average man on the street . . . sees in the tramp either a parasite or a predacious individual."); Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1203 (1953).

Residence exclusion zones are also in keeping with more modern efforts to conceive of crime control in terms of space and spatial design. The theoretical foundation for this shift is evident in increasing emphasis on "place"[54] and geographic profiling[55] in law and criminology, and in crime control strategies such as crime-mapping[56] and enhanced sanctions for crimes committed in particular locales.[57] Consistent with this orientation, state and local governments in recent years have endeavored to curtail social ills by imposing location restrictions on prostitution,[58] drug use and dealing,[59] gang activity,[60] and trespassory behavior of the suspected criminal element more generally.[61] The laws, as Robert Ellickson noted in a seminal article on the subject in the mid-1990s, regard crime control as an issue of

53. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 101–04 (1993).

54. *See generally, e.g.*, WILLIAM DELEON-GRANADOS, TRAVELS THROUGH CRIME AND PLACE (1999); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1 (2004); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998).

55. *See generally, e.g.*, Manne Laukkanen, *Predicting the Residential Location of a Serial Commercial Robber*, 157 J. FORENSIC SCI. INT'L 71 (2006); James T. Walker et al., *The Geographic Link Between Sex Offenders and Potential Victims; A Routine Activities Approach*, 3 JUST. RES. & POL'Y 15 (2001). More recently, environmental criminologists and sociobiologists have been investigating the possible connections between criminal activity and human/animal instinctual traits, especially foraging. *See, e.g.*, LUE-ALAIN GIRALDEAU & THOMAS CARACO, SOCIAL FORAGING THEORY (2000); Steven C. Le Comber et al., *Geographic Profiling and Animal Foraging*, 6 J. THEORETICAL BIOLOGY 233, 233 (2005); Chris Giles & Richard Fedora, Forensic Logic, *CrimePointWeb and Environmental Criminology*, Apr. 2005, http://www.forensiclogic.com/papers/crimepointweb_envcrim.html (follow "Papers" hyperlink in top menu).

56.. *See generally, e.g.*, JOHN E. ECK ET AL., NAT'L INST. OF JUSTICE, MAPPING CRIME: UNDERSTANDING HOT SPOTS (2005); U.S. Dep't of Justice, Nat'l Inst. of Justice, *Predicting a Criminal's Journey to Crime*, NIJ J., No. 253, Jan. 2006, *available at* http://www.ojp.usdoj.gov/nij/journals/253/predicting.html; Kate J. Bowers et al., *Prospective Hot-Spotting: The Future of Crime Mapping?*, 44 BRIT. J. CRIMINOLOGY 641 (2004).

57. *See, e.g.*, N.J. STAT. ANN. § 2C:35-7 (West 2005) (imposing mandatory three-year prison term upon persons convicted of distributing drugs within 1,000 feet of a school).

58. *See, e.g.*, State v. Lhasawa, 55 P.3d 477, 479 (Or. 2002); *see also* Sandra L. Moser, Comment, *Anti-Prostitution Zones: Justifications for Abolition*, 91 J. CRIM. L. & CRIMINOLOGY 1101, 1101 (2001).

59. *See, e.g.*, State v. Burnett, 755 N.E.2d 857 (Ohio 2001); *see also* Robert L. Scharff, *An Analysis of Municipal Drug and Prostitution Exclusion Zones*, 15 GEO. MASON U. CIV. RTS. L.J. 321 (2005).

60. *See, e.g.*, People *ex rel.* Gallo v. Acuna, 929 P.2d 596 (Cal. 1997); *see also* Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477 (1994).

61. *See, e.g.*, Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001) (addressing Knoxville, Tennessee law); *see also* Peter M. Flanagan, Note, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 NOTRE DAME L. REV. 327 (2003).

"land management,"[62] a strategy in principle now endorsed by the Supreme Court.[63]

Residence exclusion laws, however, differ in important ways from the aforementioned efforts. Whereas other modern zoning-type provisions typically apply for only a limited period (ninety days to one year)[64] and permit challenges to their individual application,[65] exclusion laws exclude individuals for a minimum of ten years (and sometimes for life),[66] and afford no notice or right to challenge exclusion.[67] Furthermore, residence exclusion laws can amount to effective exclusion from states, not merely specified neighborhoods.[68] At the same time, the laws differ from vagrancy and pauper laws, also predicated on status, because they rely on a static condition (ex-offender status), which, absent pardon or other governmental intervention, cannot be changed (unlike vagrancy or poverty).[69]

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62. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public-Space Zoning*, 105 YALE L.J. 1165, 1171 (1996). For more on recent efforts to employ property regulation as a means to exclude criminal activity and to prevent social disorder, see generally Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998); Garnett, *supra* note 54. For discussion of the opposite effort of government to segregate and contain socially undesirable activity and individuals, see JOEL BEST, REGULATING BROTHEL PROSTITUTION IN ST. PAUL, 1865–1883 (1998); Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1103–08 (2005); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1206 (1996).

63. *See* Virginia v. Hicks, 539 U.S. 113, 124 (2003) (upholding authority of local public housing authority to employ trespass laws to exclude suspected miscreants).

64. *See, e.g.*, Johnson v. City of Cincinnati, 310 F.3d 484, 489 (6th Cir. 2002) (addressing Cincinnati's prostitution-free zone), *cert. denied*, 539 U.S. 915 (2003).

65. *See, e.g.*, State v. Lhasawa, 55 P.3d 477, 480 (Or. 2002) (citing with approval provision in local law requiring that notice and right to be heard on validity of exclusion be afforded before exclusion occurs).

66. *See, e.g.*, GA. CODE ANN. § 42-1-12(g) (Supp. 2006) (dictating a minimum ten-year ban); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis Supp. 2005) (dictating a lifetime ban).

67. *See, e.g.*, IOWA CODE § 692A.2A (2005). South Dakota's recently adopted law represents an exception, allowing a registrant to petition to be exempted from the exclusion law if, inter alia, ten years have elapsed since the registrant was first subject to the law, the registrant's predicate offense did not involve a child under the age of 13, and the registrant has resided in the state for at least ten consecutive years prior to petitioning the court. *See* S.D. CODIFIED LAWS § 22-24B-27 (2006). Should the reviewing court find that the petitioner has satisfied these requirements by clear and convincing evidence, and "that the petitioner is not likely to offend again," the court may in its discretion grant an exemption. *Id.* § 22-24B-28.

68. *See infra* notes 115–27 and accompanying text.

69. Even so, the laws inspire a moral philosophy concern not unlike that identified by Jeremy Waldron, who in critiquing property rights-based limits imposed on homeless individuals, observed that "[s]ince we are embodied beings, we always have a location." Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991). I am indebted to Professor Jim Dwyer for drawing my attention to this parallel.

III. THE CURRENT JUDICIAL TERRAIN AND ITS CONSEQUENCES

Given the significant consequences of residence exclusion laws for ex-offenders (and their families), it should come as no surprise that the laws have been tested in court. To date, however, all challenges have been unsuccessful, with courts rejecting claims sounding in the Ex Post Facto Clause,[70] equal protection,[71] vagueness and overbreadth,[72] substantive[73] and procedural due process,[74] and the right to travel.[75] This Part examines the most significant decision to date, *Doe v. Miller*,[76] in which the Eighth Circuit upheld Iowa's law, an outcome the Supreme Court has refused to reconsider.[77] Finding the analysis in *Miller* wanting, the discussion then turns to the significant and immediate practical consequences of state exclusion laws and their broader national consequences, which the court failed to fully acknowledge and appreciate.

A. DOE V. MILLER

In 2002, the Iowa Legislature, by near unanimous vote,[78] adopted its exclusion law, which prohibits individuals who have committed a designated offense against a minor[79] from living within 2,000 feet of a school or child care facility.[80] Just over a year later, the U.S. District Court for the Southern District of Iowa certified a class of John Doe plaintiffs coming within the ambit of the law.[81] After hearing arguments and receiving expert testimony on the law's effects, the trial court enjoined application of Iowa's residence exclusion law, deeming it violative of the Ex Post Facto Clause, substantive and procedural due process, and the Fifth Amendment privilege against compelled self-incrimination.[82]

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70. Lee v. State, 895 So. 2d 1038, 1044 (Ala. Crim. App. 2004); Denson v. State, 600 S.E.2d 645, 647 (Ga. Ct. App. 2004).

71. People v. Leroy, 828 N.E.2d 769, 778 (Ill. App. Ct. 2005).

72. Mann v. State, 603 S.E.2d 283, 286–87 (Ga. 2004).

73. Doe v. Baker, No. Civ.A1:05-CV-2265, 2006 WL 905368, at *6–7 (N.D. Ga. Apr. 5, 2006).

74. State v. Seering, 701 N.W.2d 655, 661–62, 666 (Iowa 2005).

75. Doe v. Petro, No. 1:05-CV-125, 2005 WL 1038846, at *1 (S.D. Ohio May 3, 2005).

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

77. *Id.*, *cert. denied*, 126 S. Ct. 757, 758 (2005).

78. Bonnie Harris, *Imperfections Mar Tough Laws; Sex Offender Residency Statute Produces Unintended Results*, DES MOINES REG., Oct. 20, 2005, at 1A.

79. IOWA CODE § 692A.2A(1) (2005) (targeting persons who have "committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor").

80. *Id.* § 692A.2A(2) (defining parameter as "within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility").

81. Doe v. Miller, 298 F. Supp. 2d 844, 847 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

82. *Id.* at 880.

