SECTS' OFFENDERS: THE INEFFICACY OF SEX OFFENDER RESIDENCY LAWS AND THEIR BURDENS ON THE FREE EXERCISE OF RELIGION

AMOL N. SINHA*

I. INTRODUCTION

In 2002, Yoel Oberlander was convicted of second-degree sexual abuse after pleading guilty to abusing an eleven-year old girl in Rockland County, New York.[1] He was sentenced to six years' probation.[2] After a sex offender classification hearing, in which the court reviewed Oberlander's psychological and physical treatments—which a doctor testified caused him to be "chemically castrated and thereby rendered virtually asexual"—the court labeled Oberlander as a "level 2" sex offender.[3] In 2007, Oberlander was again arrested and held in violation of his probation when he was found living near a religious school in Monsey, New York.[4] He was arrested for violating a Rockland County law,[5] which prohibited sex offenders from living within one thousand feet of a place where children congregate.[6] In a pre-hearing motion to dismiss the violation, Oberlander argued that the county's sex offender residency law was unconstitutional on its face and as applied.[7] Oberlander's claim was a due process challenge based upon the Free Exercise Clause of the First Amendment since, as an Orthodox Jew, he was required by Jewish law to live within walking distance of a temple, but was arrested because of the proximity of his residence to a religious elementary school.[8]

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* Symposium Editor, Cardozo Journal of Law and Gender. J.D. Candidate (2010), Benjamin N. Cardozo School of Law; B.A. (2007), New York University. Many thanks to Professor Marci Hamilton for her continued inspiration and guidance throughout the note-writing process and beyond, and for her dedication to helping victims of childhood sexual abuse. Thanks also to my peers at the Cardozo Journal of Law and Gender for their comments and feedback. And finally, I would like to thank my family for their constant encouragement, emotional support and unconditional love.

1 *Decision of Interest: People v. Oberlander*, 229 N.Y.L.J. 28, 28 (2008).

2 *Id.*

3 *Id.*

4 *Id.*

5 County Pedophile-Free Child Safety Zone Act, 2007 Local L. No. 1, *invalidated by* People v. Oberlander, No. 02-354, 2009 WL 415558 (N.Y. Sup. Ct. Jan 22. 2009), http://theparson.net/so/rocklandcounty.htm (last visited Feb. 3, 2010).

6 People v. Oberlander, No. 02-354, 2008 WL 3390455, at *1 (N.Y. Sup. Ct. June 18, 2008).

7 *Id.*

8 People v. Oberlander, No. 02-354, 2009 WL 415558, at *1 (N.Y. Sup. Ct. Jan. 22, 2009).

The Supreme Court of New York in Rockland County held during the violation of probation hearing that the law was not unconstitutional because it was facially neutral and generally applicable, citing *Employment Division v. Smith*, in which the court held that laws that are generally applicable are to be tested against a lower standard of review.[9] While the court noted that previous cases involving sex offender residency laws had not challenged constitutionality on Free Exercise grounds, it stated that "nothing had been submitted demonstrating the defendant's religious need to live within the Town of Ramapo,"[10] and that "[t]he defendant's 'need' to live in Ramapo is no stronger than those of the potential victims within the town that share the same religious beliefs."[11]

When the court heard the merits of the case, it determined that the local residency restriction was invalid, as it was preempted by the state's Megan's Law—combined with a newly enacted statewide residency restriction.[12] While the court called the state restriction a residency restriction, the law is broader than residency in that it prohibits entry by level three sex offenders on parole or probation into areas within one thousand feet of a school or any place where minors congregate.[13] The court held that the state had already in place a "detailed legislative scheme" for enforcing restrictions on sex offender housing.[14] While invalidating the local law, the court in this case—and those cases challenging the local residency laws in other New York counties and/or municipalities—did not question the effectiveness of such laws.[15]

This Note attempts to analyze the effectiveness of sex offender residency laws, and the consequences and conflicts that emerge from enacting such laws in the context of religion and religious freedom.

Part II examines the inefficacy of sex offender residency laws in the context of recidivism. The main goal of these laws is to eliminate the chances of sex offenders re-offending, either with new victims or with the original victims.[16] This Note shows that such laws are a weak attempt at decreasing recidivism and only

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[9] People v. Oberlander, No. 02-354, 2008 WL 3390455, at *1 (N.Y. Sup. Ct. June 18, 2008) (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).

[10] *Id.* at *2.

[11] *Id.* at *4.

[12] People v. Oberlander, No. 02-354, 2009 WL 415558, *3-4 (N.Y. Sup. Ct. Jan. 22, 2009) (The court said that the defendant had met his civil procedure burden of showing a justifiable excuse for his probation violation by explaining that the housing requirement was impossible to meet, *Id.* at *5). For more cases regarding the state preemption of local residency restrictions, *see* Doe v. Rensselaer (N.Y. Sup. Ct. June 29, 2009) (on file with author), Wray v. Albany (N.Y. Sup. Ct. July 10, 2009) (on file with author); *See also* G.H. v. Twp. of Galloway, 401 N.J. Super. 392 (N.J. Super. Ct. App. Div. 2008).

[13] N.Y. PENAL LAW § 65.10 (McKinney 2009); N.Y. EXEC. LAW § 259(c)(14) (McKinney 2009).

[14] People v. Oberlander, No. 02-354, 2009 WL 415558, at *3 (N.Y. Sup. Ct. Jan. 22, 2009).

[15] *Id.*; *See also* Doe v. Rensselaer (N.Y. Sup. Ct. June 29, 2009); Wray v. Albany (N.Y. Sup. Ct. July 10, 2009).

[16] *See generally* JILL S. LEVENSON, RESIDENCE RESTRICTIONS AND THEIR IMPACT ON SEX OFFENDER REINTEGRATION, REHABILITATION, AND RECIDIVISM (2007), http://www.csom.org/ref/ResidenceRestrictions.pdf.

attempt to instill a false sense of security to the community the law covers, thus creating further danger for the community and providing further obstacles for the offender to regain stability in his life.

Part III suggests that because such laws are not effective, the burden placed on religion by such law is unnecessary. It is a fact that childhood sexual abuse occurs in great numbers in religious communities, especially insular ones.[17] However, attempting to eliminate childhood sexual abuse by banishing known offenders from those communities is neither productive for the offender, nor society. Such a solution misses the core of the problem: the staggering majority of sex abuse goes unreported due to the nature of the relationships between abusers and victims.[18] The current state of legislation, which is said to protect victims, is in fact designed to limit their opportunities to bring suit against their attackers.[19]

This Note does not disagree with the United States Supreme Court's ruling in *Smith*, that free exercise challenges to neutral, generally applicable laws should not require the Court to view the law under strict scrutiny or require the government to provide a compelling interest.[20] However, this Note does suggest that state and local legislatures should consider, before enacting, the actual effectiveness of the means and the ends of any law that places significant burdens on the practice of religion. Part III continues to analyze the law in both the constitutional and statutory context of state-enacted Religious Freedom Restoration Acts ("RFRAs"). Since some state-RFRAs require compelling interest tests for laws that cause even a *de minimis* burden on religion, the states with sex offender residency laws—either on the state or local levels—may be in violation of their state-RFRAs.[21]

Part IV of this Note makes recommendations for alternative legislation instead of residency restrictions. Legislatures should not burden the free exercise of religion with frivolous and ineffective laws, but rather they should enact legislation that actually deals with preventing abuse and bringing current abusers—especially religious abusers hiding behind the veil of their religion and/or church—into the criminal system. Legislatures should eliminate sex offender residency restrictions, or at least grant exemptions for religious individuals affected by them. Additionally, legislatures should enact laws that actually help victims of abuse, such as extending or eliminating statutes of limitations for victims of childhood sexual abuse, and laws that provide for strict liability against anyone who knows of abuse and fails to report it.

This Note concludes that government should not burden the free exercise of religion with frivolous, ineffective laws such as sex offender residency restrictions.

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[17] *See generally* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (Cambridge University Press 2005) [hereinafter GOD VS. GAVEL].

[18] *Id.* at 12-19.

[19] *See id.*

[20] Employment Div. v. Smith, 494 U.S. 872 (1990).

[21] *See generally* Nicholas Nugent, *Toward a RFRA That Works*, 61 VAND. L. REV. 1027 (2008).

Instead, the government should take a more nuanced position that keeps free exercise of religion beyond the reach of ineffective laws, but affords the government the ability to prosecute members of insular communities and religious institutions when charged with sexual abuse. The most effective way of maintaining this balance is to accommodate the victim, rather than the predator, through effective legislative reform.

