

NOT IN MY LIBRARY: AN EXAMINATION OF STATE AND LOCAL BANS OF SEX OFFENDERS FROM PUBLIC LIBRARIES

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INTRODUCTION

“People who prey on our children are among the most dangerous criminals we face. They target our most precious and our most vulnerable citizens”¹ Presented with these risks, most individuals favor passage of additional sex offender restrictions in their communities. Hence, political leaders in Albuquerque, New Mexico,² New Bedford, Massachusetts,³ Quincy, Massachusetts,⁴ Methuen, Massachusetts,⁵ Stephenville, Texas,⁶ Rowan County, North Carolina,⁷ and the State of Iowa⁸ have attempted to protect children by prohibiting sex offenders from entering public libraries. However, these restrictions raise First Amendment issues.

The First Amendment provides, “Congress shall make no law . . . abridging the freedom of speech.”⁹ Within the freedom of speech, the Supreme Court recognizes not only the right of speakers to distribute information, but also a corresponding right of others to receive information.¹⁰ Subsequent Court decisions have recognized the right to receive information¹¹ and determined that this right includes a right of some level of public library access.¹² Therefore, sex

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1. Press Release, John Lynch, Governor of N.H., Governor Lynch Asks House Committee to Help Protect Children from Online Predators (Apr. 3, 2008), *available at* <http://www.governor.nh.gov/media/news/2008/040308.html>.

2. ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25: REGISTERED SEX OFFENDERS IN PUBLIC LIBRARIES (Sept. 16, 2008) (on file with author) [hereinafter ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25].

3. NEW BEDFORD, MASS., CODE §§ 17-26 to -27 (2008).

4. See Simon King, *Quincy Mayor Thomas Koch Signs Anti Sex Offender Law*, QUINCY COVE, Jan. 13, 2010 (on file with author).

5. METHUEN, MASS., MUN. CODE ch. 27 (2008).

6. STEPHENVILLE, TEX., CODE §§ 130.80-.86 (2007).

7. ROWAN CNTY., N.C., CODE § 15-3 (2008).

8. IOWA CODE ANN. § 692A.113 (West, Westlaw through May 19 of 2011 Reg. Sess.).

9. U.S. CONST. amend. I.

10. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

11. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

12. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992).

offenders have a First Amendment right to access public libraries.¹³

Nonetheless, the right to receive information and the associated right to access public libraries are not absolute;¹⁴ they must be balanced with the government's interest in protecting children.¹⁵ Courts will uphold a restriction under the First Amendment if the restriction does not attempt to suppress a specific message, is reasonably tailored to serve a significant government interest, and leaves open alternative avenues of expression.¹⁶ An examination of absolute bans of sex offenders from public libraries—embodied in state statutes, county and municipal ordinances, and municipal executive instructions—reveals that these restrictions are not sufficiently tailored and therefore violate the First Amendment.¹⁷ Consequently, these bans should be repealed and replaced with less speech-restrictive safety precautions.¹⁸

Part I of this Note provides background on the regulation of sex offenders after completion of their criminal sentences. Part II introduces state statutes, county and city ordinances, and city executive instructions that prohibit sex offenders from entering public libraries. Part III outlines governments' and sex offenders' competing interests. Part IV explores First Amendment jurisprudence related to the right to access public libraries, which evolved from the right to receive information.¹⁹ In addition, Part IV provides examples of acceptable and unacceptable restrictions on library access for all patrons as well as computer and Internet use by sex offenders. Part IV will also examine *Doe v. City of Albuquerque*,²⁰ a recent decision from the United States District Court for the District of New Mexico that struck down the initial Albuquerque ban as unconstitutional.²¹ Part V recommends that courts strike down the remaining bans and adopt less speech-restrictive security alternatives.

13. *See id.*

14. *See id.*

15. *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982); Minutes of the Meeting of the Rowan Cnty. Bd. of Comm'rs 16 (Sept. 4, 2007) [hereinafter Rowan Cnty. Sept. 4, 2007 Minutes], available at <http://www.co.rowan.nc.us/GOVERNMENT/Commission/MinutesandAgendas/tabid/447/Default.aspx> (click "Minutes", then click "2000s", then click "2007", and open "cm 070904.pdf.") (justifying an ordinance banning sex offenders from public libraries because it would protect children).

16. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

17. *See infra* Parts IV.B.3, V.A.

18. *See infra* Part V.

19. *See Kreimer*, 958 F.2d at 1255.

20. No. 08-cv-01041-MCA-LFG (D.N.M. Mar. 31, 2010).

21. *Id.* at 42.

I. BACKGROUND ON SEX OFFENDER REGULATION

A. *Who Are Sex Offenders?*

Society generally views sex offenders as posing a greater risk than other criminals and believes many of them target children.²² However, sex offenders include individuals of all ages and backgrounds, even individuals convicted of crimes lacking a sexual element.²³ When considering restrictions imposed on all sex offenders, one must remember that not everyone labeled “sex offender” is a depraved individual who presents continual risks to the public.²⁴

Sex offenders that do exemplify this stereotype are sexually violent predators (SVPs), the most dangerous class of sex offenders who exhibit a “mental disease or defect” or “a behavioral abnormality.”²⁵ However, SVPs are not the subset of sex offenders in contact with society because most states commit SVPs to inpatient facilities.²⁶ Even in states such as Texas that provide outpatient treatment for SVPs, unattended children are unlikely to encounter these offenders because SVPs are prohibited from visiting public places children frequent.²⁷

Although these dangerous SVPs are the individuals normally associated with the term “sex offenders,” they represent only a small subset of sex offenders.²⁸ The large, general class of sex offenders includes many subsets. One of these subsets includes child molesters.²⁹ Some child molesters abuse children out of convenience, but many child molesters are sexually attracted to children.³⁰ The cause and development of adults’ attraction to children remains unknown.³¹

In addition to SVPs and child molesters, there are other “sex offenders”³² who are less likely to sexually abuse a child.³³ Under the Adam Walsh Child

22. See JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 6-7 (2005).

23. See, e.g., 42 U.S.C. § 16911(7) (2006) (establishing kidnapping or false imprisonment by a non-parent as offenses requiring sex offender registration).

24. See *infra* text accompanying notes 32-40.

25. See Ronnie Hall, Note, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of “Sexually Violent Predators” in Texas*, 13 TEX. WESLEYAN L. REV. 175, 186 (2006).

26. See *id.*

27. See *id.* at 188 (citing one of the provisions SVPs must adhere to: “I will not go to schools, parks, swimming pools, movie theaters, public libraries, amusement parks, arcades or malls.”).

28. In 2002, only 2478 Americans were in SVP facilities. See LAFOND, *supra* note 22, at 144.

29. See R. BARRI FLOWERS, SEX CRIMES: PERPETRATORS, PREDATORS, PROSTITUTES, AND VICTIMS 239 (2d ed. 2006).

30. ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, & OTHER SEX OFFENDERS 69 (2003).

31. *Id.*

32. See 42 U.S.C. § 16911(7) (2006).

33. See NEV. REV. STAT. ANN. §§ 179D.113 to -.117 (West, Westlaw through 2010 26th

Protection and Safety Act,³⁴ all states must classify non-parents who kidnap or falsely imprison a minor as sex offenders, even if the crime was not sexually motivated.³⁵ Consequently, a grandmother convicted of “kidnapping” her grandchildren to protect them from abusive parents would have to register as a sex offender.³⁶ In many states, individuals who engage in consensual sexual relations with a minor must also register, even if the offender is barely past the age of majority.³⁷ Other offenders include teens who engage in “sexting.” Sexting occurs when an individual sends a nude photograph of oneself via text message.³⁸ Prosecutors may charge teenagers caught sending or receiving nude photographs with child pornography distribution or possession, respectively.³⁹ If convicted, these minors who sent photos of themselves must register as sex offenders for “abusing” themselves.⁴⁰

This simultaneous labeling of children as offenders and victims indicates that the label “sex offender” has become too all-encompassing. Although sex abuse continues to be a problem, the government also needs to address this labeling issue. Legislation cannot appropriately regulate sex offenders when this group has few unifying qualities or common motivating factors.

Spec. Sess.) (defining Tier I, II, and III offenders), *held unconstitutional* by *ACLU of Nev. v. Cortez Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008); R. Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 63, 65 (Bruce J. Winick & John Q. LaFond eds., 2003) (discussing factors used to determine the likelihood that individual sex offenders will recidivate).

34. 42 U.S.C. §§ 16901-62 (2006 & Supp. 2009).

35. *Id.* § 16911(7).

36. Steven J. Costigliacci, Note, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 *FAM. CT. REV.* 180, 185 (2008).

37. *See, e.g.*, ARIZ. REV. STAT. § 13-3821(A)(4) (2011) (requiring sex offender registration by anyone convicted of “sexual conduct with a minor pursuant to . . . [section] 13-1405,” which prohibits sexual intercourse or oral sex with someone younger than eighteen years old); DEL. CODE ANN. tit. 11, § 4121(a)(4) (West, Westlaw through 2011 legislation) (defining a sex offender, in relevant part, as anyone who violates section 768, which criminalizes sexual contact with another person under eighteen years old). *But see* FLA. STAT. ANN. § 943.04354 (West, Westlaw through 2011 legislation) (removing from the sex offender registry individuals who were forced to register for having consensual sex with someone between fourteen and seventeen years old and not more than four years younger than themselves).