A three-judge panel of the Eighth Circuit reversed.[83] Writing for the court, Judge Colloton first rejected plaintiffs' assertion that the law violated procedural due process because they were denied notice of the law's application insofar as Iowa failed to provide them with information on the location of all schools and child care facilities.[84] Likewise, the panel rebuffed the claim that the law violated due process because it failed to provide for individualized determinations of dangerousness:

> The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren. . . . [T]he absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.[85]

Turning to substantive due process, Judge Colloton first rejected plaintiffs' contention that the law abridged their fundamental right to live with family members.[86] This was because rather than prescribing with whom the plaintiffs could live, the law only limited where plaintiffs could live.[87] Furthermore, unlike prior Supreme Court cases finding fault with laws that directly limited familial living arrangements,[88] Iowa's residence exclusion law had only "an incidental or unintended effect on the family."[89] According to Judge Colloton, while the law affected residency choices, it did "not directly regulate the family relationship or prevent any family member from residing with a sex offender in a residence that is consistent with the statute."[90]

Next, Judge Colloton summarily rejected plaintiffs' assertion that the law violated the right to interstate travel by limiting ingress and egress to and from Iowa. This was because the 2,000 foot buffer, as a technical matter, imposed "no obstacle" insofar as it did not "erect an 'actual barrier to interstate movement.'"[91] Nor did the law transgress equality "by treating nonresidents who visit Iowa any differently than current residents, or by

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83. Doe v. Miller, 405 F.3d 700, 701 (8th Cir. 2005).

84. *Id.* at 708–09.

85. *Id.* at 709.

86. *Id.* at 711.

87. *Id.* at 710.

88. *Miller*, 405 F.3d at 710 (citing and discussing, inter alia, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)).

89. *Id.*

90. *Id.* at 711.

91. *Id.* at 712 (citation omitted).

discriminating against citizens of other States who wish to establish residence in Iowa."[92] According to Judge Colloton, "[t]hat the statute might deter some out-of-state residents from traveling to Iowa because the prospects for a convenient and affordable residence are less promising than elsewhere does not implicate a fundamental right . . . ."[93]

For similar reasons, the court concluded that Iowa's law did not infringe any posited right to intrastate travel.[94] Noting that the Supreme Court has not expressly recognized such a right[95] (despite several circuits having done so),[96] Judge Colloton accepted for argument's sake that it existed.[97] However, any right to travel within Iowa was not infringed because the state's exclusion law only proscribed residency. It did not "prevent a sex offender from entering or leaving any part of the State, including areas within 2,000 feet of a school or a child care facility, and it does not erect any actual barrier to intrastate movement."[98] Judge Colloton was also at pains to reject any asserted right to "live where you want," which he referred to as an "ambitious articulation of [an] unenumerated right."[99]

Having found that the Iowa law did not infringe any fundamental right, the court proceeded to conclude that the law satisfied rational basis scrutiny. Despite the absence of any evidence showing that exclusion to any degree actually fulfilled the state's avowed goal of protecting children, or that the 2,000 foot limit in particular was appropriate, the court deemed the law to be well within the state's police power authority to "protect the health and welfare of its citizens."[100] Citing prior Supreme Court pronouncements on the posited disproportionately high recidivism risks of sex offenders,[101]

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92. *Id.* In point of fact, however, "current residents" are treated differently, as they are in several other states with exclusion laws, insofar as exclusion does not apply to those who resided within the prescribed radius before implementation of the law. *See* IOWA CODE § 692A.2A(4)(c) (2005).

93. *Miller*, 405 F.3d at 712. In so concluding, the court specifically disclaimed the trial court's concern that the law might sweep up visitors to Iowa who "unwittingly fall asleep" at a temporary residence such as a homeless shelter, hotel, motel, or mission. *Id.* at 712 n.3. This was because plaintiffs abandoned the contention and the record otherwise lacked evidence supporting the proximity of such temporary shelters to schools and child care facilities. *Id.*

94. *Id.* at 713.

95. *Id.* (citing Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 255–56 (1974)).

96. *Id.* (citing Johnson v. City of Cincinnati, 310 F.3d 484, 496–98 (6th Cir. 2002); Lutz v. City of York, Pa., 899 F.2d 255, 266 (3d Cir. 1990); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 647–48 (2d Cir. 1971)).

97. *Id.*

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

99. *Id.*

100. *Id.* at 714.

101. *Id.* at 714–15. According to the court:

> There can be no doubt of a legislature's rationality in believing that "[s]ex offenders are a serious threat in this Nation," and that "[w]hen convicted sex

Judge Colloton concluded that Iowa was entitled to use "common sense" in employing residence exclusion as a social control strategy and to settle upon the particular spatial boundary adopted.[102]

Finally, after giving short shrift to the trial court's decision finding a Fifth Amendment violation,[103] Judge Colloton, writing for himself and Judge Riley, and over the dissent of Judge Melloy,[104] held that Iowa's law did not constitute retroactive punishment in violation of the Ex Post Facto Clause. Applying the multi-factor test used to determine whether a given sanction qualifies as punishment,[105] Judge Colloton concluded that Iowa's exclusion provision was neither punitive in intent nor effect. First, the law did not qualify as punishment as a matter of history or tradition. Although exclusion resembled banishment, an acknowledged punitive sanction, the Iowa law did not expressly expel plaintiffs; it "restrict[ed] only where offenders may reside."[106] Second, the law did not promote the traditional punishment aims of retribution and deterrence. While the restraints and requirements of the law had some retributive impact, such effects were not inconsistent with the "regulatory objective of protecting the health and safety of children."[107]As for deterrence, while exclusion might have some deterrent effect, it was primarily intended to "reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime."[108]

Turning to the other factors, Judge Colloton agreed that Iowa's law imposed an "affirmative disability or restraint,"[109] but he concluded that evidence supporting the fourth and final factor—whether the law had a "rational connection to a nonpunitive purpose"[110]—was present. Imposing a residence exclusion limit was a rational and nonexcessive way to achieve the legislature's avowed regulatory end, even though it applied to individuals regardless of particularized risk.[111] According to Judge Colloton:

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offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault."

Id. (alterations in original) (quoting Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003)).

102. *Id.* at 715–16.

103. *Miller*, 405 F.3d at 716. The privilege against compelled self-incrimination was not implicated, the court reasoned, because the law "regulates only where the sex offender may reside; it does not require him to provide any information that might be used against him in a criminal case." *Id.*

104. *Id.* at 723 (Melloy, J., concurring in part and dissenting in part).

105. *Id.* at 718–19 (citing Smith v. Doe, 538 U.S. 84, 93–94 (2003); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

106. *Id.* at 719.

107. *Id.*

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

109. *Id.*

110. *Id.* at 721.

111. *Id.* at 721–22.

> In view of the higher-than-average risk of reoffense posed by convicted sex offenders, and the imprecision involved in predicting what measures will best prevent recidivism, we do not believe the Does have established that Iowa's decision to restrict all such offenders from residing near schools and child care facilities constitutes punishment despite the legislature's regulatory purpose.[112]

Nor, again, was it constitutionally relevant that the record lacked support for the crime control efficacy of exclusion in general and the 2,000 foot parameter in particular. Exclusion was simply a policy choice for the Iowa Legislature to make.[113]

B. THE NATIONAL CONSEQUENCES OF EXCLUSION

Miller represents the most significant judicial treatment of a state exclusion law to date. Future decisions will likely regard its rationales and the constitutionally permissible provisions of the challenged Iowa law as benchmarks to condone other state laws.[114] Moreover, given the potent political appeal of exclusion, there is every reason to expect that exclusion laws will continue to proliferate among the states.

In light of this, it is well to consider the practical effects of exclusion. For instance, in Iowa, as noted by the *Miller* trial court, the 2,000 foot parameter renders off-limits virtually all of Des Moines and Iowa City.[115] Moreover, "[i]n smaller towns that have a school or child care facility, the entire town is often engulfed by an excluded area . . . ."[116] To the Eighth Circuit panel in *Miller*, these effects were of no moment because, theoretically at least, residential options within Iowa remained available.

This view, however, ignores the actual effect of exclusion laws. In Iowa, as in other states with residential prohibitions,[117] theory conflicts with reality:

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112. *Id.* at 722.

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

114. For two such examples, see *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1014–15 (8th Cir. 2006) (relying on *Miller* to uphold Arkansas residence exclusion law); *Doe v. Baker*, No. Civ.A 1:05-CV-2265, 2006 WL 905368, at *3–4 (N.D. Ga. 2006) (relying on *Miller* to uphold Georgia residence exclusion law).

115. Doe v. Miller, 298 F. Supp. 2d 844, 851 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

116. *Id.*; *see also Miller*, 405 F.3d at 725 (Melloy, J., concurring in part and dissenting in part) (noting that "[t]he effect of the requirement is quite dramatic: many offenders cannot live with their families and/or cannot live in their home communities because the whole community is a restricted area").

117. *See, e.g.*, Shannon Muchmore, *Registration Law Backfire Forecast*, TULSA WORLD, July 7, 2006, at A1 (discussing Oklahoma law); *New Rule Will Force Most Sex Offenders in Lexington to Move*, LEXINGTON HERALD-LEADER (Ky.), June 9, 2006 (discussing Kentucky law); Phillip Reese & Amy Upshaw, *Sex Offenders in Cities Have Little Room to Live: 2000-Foot Rule Squeezes Out Convicts*,

housing options are actually far fewer, given that much of the theoretically available space outside exclusion zones is industrial in nature or residences are so expensive as to be beyond the financial means of individuals targeted by the laws.[118] Moreover, in Iowa, as in other states,[119] towns, counties, and cities, anxious that individuals forced to flee more heavily populated areas will flood their domains (as they often have), frequently augment state limits and seek to outdo (or at least match) one another in their restrictive criteria by adding to state-prescribed geographic anchor points (e.g., swimming pools)[120] and distances.[121] As a result, ever more space is placed off-limits.[122]

The upshot is that the residential prohibitions, in conjunction with the already acutely diminished range of housing options available to ex-offenders,[123] can effectively result in state-wide exclusion.[124] Other states, in turn, alarmed that they will become a magnet for ex-offenders,[125] or if

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ARK. DEMOCRAT GAZETTE, Nov. 30, 2003, at 1 (discussing Arkansas law); David Simpson et al., *Law & Order*, ATL. J.-CONST., June 24, 2006, at 3E (discussing Georgia law).