II. THE INEFFICACY OF SEX OFFENDER RESIDENCY LAWS

Generally, states' sex offender residency laws require convicted sex offenders to reside between at least 500 to 2500 feet away from places such as public parks, playgrounds, schools, day care centers, and other venues where children may congregate.[22] Legislators have the strong interest of keeping children safe from sexual predators in mind when enacting such laws, which create "pedophile-free zones,"[23] but residency restrictions do not prevent or deter the crime.[24] Instead these laws result merely attempting, weakly, to move the crime elsewhere.[25] The increasing number of sex offender residency laws gives the impression that these laws are succeeding to prevent sex crimes, but that is not the case. One of the main goals of these laws is to prevent sex offense recidivism, a widely accepted phenomenon.

However, recidivism among sex offenders is not as common as believed. In a 2003 report by the U.S. Department of Justice, which tracked the activity of sex offenders released from prison in 1994, only 3.5% were reconvicted for a sex offense within three years of release.[26] Individual state reports shed further light on recidivism and other misconceptions of residency restrictions.

A. State Reports

Reports have been produced in Minnesota, Colorado, California and Iowa regarding their states' sex offender residency laws or potential residency restrictions.[27] These reports have evaluated research and statistics that show that residency restrictions are not or will not be successful.[28]

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[22] *See* MARCUS NIETO & DAVID JUNG, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW (2006).

[23] Marci Hamilton, *The Drive to Create Pedophile-Free Zones: Why It Won't Work–And What Will Work*, FINDLAW, Aug. 25, 2005, http://writ.news.findlaw.com/hamilton/20050825.html.

[24] *See* William Garth Snider, *Banishment: The History of Its Use and A Proposal For Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 458 (1998).

[25] *Id.*

[26] PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003).

[27] MINNESOTA DEPARTMENT OF CORRECTIONS, RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA (2007), http://www.doc.state.mn.us/publications/documents/04-07SexOffenderReport-Proximity.pdf; COLORADO DEPARTMENT OF PUBLIC SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE

1. Minnesota

A report of the Minnesota Department of Corrections analyzed the effectiveness of sex offender residency laws by studying the behavioral patterns of 224 recidivists who were incarcerated for a sex crime, and were released between 1990 and 2002, but reincarcerated prior to 2006.[29] The study shows that if sex offenders were to reoffend, a residency restriction would not effectively stop them.[30] The results were as follows:

> Not one of the 224 sex offenses would likely have been deterred by a residency restrictions law. Only 79 (35 percent) of the cases involved offenders who established direct contact with their victims. Of these, 28 initiated victim contact within one mile of their own residence, 21 within 0.5 miles (2,500 feet), and 16 within 0.2 miles (1,000 feet). A juvenile was the victim in 16 of the 28 cases. But none of the 16 cases involved offenders who established victim contact near a school, park, or other prohibited area. Instead, the 16 offenders typically used a ruse to gain access to their victims, who were most often their neighbors.[31]

The report noted that with regard to sex offense recidivism, residential proximity does not matter as much as relationship and social proximity.[32] "[T]he most common victim-offender relationships found in this study was that of a male offender developing a romantic relationship with a woman who has children."[33]

The report also noted that restricting housing locations may in fact have the adverse effect intended by the law and actually worsen the process of reintegration of sex offenders into society.[34] Often, sex offenders are forced to live in neighborhoods of "social disorganization" that are not rehabilitative and provide little to no form of support for the offender.[35] The report also cited another study which examined 135 sex offenders living in Florida subject to residency restrictions that forced them to move because they were originally residing within one thousand feet of a school, day care facility, or another place where children congregate. The report found that for the offenders, the restrictions "led to increased isolation, decreased stability, and greater emotional and financial stress."[36]

COMMUNITY (2004), http://dcj.state.co.us/ors/pdf/docs/FullSLAFinal.pdf [collectively hereinafter STATE REPORTS]; NIETO & JUNG, *supra* note 22.

[28] *See generally id.*

[29] *See id.*

[30] *Id.*

[31] *Id.* at 2.

[32] *Id.*

[33] *Id.*

[34] STATE REPORTS, *supra* note 27 at 4.

[35] *See id.* at 6 (citing Elizabeth Ehrhardt Mustaine, Richard Tewksbury & Kenneth M. Stengel, *Social Disorganization and Residential Locations of Registered Sex Offenders: Is this a Collateral Consequence?*, 27 DEVIANT BEHAV. 329, 329-50 (2006)).

[36] *See* STATE REPORTS, *supra* note 27, at 6-7 (*citing* J.S. Levenson and L.P. Cotter, *The Impact of*

2. Colorado

In a 2004 report, the Colorado Department of Public Safety studied whether the proximity of the state's sex offenders' residences to schools and/or childcare centers had an effect on recidivism.[37] The study noted that in urban areas, the residency restrictions leave very limited areas for sex offenders to live.[38] Therefore, sex offenders who have reoffended either sexually or through other criminal activity seem to be scattered; there are no more sex offenders living near schools or other child-safety zones than other types of offenders.[39] The report suggested that, "[p]lacing restrictions on the location of correctionaly [sic] 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."[40]

3. California

The 2006 report of the California Research Bureau determined the impact that sex offender residency restrictions have on states and local communities and whether they are effective in preventing recidivism.[41] The report states that while there is not much research on the effect of limiting housing for sex offenders, "the few studies available find they have no impact on reoffense rates."[42]

4. Iowa

The Iowa County Attorneys Association[43] ("ICAA") produced a statement in 2006 regarding the state's enactment of a sex offender residency law.[44] The ICAA listed several reasons why such a law is ineffective to prevent sex crimes, is an inefficient way to protect children, is difficult to enforce, and is unconstitutional. The report concluded that there is no correlation between reduction of sex offenses and residency restrictions.[45] Research indicates no reason to believe strangers are of greater danger than people trusted and known by children or that residency restrictions are difficult to enforce and result in sex offenders giving false addresses

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Sex Offender Residency Restrictions: 1,000 Feet From Danger or One Step From Absurd?, 49 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 168-78 (2005)).

[37] *See* STATE REPORTS, *supra* note 27.

[38] *Id.*

[39] *Id.* at 4.

[40] *Id.*

[41] NIETO & JUNG, *supra* note 22.

[42] *Id.* at 4.

[43] This is a private organization, not a state entity.

[44] IOWA COUNTY ATTORNEYS ASSOCIATION, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (2006), http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%2011%2006.pdf.

[45] *Id.*

or becoming homeless.[46] Furthermore, many of the offenders have reunited with the victims and are married—most probably due to statutory rape crimes where the just post-majority offender had sexual intercourse with his minor girlfriend—thus the residency restriction can punish victims as well as offenders.[47]

These reports show that sex offender residency restrictions do not work for the basic reasons of inefficiency, overbreadth of the law, and simply, the lack of appropriate housing. Further reasons are explained in detail below.

B. Pedophiles are Mobile

The rationale behind residency restrictions is analogous to the First Amendment jurisprudence doctrine of "time, place, and manner" restrictions applied by the Supreme Court.[48] In *City of Renton v. Playtime Theatres, Inc.*, the Supreme Court held valid under the First Amendment a city ordinance that prohibited adult movie theaters from locating within one thousand feet "of any residential zone . . . church, park or school."[49] The same approach is applied to sex offenders in the current push for residency restrictions.[50] However, the crucial—and obvious—difference is that adult theaters cannot move, while sex offenders are mobile.[51]

While sex offenders may not be able to live near children due to residency restrictions, some of the most vile and long-term series of offenses occur when the offender preys on his victim.[52] Legislatures may be able to restrict where sex offenders live, but they cannot stop them from using the sidewalks or roads to get to their victims.[53] While some residency laws have loitering provisions which essentially say that sex offenders may not go to an area where children may congregate and remain there without a legitimate purpose, or beyond the time it

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[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In *Renton*, the Court emerged with a three-pronged test to analyze time, place and manner restrictions. The Court held that in order to be constitutional under the First Amendment, the ordinance must be content-neutral, designed to serve a substantial government interest, and not unreasonably limit the alternative avenues of communication. *Playtime Theatres, Inc.*, 475 U.S. at 47.

[49] *Playtime Theatres, Inc.*, 475 U.S. at 53.

[50] GOD VS. GAVEL, *supra* note 17.

[51] *Id.* ("While one can sympathize with the desire to create zones of safety for our children, the problem of child abuse will not be solved through zoning. Even if a pervert cannot live within 2,500 feet of a school, he will doubtless be able (either legally, or due to the limits of enforcement) to use the sidewalks and streets near schools and playgrounds. Adult bookstores are not mobile; people are.").

[52] *See* Marzulli, *Upstate New York Rabbi held On Molest Charges*, THE DAILY NEWS, Oct. 6, 2008, *available at* http://www.nydailynews.com/news/ny_crime/2008/10/06/2008-10-06_upstate_new_york_rabbi_held_on_molest_ch.html (detailing an account of a Rabbi who followed his victim overseas for years to make abuse more convenient).