38. *See* Mike Bruner, ‘Sexting’ Surprise: Teens Face Child Porn Charges, *MSNBC.COM* (Jan. 15, 2009), <http://www.msnbc.msn.com/id/28679588/>.

39. *Id.*

40. *See id.* (citing the opinion of an attorney who defends individuals charged with child pornography related crimes that “the prosecution of minors for photos *they took themselves* runs counter to the purpose of both state and federal child pornography laws: [p]reventing the sexual abuse of children by ‘dirty old men in raincoats.’” (emphasis added)).

B. Statutes Regulating Sex Offenders

Federal, state, and local governments have attempted to prevent sex crimes for decades. Many states have enforced sex offender registration statutes for almost twenty years.⁴¹ In an attempt to provide additional protection, governments subsequently adopted residency restrictions; the first state statutes were enacted in 2001.⁴² When residency restrictions also failed to prevent sex crimes, some jurisdictions implemented anti-loitering statutes specifically targeting sex offenders.⁴³ No restriction can ensure complete safety, though. When tragedies occur, angry parents may not evaluate the effectiveness of current restrictions, but may instead seek vengeance through even greater restrictions⁴⁴ in what some are referring to as a “war on sex offenders.”⁴⁵ To avoid infringing on sex offenders’ rights and possibly create more effective policies, lawmakers must analyze the effectiveness of current and proposed restrictions without succumbing to the public’s emotional demands.

1. *Sex Offender Registration.*—Emotional outcries in response to sex crimes have made sex offender registration statutes a high legislative priority.⁴⁶ Each state (as well as the District of Columbia) enforces its own sex offender registration statute.⁴⁷ Many federal and state sex offender registration statutes

41. See, e.g., *Sex Offender Registry Fact Sheet*, MO. STATE HIGHWAY PATROL, <http://www.mshp.dps.mo.gov/MSHPWeb/PatrolDivisions/CRID/SOR/factsheet.html> (last visited June 6, 2011) (noting that Missouri began its sex offender registry in January 1995); *Sex Offender Web Site*, STATE OF N.D. OFFICE OF ATT’Y GEN., <http://www.sexoffender.nd.gov/FAQ/faq.shtml> (last visited June 4, 2011) (noting that North Dakota passed its first sex offender registration statute in 1991).

42. MARCUS NIETO & DAVID JUNG, CAL. RESEARCH BUREAU, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 15 (2006), available at <http://www.library.ca.gov/crb/06/08/06-008.pdf>.

43. See discussion *infra* Part I.B.3.

44. See Rose Corrigan, *Making Meaning of Megan’s Law*, 31 LAW & SOC. INQUIRY 267, 267 (2006) (discussing the events leading up to the passage of Megan’s Law: “Kanka’s parents were outraged that they did not know a convicted sex offender lived in the neighborhood and helped organize a statewide movement to reform laws regarding sex offenders.”).

45. See generally Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010).

46. The bill that became the Adam Walsh Child Protection and Safety Act of 2006 was self-described as “[a]n Act . . . to honor the memory of Adam Walsh and other child crime victims.” Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. (2006); see also LAFOND, *supra* note 22, at xiii (“Sex offenders are America’s most hated public enemy The public has demanded action and politicians have responded, passing new laws . . .”).

47. ALA. CODE §§ 13A-11-200 to -204 (2006 & Supp. 2010); ALASKA STAT. §§ 12.63.010 to -.100 (2010); ARIZ. REV. STAT. §§ 13-3821 to -3827 (2011); ARK. CODE ANN. §§ 12-12-901 to -920 (2010); CAL. PENAL CODE §§ 290.001 to -.95 (2010); COLO. REV. STAT. §§ 16-22-101 to -115 (2010); CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West, Westlaw through 2011 legislation); DEL. CODE ANN. tit. 11, §§ 4120 to -22 (West, Westlaw through 2011 legislation); D.C. CODE §§ 22-4001

bear the name of a child abused in that jurisdiction.⁴⁸ Under the Adam Walsh Child Protection and Safety Act of 2006,⁴⁹ sex offenders must register their names, Social Security numbers, addresses, places of employment or study, and license plate numbers.⁵⁰ The federal government then requires each state to notify

to -4017 (2011); FLA. STAT. ANN. § 943.0435 (West, Westlaw through 2011 legislation); GA. CODE ANN. §§ 42-1-12 to -14 (2010); HAW. REV. STAT. §§ 846E-1 to -12 (West, Westlaw through 2011 legislation); IDAHO CODE ANN. §§ 18-8301 to -8328 (2010); 730 ILL. COMP. STAT. ANN. 150/1 to -/12 (West, Westlaw through 2011 Reg. Sess.); IND. CODE §§ 11-8-8-1 to -22 (2011); IOWA CODE ANN. §§ 692A.101 to -.130 (West, Westlaw through May 19 of 2011 Reg. Sess.); KAN. STAT. ANN. §§ 22-4901 to -4913 (2007 & Supp. 2009); KY. REV. STAT. ANN. §§ 17.500 to -.580 (West, Westlaw through 2010 legislation); LA. REV. STAT. ANN. §§ 15:540 to -:552 (West, Westlaw through 2010 legislation); ME. REV. STAT. ANN. tit. 34-A, §§ 11201-56 (West, Westlaw through 2009 1st Reg. Sess.); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -717 (West, Westlaw through 2011 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 6, §§ 178C-Q (West, Westlaw through 2011 1st Annual Sess.); MICH. COMP. LAWS ANN. §§ 28.721 to -.732 (West, Westlaw through 2011 Reg. Sess.); MINN. STAT. ANN. § 243.166 (West, Westlaw through 2011 Reg. Sess.); MISS. CODE ANN. §§ 45-33-21 to -59 (2010); MO. REV. STAT. §§ 589.400 to -.425 (2010); MONT. CODE ANN. §§ 46-23-501 to -520 (2009); NEB. REV. STAT. §§ 29-4001 to -4014 (2008 & Supp. 2010); NEV. REV. STAT. ANN. §§ 179D.010 to -.550 (West, Westlaw through 2010 Spec. Sess.); N.H. REV. STAT. ANN. §§ 651-B:1 to :12 (2007 & Supp. 2010); N.J. STAT. ANN. §§ 2C:7-1 to -18 (2011); N.M. STAT. ANN. §§ 29-11A-1 to -10 (West, Westlaw through 2011 legislation); N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney 2003 & Supp. 2011); N.C. GEN. STAT. §§ 14-208.5 to -208.45 (2011); N.D. CENT. CODE § 12.1-32-15 (1997 & Supp. 2009); OHIO REV. CODE ANN. § 2950.01-.99 (West, Westlaw through 2011 legislation); OKLA. STAT. ANN. tit. 57, §§ 581 to -87 (West, Westlaw through 2011 legislation); OR. REV. STAT. ANN. §§ 181.585 to -.606 (West, Westlaw through 2011 Reg. Sess.); 42 PA. CONS. STAT. ANN. §§ 9791-99.9 (West, Westlaw through 2011 Reg. Sess.); R.I. GEN. LAWS ANN. §§ 11-37.1-1 to -20 (West, Westlaw through 2011 1st Reg. Sess.); S.C. CODE ANN. §§ 23-3-400 to -550 (2007 & Supp. 2010); S.D. CODIFIED LAWS §§ 22-24B-1 to -34 (2010); TENN. CODE ANN. §§ 40-39-201 to -212 (West, Westlaw through 2011 1st Reg. Sess.); TEX. CRIM. PROC. CODE ANN. §§ 62.001 to -.408 (West, Westlaw through 2011 Reg. Sess.); UTAH CODE ANN. § 77-27-21.5 (West, Westlaw through 2010 legislation); VT. STAT. ANN. tit. 13, §§ 5401 to -14 (2010); VA. CODE ANN. §§ 9.1-900 to -922 (2010); WASH. REV. CODE ANN. §§ 9A.44.130 to -.145 (West, Westlaw through 2011 legislation); W. VA. CODE ANN. §§ 15-12-1 to -10 (West, Westlaw through 2011 Reg. Sess.); WIS. STAT. ANN. §§ 301.45 to -.48 (West, Westlaw through 2011 legislation); WYO. STAT. ANN. §§ 7-19-301 to -308 (West, Westlaw through 2010 legislation).

48. *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901 (2006 & Supp. 2009) (listing seventeen children whose attacks demonstrated the need for federal legislation establishing sex offender registration requirements); Megan's Law, N.J. STAT. ANN. § 2C:7-1 to -18.

49. 42 U.S.C. §§ 16901-62.