118. Judge Melloy recognized this reality in his dissent, noting that "there are so few legal housing options that many offenders face the choice of living in rural areas or leaving the state. . . . This effectively results in banishment from virtually all of Iowa's cities and larger towns." *Miller*, 405 F.3d at 724 (Melloy, J., dissenting); *cf.* Jason S. Alloy, Note, *"158-County Banishment" in Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1099, 1103 (2002) (discussing practice in Georgia where prosecutors, facing a constitutional bar on state-wide banishment, exclude probationers from all but one state county, a very rural area with few housing, transportation or work options, which triggers migration by probationers).

119. *See, e.g.*, Ellen Perlman, *Where Will Sex Offenders Live?*, GOVERNING MAG., June 2006, at 54 (discussing "domino effect" of Miami's 2,500 foot exclusion zone vis-à-vis neighboring localities).

120. *See* Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1; Mike McWilliams, *Town Looking to Tighten Law*, IOWA CITY PRESS-CITIZEN, Dec. 3, 2005, at 1A (noting that nearly two dozen counties and cities, including Des Moines, have augmented state geographic anchor points); *see also, e.g.*, Kent Mallet, *Newark Limits Where Sex Offenders Can Live*, NEWARK ADVOC. (Ohio), Jan. 18, 2006 (noting unanimous vote by city council of Newark, Ohio to expand state exclusion coverage beyond schools to licensed daycare centers, parks, playgrounds, and swimming pools).

121. *See supra* note 47 and accompanying text. As noted above, such local augmentation is possibly vulnerable to preemption challenge. *See supra* note 48 and accompanying text. Preemption can be avoided, however, by express state legislative delegation. For instance, under California's upcoming ballot initiative, local governments would enjoy authority to expand restrictions to other sites, such as libraries. *See* Jim Miller, *Jessica's Law: Effort to Keep Abusers Away*, PRESS-ENTERPRISE (Riverside, Cal.), Jan. 1, 2006, at A1.

122. This phenomenon, it bears mention, is directly affected by the relative population densities of states: for instance, residence exclusion focal points in Florida, a heavily developed and populated state, will have greater spatial exclusionary effect than those in more rural states such as New Mexico or South Dakota, with their relative lesser population densities and fewer geographic focal points for exclusion.

123. *See* TRAVIS, *supra* note 11, at 219–48.

124. *See* Emily Kittle, *Sex Offenders Fall Off Radar*, TELEGRAPH HERALD (Dubuque, Iowa), Jan. 27, 2006, at A1 (noting that many offenders from Dubuque County, Iowa lacked housing options and moved to Wisconsin, Illinois, Texas, and Nevada).

125. *See supra* note 46 and accompanying text.

otherwise enamored of the strategy in principle,[126] embrace exclusion as a social control measure. This relegates those states that are slow, or perhaps even averse (for the time being at least), to enacting exclusion laws to dumping-ground status.[127]

In voicing their support for such laws, state and local politicians are refreshingly unabashed in identifying their ultimate desire: to purge their domains of ex-offenders.[128] They feel free to speak with such candor, confident in the widespread public appeal of their positions, despite the dubious practical effects of the laws.[129] Indeed, available research suggests that exclusion neither deters nor prevents reoffense by persons with histories of criminal sexual misconduct, given that individuals bent on committing such crimes can (and logically will) travel beyond their residences.[130] Adding to this false sense of security is the empirical reality that the overwhelming majority of persons committing acts of sexual abuse

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126. *See, e.g.*, Miller, *supra* note 121 (discussing pending California ballot initiative, to be voted upon in November 2006, that would ban registrants from living within 2,000 feet of schools and parks and predicting its likely success).

127. To date, a handful of states have resisted enacting laws. *See* Tom Fahey, *House Panel OKs Sex Predator Law Changes*, UNION LEADER (Manchester, N.H.), Mar. 17, 2006, at A9; Karen Madden, *Offenders Among Us: Parents Fear Sex Offenders Living Near 3 Rapids Schools*, WIS. RAPIDS DAILY TRIB., May 27, 2006, at 1A; Larry Pozner, *Restrictions Unfair to Sex Offenders*, DENVER POST, Feb. 12, 2006, at E-03.

128. *See, e.g.*, Matthew S.L. Cate, *Perdue Signs Bill Targeting Sex Offenders*, CHATTANOOGA TIMES FREE PRESS, Apr. 27, 2006, at B1 (noting that many legislative supporters of Georgia's law hope "it will drive sex offenders out of the state"); Kent Faulk, *Tighter Restrictions Set for Sex Offenders*, BIRMINGHAM NEWS, June 7, 2006, at 1B (quoting Jasper, Alabama, Mayor Sonny Posey in wake of the city council approving a one-mile exclusion zone: "I don't reckon we're trying to hide the fact that we're not interested in those folks being around"); Jason Garcia, *State May Crack Down on Predators*, ORLANDO SENTINEL, Sept. 14, 2005, at A1 (quoting Florida State Representative Susan Goldstein to the effect that the goal of Florida's exclusion law is "to get these people out of our neighborhoods and hopefully out of our state").

129. As noted by Rebecca Cohn, a member of the California Assembly: "You can have all the experts weigh in on the practicality of this, but we need to take care of our children." Mark Martin, *California's Most Unwanted: Restrictions on Residency Make Nomads of Paroled Sex Offenders*, S.F. CHRON., June 2, 2006, at A1.

130. *See* COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004), *available at* http:/dcj.state.co.us/odvsom (follow "resources," then follow "reports") ("Placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism."); MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 9, 11 (2003) [hereinafter MINN. DEP'T OF CORR., LEVEL THREE], *available at* http://www.doc.state.mn.us (follow "publications") (finding "no evidence" that "residential proximity of sex offenders to school or parks affects reoffense" and noting that an offender "is more likely to travel to another neighborhood in order to act in secret rather than in a neighborhood where his or her picture is well known"); Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residency Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 174 (2005) (providing self-report data indicating that exclusion zones have no practical effect on the likelihood of recidivism in targeted areas).

against children, rather than being anonymous strangers in neighborhoods, are known by their victims.[131] Perhaps even more troubling, there is reason to believe that the laws are actually counterproductive. Exclusion very likely impedes development of familial, social, and therapeutic networks shown to reduce risk of recidivism,[132] and discourages individuals from reporting their whereabouts, undercutting the core public awareness purpose of registration (and community notification).[133]

Given this climate, the problematic quality of the Eighth Circuit's approval of Iowa's "common sense" decision becomes even more apparent. By casting a blind eye to the broader systemic effects of exclusion, the court condoned (indeed, encouraged) the natural defensive competitiveness of states on criminal justice matters.[134] Furthermore, by failing to require a demonstrated link between the recidivist threat and the types of individuals targeted,[135] and the evidence on the efficacy of exclusion more generally,[136]

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131. HOWARD N. SNYDER, U.S. BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf (noting that only seven percent of offenders implicated in sexual assault of victims under age seventeen were "strangers").

132. *See, e.g.*, R. KARL HANSON & KELLY MORTION-BOURGON, PUB. SAFETY & EMERGENCY PREPAREDNESS CAN., PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS 10 (2004), *available at* http://ww2.psepc-sppcc.gc.ca/publications/collections/pdf/200402_e.pdf; Candace Kruttschnitt et al., *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 JUST. Q. 61, 82 (2000); *see also* MINN. DEP'T OF CORR., LEVEL THREE, *supra* note 130, at 9 (noting that exclusion creates problems such as "isolation; lack of work, education, and treatment options"); MINN. DEP'T OF CORR., SAFE HOMES, SAFE COMMUNITIES: A FOCUS GROUP REPORT ON OFFENDER HOUSING 9 (2001), *available at* http://www.corr.state.mn.us/publications/pdf/housing.pdf (noting that sex offenders who are unable to find stable living situations are more likely to revert to "an antisocial lifestyle").

133. *See* Kittle, *supra* note 124, at A1 (citing Iowa Department of Corrections data indicating that after the law's passage, twice as many individuals now fail to fulfill their registration requirements); Eileen Mozinski, *Attorneys State Law's Flaws; Iowa Association Says Sex Offender Residency Restrictions Are Ineffective and Counterproductive*, TELEGRAPH HERALD (Dubuque, Iowa), Jan. 24, 2006, at A1 (citing study by Iowa County Attorneys Association indicating increased propensity among registrants to report false addresses).

134. *See* Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733, 1733 (2006) ("Given the negative consequences of crime, it should come as no surprise that states will endeavor to make their dominions less hospitable to potential criminal actors.").

135. With their broad scope of application, the laws resemble what Henry Smith has observed with respect to exclusionary property regimes more generally, whereby exclusion represents "a low-cost, but low-precision method that relies on rough informational variables . . . to define legal entitlements." Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 981 (2004).