[53] *Id.*

takes to conduct that purpose, these provisions might be difficult to enforce, especially as a preventative measure.[54]

A prime example of a mobile pedophile is Israel Weingarten. In October 2008, Weingarten, a Rabbi from Monsey, New York was charged with the sexual abuse of one young woman from 1990 when she was nine years old, until she was eighteen.[55] During that time, Weingarten allegedly moved his family of seven between Israel, Belgium, and the United States in order to follow his victim, prey on her, and gain greater freedom to abuse her.[56] Ultimately, Weingarten was convicted and received a sentence of thirty years in prison.[57] While Weingarten was not a registered sex offender, and thus was not subject to residency restrictions, this case shows that it would not have mattered if he were a registered sex offender. Sex crimes cross jurisdictions, even internationally, if the offender is determined to attack his victim.[58] As seen in this case, a one thousand foot radius dividing the offender and the victim's school, day care facility, or playground may not deter an attack.

C. Sex Offender Residency Restrictions are Ineffective Legislation because they Target the Wrong People

As seen in the Weingarten case and in the aforementioned studies conducted by the Minnesota and Colorado governments, more often than not, the abuser is a trusted family member, clergy, friend, or acquaintance of the victim.[59] The embarrassment, guilt, and shame felt by the victim after an attack may lead to the crime not being reported, and thus, the offender never being punished.[60] According to Deborah Jacobs of the American Civil Liberties Union of New Jersey:

> The vast majority of sex offenses are committed by trusted adults-family members, friends, clergy-and go unreported because of manipulation of the victims, unconscionable decisions by other adults, or both . . . . Because the most common type of sex crime so often goes unreported, most sex

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[54] *See, e.g.*, South Dakota's residency restriction, S.D. CODIFIED LAWS § 22-24B-23 (2006).

[55] Marzulli, *supra* note 52 (The very small town of Monsey, N.Y., as mentioned, was within reach of a recently invalidated Rockland County sex offender residency restriction, further evidence that such laws are ineffective in preventing sexual abuse.).

[56] *See* U.S. v. Weingarten, No. 08-CR-571(JG), 2009 WL 1269722, at *4 (E.D.N.Y. May 8, 2009).

[57] John Marzulli, *Hasidic Rabbi Israel Weingarten, Convicted of Daughter's Sex Molest, Sentenced to 30 Years*, THE DAILY NEWS, May 9, 2009, *available at* http://www.nydailynews.com/news/ny_crime/2009/05/09/2009-05-09_hasidic_rabbi_israel_weingarten_convicted_of_daughters_sex_molest_sentenced_to_3.html.

[58] *See* U.S. v. Weingarten, No. 08-CR-571(JG), 2009 WL 1269722, at *2-3 (E.D.N.Y. May 8, 2009).

[59] *See* STATE REPORTS, *supra* note 27.

[60] *See* Deborah Jacobs, *Why Sex Offender Laws Do More Harm Than Good*, ACLU-NJ, http://www.aclu-nj.org/issues/criminaljustice/whysexoffenderlawsdomoreha.htm.

> offenders never become part of the criminal justice system and therefore are not affected by [sex offender residency] laws.[61]

If the crime goes unreported, then the offender is not listed in the sex offender registry, and therefore is not subject to the residency restrictions.[62] According to a Department of Justice study, ninety-three percent of sex offenders who committed their offenses against children were family members or close friends of the family.[63] These offenders, the ones that the state should worry about, are the ones who most often go unpunished and are the greater problem.

However, the existence of residency restrictions shows that states are more interested in keeping an eye on those already punished rather than preventing new crimes from happening. Sex offender residency laws are punitive, serving to further punish those that have already been punished through the judicial system, thus undermining the system of punishment that already exists, and punishing twice for the same crime in the form of a civil sanction.[64] In *U.S. v. Gartner*,[65] the Ninth Circuit determined that "[a] civil penalty that bears no rational relationship to actual damages may not fairly be characterized as remedial, but only as a deterrent or retribution, and thus constitutes punishment for purposes of double jeopardy."[66] Instead, the focus of legislation should be on the aforementioned offenders who are close to their potential victims but go unpunished because of the nature of the relationship between the offender and the victim or the protection granted to the offender from religious organizations.[67]

D. Residency Laws Are Modern-Day Forms Of Banishment

Banishment, historically, is the removal of an individual, usually from a state or country, as punishment.[68] If one uses this definition to view sex offender residency laws, it is apparent that these laws attempt to banish offenders from one area and send them to another.[69] Taking a close look at the legislative intent of

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[61] *Id.*

[62] *Id.*

[63] HOWARD N. SNYDER, DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (2000).

[64] *See* U.S.v. Gartner, 93 F.3d 633 (9th Cir. 1996).

[65] *Id.*

[66] *Id.* at 635.

[67] *See* GOD VS. GAVEL, *supra* note 17 (arguing that professionals, including clergy, with access to children should turn abusers in and should be subject to liability if they suspect child abuse and fail to report it).

[68] *See generally*, Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513 (2007); Amber Leigh Bagley, *"An Era of Human Zoning": Banishing Sex Offenders from Communities through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1349 (2008) ("Banishment has historically been used to punish criminals and political dissidents by expelling them from a community.").

[69] William Garth Snider, *Banishment: The History of Its Use and A Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 458 (1998) (arguing that all banishment does is remove the source of the evil in question from one community and impose it on another).

these laws, one can see that the basic and obvious goal of the law is to keep sex offenders out of "child safety zones."[70] In the case of Rockland County, New York, a "child safety zone" creates one thousand foot radius buffer zone around schools, public parks, playgrounds, day care facilities, and anywhere else children may congregate, from which sex offenders are banished.[71] Many localities enforce child safety zones of greater than one thousand feet, and many incorporate several more restriction-points such as libraries, bus stops, and churches, thus making the vast majority of the town, sometimes 80% to 90%, unlivable for sex offenders and almost completely banishing the individual from the town.[72]

"Banishment does nothing to solve the problems of crime, but merely forces the criminal element and the attendant root cause of crime upon another community."[73] Legislatures believe that sex offenders are recidivists and claim that their primary concern is the safety of children.[74] Thus, they are enforcing residency restrictions as a preventative measure, but, if their beliefs are true, they are simply moving the crime elsewhere, to another community. This could lead to many sex offenders leaving the "watchful eye of police and parole officers" and moving to remote areas where they will not be under public scrutiny.[75]

If the goal of incarceration is rehabilitation, so that criminals can one day become productive members of society, then sex offender banishment is counterintuitive. Rather than rehabilitate the individual, these laws push them to areas where they cannot get the help or treatment they may need. As William Garth Snider explains:

> [b]anishment zone laws may very likely force sexual offenders to move from environments in which they have support networks into other communities in which they have no support, putting residents in their new communities at risk. Further, people who are labeled as sex offenders lose jobs, get evicted, are threatened with death, and harassed by neighbors. Some have had their homes burned down or been beaten in acts of vigilantism. Coping with this kind of stress is almost impossible, and without exceptionally strong support systems, most are doomed to fail . . . . When nothing works out - job, home, family-individuals are more likely to give up and reoffend.[76]

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[70] Rockland County Pedophile-Free Child Safety Zone Act, 2007, Local L. No.1.

[71] *Id.*

[72] Suffolk County, NY prohibits sex offenders from living within a quarter mile of a place where children congregate. *See* Jennifer Smith, *Residency Laws for Sex Offenders Under Microscope*, NEWSDAY, Dec 2, 2006, *available at* http://www.newsday.com/news/local/longisland/ny-lisex1203,0,363472.story?coll=ny-linews-utility.

[73] Snider, *supra* note 69, at 458.

[74] *See* STATE REPORTS, *supra* note 27.

[75] Jacobs, *supra* note 60.

[76] *Id.*

Traditional banishment statutes have not survived in court, most jurisdictions holding that banishment is illegal in the majority of cases.[77] Some reasons for this common holding of illegality are that banishment laws "(1) serve no rehabilitative or public protection function; (2) permit one jurisdiction to dump its criminals on another jurisdiction; (3) violate the state constitution; (4) interfere with the right to interstate and intrastate travel; and (5) violate the Eighth Amendment as cruel and unusual punishment."[78] All five of these conditions can be attributed to sex offender residency restrictions as well as traditional banishment laws, yet few courts have taken action to remedy the situation.

A direct negative effect of the banishment of sex offenders due to residency restrictions is the development of specific communities filled with offenders in towns where no suitable housing exists that is beyond the limits of the restrictions. In St. Petersburg, Florida, there exists a mobile home park of which nearly half the residents are sex offenders.[79] About six hundred sex offenders have lived in the park in the past few years, only one of whom has reoffended.[80] This proves that banishment is unnecessary, a waste of valuable time and money to enforce, and is ineffective because it targets the wrong group of offenders.