50. *Id.* § 16914. States may also require additional information. For example, in Delaware, [t]he registration forms shall include, but are not limited to, the following information: the sex offender's legal name, any previously used names, aliases or nicknames, Social Security number, email address or addresses, Internet identifiers, and the age, gender, race and physical description of the sex offender. The registration form shall also

the public of sex offenders in its jurisdiction through an online registry.⁵¹

2. *Residency Restrictions.*—States and cities have adopted residency restrictions prohibiting sex offenders from living within a prescribed number of feet of schools, parks, day care centers, and other places where children frequently gather.⁵² The most restrictive locales, such as the City of Sunny Isles Beach, Florida, prohibit sex offenders from living within 2500 feet of a school, school bus stop, day care center, park, playground, or other locations where children congregate.⁵³ Creation of zones with a radius of 2500 feet around each of these common locations greatly limits or renders nonexistent the remaining areas where a sex offender can live.

In *Doe v. Miller*,⁵⁴ the Eighth Circuit upheld Iowa's sex offender residency restriction, which forbids sex offenders from living within 2000 feet of a school.⁵⁵ The court noted that state legislatures may determine the best way to protect their constituents' health and welfare when insufficient statistical data exist to determine whether a restriction will achieve its stated goal.⁵⁶ The court assumed that the statement "[s]ex offenders are a serious threat in this Nation" was

include all other known identifying factors, the offense history and the sex offender's current residences or anticipated place of future residences, places of study and/or places of employment, and the registration plate numbers and descriptions of any vehicles owned or operated by the offender, including any watercraft or aircraft with the locations where such vehicles are docked, parked, or otherwise stored, copies of that offender's passport, any licenses to engage in an occupation or to carry out a trade or business, and the offender's home telephone number and any cellular telephone numbers. The forms shall also include a statement of any relevant conditions of release, discharge, parole or probation applicable to the sex offender. Additionally, the form shall identify the age of the victim or victims of the offense or offenses and describe the victim's relationship to the offender. The form shall also indicate on its face that false statements therein are punishable by law. A photograph of the offender taken at the time of registration shall be appended to the registration form.

DEL. CODE ANN. tit. 11, § 4120(d)(2). Utah requires sex offenders to register their "Internet identifiers and the addresses the offender uses for routing or self-identification in Internet communications or postings." UTAH CODE ANN. § 77-27-21.5(14)(i). Despite the potential for a chilling effect on normally anonymous speech, this requirement has been upheld in the face of a First Amendment challenge. *Doe v. Shurtleff*, 628 F.3d 1217, 1227 (10th Cir. 2010).

51. 42 U.S.C. § 16918.

52. See, e.g., ALA. CODE § 15-20-26 (prohibiting sex offenders from living within 2000 feet of a school or day care center); CAL. PENAL CODE § 3003.5(b) (prohibiting registered sex offenders from living within 2000 feet of a school or park); NEWARK, N.J., REV. GEN. ORDINANCES tit. XX, ch. 26A, § 1 (2008) (prohibiting convicted sex offenders from living within 200 feet of a "school, playground, recreation center, or park"); STEPHENVILLE, TEX., CODE § 130.83(D) (2007) (making it unlawful for sex offenders to reside within 1000 feet of places where children gather).

53. SUNNY ISLES BEACH, FLA., CODE § 222-4(A) (2005).

54. 405 F.3d 700 (8th Cir. 2005).

55. IOWA CODE ANN. § 692A.114 (West, Westlaw through May 19 of 2011 Reg. Sess.).

56. *Miller*, 405 F.3d at 714.

rational⁵⁷ without drawing any distinction between types of sex offenders or their likelihood of recidivism.⁵⁸ The Eighth Circuit rejected fear of sex offenders or a desire to harm them as rationales for the residency restriction.⁵⁹ Assuming sex offenders have a high rate of recidivism, the court rationalized the residency restriction on this basis.⁶⁰ Ultimately, the court grounded its holding in “common sense”—specifically, on the notion that “limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense.”⁶¹

A Minnesota Department of Corrections study refutes the *Miller* court’s “common sense” reasoning. The study examined the offense characteristics of 224 Minnesota recidivists’ offenses and concluded that a residency restriction would not have prevented any of them.⁶² Most of the cases involved a child victim the offender already knew.⁶³ Of the cases where the offender made initial contact with a stranger within 2500 feet of the offender’s residence, sixteen involved a minor victim, but none occurred near the locations designated by residency restriction statutes.⁶⁴ In three instances, the offense occurred in a prohibited location, but two instances involved an offender who lived more than ten miles away, and the other attack involved an adult victim.⁶⁵ These findings demonstrate that residency restrictions are ineffective and attacks in public places are exceedingly rare.

An analogous study by the Colorado Department of Public Safety Sex Offender Management Board reported similar findings. The report noted that residency restrictions may actually increase recidivism rates because they greatly limit the areas where offenders can live, thereby removing them from support

57. *Id.* at 715 (quoting *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003)).

58. If all sex offenders are equally dangerous, statutes such as IOWA CODE ANN. § 692A.102, where the Iowa legislature classifies its sex offenders into three tiers based on their convicted offenses, would be unnecessary.

59. *Miller*, 405 F.3d at 716.

60. *Id. Contra* Dwight H. Merriam & Patricia E. Salkin, *Residency Restriction for Convicted Sex Offenders: A Popular Approach on Questionable Footing*, 2009 A.L.I. LAND USE INST. 95, 98 (identifying high recidivism of sex offenders as a popular myth to justify residency restrictions after examining the U.S. Department of Justice’s findings that only 5.3% of sex offenders reoffended three years after release).

61. *Miller*, 405 F.3d at 716. A little over a year after this decision, the Iowa County Attorneys Association issued a statement expressing its disbelief in the effectiveness of this law. IOWA CNTY. ATT’YS ASS’N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (Dec. 11, 2006), available at <http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%2011%2006.pdf>.

62. MINN. DEP’T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA 1-2 (Apr. 2007), available at <http://www.doc.state.mn.us/publications/documents/04-07SexOffenderReport-Proximity.pdf>.

63. *See id.* at 2.

64. *Id.*

65. *Id.* at 23.

systems.⁶⁶ This study found the sites of sex crimes to be scattered throughout the community; they were not clumped near schools, day care centers, or other places children usually gather.⁶⁷ Although this study did not find the location of a sex offender's residence to be related to recidivism, it did find that sex offenders living in shared living arrangements with other sex offenders to whom they were accountable were less likely to reoffend than offenders living with friends or family.⁶⁸ This study shows that instead of focusing on where a sex offender lives, attention should be given to how and with whom offenders live.

3. *Anti-Loitering Ordinances.*—Anti-loitering ordinances are less restrictive than bans of sex offenders from public places, but the bans may have evolved from these anti-loitering ordinances.⁶⁹ In fact, Henderson County, North Carolina's ordinance, which forbids "a convicted child sex offender to knowingly loiter in any child safety zone," is titled "Prohibition of convicted child sex offenders in child safety zone."⁷⁰ This ordinance does not prohibit sex offenders from entering the "child safety zone," which includes public libraries, but it expressly states that a sex offender may not "loiter," which is defined as "[s]tanding, sitting idly, whether or not the person is in a vehicle or remaining in or around a child safety zone."⁷¹ The risk of over-enforcement of these ordinances in libraries is high. A sex offender casually perusing a magazine at the library could be classified as "sitting idly."

Stephenville, Texas's anti-loitering ordinance is narrower than Henderson County's; it only prohibits a sex offender to "knowingly loiter *on a public way within 300 feet* of a [c]hild [s]afety [z]one."⁷² Stephenville's anti-loitering provision can be narrower because it is supplemented by a provision prohibiting

66. COLO. DEP'T OF PUB. SAFETY SEX OFFENDER MGMT. BD., REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 9 (2004), available at <http://dcj.state.co.us/ors/pdf/docs/fullSLAfinal.pdf>.

67. *Id.* at 30.

68. *Id.* at 25.

69. Not only is banning someone's presence one step removed from prohibiting loitering, but some of the sex offender bans involve "child safety zones" similar to those defined in anti-loitering statutes. Compare NEW BEDFORD, MASS., CODE § 17-26(1) (2008), with HENDERSON CNTY., N.C., CODE § 130A-50 (2008).

70. HENDERSON CNTY., N.C., CODE § 130A-50(B).

71. *Id.* § 130A-50(A).

72. STEPHENVILLE, TEX., CODE § 130.83(C) (2007) (emphasis added). Stephenville's "child safety zone" includes

[p]ublic parks, private and public schools, *public library*, amusement arcades, video arcades, indoor and outdoor amusement centers, amusement parks, public or commercial and semi-private swimming pools, child care facility, child care institution, public or private youth soccer or baseball field, crisis center or shelter, skate park or rink, public or private youth center, movie theater, bowling alley, scouting facilities and Offices for Child Protective Services.