136. *See* Doe v. Miller, 405 F.3d 700, 709, 721–22 (8th Cir. 2005). A similar insouciance was expressed by the Illinois Court of Appeals, which in rejecting a challenge to Illinois' law stated:

> Although the record is bare of any statistics or research correlating residency distance with sex offenses, we conclude that it is reasonable to believe that a law that prohibits child sex offenders from living within 500 feet of a school will reduce [sex offenses against children] . . . . Although it is not clear from the record how

Miller creates a slippery slope, increasing the likelihood that other offender sub-groups will be targeted[137] and that more ambitious geographic limits will be imposed.[138]

As a result, as the laws gain favor, a classic tragedy of the commons problem is now taking shape, with sections of the nation placed off-limits,[139] states exporting negative externalities in the form of increased social welfare costs associated with offender reentry (e.g., job training, treatment),[140] and to the extent criminal propensity is displaced,[141] criminal victimization[142] and

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the distance of 500 feet was decided upon, we believe that 500 feet is a reasonable distance.

People v. Leroy, 828 N.E.2d 769, 777 (Ill. App. Ct. 2005).

137. *See* Joan Petersilia, *Community Corrections, in* CRIME: PUBLIC POLICIES FOR CRIME CONTROL 483, 500 (James Q. Wilson & Joan Petersilia eds., 2002) (noting rapid expansion of registration laws to include nonsexual offenses and offenses not involving minors); Kris Wise, *Bill Sets Up Registry for Meth Lab Crimes*, CHARLESTON DAILY MAIL (W. Va.), June 12, 2006, at 1A (noting that Tennessee and Illinois subject persons convicted of operating methamphetamine labs to registration and community notification and that several other states are considering such expansions).

138. *See, e.g.*, Jennifer Sorentrue, *Tougher Sex-Offender Limits Raise Issues*, PALM BEACH POST (Fla.), June 20, 2006, at 4B (quoting a county commissioner in Palm Beach County, Florida, a locality that enacted a 2,500 foot buffer to augment the state's 1,000 foot limit: "If they ask me to make it 5,000 feet, I'd vote for it."). On the phenomenon of legislative slippery slopes more generally, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1035–36 (2003).

139. One subtle but important functional aspect of this boundary setting is that it undercuts the mobility thought characteristic of and necessary to collective national identity. As Professor Todd Pettys has observed, "Americans' mobility plays a significant role in creating [the] widespread perception of national community—citizens' own geographic paths and those of their families, friends, and colleagues create connections and associations that touch far-reaching areas of the nation." Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 514 (2004).

140. *See* TRAVIS, *supra* note 11, *passim.*

141. The actual occurrence of migration in response to draconian state criminal justice policies remains somewhat in empirical doubt. For a discussion of this possibility, based on largely anecdotal evidence, see Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1839–57 (2005). Indeed, Charles Tiebout, the progenitor of the rational choice jurisdictional competitiveness model on which the theory is based, acknowledged that his model artificially presumes adequate legal knowledge of comparative differences relative to government policy. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956).

Given the socially disadvantaged backgrounds common to ex-offenders, there arguably exists even less potential for self-education. *Cf.* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420–21 (1990) (noting that mobility is constrained by "economic and social factors that tend to affect poorer people more than affluent ones" and that business owners and capital investors are more sensitive to relocation options). Whatever the broader empirical reality, the accumulated evidence regarding the laws examined here supports such a displacement effect, i.e., that targeted individuals are fleeing states with exclusion laws, which is understandable given that individuals face the immediate, drastic consequence of exclusion, making them logically more cognizant of other states' policies.

142. While recidivism rates vary significantly among offender subpopulations, aggregate data are troubling: approximately two-thirds of released prisoners are rearrested within three

its costs.[143] Not only are such burdens shifted elsewhere—with more densely populated states (and subpolities within them[144]) naturally benefiting most,[145] but so are the nature and quality of the burdens expelled. This is because the ex-offenders who are forced to move likely experience greater reentry challenges[146] and law enforcement in receiving locales are disadvantaged insofar as they lack familiarity with the backgrounds of *émigrés*, undercutting their ability to monitor them.[147]

Ultimately, the socio-political dynamic giving rise to exclusion laws summons to mind core public policy concerns that long ago prompted judicial condemnation of state banishment laws. As recognized by the Supreme Court of Michigan more than seventy-five years ago, in a time marked by similar acute public anxiety over crime:

> To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power . . . to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself.[148]

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years of release. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf.

143. On the fiscal consequences of crime control, encompassing police, judicial, and correctional outlays, which account for increasingly large portions of state budgetary expenditures, see KRISTEN A. HUGHES, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 2122603, JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2003, at 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf (noting that in 2003 criminal justice expenditures accounted for roughly 7.2% of all state and local expenditures). Total state justice system expenditures increased from $34 billion in 1992 to over $66 billion in 2003, a 94% increase. *Id.* at 5.

144. *See* NANCY G. LA VIGNE & JAKE COWAN, URBAN INSTITUTE, MAPPING PRISONER REENTRY: AN ACTION RESEARCH GUIDEBOOK 6, 9 (2005), *available at* http://www.urban.org/uploadedPDF/411250_RMNguidebook.pdf (discussing significant tendency of released prisoners to reside in urban areas upon expiration of their terms). In this respect, the reality that local governments—cities, towns, and counties—largely cover expenses for main components of crime control, especially police, prosecutors, and jails, has special significance. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 788, 809 (2006) (discussing local expenditures).

145. As noted by Jeremy Travis, former head of the National Institute of Justice, "most prisoners are incarcerated in, and therefore released in, a small number of states." TRAVIS, *supra* note 11, at 286; *see also id.* at 281 (noting uneven distribution of reentry populations).

146. *See supra* note 132 and accompanying text.

147. *See* Harris, *supra* note 78, at 1A (noting same concern expressed by state law enforcement official).

148. People v. Baum, 231 N.W. 95, 96 (Mich. 1930); *see also* State v. Doughtie, 74 S.E.2d 922, 924 (N.C. 1953) (observing that "[i]t is not sound public policy to make other states a dumping ground for our criminals"). Moreover, the dynamic naturally lends itself to intrastate ill will as well. This is because localities within states can be differentially affected; for instance, suburbs and rural areas with fewer geographic focal points such as schools have a lesser capacity

IV. A NATIONAL SOLUTION FOR A NATIONAL CHALLENGE

As is evident from the foregoing discussion, residence exclusion laws create a collective action problem of national proportion. Individual states, eager to expel and repel ex-offenders, left to their own devices, have indulged their natural tendency to behave in a manner oblivious to the interests of their sister states.[149] This dynamic, as discussed next, is both contrary to the long-term, practical interests of the union, of which individual states are a part, and betrays the nation's sustaining constitutional traditions and history that have given force to this recognition.

A. COLLECTIVIST TRADITIONS

As noted earlier, the Constitution originated out of a recognized need to more effectively unify the states and to curb individual state tendencies to act in self-interested ways that are harmful to one another and to the union as a whole.[150] To this end, the Framers designed a federalist structure of governance anchored by the Supremacy Clause,[151] empowering a central authority to trump discordant state regulations, complemented by a variety of unity-enforcing provisions that impose negative constraints and affirmative obligations on the states vis-à-vis one another.

Perhaps chief among such constraints is the Compact Clause, which seeks to head off possible cabalistic tendencies among states.[152] Other limits include express prohibitions on the capacity of states to create and use their own specie,[153] impose duties on imports or exports,[154] and maintain independent armies and navies.[155]

In terms of affirmative obligations, the Framers, as well as drafters of the Civil War era amendments, sought to ensure interstate cooperation and respect. Article IV, for instance, requires that states afford "Full Faith and Credit" to one another's official acts and records[156] and that they honor

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to exclude targeted individuals compared to urban areas. *See, e.g.*, Bill Ainsworth, *Backers Turning Against Tough Molester Initiative; Residency Limits Raise Concerns*, SAN DIEGO UNION-TRIB. (San Diego), Apr. 25, 2006, at A1 (noting concern of rural and suburban lawmakers that California's pending state-wide law will have such an effect). However, as noted above, the California law, if approved as predicted, will expressly authorize localities to expand on geographic focal criteria. *See supra* note 121.

149. *See* Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems*, *in* THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 3, 6 (John Ferejohn & Barry R. Weingast eds., 1997) (noting incentives of states to export social problems to neighboring states).

150. *See supra* notes 1–5 and accompanying text.

151. U.S. CONST. art. VI, cl. 2.

152. *Id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power . . . .").

153. *Id.* art. I, § 10, cl. 2.

154. *Id.*

155. *Id.* art. I, § 10, cl. 3.

156. U.S. CONST. art. IV, § 1.

other states' requests for criminal extradition[157] (even if the alleged misconduct serving as the basis for extradition is not criminalized by the asylum state).[158] Likewise, Article IV further requires that the "Citizens of each State shall be entitled to all Privileges and Immunities in the several States,"[159] while the Fourteenth Amendment commands that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[160]

For its part, over the decades the Supreme Court has often invoked fidelity to shared national interests when addressing the constitutionality of actions by particular states.[161] This tendency has been readily apparent in its privileges and immunities jurisprudence, which, despite its nascent crabbed reading in the *Slaughter-House Cases*,[162] has come to assume an unmistakable collectivist cast. Most notably, in *Saenz v. Roe*,[163] the Court invoked the Privileges or Immunities Clause of the Fourteenth Amendment to invalidate a California law limiting public-assistance benefits paid to newly arrived residents, tying benefit amounts to what newcomers received in their erstwhile state residences. Writing for the seven-member majority, Justice Stevens concluded that California's law violated the right to travel implicit in the Clause, insofar as it treated newcomers less favorably than current residents.[164] Concluding, Justice Stevens invoked the broader structural purpose of nationhood animating the Clause (combined with the Citizenship Clause of the Fourteenth Amendment),[165] which the California law imperiled:

> Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." U.S.

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157. *Id.* art. IV, § 2.

158. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW SUBSTANCE & PROCEDURE § 12.7 (3d ed. 1999 & Supp. 2006). Similarly, before being superseded by the Thirteenth Amendment, the Fugitive Slave Clause compelled states to surrender runaway slaves to their states of origin. U.S. CONST. art. IV, § 2.