E. Court Actions

The state courts that have taken action against sex offender residency laws are Iowa, Georgia, New Jersey, and recently, Pennsylvania; yet, these cases have produced mixed results.[81] In the 2005 case of *Doe v. Miller*,[82] the plaintiffs were a class of sex offenders in the state of Iowa, who were challenging a residency restriction requiring that "a person [who has committed a criminal offense against a minor] shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility."[83] In effect, a sex offender who committed an offense against a minor may not live within two thousand feet of a school zone.[84]

The class members had a series of complaints, including violations under the *ex post facto* clause, the Fifth Amendment, and procedural and substantive due process.[85] The District Court held that the statute was unconstitutional, as it

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[77] Snider, *supra* note 69, at 466.

[78] *Id.*

[79] Rich Phillips, *Trailer Park Becomes 'Paradise' for Sex Offenders*, CNN, Oct. 18, 2007, *available at* http://www.cnn.com/2007/US/10/17/trailer.sexoffender.

[80] *Id.* The manager of the mobile home park has taken it upon herself to offer counseling sessions to her residents, further proving that a rehabilitative approach, rather than a banishment approach, is what works.

[81] *See* Doe v. Miller, 405 F.3d 700 (8th Cir. 2005); Mann v. Ga. Dep't of Corr., 653 S.E.2d 740 (Ga. 2007); G.H. v. Twp. of Galloway, 401 N.J. Super. 392 (App. Div. 2008).

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

[83] Doe v. Miller, 298 F. Supp. 2d 844, 847 (citing IOWA CODE § 692A.2A (2008)).

[84] *Id.*

[85] *Id.*

violated the *ex post facto* clause when it was applied to offenders who committed crimes before the law was enacted.[86] The court also determined that the statute was punitive in nature when it applied the standards set out in *Smith v. Doe*.[87] Further, the court held that the statute violated substantive due process, as it interfered with the right to personal choice regarding family matters and the right to travel.[88]

The Eighth Circuit reversed the District Court's decision and upheld the law, saying that the law is constitutional on all grounds. As to the interference with family matters, the Eighth Circuit stated:

> [w]hile there was evidence that one adult sex offender in Iowa would not reside with his parents as a result of the residency restriction, that another sex offender and his wife moved 45 miles away from their preferred location due to the statute, and that a third sex offender could not reside with his adult child in a restricted zone, the statute does not directly regulate the family relationship.[89]

Regarding the right to travel, the court said:

> [t]he Iowa statute would not implicate a right to intrastate travel for the same reasons that it does not implicate the right to interstate travel. The Iowa residency restriction does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility, and it does not erect any actual barrier to intrastate movement.[90]

Some say that this interpretation is a misreading of the Supreme Court decision of *Saenz v. Roe*[91] regarding the right to travel, as the right was not limited to the literal meaning of travel, but also applied to benefits received while in the state.[92] This includes being treated equally as a citizen in the state. *Doe* argued that sex offenders are not treated equally as citizens of the state. But, the court glossed over that argument, saying that the state of Iowa treats both out of state and instate sex offenders in the same manner.[93]

As mentioned above, the Iowa County Attorneys Association released a report in 2006—after the Eighth Circuit's decision—regarding the effectiveness of

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[86] *Id.* at 866.

[87] *Id.* at 869 (citing Smith v. Doe, 538 U.S. 84 at 97 (2003)) (arguing that the restriction has been historically viewed as punishment, that it imposes an affirmative restraint upon those subject to it, that it promotes traditional aims of punishment, that it is rationally connected to an alternative purpose, and that it is excessive of reaching that purpose).

[88] *Miller*, 298 F. Supp. 2d at 872.

[89] *Miller*, 405 F.3d at 711.

[90] *Id.* at 713.

[91] Saenz v. Roe, 526 U.S. 489 (1999).

[92] Crime & Federalism: Doe v. Miller: The Legal Theories, April 29, 2005, http://federalism.typepad.com/crime_federalism/2005/04/idoe_v_milleri__1.html.

[93] *Id.*

sex offender residency laws.[94] The statement renounced the state's residency law and listed reasons why the law is unconstitutional and ineffective.[95] The list included reasons such as: the effects and costs on families of sex offenders, the over breadth of the law, and the lack of housing and transportation actually available in approved areas for sex offenders.[96]

In the Georgia case of *Mann v. Georgia Department of Corrections*,[97] the plaintiff challenged the constitutionality of Georgia's state sex offender residency law, which did not include a "move-to-the-offender" provision.[98] "Move-to-the-offender" provisions would allow individuals to remain in their homes who were not violating the residency restriction until a school or day care opened within one thousand feet of the sex offender's home.[99] In such an instance, Georgia would require the sex offender to move.[100] The law also did not allow the offender to work within a child safety zone.[101]

The residency law, in effect, would banish all sex offenders from Georgia. A school, church, day care center, or general place where children congregate could emerge in any part of the state, forcing sex offenders within a one thousand foot radius to move and/or leave their jobs, or face prosecution.[102]

The Supreme Court of Georgia held the residency law unconstitutional, under the Takings Clause,[103] as it "permits the regulatory taking of appellant's property without just and adequate compensation."[104] But, since the appellant's economic interest in his job could be maintained without his presence at the actual work site, the law was constitutional as applied to the employment provision.

Though the Georgia state legislature revised its statute, it remains largely the same, and still poses the constitutional problems discussed within this note. It still prohibits registered sex offenders from living within one thousand feet of a church.[105]

In the New Jersey case of *G.H. v. Township of Galloway*,[106] a convicted sex offender challenged the validity of a township sex offender residency law.[107] G.H.

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[94] IOWA COUNTY ATTORNEYS ASSOCIATION, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (2006).

[95] *Id.* at 2.

[96] *Id.* at 2.

[97] Mann v. Ga. Dep't of Corr., 653 S.E.2d 740 (Ga. 2007).

[98] *Id.* at 742.

[99] *Id.*

[100] *Id.*

[101] GA. CODE ANN. § 42-1-15 (2009).

[102] *Mann*, 653 S.E.2d at 742.

[103] U.S. CONST. amend. V.

[104] *Mann*, 653 S.E.2d at 745.

[105] *See Georgia Legislature Passes Revised Sex Offender Residency Restrictions*, http://sentencing.typepad.com/sentencing_law_and_policy/2008/04/georgia-about-t.html (last visited Dec. 30, 2009).

[106] G.H. v. Twp. of Galloway, 401 N.J. Super. 392 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 199 N.J. 135 (N.J. 2009).

was a student at Richard Stockton College and was told he could not live within two thousand five hundred feet of the campus, as he was a registered sex offender, pursuant to Megan's Law.[108] The Superior Court of New Jersey held municipal ordinances that restrict sex offender residency are invalid as they serve the same purpose as, and are thus preempted by the state's Megan's Law.[109] As a result of this case, all municipal sex offender ordinances—there were 100 or so in New Jersey at the time—were deemed invalid and preempted by Megan's Law.

In Pennsylvania, the American Civil Liberties Union ("ACLU") filed suit in October of 2008 in federal court on behalf of six sex offenders against Allegheny County in *Fross v. County of Allegheny*,[110] seeking a declaratory injunction to invalidate the residency law.[111] The County enacted a sex offender residency ordinance in 2007 which prohibits registered sex offenders from living within two thousand five hundred feet of a school, child care center, community center, public park or playground.[112]

The ACLU alleged that this ordinance would make it impossible or nearly impossible for registered sex offenders to find appropriate housing anywhere in the county, and definitely not in the city of Pittsburgh.[113] According to the complaint, the only places where sex offenders can find housing are remote hill tops and unaffordable areas that do not have access to public transportation, nor to the rehabilitative treatment that the sex offenders need.[114] This restriction leads to sex offenders resorting to homelessness and dodging the registration system, or returning to prison after they have already served their time and/or been granted parole.[115]

The district court in Pennsylvania ultimately ruled that the sex offender residency law was preempted by Pennsylvania's Megan's Law and probation and parole laws, as in the New Jersey and New York cases above.[116] These cases demonstrate the nature of the case law revolving around sex offender residency

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[107] *Id.* at 396.

[108] *Id.*; *See, e.g.*, Megan's Law, N.J. STAT. ANN. § 2C:7-1 (West 2010), *et seq.*

[109] *G.H.*, 951 A.2d at 225. The far-reaching scope of Megan's Law and its multilayered enforcement and monitoring mechanisms constitute a comprehensive system chosen by the Legislature to protect society from the risk of reoffense by [convicted sex offenders] and to provide for their rehabilitation and reintegration into the community. The system is all-encompassing regarding the activities of [convicted sex offenders] living in the community. We conclude that the ordinances conflict with the expressed and implied intent of the Legislature to exclusively regulate this field, as a result of which the ordinances are preempted.

[110] Fross v. County of Allegheny, 612 F. Supp. 2d 651 (W.D. Pa. 2009).

[111] Press Release, *Lawsuit Filed Challenging Allegheny County's Sex-Offender-Residency-Restriction Ordinance*, AMERICAN CIVIL LIBERTIES UNION, Oct. 6, 2008, http://www.aclupa.org/pressroom/lawsuitfiledchallengingall.htm [hereinafter ACLU Press Release].