Id. § 130.82 (emphasis added).

sex offenders from knowingly entering a “child safety zone.”⁷³ Similarly, Iowa forbids a sex offender whose victim was a minor from loitering within three hundred feet of a school, child care facility, public library, or “any place intended primarily for the use of minors.”⁷⁴

Methuen, Massachusetts also couples an anti-loitering provision with a prohibition of registered sex offenders’ entrance to designated areas—such as schools, libraries, recreational facilities, and housing for the elderly and mentally retarded—but requires the Methuen Police Department to notify a registered sex offender of his or her loitering before the individual can be subject to penalties for loitering.⁷⁵ This loitering provision also encompasses a broader area than the Stephenville or Iowa loitering restrictions by prohibiting registered sex offenders from loitering within five hundred feet of the protected locations.⁷⁶ However, the Methuen ordinance instructs law enforcement to measure the minimum distance “by following a straight line from the location where the [r]egistered [s]ex [o]ffender is or was present to the outer property line of the [s]chool, a [d]ay [c]are [c]enter, a [p]ark, any [r]ecreational [f]acility, [e]lderly [h]ousing [f]acility or [f]acility for the [m]entally [r]etarded.”⁷⁷

Despite the efforts of the aforementioned restrictions, sex offenses continue to plague society. However, instead of examining the efficacy of existing sex offender regulations and addressing their deficiencies,⁷⁸ government officials usually respond by adding more restrictions.⁷⁹ Because the label “sex offender” encompasses a wide variety of individuals,⁸⁰ it is difficult to create legislation strong enough to deter the worst offenders without excessively restricting those who are sex offenders because of a technicality. Unfortunately, many jurisdictions’ citizens do not worry about excessive restrictions.⁸¹

73. *Id.* § 130.83(B).

74. IOWA CODE ANN. § 692A.113(1)(h) (West, Westlaw through May 19 of 2011 Reg. Sess.).

75. *See* METHUEN, MASS., MUN. CODE ch. 27, § 1, 3(A) (2008).

76. *Id.* § 3(A)(4).

77. *Id.*

78. An efficacy study of New Jersey’s Megan’s Law was conducted in 2008; it found that “Megan’s Law showed no demonstrable effect in reducing sexual re-offenses. . . . Megan’s Law has no effect on reducing the number of victims involved in sexual offenses.” KRISTEN ZGOBA ET AL., N.J. DEP’T OF CORR., MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 2 (2008), available at <http://www.nj.gov/defender/news/MegansLawAssessingEfficacy.pdf>. Despite these findings, Megan’s Law has not been amended since 2008. *See* N.J. STAT. ANN. § 2C:7-1 to -18 (2011).

79. *See supra* Parts I.B.2-3; *see also* A.B. 1844 (Cal. 2010) (The Chelsea King Child Predator Prevention Act of 2010, which was signed into law on September 9, 2010, increases the penalties for criminal defendants found guilty of various sex crimes against children.).

80. *See supra* notes 32-40 and accompanying text.

81. The Rowan County Board of Commissioners provided public notice when it proposed an ordinance banning sex offenders from public places. No public comments were received, and only one individual inquired about public hearings regarding the proposed ordinance. Minutes of the Meeting of the Rowan Cnty. Bd. of Comm’rs 3-4 (Apr. 7, 2008) [hereinafter Rowan Cnty. Apr.

II. BANS OF SEX OFFENDERS FROM PUBLIC LIBRARIES

Few jurisdictions currently ban sex offenders from public libraries, but additional communities may be considering this type of restriction.⁸² When sex offender restrictions are upheld, additional jurisdictions add similar legislation.⁸³ However, following *Doe v. City of Albuquerque*,⁸⁴ other jurisdictions may reconsider plans to adopt a similar ban.⁸⁵ Bans of sex offenders from public libraries exist at the state,⁸⁶ county,⁸⁷ and municipal⁸⁸ levels of government in nearly all regions of the United States.⁸⁹ Some of the currently enforced bans include libraries among places where sex offenders cannot be present,⁹⁰ while other legislation creates “child safety zones”—including libraries—which sex offenders may not enter.⁹¹

A. Currently Enforced Bans of Sex Offenders from Public Libraries

1. *State Statute.*—Currently, the only state-level ban of sex offenders from public libraries is in Iowa, and it only applies to sex offenders convicted of a sex offense against a minor.⁹² Iowa’s ban of sex offenders from libraries and other

7, 2008 Minutes], available at <http://www.co.rowan.nc.us/GOVERNMENT/Commission/MinutesandAgendas/tabid/447/Default.aspx> (click “Minutes”, then click “2000s”, then click “2008”, and open “cm 080407.pdf.”).

82. See H.B. 1100, 2011 Gen. Assemb., 1st Reg. Sess. (Ind. 2011) (“A registered sex offender who knowingly or intentionally enters a public library . . . commits sex offender library trespass, a Class D felony.”).

83. See Megan McCurdy, Case Note, *Doe v. Miller*, 38 URB. LAW. 360, 361 (2006) (noting that Polk County and Des Moines, Iowa amended their residency restrictions to include additional public places sex offenders could not reside near following *Doe v. Miller*); Rowan Cnty. Apr. 7, 2008 Minutes, *supra* note 81, at 3 (noting that the Rowan County Planning Board used Woodfin’s ordinance banning sex offenders from parks as a model after the North Carolina Court of Appeals upheld it).

84. No. 08-cv-01041-MCA-LFG (D.N.M. Mar. 31, 2010).

85. See Neil Vigdor, *Sex Offender Ban Going Back to RTM*, GREENWICH TIME, May 10, 2010, available at <http://www.greenwichtime.com/local/article/Originally-in-the-Sunday-paper-Sex-offender-ban-481180.php> (noting that the original proposed ban was changed so that libraries would not be included in child safety zones).

86. IOWA CODE ANN. § 692A.113(1)(f) (West, Westlaw through May 19 of 2011 Reg. Sess.).

87. ROWAN CNTY., N.C., CODE § 15-3(b) (2008).

88. NEW BEDFORD, MASS., CODE § 17-26(1) (2008); STEPHENVILLE, TEX., CODE §§ 130.82-.83 (2007).

89. IOWA CODE ANN. § 692A.113(1)(f); ROWAN CNTY., N.C., CODE § 15-3(b); NEW BEDFORD, MASS., CODE § 17-26(1); STEPHENVILLE, TEX., CODE §§ 130.82-.83.

90. See, e.g., IOWA CODE ANN. § 692A.113.

91. NEW BEDFORD, MASS., CODE § 17-26(1); STEPHENVILLE, TEX., CODE §§ 130.82-.83.

92. IOWA CODE ANN. § 692A.113(1).

public places evolved from Polk County⁹³ and Des Moines⁹⁴ ordinances. These ordinances added public pools and libraries to the list of locations near which sex offenders could not live following the Eighth Circuit's decision in *Doe v. Miller*,⁹⁵ which allowed the government to prohibit sex offenders from living near schools and child care facilities.⁹⁶ In 2009, these local ordinances were repealed when the Iowa General Assembly passed statutes prohibiting sex offenders' residences within 2000 feet of a school or child care facility⁹⁷ and their presence on library or pool property.⁹⁸

Many similarities exist among public library policies adopted to comply with the Iowa statute.⁹⁹ To enter library property, sex offenders usually must appeal to the library's board of trustees.¹⁰⁰ Library materials may be borrowed through a designee who uses the sex offender's library card.¹⁰¹ Sex offenders may receive books and other media through home delivery from select libraries,¹⁰² but many libraries will not provide this service to sex offenders.¹⁰³ Furthermore, because sex offenders cannot be present on library property, they cannot access information available only inside the library, such as non-circulating reference materials and local history archives.¹⁰⁴ An affected offender might, however, request that library staff conduct local history or genealogy research on his or her behalf for a modest fee.¹⁰⁵ Currently, Iowa remains a test case that other states can monitor to ascertain if bans will abate sex offenses and survive constitutional challenges.

2. *County Ordinance.*—Because most states do not ban sex offenders from public libraries, counties may enact similar ordinances. Local ordinances may be a more appropriate source of sex offender restrictions because they allow each

93. POLK CNTY., IOWA, ORDINANCE 238 (2005) (repealed 2009).

94. DES MOINES, IOWA, CODE §§ 70-307 to -311 (2005) (repealed 2009).

95. 405 F.3d 700 (8th Cir. 2005).

96. McCurdy, *supra* note 83, at 360.

97. IOWA CODE ANN. § 692A.114.

98. *Id.* § 692A.113.

99. *See Sex Offender Against Minors Policy*, KNOXVILLE PUB. LIBRARY, <http://www2.youseemore.com/knoxville/about.asp?loc=20> (last modified Sept. 16, 2009) [hereinafter *Knoxville Policy*]; *Sex Offender Policy from Iowa City Public Library*, STATE LIBRARY OF IOWA (July 23, 2009), <http://www.statelibraryofiowa.org/ld/k-p/Policies/ic/> [hereinafter *Iowa City Policy*]; *WATERLOO PUB. LIBRARY, REGISTERED SEX OFFENDERS POLICY* (July 13, 2009), available at <http://www.waterloo.lib.ia.us/library-information/policies/offender> [hereinafter *Waterloo Policy*].

100. *Iowa City Policy*, *supra* note 99; *Knoxville Policy*, *supra* note 99; *Waterloo Policy*, *supra* note 99.

101. *Iowa City Policy*, *supra* note 99; *Knoxville Policy*, *supra* note 99; *Waterloo Policy*, *supra* note 99.

102. *Iowa City Policy*, *supra* note 99.

103. *See, e.g., Knoxville Policy*, *supra* note 99.

104. *See Genealogy Research Policies*, AKRON PUB. LIBRARY, <http://www.akron.lib.ia.us/library-information/policies/access/Genealogy> (last modified Mar. 13, 2010).