159. U.S. CONST. art. IV, § 2.

160. *Id.* amend. XIV, § 1.

161. *See* Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights,"* 46 WM. & MARY L. REV. 213, 333 (2004) ("The Court has on many occasions, and in myriad contexts, encouraged an attitude of national unity rather than selfish state concern."). This is not to say that the Court has consistently invoked collectivism when addressing potentially divisive state regulatory efforts. For discussion of what one author calls the "entitlements" (noncollectivist) and "fidelity" (collectivist) approaches to federal state-government oversight, with the former regarded as dominant, see generally Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731 (2004).

162. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

163. Saenz v. Roe, 526 U.S. 489 (1999).

164. *Id.* at 502–04.

165. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

> Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[166]

Collectivism has been equally, if not more, evident in the Court's long line of cases interpreting the Dormant Commerce Clause ("DCC"). Deriving from the negative authority implied by the powers expressly afforded Congress under the Commerce Clause to "regulate Commerce . . . among the several States,"[167] the DCC prevents states from "erect[ing] barriers against interstate trade."[168] DCC doctrine, which extends beyond the narrow economic realm in which it ostensibly operates,[169] seeks to ensure "national solidarity,"[170] a purpose James Madison regarded as more important than the affirmative grant of congressional authority embedded in the Commerce Clause itself.[171] To this end, the DCC combats state efforts designed to promote protectionism[172] and isolationism.[173]

Privileges and immunities and DCC jurisprudence thus plainly share a kindred concern for national collective interests[174] and provide a prime (albeit not exclusive) jurisprudential manifestation of collectivism. To further illustrate this tradition and highlight the particularly problematic nature of residence exclusion laws vis-à-vis collectivism, the discussion next turns to two of the Court's DCC decisions in particular—one limiting state authority to exclude indigents and the other limiting state authority to exclude solid and liquid waste.

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166. *Saenz*, 526 U.S. at 510–11 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)); *see also* Baldwin v. Fish & Game Comm. of Mont., 436 U.S. 371, 383 (1978) (condemning state distinctions that "hinder the formation, the purpose, or the development of a single Union of those States").

167. U.S. CONST. art. I, § 8, cl. 3.

168. Maine v. Taylor, 477 U.S. 131, 137 (1986) (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980)). For a helpful overview of the historic evolution of the DCC, see Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 160–65 (2005).

169. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-6, at 1060 (3d ed. 2000) (observing that "'discrimination' [does not] necessarily depend on economic analysis").

170. *Baldwin*, 294 U.S. at 523.

171. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994).

172. *See* Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992).

173. *See* Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 339–40 (1992).

174. *See* Hicklin v. Orbeck, 437 U.S. 518, 531–32 (1978) (noting the "mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from . . . their shared vision of federalism").

B. TRAMPS, TRASH, AND INDIVIDUAL STATE INTERESTS

In *Edwards v. California*,[175] the Court addressed whether a state could isolate itself from the nation's broader economic maladies by shunning the poor. California, reeling from the effects of the Great Depression, enacted a law making it a misdemeanor to bring into the State "'any indigent person who is not a resident of the State.'"[176] Edwards knowingly brought his indigent brother-in-law into California and was convicted of a misdemeanor.[177] Framing the issue as whether the "Okie Law" was within California's police power authority, the Court acknowledged the major difficulties facing states as a result of the masses of itinerant poor then moving about the land:

> The grave and perplexing social and economic dislocation which this statute reflects is a matter of common knowledge and concern . . . . We appreciate that the spectacle of large segments of our population constantly on the move has given rise to urgent demands on the ingenuity of government . . . . The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true.[178]

At the same time, however, the *Edwards* Court refused to condone California's effort to isolate itself from the nation's economic woes and responsibility for the poor. While "[i]t is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world," recent experience made clear that "in an industrial society the task of providing assistance to the needy has ceased to be local in character."[179] As a member of the federal union, California was obliged to shoulder the shared obligation of assisting the poor, which in modern times had become "the common responsibility and concern of the whole nation."[180] Its refusal to do so imposed an impermissible barrier upon interstate commerce insofar as the free interstate passage of all citizens, including the poor, affected commerce.[181] Furthermore, the law was problematic in political process terms because it deprived nonresident indigents, the targets of the law, "of the opportunity to

175. Edwards v. California, 314 U.S. 160 (1941).
176. *Id.* at 171 (quoting CAL. WELF. & INST. CODE § 2615 (Deering 1937)).
177. *Id.*
178. *Id.* at 173.
179. *Id.* at 173, 174–75.
180. *Edwards*, 314 U.S. at 175.
181. *Id.* at 174, 176.

exert political pressure upon the California Legislature in order to obtain a change in policy."[182]

In short, California's effort at exclusion, despite its understandable fiscal and social motivations, exceeded its police power authority. In reaching its result, the Court tempered its historic deference to state laws repelling socially undesirable individuals, dating back to *City of New York v. Miln*.[183] *Miln* upheld the "necessary" right of New York to bar "the moral pestilence of paupers, vagabonds, and possibly convicts."[184] Such a right, the *Miln* Court concluded, was as innate as the right "to guard against physical pestilence, which may arise from unsound and infectious Articles imported,"[185] and was a "regulation not of commerce, but of police."[186] Under this broad aegis, New York enjoyed the right to control those persons "obnoxious to the law" and to "guard, by anticipation, against the commission of an offence against its laws."[187] Just over a century later, however, California's exclusion of the poor was deemed an impermissible encroachment on interstate commerce, not a lawful exercise of police power, which, while perhaps not equating the poor with "moral pestilence," was nonetheless impermissible.[188]

In *City of Philadelphia v. New Jersey*,[189] decided in 1978, the Court again was faced with a state effort to isolate itself from a societal problem of national scope—trash.[190] Concerned about the diminution of its available landfill space, as well as the adverse environmental consequences of treating and disposing of waste,[191] the New Jersey Legislature banned the entry of all solid and liquid waste generated outside New Jersey.[192]

Before reaching the merits of the Dormant Commerce Clause claim, the seven-member majority first rejected the finding by the New Jersey Supreme Court that the trash targeted by the prohibition did not qualify as

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182. *Id.* at 174.

183. City of New York v. Miln, 36 U.S. 102 (1837).

184. *Id.* at 142.

185. *Id.* at 142–43.

186. *Id.* at 132.

187. *Id.* at 140.

188. Edwards v. California, 314 U.S. 160, 176 (1941) (quoting *Miln*, 36 U.S. at 142).

189. City of Phila. v. New Jersey, 437 U.S. 617 (1978).

190. For discussion of the interstate "garbage wars," waged between garbage-importing and garbage-exporting states, see generally Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239 (1997).

191. *See City of Phila.*, 437 U.S. at 625 (citing and discussing chapter 363 of 1973 New Jersey laws).

192. *See* N.J. STAT. ANN. § 13:1I-10 (West Supp. 1978) ("No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the state . . . ."). Pursuant to the law, the State Commissioner of Environmental Protection exempted four categories of waste from the prohibition, including materials intended for recycling and to be used to feed swine. *See* N.J. ADMIN. CODE § 7:1-4.2 (Supp. 1977).

"commerce."[193] Much as the *Edwards* Court broadly read the Clause to include the interstate movement of indigent individuals,[194] the majority deemed "valueless waste" as articles of commerce worthy of constitutional scrutiny.[195] While some "innately harmful articles,"[196] such as those spreading disease or contagion ultimately might not qualify, as allowed by older precedent of the Court, the majority concluded that no object is per se excluded. The states rightfully banned innately harmful objects because their "worth in interstate commerce was far outweighed by the dangers inhering in their very movement."[197] The majority in *City of Philadelphia*, however, rejected the conclusion that "valueless" trash came within this exception.[198]

Having established that the prohibition of trash warranted Commerce Clause scrutiny, the Court proceeded to invalidate New Jersey's law. Like other "parochial legislation," such as that successfully challenged in *Edwards*, "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy."[199] The law impermissibly imposed on other states "the full burden of conserving the State's remaining landfill space"[200] and amounted to an "attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[201]

Taken together, *Edwards* and *City of Philadelphia* provide a prime illustration of collectivist jurisprudence. Each decision balanced the acknowledged challenges presented by the targets of state exclusionary efforts—the poor and waste—against the broader national obligation to address what are in the end indefeasibly national problems. Thus, they provide an obvious parallel to current state efforts to exclude ex-offenders, and sex offenders in particular, who are the target of even greater disdain and social concern. Having been released from confinement, they become,

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193. *City of Phila.*, 437 U.S. at 622.

194. *See* Edwards v. California, 314 U.S. 160, 172 (1941) ("[I]t is settled beyond question that the transportation of persons is 'commerce,' within the meaning of [the Commerce Clause.]").

195. *City of Phila.*, 437 U.S. at 622.

196. Such articles include:

> [Those] which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption.

Id. (quoting Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465 (1888)).

197. *Id.*

198. *Id.*

199. *Id.* at 627.

200. *City of Phila.*, 437 U.S. at 628.

201. *Id.*

in the words of the *City of Philadelphia* Court, a "problem shared by all,"[202] and in the words of the *Edwards* Court, "the common responsibility and concern of the whole nation."[203] State residence exclusion laws, designed to expel indigenous ex-offenders and repel others possibly seeking entry, betray this understanding. They also present the same political-process concerns vis-à-vis residents and nonresidents singled out by the Court in *Edwards*.[204]

While a very narrow slice of the imprisoned population faces indefinite incarceration, nearly all inmates (including thousands of convicted sex offenders)[205] eventually reenter society,[206] facing what criminologist Joan Petersilia has termed "coming home."[207] Residence exclusion laws beg the question of what "home" means. *Edwards* and *City of Philadelphia* underscore that home is synonymous with the constituent parts of the nation, consistent with what Justices Douglas and Jackson referred to in their *Edwards* concurring opinions as the right of "national citizenship."[208]

Importantly, this right is not one of a personal nature, such as the right to travel or to be free of discrimination. Courts are unlikely to conclude that residency laws jeopardize these rights as a technical matter, as the Eighth Circuit's decision in *Doe v. Miller* makes clear.[209] Rather, the right is a socio-political one deriving from the structure of the nation's constitutional

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202. *Id.* at 629.