[112] Fross v. County of Allegheny, 612 F. Supp. 2d 651 (W.D. Pa. 2009).

[113] *Id.*, *see also* http://www.aclupa.org/legal/legaldocket/sexoffenderresidencyrestri.htm

[114] *Id.*

[115] *See* ACLU Press Release, *supra* note 111.

[116] Fross v. County of Allegheny, 612 F. Supp. 2d 651, 660 (W.D. Pa. 2009).

laws and how they have been viewed by various jurisdictions. As evidenced by these cases, certain courts are invalidating local residency restrictions on preemption grounds. However, no high court case has yet determined the validity of sex offender residency restrictions in the context of the First Amendment right to free exercise of religion.

III. SEX OFFENDER RESIDENCY RESTRICTIONS BURDEN THE FREE EXERCISE OF RELIGION

The first clause of the First Amendment of the Constitution reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[117] The Free Exercise clause simply states that Congress cannot make a law that prohibits the free exercise of religion, but it has led to years of litigation and conflict regarding religious beliefs, practices and the law.

Free exercise jurisprudence relies on the level of scrutiny the reviewing court must apply to the law, policy or governmental action in question.[118] There are three different levels of scrutiny: strict scrutiny, intermediate scrutiny, and rationality review.[119]

Often, sex offender residency laws span across many counties or localities, a portion of which may include religious communities.[120] There may not exist residential or employment areas for sex offenders in insular religious communities that are beyond the minimum distance requirement of the residency law, but that are still a part of the community.[121] Thus, religious people may be banished from their communities simply because they cannot find housing that is appropriate for their limitations. This section highlights this and other possible Free Exercise problems that could arise through ongoing enforcement and litigation of sex offender residency laws. This section also utilizes the two types of analyses that courts have used regarding Free Exercise cases, one of which is constitutional and the other statutory in nature, each producing a different outcome.

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[117] U.S. CONST. amend. I.

[118] *See* RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 359-85 (Matthew Bender & Company, Inc. 2d ed. 2006).

[119] *See id.* Strict scrutiny is the most exacting level of scrutiny, requiring the government to present a compelling interest for the action in question and showing that the action is the least restrictive means of furthering that compelling interest. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). Intermediate scrutiny is the next level down, in which the government must show only an important governmental interest and that the means of obtaining that interest are reasonable. *See* Craig v. Boren 429 U.S. 190 (1976). Rationality review, which is the lowest level of scrutiny requires the government to present a substantial interest and that the means be merely rationally related to furthering that interest. Economic policy is often viewed under this lens, as are neutral, generally applicable laws, as evidenced by the evolution of free exercise case law. *See* Lochner v. N.Y., 198 U.S. 45 (1905).

[120] *See, e.g.*, People v. Oberlander, No. 02-354, 2008 WL 3390455 (N.Y. Sup. Ct. June 18, 2008) (The Jewish community of Monsey, NY under the scope of a Rockland County sex offender residency restriction.).

[121] *See id.*

A. Modern History of Free Exercise

In modern free exercise litigation, religious exercise free from government intrusion was not only protected, but also endorsed in law schools as constitutionally obvious.[122] As Professor Marci Hamilton writes:

> From the 1960s into the 1990s, law schools taught two constitutional principles that were largely unquestioned . . . . First, no government could enforce a law against a religious believer unless the government could prove that its law was passed for a compelling interest. Second, Congress held the power to increase constitutional rights at will. A generation of law students was taught that these principles were self-evident from the Constitution and Supreme Court cases.[123]

In the 1963 case of *Sherbert v. Verner*,[124] the Supreme Court faced the decision of whether an individual could receive unemployment compensation after she was fired for refusing to work on Saturdays, her day of Sabbath.[125] The case was a challenge to the South Carolina Unemployment Compensation Act, which stated, in part "that a claimant is ineligible for benefits if . . . [s]he has failed, without good cause . . . to accept available suitable work."[126] The Court saw that under the statute, "good cause" was available for secular purposes but not for religious ones.[127] For instance, one could get Saturday off for going to the doctor, but not for observing Sabbath. If the employment/compensation system is capable of tolerating others who miss work on Saturdays for secular reasons, then it can also handle this reason.[128] Thus, the Court applied strict scrutiny to the law and overturned the unconstitutional statute.[129] *Sherbert* led to the conclusion that neutral, generally applicable laws which burdened religion were "presumptively unconstitutional,"[130] a conclusion that determined the fate of legislation before it was even tested in the real world.

In 1972, the Supreme Court heard the case of *Wisconsin v. Yoder*,[131] in which a member of the Amish community was fined for refusing to send his two children, aged fourteen and fifteen, to high school.[132] Wisconsin law mandated children to attend school until at least age sixteen.[133] The majority, speaking through Justice Burger, again applied strict scrutiny and said that while the state

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122 GOD VS. GAVEL, supra note 17.
123 *Id.*
124 Sherbert v. Verner, 374 U.S. 398 (1963).
125 *Id.* at 399.
126 *Id.* at 401.
127 *Id.* at 404.
128 *Id.*
129 Verner, 374 U.S at 404.
130 GOD VS. GAVEL, *supra* note 17, at 218.
131 Wisconsin v. Yoder, 406 U.S. 205 (1972).
132 *Id.* at 207.
133 *Id.*

had a strong interest in educating children, Yoder's interests trump, since his claim was rooted in religious belief and the First Amendment is designed to protect this freedom.[134] The Court stated that one or two additional years of schooling would do little to serve the state's secular interests and that compulsory education violated the First Amendment.[135] In addition, there was a substantive due process right of parents to control the upbringing of their children, and thus the case was a "hybrid" one since it involved two constitutional issues.[136] The Court essentially created an exemption for Amish children, as the State was not infringing on the right of parents to raise their children, generally, but rather only on the right of Amish parents to raise their children.[137]

Later, in 1990, the Court heard the aforementioned pivotal case of *Employment Division v. Smith*, in which two Native American employees were fired from a drug rehabilitation clinic for ingesting the hallucinogen, peyote, during a religious ritual.[138] They were denied unemployment benefits from the state of Oregon because they were discharged from their jobs for work-related misconduct.[139] The majority opinion, written by Justice Scalia, held that rationality review applies to neutral, generally applicable laws, and therefore held in favor of the state of Oregon.[140] Scalia wrote that an individual's religious beliefs do not put him beyond the reach of an otherwise neutral law prohibiting criminal misconduct.[141] In this decision, the Supreme Court rejected the first of the two principles cited by Professor Hamilton: that "no government could enforce a law against a religious believer unless the government could prove that its law was passed for a compelling interest."[142] The Court in *Smith* stated, in dictum, that religious organizations and/or individuals who feel unfairly burdened by neutral, generally applicable laws must look to legislatures, not courts, to have that burden removed.[143]

B. Constitutional Analysis of Sex Offender Residency Restrictions

In the context of sex offender residency laws, the free exercise conflict that emerges is one between religious liberty and community safety.[144] While religious

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134 *Id.*

135 *Id.* at 225.

136 Yoder, 406 U.S. at 225.

137 *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).

138 Employment Div. v. Smith, 494 U.S. 872, 872 (1990).

139 *Id.*

140 *Id.*

141 *Id.*

142 GOD VS. GAVEL, *supra* note 17, at 203.

143 *Smith*, 494 U.S. at 888-90.

144 The constitutionality of sex offender residency laws in other, non-First Amendment contexts are not discussed in this Note. In the Iowa case of State v. Seering, 701 N.W.2d 655 (Iowa 2005), the Iowa Supreme Court found residency restrictions to be constitutional because community safety outweighs the right of sex offenders to find suitable housing. *Id.* at 668.

practice deserves safeguards from intrusion by government, absolute immunity should not be granted to religious organizations or individuals in the name of religion.[145] Thus exists an ongoing search for balance of power between church and state.[146] But, those who have served their sentences, especially those who may be using their beliefs as a way to regain stability in their lives, should not be subjected to laws which are ineffective and, in effect, remove individuals from the place they need most to complete the rehabilitative process. In *People v. Oberlander*, the defendant claimed that the Rockland County sex offender residency law was unconstitutional under the Free Exercise Clause as it would allegedly force him to relocate from his preferred town of Monsey, New York, a predominantly Jewish community.[147] The presiding judge did not grant the defendant's motion to dismiss his violation of probation because the defendant did not provide sufficient documentary evidence, such as a map and/or an affidavit from a planning expert, to show that that he could not locate suitable housing in the community.[148]

In order to appropriately examine the facts and analyze such a case in the constitutional context, the main question to be answered is which level of scrutiny must be applied. To answer this, we must look to the history of Free Exercise jurisprudence. In *Employment Division v. Smith*, the Supreme Court faced the issue of whether or not the state of Oregon should grant unemployment benefits to two individuals who were fired from their jobs for ingesting peyote, a hallucinogen, even though this drug was ingested as a part of a Native American religious practice.[149] The law that was challenged was one that made ingestion of hallucinogens by anyone illegal, thus it was a "neutral, generally applicable" law.[150] The Court held that the state could grant an exception for ingestion of peyote for religious purposes, but it did not have to do so. Since the state's ban on possession of the drug was not aimed specifically at religious practices, the state did not have to provide a compelling interest; the adopted standard was rationality review.[151]

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[145] *See generally*, GOD VS. GAVEL, *supra* note 17.