105. *See id.*

community to determine the appropriate balance between public safety and individual rights based on its own standards. An example of a county ordinance is Rowan County, North Carolina's, which reads "Registered sex offenders prohibited from entering Rowan County parks, recreation areas, fairgrounds and public libraries."¹⁰⁶

The relevant portion of Rowan County's ordinance reads, "No registered sex offender shall enter into or upon any Rowan County parks, recreation area, fairgrounds, or public libraries operated by the County of Rowan."¹⁰⁷ This ordinance did not initially include libraries; rather, it sought only to protect people in Rowan County parks and recreation areas.¹⁰⁸ The planning board confidently added other public locations to the proposed ordinance¹⁰⁹ after October 2007, when the North Carolina Court of Appeals upheld a similar ordinance banning sex offenders from public parks in *Standley v. Town of Woodfin*.¹¹⁰ The board of commissioners stated at that time that the purpose of the resolution was "to protect children."¹¹¹ Local ordinances like these are passed by legislators who likely know the children whose protection is at stake. In these instances, there is great danger that emotion can undermine considerations of sex offenders' rights.

3. *Municipal Ordinance*.—Most bans of sex offenders from public libraries are issued by cities.¹¹² Sometimes, these ordinances respond to improper activities that occur at the local library.¹¹³ Municipal ordinances attempting to protect children from harm favor the "child safety zone" approach.¹¹⁴

Stephenville, Texas's "Sex Offender Prohibition" is a municipal ordinance that prohibits a sex offender from "knowingly enter[ing] a [c]hild [s]afety [z]one."¹¹⁵ Public libraries are included in the term "child safety zone."¹¹⁶ This

106. ROWAN CNTY., N.C., CODE § 15-3 (2008).

107. *Id.* § 15-3(b).

108. *See* Rowan Cnty. Sept. 4, 2007 Minutes, *supra* note 15, at 16.

109. *See* Rowan Cnty. Apr. 7, 2008 Minutes, *supra* note 81, at 3-4.

110. 650 S.E.2d 618, 623 (N.C. Ct. App. 2007), *aff'd*, 661 S.E.2d 728 (N.C. 2008).

111. Minutes of the Meeting of the Rowan Cnty. Bd. of Comm'rs 19 (Apr. 21, 2008) [hereinafter Rowan Cnty. Apr. 21, 2008 Minutes], available at <http://www.co.rowan.nc.us/GOVERNMENT/Commission/MinutesandAgendas/tabid/447/Default.aspx> (click "Minutes", then click "2000s", then click "2008", and open "cm 080421.pdf").

112. *Compare* Part II.A.1-2, with Part II.A.3-B.

113. *See, e.g.*, Jack Encarnacao, *Quincy Moves to Ban Sex Offenders from Libraries, Parks*, PATRIOT LEDGER, Dec. 29, 2009, available at http://www.patriotledger.com/news/cops_and_courts/x1444026856/Quincy-moves-to-ban-sex-offenders-from-libraries-parks (reporting that a Quincy, Massachusetts city councilor's reason for considering the ordinance was that a teenager had witnessed a man masturbating while viewing pornography on a library computer).

114. *See* NEW BEDFORD, MASS., CODE § 17-26(1)(a)(i) (2008); STEPHENVILLE, TEX., CODE § 130.83 (2007); Encarnacao, *supra* note 113 (noting that the proposed Quincy, Massachusetts ordinance would establish "safety zones").

115. STEPHENVILLE, TEX., CODE § 130.83(B).

116. *Id.* § 130.82.

restriction applies only to offenders whose victim was under seventeen years old¹¹⁷ and does not apply to offenders who were minors at the time of the offense *and* were not tried as adults.¹¹⁸ The “Purpose and Intent” of the ordinance reads as follows:

It is the intent of this subchapter to serve the city’s *compelling interest* to promote, protect and improve the health, safety and welfare of the citizens of the city by creating areas around locations where children regularly congregate in concentrated numbers wherein certain registered sex offenders and sexual predators are prohibited from loitering or prohibited from establishing temporary or permanent residency.¹¹⁹

This wording shows that the city council anticipated a constitutional challenge. Surprisingly, prohibiting sex offenders from child safety zones is not linked here with serving a compelling interest.¹²⁰

Another example is New Bedford, Massachusetts’s ordinance, “Child Sex Offender in Child Safety Zone.”¹²¹ New Bedford passed this ordinance banning sex offenders from public places—including libraries—after a convicted sex offender raped a six-year-old boy in the New Bedford Public Library.¹²² This ordinance includes the library in the “child safety zone”¹²³ and prohibits registered sex offenders from being present in any “child safety zone.”¹²⁴

The New Bedford ban recognizes that not all sex offenders pose the same threat to children and applies only to level two and three offenders.¹²⁵ It also

117. *Id.*

118. *Id.* § 130.85(D).

119. *Id.* § 130.82 (emphasis added).

120. *See id.*

121. NEW BEDFORD, MASS., CODE § 17-26 (2008). Of the ban examples provided in this Note, the New Bedford ordinance is the most detailed.

122. *See* Marie Szaniszlo, *Alleged New Bedford Library Rape Prompts Action*, BOS. HERALD, Feb. 16, 2008, at 6.

123.

Child safety zone means: (a) A park, playground, recreation center, *library*, school, day care center, private youth center, video arcade, bathing beach, swimming pool or wading pool, gymnasium, sports field, or sports facility, including the parking area and land adjacent to any of the aforementioned facilities, and school or camp bus stops, which is: 1) Under the jurisdiction of any department, agency, or authority of the City of New Bedford, including but not limited to the School Department of the City of New Bedford, or 2) Leased by the City of New Bedford to another person for the purpose of operating a park, playground, recreation center, bathing beach, swimming pool or wading pool, gymnasium, sports field, or sports facility.

NEW BEDFORD, MASS., CODE § 17-26(1)(a)(i) (second emphasis added).

124. *Id.* § 17-26(1)(b).

125. *Id.* § 17-26(1)(a)(ii)(a). Level two offenders are those whose “risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information.” MASS. GEN. LAWS ANN. ch. 6, §

provides for several exceptions when sex offenders may enter the “child safety zone.”¹²⁶ The New Bedford ordinance allows sex offenders to conduct business at government facilities, but it specifically excludes libraries from this exception.¹²⁷ Only sex offenders whose polling place is the library may ever visit the library, and even then, offenders may enter the library only to vote.¹²⁸ This ordinance’s limited application and specific exceptions reflect the impracticability of enforcing a complete ban of sex offenders from public places. The exceptions also create a more equitable restriction despite the emotional circumstances that inspired the ban.

Methuen, Massachusetts’s ordinance, “Registered Sex Offender Restrictions,” was also inspired in part by the attack at the New Bedford Public Library.¹²⁹ This ordinance does not create “child safety zones,” although Section 3 is entitled “Safety Zones,” but it specifies that

[a] [r]egistered [s]ex [o]ffender is prohibited from entering upon the premises of a [s]chool or [d]ay [c]are [c]enter unless previously authorized specifically in writing by the [s]chool administration or [d]ay [c]are [c]enter owner . . . an [e]lderly [h]ousing [f]acility or [f]acility for the [m]entally [r]etarded unless previously authorized in writing by the on-site manager In the case of those dwellings under the ownership, administration, or operation to the Methuen Housing Authority a [r]egistered [s]ex [o]ffender is prohibited from entering upon the premises thereof unless previously authorized in writing by the executive director of the Methuen Housing Authority to do so, [or] a [p]ark or any [r]ecreational [f]acility.¹³⁰

Public libraries are included under the definition of “school.”¹³¹ Like New

178K(2)(b) (West, Westlaw through 2011 1st Annual Sess.). A level three offender is someone whose “risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination.” *Id.* § 178K(2)(c). The city of Quincy, Massachusetts also bans sex offenders from libraries but limits its ban only to these most dangerous level III offenders. *See King, supra* note 4. By contrast, level one offenders’ “risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability.” MASS. GEN. LAWS ANN. ch. 6, § 178K(2)(a). For more information on level one offenders in Massachusetts, see Jenai J. Cormier, Note, *Noble in Theory, Vain in Practice: A Critique of Level One Sex Offenders in Massachusetts*, 44 NEW ENG. L. REV. 103 (2009).

126. *See* NEW BEDFORD, MASS., CODE § 17-26(1)(c).

127. *Id.* § 17-26(1)(c)(vi)(a).

128. *Id.* § 17-26(1)(c)(iv).

129. City councilor Willette argued in support of the ordinance, “You’ve had Level 3 sex offenders travel into public libraries and attack children. . . . It’s well documented throughout the last year” J.J. Huggins, *Sex Offender’s Family Opposes Law on ‘Predator Free’ Zones*, EAGLE-TRIB., July 13, 2008 (on file with author).

130. METHUEN, MASS., MUN. CODE ch. 27, §§ 3(A)(1)-(3) (2008).

131. *Id.* § 1.