203. Edwards v. California, 314 U.S. 160, 175 (1941).

204. *See supra* note 182 and accompanying text. Indeed, individuals targeted by exclusion laws very likely experience political disempowerment that is far more acute and intractable than that experienced by indigents (as in *Edwards*), given the unparalleled disdain they inspire. *See* Logan, *supra* note 37, at 310–11 (discussing the "unique political impotence" of sex offenders, even as compared to ex-offenders more generally).

205. *See* HARRISON & BECK, *supra* note 17, at 9 (noting that 142,000 state prison inmates in 2002 were convicted of sex offenses). Currently California alone has over 102,000 registered sex offenders. BILL LOCKYER, CAL. ATT'Y GEN., 2004 REPORT TO THE CALIFORNIA LEGISLATURE ON CALIFORNIA SEX OFFENDER INFORMATION 5 (2005), *available at* http://www.meganslaw.ca.gov/pdf/2004legreportcomplete.pdf.

206. TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES, http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm (last visited Aug. 31, 2006) (noting that "[a]t least 95% of all State prisoners will be released from prison at some point").

207. PETERSILIA, *supra* note 11, at 21.

208. *Edwards*, 314 U.S. at 178 (Douglas, J., concurring); *id.* at 183 (Jackson, J., concurring). For elaboration of this theme, with particular attention paid to how the Fourteenth Amendment's Citizenship Clause and Privileges or Immunities Clause should serve as bases to invigorate nationalist inclusion, see F.H. Buckley, *Liberal Nationalism*, 48 UCLA L. REV. 221 (2000) (Privileges or Immunities Clause); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000) (Citizenship Clause).

209. *See supra* notes 83–113 and accompanying text.

framework and its collectivist traditions.[210] It is an example of what James Weinstein recently referred to as the "set of federal structural common law rules . . . designed to vindicate interstate relations,"[211] taking its place among other critically important non-textually derived rules limiting state authority.[212]

Much as limits on state efforts at economic isolationism evolved from the recognized needs of a national economy,[213] the time has arrived for a similar commitment to the imperative of national social union with regard to ex-offenders. During the nation's early years, circumstances belied the need for any such imperative inasmuch as criminal justice was administered by insular governments, what Lawrence Friedman has called "tight little islands,"[214] whose crime control efforts were of little national consequence.[215] However, as the nation has grown, and state criminal justice systems have swept up ever greater numbers of individuals, post-confinement disposition of criminal offenders, much like care of the poor and disposal of waste, has become a problem of national concern.

As the discussion here makes clear, without this commitment, states will succumb to the potent impulse to exclude ex-offenders in disregard of the unavoidable national necessity to accommodate them. Because state governments cannot forever imprison all offenders who occasion fear, a fiscal[216] if not constitutional[217] impossibility, they cannot be permitted to

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210. Structural reasoning traces its judicial origins back to *McCulloch* and *Marbury*, as recognized in the seminal work of Professor Charles Black. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). Since then, structuralism has been a staple in conservative and liberal commentary and judicial opinions alike. *See generally, e.g.*, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995); Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693 (2005).

211. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 289–90 (2004).

212. *See id.* at 290–91 & n.439 (noting, inter alia, "the dormant Commerce Clause rules, the interstate migration rules, the interstate dispute rules, [and] the federal rules of jurisdiction governing interstate recognition"); *see also id.* at 288 n.436 (noting, inter alia, "rules vindicating the dormant Commerce Clause, interstate travel, and state sovereign immunity").

213. *See* City of Phila. v. New Jersey, 437 U.S. 617, 623 (1978) ("[T]he bounds of [Dormant Commerce Clause] restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.").

214. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 17 (1993).

215. *See* Logan, *supra* note 37, at 264.

216. *See, e.g.*, Fox Butterfield, *States Ease Laws on Time in Prison*, N.Y. TIMES, Sept. 2, 2001, at 1A (noting that fiscal pressures have prompted several states to ratchet down lengthy criminal sentences).

217. Under current Eighth Amendment jurisprudence, states enjoy virtual carte blanche to impose very lengthy prison terms. *See* Ewing v. California, 538 U.S. 11, 21 (2003) (noting that successful Eighth Amendment challenges to non-capital sentences are "exceedingly rare").

avoid the responsibility of offender reentry.[218] Rather, precisely because those who have violated the nation's criminal laws carry a threat of recidivism, and because successful ex-offender reentry entails significant fiscal and social costs, states must share in shouldering the burdens of integrating ex-offenders into the ranks of law-abiding society.

C. PROSPECTS FOR REMEDY

In light of the difficulties presented by exclusion laws, one would hope that a remedy might be readily at hand. Several potential avenues do come to mind, none of which, unfortunately, hold realistic promise to stem the tide of state exclusionary efforts.

As a threshold matter, ideally, remedy would lie in the affirmative behavior of state governments, which might take it upon themselves to cooperate with one another and refrain from enacting laws after recognizing the ultimately negative effects of expulsion. Indeed, precedent exists for interstate cooperation with regard to offender reentry matters. Since 1937, states have worked together to facilitate the interstate movement of individuals released from prisons and jails subject to probation and parole conditions.[219] Today, forty-eight states and the District of Columbia are signatories of the Interstate Compact on Adult Offender Supervision ("ICAOS"),[220] which proclaims as its purpose:

> [T]hrough means of joint and cooperative action among the compacting states: to provide for the promotion of public safety and protect the rights of victims through the control and regulation of the interstate movement of offenders in the community; to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving states; and to equitably distribute the costs, benefits, and obligations of the compact among the compacting states.[221]

The Compact empowers an interstate commission to promulgate rules regulating the terms and conditions under which offenders can be transferred between states, collect and manage data, assist in the resolution

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218. In 2004 alone, nearly 700,000 individuals were released into communities from state prisons, an eleven percent increase since 2000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 213133, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 6 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf.

219. *See* INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION, BENCH BOOK FOR JUDGES AND COURT PERSONNEL 23–35 (2006) [hereinafter BENCH BOOK], *available at* http://www.interstatecompact.org/legal/benchbook.pdf.

220. *See* Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71, 73 (2003). For the text of the Model Act for the ICAOS, see BENCH BOOK, *supra* note 219, at 107–22.

221. *See* BENCH BOOK, *supra* note 219, at 107.

of disputes, and initiate enforcement actions against any state in violation of the Compact and its rules.[222]

Like other state-state compacts, ranging from the placement of children[223] to the handling of insurance receiverships,[224] the ICAOS is designed to address interstate challenges that, absent coordination, will ultimately redound to the reciprocal disadvantage of individual states. In this respect, the states' near-total endorsement of the ICAOS gives reason to be optimistic about the prospect for like-minded cooperation among states in the face of the ultimately deleterious effects of exclusion.

Cause for optimism fades, however, in the face of the practical reality of the distinct nature of the challenge states encounter when it comes to ex-offenders who are "on paper" (i.e., subject to post-release probation or parole-supervision conditions) versus those who are not. Probationers and parolees, who today number in the millions,[225] present an immediate, practical challenge to states because their conditional release requires ongoing supervision by some governmental authority.[226] When supervised ex-offenders wish to migrate across state lines, a bureaucratic challenge of significant magnitude is thus created.[227]

Individuals who are "off paper," the subpopulation principally subject to residence exclusion laws,[228] pose no such logistical difficulties. Having satisfied the terms of their conditional release into the community, they are

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222. Buenger & Masters, *supra* note 220, at 119. Significantly, with the upsurge in parolees and probationers attending the tough-on-crime initiatives beginning in the 1980s, states largely ignored requirements contained in the 1937 Compact, prompting several legislatures to limit entry of ex-offenders from other states. *See id.* at 112–13. In response, in the late 1990s the Council of State Governments and other organizations spearheaded successful efforts to revamp the Compact, resulting in the more rigorous standards and rules embodied in the ICAOS today. *See id.* at 116.

223. *See, e.g.*, CAL. FAM. CODE § 7900 (West 2004).

224. *See, e.g.*, 45 ILL. COMP. STAT. ANN. § 160/5 (LexisNexis Supp. 2005). For a compilation of state compacts, see http://www.csg.org/CSG/Programs/National+Center+for+Interstate+Compacts/statutes.htm (follow "State Trends & Policy: Programs: National Care for Interstate Compacts" hyperlink; Interstate Compact Database" hyperlink) (last visited Sept. 20, 2006).

225. *See* LAUREN E. GLAZE & SERI PALLA, U.S. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2004, at 1 (noting that in 2004 the total number of persons under community supervision in the United States was just under five million).

226. *See* 1 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 17:34 (2d ed. 1999 & Supp. 2006) (noting "severe practical problems" entailed in interstate monitoring of probationers and parolees).

227. Over 3,200 distinct local authorities operating under 861 distinct agencies oversee the interstate travel of parolees and probationers. *See* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, CONTEXT FOR AMENDING THE PAROLE AND PROBATION INTERSTATE COMPACT, http://nicic.org/Downloads/Other/background.htm (last visited Sept. 20, 2006).