[146] Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823, 825 (2001) ("The free exercise of religion does not give carte blanche to religion to supersede all laws.").

[147] *See* People v. Oberlander, No. 02-354, 2008 WL 3390455 (N.Y. Sup. Ct. June 18, 2008) at *1. For a general analysis of the right to residency, see the Iowa case of *Seering*, 701 N.W.2d 655.

[148] *Id.* Monsey, New York encompasses a 2.21 square mile land area and has twenty-one private and public schools. With a median age of 18.6 years—it is 35.9 in New York State in general—it is difficult to imagine an area in the small town that would be 1,000 feet away from a place where children congregate, *Monsey, New York*, City-Data, http://www.city-data.com/city/Monsey-New-York.html (last visited Oct. 26, 2008).

[149] *Smith*, 494 U.S. 872.

[150] *Id.* at 880.

[151] *Id.*

In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[152] the Court faced the issue of whether a state has the right to ban animal sacrifice.[153] It was apparent from the record that the only reason the state had enacted the law was to aim it at a group of Santerians which had moved into the state, and therefore the law was not generally applicable to all religions, but rather only applied to the Santerians.[154] The Court wrote: "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[155]

Therefore, unless it is apparent that the reason for the existence of a law is hostility or animosity towards a religion or its practices, the Court will view the law with a low standard of scrutiny—rationality review. Professor Hamilton writes:

> "[w]hen read together, *Smith*, *Lukumi* . . . identified pivotal principles: (1) the courts are to apply a default rule in favor of applying duly enacted, neutral, and generally applicable laws to religious conduct and (2) that default rule is only overcome in the face of evidence of persecution of religion."[156]

Under the Free Exercise jurisprudence documented, in the case of a challenge to a sex offender residency law, the Court would first determine whether or not the law was neutral and generally applicable.[157] Since these laws apply to all sex offenders, it is apparent that the law is generally applicable, and since the law does not target religion or a religious practice, it is facially neutral. Therefore, the Court would view the law under rationality review, and give a high level of deference to the legislature, which would ultimately amount to upholding the law.[158]

C. Statutory Analysis

1. The Religious Freedom Restoration Act

In response to the decision in *Smith*, which called for rationality review for neutral, generally applicable laws, Congress enacted the federal Religious Freedom Restoration Act in 1993, which called for strict scrutiny in all challenges to laws, even neutral, generally applicable ones, which posed a burden on religion.[159] Congress, in its findings, wrote that "laws 'neutral' toward religion may burden

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[152] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[153] *Id.*

[154] GOD VS. GAVEL, *supra* note 17, at 216.

[155] *Id.*

[156] GOD VS. GAVEL, *supra* note 17, at 216.

[157] *See, e.g.*, *Smith*, 494 U.S. 872.

[158] *Id.*

[159] Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb(a) (1993).

religious exercise as surely as laws intended to interfere with religious exercise."[160] Also, Congress wrote, "in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," and "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[161] The purpose of the RFRA, Congress found, was "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is burdened."[162] Thus, under the RFRA, even neutral, generally applicable laws which posed the slightest burden on the free exercise of religion would face strict scrutiny.[163]

2. The End of the Federal RFRA and the Application of State-RFRAs

The Religious Freedom Restoration Act was overturned, in part, in the 1997 Supreme Court decision of *City of Boerne v. Flores*.[164] In *Boerne*, the Roman Catholic Archdiocese of San Antonio wished to enlarge one of their churches in Boerne, Texas, but was denied the appropriate permits by the city.[165] The Archbishop, Flores, sued under the RFRA, claiming that the denial of the permits was a violation of free exercise, as the enlargement was to keep up with the fast growing population of the church.[166] The Court held that the RFRA was an unconstitutional use of section five of the Fourteenth Amendment, which states that Congress has the right to enact legislation that enforces the rights protected by the other sections of the Fourteenth Amendment.[167] Congress enacted the RFRA in order to enforce First Amendment rights, but the Court held that Congress was not authorized to do so.[168] While Congress may enact legislation that is "congru[ent]

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160 *Id.*

161 *Id.*

162 *Id.*

163 Nicholas Nugent, *Toward a RFRA That Works*, 61 VAND. L. REV. 1027, 1028 (2008).

164 City of Boerne v. Flores, 521 U.S. 507 (1997). *Boerne* was decided before the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") was passed in 2000. RLUIPA's general rule states:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(a)(1) (2000).

165 *Boerne*, 521 U.S. 507 (1997).

166 *Id.* at 512.

167 *Id.* at 535.

168 *Id.* at 508-09.

and proportion[al]" to constitutional rights, it may not determine the level and scope of substantive constitutional rights.[169] Since the enactment of the RFRA, there was much discussion of its constitutionality in the free exercise and establishment clause contexts, but not of the constitutionality of Congress' right—or lack thereof—to enact it. This was because, through the RFRA, Congress was increasing religious liberty, and it was thought that while Congress could not take away constitutional rights, it could surely increase them.[170]

However, this ruling only applied to the RFRA's application to the states.[171] The RFRA still applied to federal laws, as clarified in the 2006 case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[172] The Supreme Court held that the religious sect Uniao do Vegetal of New Mexico was able to use, for religious purposes, *hoasca* tea, which contained the controlled substance dimethyltryptamine.[173] The federal government had seized a shipment of the tea into New Mexico, which the Court held as an unlawful action under the federal RFRA.[174] This interpretation of the RFRA is often criticized.[175]

Since the landmark decision of *Boerne*, thirteen states have enacted their own "mini-RFRAs"—state versions of the federal law that no longer applies to states.[176] These laws basically say, as did the federal RFRA, that the legislature may not enact a law that poses a significant burden on religion unless the state has a compelling interest for the law and the law is the least restrictive means of reaching the state's compelling interest.[177]

When a state-RFRA is applied to a neutral, generally applicable sex offender residency law, a wholly different result might emerge than under the constitutional doctrine. In this case, the court would apply a strict scrutiny standard of review and

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169 *Id.*

170 GOD VS. GAVEL, *supra* note 17, at 230. Scholars incorrectly thought that:

> Congress had the power . . . to ratchet up rights. This novel power was defended on the ground that it was a one-way ratchet, so no rights could be diminished by Congress, but they could be increased at will. If that was Congress's proper role, then RFRA was a no-brainer. It dramatically expanded the rights of religious entities, and certainly did not diminish them.

Id. at 230.

171 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

172 *Id.*

173 *Id.* at 425.

174 *Id.* at 423.

175 *See generally* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998) ("When the Court reaches the question of RFRA's constitutionality as applied to federal law, it may have the opportunity to address RFRA's Establishment Clause and due process of lawmaking defects. It could point out that Congress must articulate the constitutional basis upon which it acts when it attempts to regulate First Amendment freedoms in gross, when it responds reflexively to a powerful interest group, and when it devises a new statutory form. This is a fair burden if Congress's enactments are to be accorded deference. The Religious Freedom Restoration Act is unconstitutional, period.").

176 GOD VS. GAVEL, *supra* note 17, at 109.

177 *See id.*

hold the law unconstitutional, unless the state can provide a compelling interest—a requirement used throughout constitutional law. Whether or not a law will stand depends on how the reviewing court defines "compelling." Objectively, it seems that "compelling interest"—the first prong of a strict scrutiny standard of review—means "a governmental interest of exceeding importance that, when advanced by a law that is narrowly tailored to advance that interest, is sufficient to justify the abridgement of any constitutional liberty interest."[178] In the case of sex offender residency laws, the state would claim its interest is the health and safety of children and the community at large. In other areas of constitutional law, health and welfare concerns are considered sufficient to meet the somewhat stringent compelling interest standards. However, if the state-RFRA in question does what the federal RFRA set out to do, which is to restore the compelling interest test of *Sherbert* and *Yoder*[179] either by definition in its findings, or by the evolution of its application, then:

> even generally applicable health, welfare, and safety regulations could be struck down if their burden on religious practice, however accidental, did not meet certain constitutional requirements. The *Sherbert* line of cases boldly asserted that for a law of general applicability to bind religious objectors, the state must demonstrate a 'compelling state interest.'[180]

If and when courts apply state-RFRAs to sex offender residency laws, it is likely that such laws will be held to be violations of the RFRAs since, as the *Sherbert* line of cases suggests, however compelling health and welfare interests are in other areas of constitutional law, they do not pass the test in free exercise jurisprudence under RFRA.[181] Therefore, in states with RFRAs, sex offender residency laws are in violation of the state-RFRA.[182]

IV. A CALL FOR LEGISLATIVE ACTION

As shown, a tension exists between sex offender residency restrictions and religious free exercise when considering the need of religious individuals to remain within their religious communities. In order to alleviate this tension, state and local legislatures that find it necessary to enact residency restrictions should also consider allowing exemptions for people in religious communities affected by these laws. States could also consider removing religious institutions from lists of places near which offenders cannot reside.