Bedford's ordinance, the Methuen ordinance applies only to level two, level three, and SVP offenders,¹³² and it provides an exception for offenders to vote if one of the prohibited locations is his or her polling place.¹³³ This ordinance is unique in that it also provides for posting of level three offenders at the Nevins Library and the other locations where offenders are not allowed.¹³⁴ Thus, the ordinance shows that there are so few offenders in their community that they can easily post their pictures in a public area of each location.

B. *Unconstitutional Ban of Sex Offenders from Public Libraries*

Before delving into why the initial Albuquerque ban was declared unconstitutional,¹³⁵ it is important to understand some of its unique aspects. The Albuquerque ban was established by an executive instruction signed by Albuquerque's former mayor, Martin Chavez.¹³⁶ Proper municipal executive instruction subject matter varies by jurisdiction and depends on the mayoral duties assigned by the city's charter.¹³⁷ Generally, the legislature, as the most politically accountable branch, should make important policy decisions.¹³⁸ Municipal executive instructions are often used to make appointments¹³⁹ or regulate mundane matters, such as how city employees answer the telephone.¹⁴⁰

Despite the tradition of using executive instructions to facilitate the daily operations of city government, in 2008, former Albuquerque mayor Martin J. Chavez issued Executive Instruction No. 25, which prohibited registered sex offenders from entering public libraries in the City of Albuquerque.¹⁴¹ His goal

132. *Id.*

133. *Id.* § 3(B)(1).

134. *Id.* § 4(A). This posting is similar to an attempted de facto ban of sex offenders from public libraries in Boston in 2005. In that instance, then-Mayor Thomas Menino provided public libraries with mug shots of the most serious sex offenders in Boston in order to help librarians identify them and ask them to leave if they were engaging in suspicious behavior. Allegedly registered sex offenders would be allowed to stay at the library if they were in compliance with library use policies. Kevin Rothstein, *Stacked Against Them: Perv Mugshots Will Hang in Libraries*, BOS. HERALD, Aug. 13, 2005, at 2. However, if librarians should be looking out for suspicious behavior from any patron, why are pictures of registered sex offenders necessary?

135. See discussion *infra* Part IV.B.3.

136. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

137. For example, Albuquerque, New Mexico's charter delegates executive and administrative power to the mayor to organize and delegate responsibility to city employees. See CITY OF ALBUQUERQUE, CHARTER art. 5, §§ 3-4 (2007).

138. See *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

139. See, e.g., ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 3: APPOINTMENT OF CHIEF ADMINISTRATIVE OFFICER (Dec. 5, 2005) (on file with author).

140. ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 11: TELEPHONE COURTESY (Aug. 8, 2000) (on file with author).

141. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

was to prevent predators from accessing children and public computers where they could talk to children.¹⁴² The executive instruction required libraries to initially notify library card-carrying sex offenders that they could not enter any public library in Albuquerque.¹⁴³ After this initial notification, law enforcement agencies were responsible for enforcing Executive Instruction No. 25.¹⁴⁴ The Albuquerque/Bernalillo County Library System also provided continual notice to sex offenders in its building use rules, which read in part, “City of Albuquerque policy prohibits registered sex offenders from using public library facilities.”¹⁴⁵ Two days after the ruling in *Doe v. City of Albuquerque*, which held the ban unconstitutional,¹⁴⁶ this line was removed from the building use rules.¹⁴⁷ Albuquerque’s ban, as an executive instruction that applied only to libraries,¹⁴⁸ was unique.

However, the City of Albuquerque did not abandon its efforts to protect children following *Doe v. City of Albuquerque*. In addition to appealing the decision, Albuquerque’s current mayor, Richard Berry, signed a new executive instruction on May 6, 2010.¹⁴⁹ This instruction allows registered sex offenders to visit the main library in downtown Albuquerque only on Thursdays and Saturdays between 10:00 A.M. and 6:00 P.M., and they must sign in with security officers, provide photo identification, and refrain from visiting the children’s section.¹⁵⁰

C. Comparison of the Bans

Although each ban has a distinct scope, several similarities exist among them. Even though the Iowa, Stephenville, and New Bedford bans are limited to sex offenders with minor victims, all of the bans target a wide range of offenders,¹⁵¹

142. Scott Sandlin, *Sex Offender Library Ban Overturned*, ALBUQUERQUE J., Apr. 2, 2010, at C1.

143. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2. However, when this law was enforced, the police compared the list of library card holders with sex offender registries and sent criminal trespass warnings to those on both lists. Sandlin, *supra* note 142.

144. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

145. ALBUQUERQUE/BERNALILLO CNTY. LIBRARY SYS., ORIGINAL BUILDING USE RULES (on file with author).

146. *Doe v. City of Albuquerque*, No. 08-cv-01041-MCA-LFG, slip op. at 42 (D.N.M. Mar. 31, 2010).

147. *See Library Organization & Policies*, CITY OF ALBUQUERQUE, <http://www.cabq.gov/library/policies/index.html#conduct> (last visited June 4, 2011).

148. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

149. ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25: AMENDED INSTRUCTION REGARDING REGISTERED SEX OFFENDERS IN PUBLIC LIBRARIES (May 6, 2010), *available at* <http://www.solresearch.org/~SOLR/cache/gov/US/loc/NM-Alb/20100506-SOsInLibrary.pdf>.

150. *Id.*

151. *See supra* Part II.A-B.

including individuals who pose a minimal risk to children.¹⁵² Each ban also restricts offenders' rights to some level of public library access.¹⁵³ In addition, each ban—except the Iowa statute—designates law enforcement officers, as opposed to library employees, as the party responsible for enforcing the law.¹⁵⁴

Although these bans have many similarities, important differences exist among them as well. Of all the bans, only the original Albuquerque executive instruction applied solely to libraries.¹⁵⁵ The ordinances and the Iowa statute also apply to parks, schools, and day care centers.¹⁵⁶ The Iowa statute and the Stephenville ordinance not only prohibit sex offenders' presence at schools, child care facilities, public libraries, playgrounds, and swimming pools, but also forbid sex offenders to loiter within three hundred feet of these locations.¹⁵⁷ The Methuen ordinance extends the boundary for loitering to within five hundred feet of these locations.¹⁵⁸ The Iowa statute also prohibits sex offenders from working or volunteering at events or facilities where children are present.¹⁵⁹ The New Bedford and Methuen ordinances are unique because they exclude level one offenders in Massachusetts from their reach¹⁶⁰ and apply only to more dangerous level two and three offenders.¹⁶¹ The other bans fail to distinguish sex offenders based on their risk of recidivism.

Another difference among the bans has to do with the communities' comparative experiences with sex offenders. Each ban seeks to protect individuals from sexual assault, but only the New Bedford ordinance¹⁶² and, arguably, the Iowa statute,¹⁶³ responded to events in those jurisdictions.¹⁶⁴ The

152. Under federal law, a sex offense can be a crime with a sexual component or “a criminal offense that is a specified offense against a minor.” 42 U.S.C. § 16911(5)(A)(ii) (2006). Therefore, sex offenders include individuals who commit sex offenses only against adults. Also, an individual whose minor “victim” was a teenage boyfriend or girlfriend is unlikely to pose a risk to children generally.

153. See *supra* Part II.A-B.

154. METHUEN, MASS., MUN. CODE ch. 27, § 6(A) (2008); NEW BEDFORD, MASS., CODE § 17-26 (2008); ROWAN CNTY., N.C., CODE § 15-3(b) (2008); STEPHENVILLE, TEX., CODE § 180.84(A) (2007); see also ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

155. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

156. See *supra* Part II.A.

157. IOWA CODE ANN. § 692A.113(1) (West, Westlaw through May 19 of 2011 Reg. Sess.); STEPHENVILLE, TEX., CODE § 180.83.

158. METHUEN, MASS., MUN. CODE ch. 27, § 3(A)(4).

159. See IOWA CODE ANN. § 692A.113(3).

160. See METHUEN, MASS., MUN. CODE ch. 27, § 1; NEW BEDFORD, MASS., CODE § 17-26(1)(a)(ii) (2008).

161. METHUEN, MASS., MUN. CODE ch. 27, § 1; NEW BEDFORD, MASS., CODE § 17-26(1)(a)(ii). The Quincy, Massachusetts ban also shares this quality, but it is even more tailored to only level three offenders. King, *supra* note 4.

162. NEW BEDFORD, MASS., CODE § 17-26.

163. IOWA CODE ANN. § 692A.113.

164. See *Des Moines Library Staff Rescues Girl from Sex Offender*, AM. LIBRARY ASS'N (Oct.

original Albuquerque executive instruction,¹⁶⁵ Stephenville ordinance,¹⁶⁶ and Rowan County ordinance¹⁶⁷ do not appear to respond to actual crimes committed in a public place, but only to the belief that a threat existed.¹⁶⁸

All of the bans prohibit sex offenders from entering a public library legally, but each ban achieves this result through different levels of specificity.¹⁶⁹ The bans range from the detailed Methuen and New Bedford ordinances that focus on more dangerous sex offenders¹⁷⁰ to the blunt Albuquerque executive instruction, which the local media described as the “firing [of] another shot in . . . [Albuquerque mayor Martin Chavez’s] war with sex offenders.”¹⁷¹ Ultimately, each ban creates a conflict between safety and liberty concerns.