228. *See supra* note 26.

free to migrate elsewhere.[229] As a consequence, states have no pressing practical incentive to work with one another, and indeed, as the residence exclusion laws themselves attest, actually have a short-term positive incentive to act in disregard of one another's interests.[230]

In the absence of a state-initiated remedy, the judiciary naturally comes to mind as an option. As Alexander Bickel once observed, the unique institutional position of the judiciary "lengthen[s] everyone's view."[231] "[The] courts," Bickel posited, "have certain capacities for dealing with matters of principle that legislatures and executives do not possess."[232] Indeed, this sensitivity was evinced early on by the Supreme Court, when Chief Justice Marshall observed that "[w]hatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment."[233]

Such "feelings of the moment" are now besetting the states and, thus far, have met no resistance from state and federal courts. As discussed earlier, residence exclusion laws have withstood a broad array of constitutional challenges,[234] an outcome consistent with the historic deference paid to the police power of state legislatures,[235] whatever their negative interstate spillover effects.[236]

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229. *See* Smith v. Doe, 538 U.S. 84, 101 (2003) (distinguishing ex-offenders under post-release supervision from those who are not and noting that the latter "are free to move where they wish and to live and work as other citizens, with no supervision").

230. *Cf.* Ewing v. California, 538 U.S. 11, 27 (2003) (noting a "positive consequence" of California's "three strikes" law was that it encouraged parolees to leave the state). As I have noted elsewhere, "[w]ith criminal justice, there is, in effect, no 'Delaware'—no individual state calls the shots with respect to crime control policies, creating a climate in which competition (to the extent it exists) is perhaps keener than in the corporate law realm, where Delaware's preeminence has been theorized to undercut competition." Logan, *supra* note 134, at 1747 n.99.

231. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (1st ed. 1962).

232. *Id.* at 25.

233. Fletcher v. Peck, 10 U.S. (Cranch) 87, 137–38 (1810) (Marshall, C.J.); *see also id.* at 138 ("[T]he people of the United States, in adopting [the Constitution], have manifested a determination to shield themselves . . . from the effects of those sudden and strong passions to which men are exposed."); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921) (recognizing that "[s]tatutes are designed to meet the fugitive exigencies of the hour").

234. *See supra* notes 70–75 and accompanying text.

235. As the Court noted in *L'Hote v. City of New Orleans*, 177 U.S. 587 (1900), "[i]t has often been said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the States, and that upon them rests the duty of so exercising it as to protect the public health and morals." *Id.* at 596; *see also* United States v. Morrison, 529 U.S. 598, 618 n.8 (2000) (emphasizing that a "generalized police power" reserved to the states "is deeply ingrained in our constitutional history"). On the question of state police power authority more generally, Professor Barnett has observed:

Other potential constitutional claims, such as those sounding in the Privileges and Immunities and the Dormant Commerce Clauses, likewise hold little promise for ultimate success. This is because, despite the severe disabling effects of residence exclusion laws, courts will be inclined to find that—as did the Eighth Circuit in *Doe v. Miller*[237]—the laws technically permit targeted individuals to remain in states and allow for ingress of others. As a result, no express denial of rights, such as troubled the Court in *Saenz*,[238] will be thought constitutionally implicated. Likewise, unlike in *Saenz*,[239] the laws do not facially discriminate—in-state and out-of-state individuals alike are potentially subject to exclusion—also undercutting privileges and immunities concerns.[240]

With respect to the DCC in particular, even if excluded individuals qualify as "commerce" a la *Edwards*, no successful challenge would likely lie because the facially neutral character of exclusion laws would relegate their analysis to a less demanding standard of constitutional review. If deemed nondiscriminatory, the laws would be analyzed pursuant to the balancing test enunciated in *Pike v. Bruce Church, Inc.*,[241] which provides that when a law "regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[242] There is strong reason to believe that, despite the highly questionable efficacy of residence exclusion laws,[243] courts applying *Pike* will defer to the judgment of state legislatures on their public

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> Determining the propriety of state laws is more problematic than with federal powers . . . because there is no list of enumerated powers the original meaning of which can be used to distinguish proper from improper exercises of power. Indeed, there is nothing in the Constitution that speaks to the issue of the proper scope of state powers.

Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 434 (2004).

236. *See, e.g.*, Ewing v. California, 538 U.S. 11, 27 (2003) (noting with seeming approval that the "'unintended but positive consequence'" of California's draconian three-strikes law was to encourage parolees to leave the state (quoting OFFICE OF THE ATTORNEY GENERAL, CAL. DEP'T OF JUSTICE, THREE STRIKES AND YOU'RE OUT—ITS IMPACT ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS 10 (1998))).

237. *See supra* notes 91–99 and accompanying text.

238. *See supra* notes 163–66 and accompanying text.

239. Saenz v. Roe, 526 U.S. 489, 500 (1999).

240. *See* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1448 (1995) ("The Privileges and Immunities Clause has been construed to protect only against state rules . . . distinguishing between citizens and noncitizens of states.").

241. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

242. *Id.* at 142.

243. *See supra* note 130–33 and accompanying text.

policy wisdom, as did the Eighth Circuit in *Doe v. Miller*,[244] dooming any DCC claim.

In addition, the distinct prospect exists that reviewing courts will subscribe to lingering precedent condoning state isolationist tendencies vis-à-vis socially disdained subpopulations. Indeed, while *Edwards* condemned *Miln*'s approval of state efforts to bar "paupers," bristling at the archaic stereotype motivating *Miln* (decided in 1836) that equated "[p]overty and immorality,"[245] it avoided reconsideration of *Miln*'s tacit approval of state authority to bar "convicts."[246] State laws targeting ex-offenders, sex offenders in particular, would not likely be so readily dismissed as outmoded and irrational, but rather considered justified in light of such individuals' established propensity to violate the criminal law.[247] Similarly, temptation will exist to equate ex-offenders with the exception carved out in *City of Philadelphia*, condoning state prohibitions of items that "'bring in and spread disease, pestilence, and death'" and otherwise "'valueless waste.'"[248]

A third and final possible institutional avenue for relief is Congress, which has previously intervened in instances of state externalization of social problems. Most often Congress has done so when states have engaged in a "race to the bottom," as is said to occur with environmental policy when states weaken their regulations in an effort to attract or retain business.[249] In such instances, federal intervention is thought warranted to forestall the possibility that states may adopt weaker (and thus more environmentally harmful) regulations than they perhaps naturally would in the absence of

244. *See supra* note 100–02, 113 and accompanying text.

245. Edwards v. California, 314 U.S. 160, 177 (1941) ("Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous.").

246. *See id.* at 176 (citing Mo., Kan. & Topeka Ry. v. Haber, 169 U.S. 613 (1898); Plumley v. Massachusetts, 155 U.S. 461 (1894); R.R. Co. v. Husen, 95 U.S. 465 (1877); Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283 (1849)); *see also* Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (stating similarly in dictum); *cf.* Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) ("The right to confiscate and banish, in the case of an offending citizen, must belong to every government.").

247. This predisposition would be enhanced by courts' persistent assertion that sex offenders recidivate at a far greater rate than other offender subpopulations, an assertion contradicted by empirical work. *See* LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 1 (1996), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvvoatvx.pdf; PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ-198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 24 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

248. City of Phila. v. New Jersey, 437 U.S. 617, 622 (1978) (quoting Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 489 (1888)).

249. *See generally* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 (1997).

interstate competition, thereby negatively impacting other states.[250] Federal laws regulating firearms, which can be readily transferred across state lines, represent another example of federal intervention in the face of lax state policies.[251] With exclusion laws, on the other hand, the concern is not laxness; rather, concern stems from emulation of harsh laws out of a mutual governmental desire to purge ex-offenders, to the immediate detriment of other states, and ultimately the nation as a whole.

While other potential jurisdictional bases might support federal action,[252] the most promising basis likely lies in Congress's invocation of its Spending Clause authority.[253] A prime illustration of the exercise of this authority came in the 1980s when Congress, alarmed over a looming crisis inspired by states' aversion to locating low-level radioactive waste within their territories, required states to provide for the disposal of such waste, either internally or in other states pursuant to multi-state compacts.[254] Congress did so by means of a series of monetary "incentives" that the Supreme Court unanimously upheld in *New York v. United States*.[255]

Just as states needed an incentive to accommodate radioactive waste, they now need an incentive not to expel and repel ex-offenders by means of residence exclusion laws. Congress could, consistent with Spending Clause

250. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 627–38 (1996).

251. *See* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1310–12 (2005); *see also* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 285 (1997) (advocating federal gun control involvement due to mobility of individuals and guns and because "one state's stringent gun control measure can be substantially undermined if bordering states choose not to enact such a measure").

252. For instance, as recognized in *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981), Congress has authority under the Commerce Clause to adopt a national regulatory scheme to address intrastate activities, including those within the traditional regulatory ambit of state police power, that are not themselves of a commercial or an economic nature. State-imposed limits on the capacity of individuals to move to or remain in states would arguably qualify. *Cf.* Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (upholding congressional authority to criminalize possession, manufacture, or use of marijuana in face of state law providing medical purpose exception).

253. *See* U.S. CONST. art. I, § 8, cl. 1 (empowering Congress to tax and "provide for the common Defense and General Welfare"); *see also* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (observing that pursuant to its spending power "Congress may attach conditions on the receipt of federal funds").

254. *See* Low-Level Radioactive Waste Policy Amendment Act of 1985, Pub. L. No. 99-240, § 5(3)(2), 99 Stat. 1842 (codified as amended at 42 U.S.C. § 2021e (2000)).