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[178] Nugent, *supra* note 21, at 1054.

[179] 42 U.S.C. § 2000bb(b)(1).

[180] Nugent, *supra* note 21, at 1028.

[181] *See id.*

[182] The same result would hold true for state constitutions which have taken the Sherbert v. Verner, 374 U.S. 398 (1963), approach in analyzing free exercise cases. In those states, courts would apply strict scrutiny to neutral laws that pose burdens on free exercise of religion.

Additionally, the sheer inefficacy of sex offender residency restrictions proves that state legislatures must do more to prevent and deter child abuse, and not just lay stagnant as the problem of child sexual abuse heightens.[183] The problem with current sex abuse legislation is that it is often predicated upon the misguided assumption that sex offenders are already identified and that those named offenders are the ones causing harm to children.[184] This is not the case. The people we should be worried about are those offenders who have not yet been caught—those who have abused children and are continuing to abuse children because of laws that do not make it easy enough for victims of abuse to come forward and speak out against their abusers. This section suggests changes to current residency restrictions and proposes alternatives, namely statute of limitations reform, which would be more effective in solving the problem of sexual abuse of children.

A. Revise Current Residency Restrictions to Remove Limitations on Religious Practice

Residency restriction statutes, some of which list churches among the locations near which offenders may not reside, unreasonably burden the free exercise of religion.[185] This is especially burdensome for those individuals who must live near their houses of worship because they observe Sabbath. Legislatures should amend their residency restrictions to remove houses of worship from the list, allowing registered sex offenders to live near churches and temples if they so desire as a part of their religious practices. Additionally, the legislatures should carve out an exception for schools and day care facilities that are located in churches. While it is reasonable that sex offenders be prohibited from working in such facilities, offenders should be able to live near such institutions if they are attached to his or her house of worship.

Also, if the offender lives in a known religious community, then the legislature should exempt the individual from residency restriction if the restriction forces the individual out of the community.[186] Community is a key aspect of many religions. In addition, sex offenders and others often use religious community as a means of rehabilitation, to remove an individual from his religious community is an excessive burden on his right to free exercise. This would allow the state to maintain its interest in preventing recidivism by registered sex offenders and still allow religious sex offenders to fully practice their religion.

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[183] For reasons on why and how legislatures need to act, *see generally*, MARCI A. HAMILTON, JUSTICE DENIED (Cambridge University Press 2008) [hereinafter JUSTICE DENIED].

[184] *Id.* at 23-27. Hamilton briefly examines current legislation in effect either against sex offenders or for victims and survivors, including harsher penalties for offenders, electronic tracking of offenders, and states' Megan's Laws, which call for official registration of offenders. These methods, Hamilton points out, only work against those who we know are offenders, not for preventing offense or allowing for current victims to bring charges against their current abusers.

[185] *See* GA CODE ANN. § 42-1-15 (2008).

[186] *See* People v. Oberlander, No. 02-354, 2008 WL 3390455 (N.Y. Sup. Ct. June 18, 2008).

B. Statutes of Limitations for Childhood Sexual Abuse Must be Abolished

States have statutes of limitations ("SOL's") that dictate how long an individual has to file a lawsuit. In the context of child sexual abuse, states have statutes of limitations which determine how long a victim of childhood sex abuse has before he or she gives up the right to bring criminal and/or civil charges against his or her attacker. These statutes vary by state and by category of law. For instance, state SOL's governing property and contract law are relatively short, while murder has no SOL due to the remarkably heinous nature of the crime.[187] Professor Marci Hamilton argues that "the SOL for childhood sexual abuse should be treated like an SOL for murder, not property . . . it is in society's interest to have sex abuse survivors identify child predators for the public in judicial proceedings."[188] In order to best serve the needs of children who are abused, who may need years or even decades to realize what has happened to them, and rebuild enough confidence to speak out against their abusers, statutes of limitations for childhood sexual abuse must be abolished.

1. Victims of Abuse Need Time

Young children do not have the maturity, understanding, and knowledge of the abuse needed in order to realize the impact of what has happened to them. [189] This is especially true regarding sex abuse, as children lack knowledge about sex, and do not know that it is harmful for them or that the action taken by the adult is wrong.[190] It is irrational and unreasonable to ask a child victim to attempt to bring suit against his or her abuser, who may be a parent, close relative, clergy, or trusted family friend.

As Professor Hamilton describes, there exists a "fundamental mismatch between the SOL's on child abuse, which cut off claims very quickly, and the ability of children to come forward."[191] When children reach varying levels of maturity and the pedophile loses interest in the victim, the child is then only able to obtain the appropriate distance from his or her abuser and evaluate what has happened to him or her.[192] But, our legislative system is designed so that there is very little time between the victim's maturity and his or her ability to bring claims against his or her abuser.[193] Because of this inherently—but purposely—flawed

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[187] *Id.* at 3.

[188] JUSTICE DENIED, supra note 183, at 3.

[189] *Id.* at 18. ("[C]hildren who are sexually abused cannot comprehend what is happening to them . . . . The concept of a "childhood" does not exist for a child. When you are a child, what is "normal" is whatever is happening to you . . . With regard to sex abuse, the problem is amplified because children do not understand what sex is . . . . The reality is that it often takes *decades* for a child sex abuse survivor to come forward . . . .").

[190] *Id.*

[191] *Id.* at 19.

[192] *Id.*

[193] JUSTICE DENIED, *supra* note 183 at 19.

design of legislation, abusers are able to get away with abuse time and again, knowing that due to SOL's, they will not be prosecuted.[194]

2. Public Policy Concerns

There are four major public policy concerns that Professor Hamilton discusses in *Justice Denied*, suggesting that all of these concerns will be met with the appropriate SOL reforms in effect.[195] Hamilton suggests that abolition of SOL's will: (1) make abused survivors the priority, instead of their attackers, because we will be accommodating their needs; (2) identify the predators that we do not know of, as victims will be able to speak out at any time; (3) identify more victims of the same predator after one survivor speaks out; and (4) deter larger institutions from covering up sex abuse, as institutions of which predators are a part will also be held accountable.[196]

3. What's Stopping SOL Reform?

There is proposed legislation and a grassroots movement to change current SOL's regarding childhood sexual abuse. In New York, for instance, Assemblywoman Marge Markey of the 30th Assembly District has sponsored the Child Victims' Act, which would extend the tolling of statute of limitations in New York by five years, thus allowing victims to bring criminal charges against their abusers until age twenty-three, instead of eighteen, and twenty-eight instead of twenty-three for civil charges.[197] The Act would also put into effect a window period of one year to allow those victims who were unable to get relief since they were previously barred by SOL's to come forward with civil complaints against their abusers.[198]

While the positive effects of the proposed legislation seem obvious, there are several interest groups fighting against such laws.[199] The Roman Catholic Church, for one, is the most publicly outspoken opponent of childhood sexual abuse SOL

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194 *Id.* at 19-20.

195 *Id.* at 29-36.

196 *Id.*

197 Child Victims' Act, N.Y. State Assem. B. A02596 (2009), *available at* http://assembly.state.ny.us/leg/?bn=A02596&sh=t.

198 *Id.* California and Delaware both enacted window periods with great success, in 2003 and 2007, respectively. In California, over 300 new predators were recognized. *See* Marci Hamilton, "*Expose Child Sex Abuse in the Orthodox Jewish Community*," DAILY NEWS, Nov. 20, 2008, *available at* http://www.nydailynews.com/opinions/2008/11/21/2008-11-21_expose_child_sex_abuse_in_the orthodox_j.html. Delaware's window period ran until July 2009. *See* http://www.childvictimsvoice.com. Because of the Supreme Court's decision in Stogner v. California, 539 U.S. 607 (2003), statutes of limitations may not be applied retroactively for criminal redress, since that would be a violation of the ex post facto clause of the Constitution.