III. CONFLICTING INTERESTS

When convicted sex offenders’ rights conflict with innocent children’s safety, governments tend to protect children without reservation. Due to their law violations and, in some cases, abusive actions toward children, it is often difficult to promote consideration of sex offenders’ interests. Nonetheless, sex offenders’ interest in public library access should be seriously considered, as opposed to deeming their interest insignificant in comparison to the government’s conflicting interest in child protection.

A. Government Interests

Governments have three primary interests in regulating sex offenders’ post-release behavior: deterring criminal conduct, protecting the public from defendants’ future crimes, and meeting offenders’ “educational, vocational, medicinal or other correctional needs.”¹⁷² The state’s constitutionally recognized police power authorizes deterrence of criminal conduct.¹⁷³ However, before a

7, 2005), <http://www.ala.org/ala/online/currentnews/newsarchive/2005abc/october2005ab/desmoines.cfm> (describing an incident at the Des Moines Public Library where a sex offender took a twenty-month-old girl into the men’s bathroom); *see also supra* note 122 and accompanying text.

165. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

166. STEPHENVILLE, TEX., CODE § 180.80 (2007).

167. ROWAN CNTY., N.C., CODE § 15-3 (2008).

168. *See* Rowan Cnty. Apr. 21, 2008 Minutes, *supra* note 111, at 19 (citing general protection of children as the ordinance’s purpose). However, the City of Albuquerque claimed that its executive instruction was a response to the attack in New Bedford. *See Doe v. City of Albuquerque*, No. 08-cv-01041-MCA-LFG, slip op. at 26 (D.N.M. Mar. 31, 2010).

169. *See supra* Part II.A-B.

170. METHUEN, MASS., MUN. CODE ch. 27 (2008); NEW BEDFORD, MASS., CODE § 17-26 (2008).

171. *Libraries Ban Sex Offenders*, KOAT ALBUQUERQUE (Mar. 5, 2008), <http://www.koat.com/news/15493567/detail.html>.

172. *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009).

173. *See* U.S. CONST. amend. X.

municipality may exercise this power, it must be delegated by the state.¹⁷⁴

The government seeks to protect the public from all convicts' future crimes. However, it also possesses a heightened interest in the prevention of future sex crimes by known sex offenders, as evidenced by the U.S. Sentencing Guidelines, which discourage a decrease of a defendant's criminal history category if he or she is a "repeat and dangerous sex offender against minors."¹⁷⁵ Government officials who research the best methods to protect the public from sex offenders often conclude that prohibiting sex offenders from public areas is the most effective option.¹⁷⁶

Although the government strives to protect all citizens from sex offenses, it focuses primarily on preventing children from becoming sex offenders' targets.¹⁷⁷ Governmental bodies justify bans of sex offenders from public places on the premise that if sex offenders are not present where children gather, these individuals will be less tempted and have fewer opportunities to reoffend.¹⁷⁸ The government seeks to protect children not only in public places, but also online. The Internet allows sex offenders to converse freely and anonymously with minors in teenage chat rooms.¹⁷⁹ Consequently, restrictions on convicted sex offenders' computer and Internet usage attempt to protect children from this threat.¹⁸⁰

Due to the harmful effects of sexual assault and the devious nature of many offenders, governments usually promote safety by restricting all sex offenders rather than creating restrictions targeted at only the most dangerous offenders.¹⁸¹ Perhaps these governments fear that more targeted restrictions could provide some truly deviant lower-level sex offenders full access to society's privileges and therefore more opportunities to reoffend. Some sex offenders believe they are talented at identifying vulnerable children who are more easily groomed.¹⁸²

174. *XO Mo., Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1027 (8th Cir. 2004).

175. U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(b)(2)(B) (2010). A "repeat and dangerous sex offender against minors" is someone whose current offense is a sex crime, who is not a career offender under section 4B1.1, and who has a prior sex offense conviction. *Id.* § 4B1.5(a).

176. *See Standley v. Town of Woodfin*, 661 S.E.2d 728, 729 (N.C. 2008).

177. *Doe v. Miller*, 405 F.3d 700, 714 (8th Cir. 2005).

178. *See Janet Mandelstam & Carrie Mulford, Unintended Consequences of Sex Offender Residency Laws: Can GIS Mapping Help?*, CORR. TODAY, Aug. 2008, at 104.

179. Virginia Kendall, *The Lost Child: Congress's Inability to Protect Our Teenagers*, 92 NW. U. L. REV. 1307, 1307 (1998).

180. *See Marlon A. Walker, MySpace Removes 90,000 Sex Offenders*, MSNBC.COM (Feb. 3, 2009), <http://www.msnbc.msn.com/id/28999365> (reporting that neither MySpace nor Facebook allows registered sex offenders to set up profiles).

181. *See, e.g., CAL. PENAL CODE* § 3003.5 (2010); NEWARK, N.J., REV. GEN. ORDINANCES tit. XX, ch. 26A, § 1 (2008).

182. SALTER, *supra* note 30, at 66. Definitions of "grooming" vary, but those who have examined the literature in this area provide the following overarching definition:

A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining

Preferential child molesters select victims based on age and will shower a victim with attention and gifts to gain the victim's trust.¹⁸³ Once the offender gains the child's trust, the offender will molest and then "dump" the child, moving on to another victim.¹⁸⁴ Consequently, the deceitful nature of many child molesters prompts governments to adopt far-reaching restrictions to prevent children from experiencing the pain associated with intense seduction followed by immediate rejection.¹⁸⁵

The protection of children from sexual abuse and its devastating effects is a high priority for reasons of public policy. Child victims of sexual assault are more likely to abuse alcohol and drugs, suffer from depression, anxiety, nightmares, and social isolation, and commit suicide.¹⁸⁶ These children feel responsible for upsetting their family members if they report abuse and often blame themselves for the abuse.¹⁸⁷ Many childhood sexual abuse survivors feel guilt and shame and continue to experience emotional and psychological isolation long after the physical abuse has ceased.¹⁸⁸

However, governments are also interested in reintegrating paroled offenders into society.¹⁸⁹ Governments attempt to accomplish this task by meeting sex offenders' "educational, vocational, medicinal or other correctional needs" during the supervised release period.¹⁹⁰ Nevertheless, a conflict exists between the government's interests in sex offenders' rehabilitation and public protection.¹⁹¹

the child's compliance and maintaining the child's secrecy to avoid disclosure. This process serves to strengthen the offender's abusive pattern, as it may be used as a means of justifying or denying their actions.

Samantha Craven et al., *Sexual Grooming of Children: Review of Literature and Theoretical Considerations*, 12 J. SEXUAL AGGRESSION 287, 297 (2006). Serial sex offenders move from community to community, hand-picking not only children to groom, but their families as well. Once a family completely trusts the offender, even when suspicions arise, the offender can easily quell the family by pointing back to that trust. See SALTER, *supra* note 30, at 42-44.

183. Kendall, *supra* note 179, at 1312; see generally FLOWERS, *supra* note 29, at 106-08 (distinguishing preferential child molesters, who are sexually attracted to children, from situational child molesters, who are not attracted to children).

184. Kendall, *supra* note 179, at 1312.

185. See *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident . . . that a [s]tate's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)).

186. Kim English et al., *Community Containment of Sex Offender Risk: A Promising Approach*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 33, at 265, 267.

187. See Shirley Jülich, *Stockholm Syndrome and Child Sexual Abuse*, 14 J. CHILD SEXUAL ABUSE 107, 114, 117 (2005).

188. *Id.* at 116, 117.

189. See *Boykin v. Thaler*, No. H-06-3291, 2009 WL 3448176, at *4 (S.D. Tex. Oct. 26, 2009).

190. *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009).

191. See Emily Brant, Comment, *Sentencing "Cybersex Offenders": Individual Offenders*

When this conflict arises, political pressure may influence the government to severely restrict sex offenders to promote public safety, but government restrictions on sex offenders should not preclude rehabilitation.¹⁹²

B. Sex Offenders' Interests in Using Public Library Materials

Libraries possess resources that allow offenders to become more knowledgeable, insightful, and productive in civic activities.¹⁹³ The corrections system expects offenders on parole or probation to secure and retain employment, often without job placement assistance prior to prison release.¹⁹⁴ Securing employment significantly reduces the likelihood that an offender will recidivate,¹⁹⁵ but without access to employment information, many offenders experience difficulty finding a job.¹⁹⁶ Public libraries can help offenders achieve this rehabilitation objective through services many libraries already provide, such as access to job advertisements, online applications, and workshops on résumés and cover letters.¹⁹⁷

Libraries also allow sex offenders to become more active citizens by providing access to information on how to engage in government processes.¹⁹⁸ Access to a wide variety of materials, especially citizenship and democratic process related materials, furthers the First Amendment goal of “producing an informed public capable of conducting its own affairs.”¹⁹⁹ Additionally, access to information is becoming more a need than a luxury²⁰⁰ as more information

Require Individualized Conditions When Courts Restrict Their Computer Use and Internet Access, 58 CATH. U. L. REV. 779, 803 (2009).