255. New York v. United States, 505 U.S. 144, 171–72 (1992). A majority of the Court did, however, find fault with one aspect of the Act, the "take title" provision, which offered states the option of either enacting laws in compliance with federal laws on the storage and disposal of radioactive waste, or in the alternative, assuming ownership over all radioactive waste in the state. A 6-3 majority deemed the provision an impermissible act of federal commandeering of state authority, in violation of the Tenth Amendment. *Id.* at 177.

authority requirements,[256] conditionally prohibit states from enacting such laws.[257]

However, even if Congress enjoys the authority to intervene, concern remains over whether a congressional solution is realistic. Historic instances such as the Indian Removal Act of 1830[258] and the Chinese Exclusion Act of 1882,[259] call into question Congress's willingness to legislate in favor of inclusiveness in times of national anxiety over particular subpopulations. More recently, this aversion has manifested itself with respect to criminal justice policy, especially, with Congress exercising its Spending Clause authority to compel harsher (never more lenient) strategies,[260] including laws targeting sex offenders in particular.[261]

Moreover, serious doubt exists over the willingness of Congress to act in this particular context, given that it requires federal political leaders to step in and limit the centrifugal will of state legislatures. Even though members

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256. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 232–33 (7th ed. 2004) (discussing four-part test used to determine propriety of Congress's invocation of its Spending Clause authority).

257. Any such legislation would of course need to be sensitive to the recognized power of individual states to adopt criminal justice policies that, ultimately, can also function to expel and repel ex-offenders. A prime illustration of this capacity is found in California's notably harsh "three strikes" law, which imposes heightened prison terms on recidivists and was condoned by the Supreme Court in *Ewing v. California*, 538 U.S. 11, 21 (2003). Such laws, for better or worse, are a byproduct of the nation's federalist system—manifestations of the extolled ideal of states as "laboratories" of social and economic experimentation. *See* New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Where the tipping point lies relative to extraterritorial effect, sufficient to warrant concern, is a critically important question with major ramifications for federalism, but one that is beyond the scope of this Essay. Suffice it to say, the state laws examined here, which impose express residence restrictions on a class of individuals, justify collectivist concern warranting federal attention.

258. The Indian Removal Act of 1830, ch. 148, 4 Stat. 411.

259. The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

260. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13702(a) (2000) (providing grants to states that require violent offenders to serve at least 85% of their prison terms); Aimee's Law, 42 U.S.C. § 13713 (2000) (exempting states from reimbursement requirements for the prosecution of their parolees who recidivate in other states if they adopt specified minimum sentences for specified serious offenders). For more on the unique political factors driving Congress to enact particularly draconian laws, see generally Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005); Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

261. *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 125, 120 Stat. 587, 597 (2006) (conditioning states' receipt of federal law enforcement funds on adoption of specified minimum registration and community notification requirements for convicted sex offenders); *cf.* Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking,"* 53 HASTINGS L.J. 843, 855–56 (2002) (discussing decision by Congress to amend the Federal Rules of Evidence to make it easier to admit evidence of prior sexual misconduct to establish, inter alia, propensity and character, despite vigorous opposition of U.S. Judicial Conference and many critics).

of Congress theoretically seek to serve the best interests of the nation,[262] because they must stand for election before state voters, the political popularity of exclusion laws diminishes to the point of near extinction the likelihood of congressional intervention. Federal elected officials will be loath to act in a way that can be portrayed as being at once "pro-sex offender"[263] and contrary to the revered police authority of states.[264]

In sum, despite the detriments of residence exclusion laws, their proliferation appears likely to continue unabated. State legislatures lack any practical incentive to cooperatively resist the temptation of exclusion and naturally embrace it as a politically popular method of social control that at once assuages public anxiety over crime and avoids the major costs of continued incarceration. Nor, for reasons discussed, do the courts and Congress hold promise as means to intercede in what will in all likelihood be an ongoing race to enact exclusion laws.

V. CONCLUSION

Historically, disdain for criminal offenders has been viewed as natural[265] and even socially beneficial. Emile Durkheim, for one, extolled the societal benefit of punishing criminals, maintaining that targeting wrongdoers for sanction reaffirms the collective moral order and promotes social

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262. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803 (1995) ("[I]n [the] National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation . . . . Representatives and Senators are as much officers of the entire Union as is the President."); *see also* Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 89 (2006) (noting same and providing additional historical evidence in support of view).

263. *See generally* LORD WINDLESHAM, POLITICS, PUNISHMENT, AND POPULISM 100–04, 177–88 (1998) (discussing catalytic political pressures prompting rapid and near-unanimous adoption of recent federal sex offender-related laws). In the state context, the Iowa Legislature has resisted efforts to amend its law, rejecting concerns about exclusion voiced by the Iowa County Attorneys Association and the state sheriffs association. Tom Shaw, *Prosecutor: Offender Law Flawed*, OMAHA WORLD-HERALD, Jan. 28, 2006, at 1A; *see also* Jill Young Miller, *Keeping Sex Offenders Away from . . . Schools/Playgrounds/Bus Stops/Churches—Is It as Practical as It Sounds?*, ATLANTA J.-CONST., Mar. 17, 2006, at A1 (noting lobbying effort of the Georgia Sheriff's Association seeking to modify exclusion zone provision relating to school bus stops due to enforcement difficulties and quoting one sheriff as saying "[w]e're kind of against the wall on this one because if you don't support it (the bill) you're seen as soft on crime").

264. *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (stressing the predominant, autonomous role of states on criminal justice matters); THE FEDERALIST NO. 45, at 137 (James Madison) (Roy P. Fairfield ed., Johns Hopkins Paperbacks 1981) (2d ed. 1966) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .").

265. *See, e.g.*, 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) ("The criminal law . . . proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.").

cohesion.[266] History itself provides ample evidence of the impulse to target "dangerous classes,"[267] to physically exclude unwanted individuals,[268] and the more general desire to reify and define the moral "us" versus the immoral "them."[269]

These tendencies, however, assume new significance in modern America, which for the past two decades has engaged in a historically unprecedented experiment in mass penality,[270] resulting in millions of Americans being branded with the highly stigmatizing ex-offender label, with its many social and legal impediments.[271] In this context, the espoused Durkheimian benefits associated with stigmatization and ostracism collide with a pragmatic reality: the necessity of eventually reintegrating these freed millions back into society. The assimilation of convicted sex offenders has proven especially controversial and difficult, prompting an array of social control strategies, including laws that prohibit such individuals from living in specified areas.

Residence exclusion laws remain untested in terms of their efficacy, and, indeed, the available evidence suggests that they actually may be

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266. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 102 (George Simpson trans., Macmillan Co. 1933) (1893) ("Crime brings together upright consciences and concentrates them."); *see also* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 33 (1990) (attributing to Durkheim the view that punishment provides "an occasion for the collective expression of shared moral passions, and this collective expression serves to strengthen these same passions through mutual reinforcement and reassurance").

267. *See* CHARLES LORING BRACE, THE DANGEROUS CLASSES OF NEW YORK, AND TWENTY YEARS' WORK AMONG THEM 28–29 (1872) (characterizing such persons as a congregate of the "great masses of the destitute, miserable, and criminal persons"); *cf.* FRIEDMAN, *supra* note 53, at 83–106 (discussing historic use of the criminal law to target particular "outsider" groups and maintain social status quo); Eric S. Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576, 582-87 (2004) (discussing "the concept of the degraded 'other,'" citing historic instances of such "outsider groups" in American constitutional history).

268. *See, e.g.*, Martine Kaluszynski, *Republican Identity: Bertillonage as Government Technique, in* DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD 123, 136–37 (Jane Caplan & John Torpey eds., 2001) (discussing efforts by French authorities in the early 1900s to exclude gypsies from communes).

269. *See* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 427 (2001) (characterizing "displacement [as] the central act of community").

270. For an expansive treatment of the broader social and political forces driving this transformation, see generally DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

271. *See generally* JUSTICE POLICY CENTER, URBAN INSTITUTE, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO (2006), http://www.urban.org.cfm?ID=411289 (discussing myriad challenges faced by ex-offenders, including housing and employment scarcity); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–38 (2006) (discussing extensive array of collateral consequences imposed as a result of criminal convictions).

harmful because they increase the prospects for reoffense.[272] This Essay, however, has focused on the negative impact of the laws on the nation's unity-enforcing constitutional structure, doctrine, and traditions. While economic isolationism was of predominant concern during the framing era, exclusion laws make clear the contemporary need for a kindred effort to combat the social tensions and negative reciprocities bred in an era when states have come to "govern through crime."[273]

Whatever the preference of individual states, and despite the increasingly isolationist tenor of American society more generally,[274] ex-offender reentry is unavoidably a "problem shared by all." As recognized since the nation's formation, no state can be permitted to except itself from common national challenges. Rather than presenting an internal police power matter, in which "the general welfare of the United States is not concerned,"[275] the treatment of ex-offenders is manifestly a national concern that ultimately must be addressed by the constituent parts of the nation as a whole. In the end, this imperative stems not from any idealized expression of nationalistic fealty, but rather from an irreducibly pragmatic need-based reality. For, as Justice Cardozo's oft-repeated recognition reminds us, the nation's constitutional order was based on a "political philosophy less parochial in range . . . . [T]hat the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[276]

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272. *See supra* notes 130–31 and accompanying text.

273. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: THE WAR ON CRIME AND THE TRANSFORMATION OF AMERICA, 1960–2000, at 5 (forthcoming 2006) ("[W]hatever effects American governments have had on crime through the war on crime, crime has changed how we govern ourselves, our institutions, our polities.").

274. As Richard Schragger has observed, "We live in a society that relies heavily on boundaries . . . . Instead of an inclusionary concept, community has become a mechanism for building high normative and literal walls in legal, social, and physical space." Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 471 (2001).

275. Barnett, *supra* note 235, at 476 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 3d ed. 1966) (statement of Mr. Sherman, July 17, 1787)).

276. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).