199 *See* JUSTICE DENIED, *supra* note 183. Hamilton notes several barriers to reform, the two largest being the insurance industry and the Roman Catholic Church. Others include teachers unions, defense attorneys, and the uninformed public. This Note considers the interests of the insurance industry and the Roman Catholic Church.

reform.[200] Recent to the date of this writing, an article appeared a small, Sioux City, Iowa newspaper *The Catholic Globe*.[201] The article covered the annual dinner of the Cathedral Club that is held in New York, and quoted Bishop Nicholas Dimarzio of Brooklyn.[202] Bishop Nicholas Dimarzio spoke against the New York State Assembly's proposed SOL legislation, calling it an attack on the Catholic Church.[203] However, the text of the Child Victims' Act—the bill which Bishop DiMarzio was referencing—makes no mention of religion or of targeting any group whatsoever.[204] The fact that the Bishop would call it an attack shows that the church recognizes that the problem of child sex abuse, by its clergy, exists and has existed for generations, but that the Church would rather hide the problem than support attempts to solve it.[205]

The Roman Catholic Church's opposition to proposed legislation is of great weight to the likely failure of the legislation because of the sheer size of the Church and its following.[206] Nearly a quarter of the United States population identifies itself as Catholic.[207] Professor Hamilton writes:

> [t]here are 18,584 Catholic parishes and 41,794 priests in the United States alone. If there is an institution-wide policy within an organization of this size—like hiding the identities of child-molesting clergy—it likely affects every state . . . which means no American is terribly far from feeling its effects . . . .[208]

Another group generally opposed to child sexual abuse SOL reform is the insurance industry. Specific insurance agencies exist to support churches by providing them with sexual abuse liability insurance,[209] and these companies have

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200 *Id.* at 51.

201 Ed Wilkinson, "*Laity Urged to be Stronger Advocates for Church Issues in Civic Arena*," THE CATHOLIC GLOBE, Feb. 9, 2009, *available at* http://www.catholicglobe.org/news24.3.html.

202 *Id.*

203 *Id.* ("Bishop DiMarzio warned that Catholics 'face monumental attacks that distract from the positive vision and the work we seek to accomplish.' 'As many of you know, the state Assembly has proposed legislation that would have a devastating impact on our church and exploit a painful chapter in our history -- namely, the statute of limitation rollback for cases of sexual abuse of minors,' said the bishop . . . . 'The state of New York would target the church with the passage of legislation which would retrospectively repeal the statute of limitations and expose the church to litigation as far back as 50 years ago that would be impossible to defend against,' the bishop said.").

204 Child Victims' Act, *supra* note 197.

205 JUSTICE DENIED, *supra* note 183, at 73-74. A similar outcry by the Church occurred when California allowed for a window period for sex abuse cases, allowing any person to come forward with allegations of abuse, even those who may have previously been barred by the State's statue of limitations. The window period applied generally to any person or institution charged with abuse and never mentioned the Catholic Church or religion, yet the Roman Catholic Church spent massive amounts of money to "(1) get the window declared unconstitutional, (2) establish a constitutional right to keep their personnel files privileged, and (3) prevent window legislation in other states." *Id.* at 73-74.

206 *Id.* at 68.

207 Roman Catholicism, RELIGION FACTS, http://www.religionfacts.com/christianity/denominations/catholicism.htm, (last visited Feb. 28, 2009).

208 JUSTICE DENIED, *supra* note 183, at 68.

209 *Id.* at 53.

protocol and guidelines laying out what to do in case of a sexual abuse claim.[210] It is in the interest of the insurance industry to defend churches and clergy to the fullest extent, in order to avoid large payouts to survivors of sex abuse.[211] And, as a very wealthy entity—definitely more so than those fighting for children's rights—the insurance industry is able to inflict pressure upon the legislature and lobby for its own interests in the matter, without ever having to take a public position on the matter which would tarnish their reputation.[212]

While powerful barriers to legislation exist, it is up to the general public to make informed decisions regarding children and make its voice heard to state representatives. An informed constituency is often the strongest force for change.

C. Other Ideas for Legislative Action

Coupled with the abolition of sex abuse statutes of limitations, other legislation could create a great system in which children are safer and those who have been abused can receive the redress and justice they deserve. First, the law should apply the abolition of statutes of limitations retroactively.[213] This would allow for victims who were abused in the past but previously barred by SOL's from bringing suit against their abusers. While window legislation is a step in the right direction,[214] the short time frame opened by such legislation may not be sufficient for victims to realize the lingering effects of abuse and gain the confidence needed to pursue litigation against their abusers. Applying permanent retroactivity would allow the most possible amount of time for victims to bring civil claims against their attackers.[215]

Second, state governments should impose strict liability upon professionals who know about or suspect abuse, yet fail to report it.[216] This would give greater incentive for teachers, clergy, and others who work closely with children to report

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[210] *Id.* at 53-54 (citing Michael J. Bemi, *TNCRRG Provides Series of Legal Defense Practice Workshops: Workshops Specifically Address the Handling of Claims Related to Sexual Misconduct*, VIRTUS ONLINE, http://www.virtus.org/virtus/newsletter.cfm?newsletter_id=37 (last visited Feb. 28, 2009)).

[211] Posting of Marci Hamilton to Cambridge Blog, http://www.cambridgeblog.org/2008/06/the-state-of-sol-reform/.

[212] *See* JUSTICE DENIED, *supra* note 183, at 55-56. ("There is hardly a more powerful set of lobbyists in the United States than those laboring for the insurance industry . . . . [T]he insurance industry spent over $130 million on lobbying in 2006 and over $890 million from 1998 to 2006."). Hamilton goes on to point out specific instances in Ohio and Colorado in which State legislators named the Catholic Church and insurance companies as the biggest lobbyists against statute of limitations reform. *Id.* at 55-56.

[213] Marci Hamilton, *The Drive to Create Pedophile-Free Zones: Why It Won't Work – And What Will Work*, FINDLAW, Aug. 25, 2005, http://writ.news.findlaw.com/hamilton/20050825.html.

[214] *See id.*

[215] *See* Stogner v. California, 539 U.S. 607, 632-33 (2003). The Supreme Court in Stogner held that it is a violation of the ex post facto clause of the Constitution to apply retroactive abolition of statutes of limitations to criminal claims.

[216] Hamilton, *supra* note 213.

abuse when they see or suspect it, and would deter these individuals from ignoring or covering up such abuse.[217]

Finally, states should provide further incentive, protection, and assistance to those already fighting the battle for children's rights, especially those doing so in insular religious communities. There should be state-run hotlines for reporting child abuse anonymously,[218] as community hotlines in insular religious communities often receive hostility by people who may view it as an attack on their religion.[219] The government should take the initiative to create and effectively run such hotlines, which would take the burden off community activists. Moreover, the government should provide police protection for people who speak out against the problems in their communities and are consequently threatened or actually injured because of their positions.[220]

V. CONCLUSION

It is clear that there exists a societal problem of sexual abuse of children, which is highly prevalent in insular religious communities in the United States.[221] State governments have passed legislation to combat the problem, one such type of law being sex offender residency restrictions. These restrictions are ineffective, and when considered under the context of religion, place an unreasonable burden on the free exercise of religion, as they may force people out of their religious communities. The free exercise of religion is a sacred right guaranteed by the First Amendment,[222] and should not be burdened by frivolous, ineffective laws—such as residency restrictions. State governments should thus take a nuanced, balanced approach, as they should protect the freedom from government entanglement with religion, yet maintain the ability to prosecute religious individuals, clergy, and religious institutions when necessary. The best way to gain this position is to enact legislation that makes it easier for victims to speak out against their abusers. This will target the actual danger, which is the ninety percent of sexual abuse cases that go unreported. State legislatures should abolish the statutes of limitations on childhood sexual abuse, thus allowing victims to come forward even decades after their abuse. If statutory periods are extended or abolished, more offenders would be named by victims, as more victims would be able to bring claims against their

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217 *See id.*

218 *Id.*

219 Simon Weichselbaum, *Perv-Fighting Rabbi Nuchem Rosenberg: They're Out to Kill Me*, DAILY NEWS, November 17, 2008, *available at* http://www.nydailynews.com/news/2008/11/17/2008-11-17_pervfighting_rabbi_nuchem_rosenberg_they.html. Rabbi Rosenberg publicly speaks out against child molestation in his Orthodox Jewish Brooklyn neighborhood and has been targeted with threats of injury and death. *Id.* Rabbi Rosenberg started a hotline to allow for individuals to report sex abuse, but had to shut it down due to the quantity and nature of threats he was receiving. *Id.*

220 *See id.*

221 *See* JUSTICE DENIED, *supra* note 183.

222 U.S. CONST. amend. 1.

keep track of and re-punish the offenders that the states already know about. Unfortunately, they serve only to instill a false sense of security in communities and do not actually protect children. The real threats to community safety are the abusers that states do not yet know about. The only solution to this problem is to enact legislation that will allow and encourage people to bring suits against more predators. While powerful interest groups exist, such as the Roman Catholic Church and the insurance industry, lobbying against positive legislation, the most powerful influence is that of an informed constituency. We must remember that the point of sexual abuse legislation is the safety of children, and not the liability of adults. State legislatures must realize this and start protecting children instead of the reputations of potential predators.