192. *See id.*

193. *See, e.g.*, Mark Edmundson, *Against Readings*, CHRON. REV., Apr. 24, 2009, at B7 (discussing how Malcolm X taught himself how to read by copying down the dictionary while he was in prison).

194. Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 222 (2006).

195. *See id.*

196. *Id.*

197. *See, e.g.*, *Technology @ Your Library*, KALAMAZOO PUB. LIBRARY, <http://www.kpl.gov/computer-training/> (last modified June 4, 2011).

198. *See* Anne Goulding, *Libraries and Social Capital*, 36 J. LIBRARIANSHIP & INFO. SCI. 3, 5 (2004).

199. *Red Lion Broad. Co. v. Fed. Comm'n's Comm'n*, 395 U.S. 367, 392 (1969).

200. *See* Peter Hernon & Harold C. Relyea, *Information Policy*, in *ENCYCLOPEDIA OF LIBRARY & INFORMATION SCIENCE* 1300, 1300 (Miriam A. Drake ed., 2d ed. 2003) (“Information is ‘essential to our existence’ and assumes a ‘life of its own.’”). Many programs seek to assist needy individuals, but they must be able to learn about these programs to take advantage of them. *See, e.g.*, *Access to Information May Mean More Cash for College*, SCHOLARSHIPS.COM, <http://www.scholarships.com/financial-aid/financial-aid-information/access-to-information-may-mean-more-cash-for-college/> (last visited June 4, 2011).

becomes available only online.²⁰¹ Materially poor individuals experience great difficulty accessing this information.²⁰² States recognize the importance of providing Internet access to all people and have equipped public libraries with additional electronic resources in an attempt to compensate for the uneven distribution of information resources.²⁰³

Although individuals concerned about unequal access to information currently focus on Internet availability, access to all types of media is important. Individuals with a more extensive knowledge base are more likely to absorb additional information in the future.²⁰⁴ This initial knowledge base functions as a schema individuals use to filter new information and subconsciously decide to ignore or commit to memory each new idea.²⁰⁵ Therefore, individuals with a larger knowledge base are more likely to recognize a greater percentage of the new knowledge they encounter and incorporate more new ideas.²⁰⁶ Conversely, individuals with a limited knowledge base are less likely to recognize new information and will reject a greater percentage of new ideas, maintaining information poverty.²⁰⁷

Therefore, an information gap between the “information-rich” and “information-poor” grows dramatically as those with a larger knowledge base accumulate more knowledge at faster rates and those without a substantial knowledge base fail to accumulate the additional knowledge they encounter.²⁰⁸ This information gap impedes communication and interaction with others, and information-poor individuals may not be able to make informed decisions if they vote. Ultimately, denying sex offenders access to library resources is likely to prevent their full rehabilitation, future active citizenship, and self-improvement.

201. Rebecca Carrier, *On the Electronic Information Frontier: Training the Information-Poor in an Age of Unequal Access*, in *CYBERGHETTO OR CYBERUTOPIA?: RACE, CLASS, AND GENDER ON THE INTERNET* 153 (Bosah Ebo ed., 1998) (“As information takes an even greater role in determining social class, those who have the greatest abilities to retrieve and process the most important information will be separated from other members of society.”).

202. Jutta Haider & David Bawden, *Conceptions of “Information Poverty” in LIS: A Discourse Analysis*, 63 *J. DOCUMENTATION* 534, 546 (2007).

203. Carrier, *supra* note 201, at 154; see also Elizabeth Anne Buchanan, *Ethical Transformations in a Global Information Age*, 13 *TECH. SERVS. Q.* 23, 30 (1996) (“[O]nly [in] the United States . . . will the information age have its own form of ‘information welfare,’ where some can access the Internet from public places and be given an information subsidy.”).

204. See Carrier, *supra* note 201, at 157.

205. *Id.* at 157-58.

206. *Id.*

207. *Id.* at 158; see also Reijo Savolainen, *Everyday Life Information Seeking*, in *ENCYCLOPEDIA OF LIBRARY & INFORMATION SCIENCE* 1780, 1783 (3d ed. 2010) (“[S]ituational relevance is instrumental in explaining information poverty. Potentially useful information will be not used because people living in a small world do not see a generalized value of sources provided by outsiders intended to respond to their situation. The source is ignored because it is not legitimized by ‘contextual others.’”).

208. See Carrier, *supra* note 201, at 157-58.

IV. FIRST AMENDMENT FREEDOM OF SPEECH

The First Amendment reads, in relevant part, “Congress shall make no law . . . abridging the freedom of speech.”²⁰⁹ However, this amendment protects more than one’s ability to speak.²¹⁰ One of the many additional activities it protects is access to a public library.²¹¹ Generally, restrictions on behavior that are not related to the expression of a particular message will be upheld, but if a restriction is not sufficiently tailored to the government’s interest, it will be overturned.²¹²

A. *Is Protected Expression Involved?*

First Amendment free speech protection includes many forms of expression other than spoken words.²¹³ The Supreme Court has upheld flag burning²¹⁴ and students’ display of black armbands to protest the Vietnam War²¹⁵ as protected expressive activity. The Court has even deemed reading obscene material a protected activity if it took place in the privacy of an individual’s home.²¹⁶ However, not all actions with an expressive element enjoy First Amendment protection, as shown in *Doe v. City of Lafayette*.²¹⁷ In this case, the Seventh Circuit rejected a sex offender’s argument that his banishment from city parks punished him solely for thoughts about molesting children and held that the offender had not shown that this restriction prevented his engagement in expressive conduct.²¹⁸ Therefore, it appears that if the purpose is to express a viewpoint, courts are more likely to protect the expression. However, if the expression is merely incidental to conduct, courts may refuse to protect the expression.

B. *Right to Access Public Libraries*

The Third Circuit has held that the First Amendment “includes the right to some level of access to a public library, the quintessential locus of the receipt of information.”²¹⁹ This right has foundations in freedom of speech and the

209. U.S. CONST. amend. I.

210. *See Doe v. City of Lafayette*, 377 F.3d 757, 763 (7th Cir. 2004) (en banc).

211. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992).

212. *See United States v. Bender*, 566 F.3d 748, 753 (8th Cir. 2009).

213. *City of Lafayette*, 377 F.3d at 763.

214. *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

215. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

216. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

217. *See City of Lafayette*, 377 F.3d. at 767.

218. *Id.* at 761, 764.

219. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992). Sex offenders also have a right to access public libraries under the American Library Association’s Library Bill of Rights, which—although it does not have the authority to grant legal rights—provides, “A person’s right to use a library should not be denied or abridged because of origin, age, background, or

associated right to receive information.²²⁰ In *Red Lion Broadcasting Co. v. FCC*,²²¹ the Supreme Court announced that a government actor cannot abridge “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.”²²² This prohibition also applies to libraries because “[t]he library . . . is in a sense a perfect incarnation of ‘the marketplace of ideas.’”²²³

1. *Right to Receive Information.*—First Amendment jurisprudence encourages the presentation of multiple viewpoints regarding controversial topics.²²⁴ In *Griswold v. Connecticut*,²²⁵ the Supreme Court clearly expressed that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”²²⁶ The *Griswold* Court also recognized a right to read as part of the freedom of speech.²²⁷ Peripheral rights, such as the ability to research, are necessary for individuals to meaningfully exercise their free speech rights in the “marketplace of ideas.”²²⁸

When faced with a free speech challenge, courts must determine the applicable level of scrutiny by determining whether the restriction is content-based or content-neutral.²²⁹ A content-based restriction is one that “restrict[s] expression because of its message, its ideas, its subject matter, or its content.”²³⁰ This type of speech restriction must be “narrowly drawn to effectuate a compelling state interest”²³¹ to be upheld against a First Amendment challenge. Alternatively, a content-neutral restriction is “justified without reference to the content of the regulated speech.”²³² These restrictions survive a First Amendment challenge provided that “they are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.”²³³

2. *How Far Does the Right to Access Public Libraries Extend?*—Although individuals hold the right to some public library access, the Constitution allows

views.” AM. LIBRARY ASS’N, LIBRARY BILL OF RIGHTS (1948), available at <http://www.ala.org/ala/issuesadvocacy/intfreedom/librarybill/index.cfm>.

220. See *Kreimer*, 958 F.2d at 1255.

221. 395 U.S. 367 (1969).

222. *Id.* at 390.

223. Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141, 1221 (2008).

224. See *Red Lion*, 395 U.S. at 383-84.

225. 381 U.S. 479 (1965).

226. *Id.* at 482.

227. *Id.*

228. See *id.* at 483.

229. *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring).

230. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

231. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (citation omitted).

232. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

233. *Id.*

library policies to define acceptable library patron behavior and hygiene, even if policy violations result in expulsion from the library.²³⁴ This acknowledgement of libraries' ability to regulate library behavior within the confines of the First Amendment recognizes libraries' significant interest in providing the safest experience for library patrons.²³⁵ For example, a library can require patrons to wear shoes while using library facilities.²³⁶

Revocation of library privileges is also constitutionally permissible if a patron physically punishes other patrons who misbehave in the library.²³⁷ This type of behavior can be regulated because the First Amendment protects only library-related behavior such as reading and researching.²³⁸ Additionally, if a library employee asks a patron who has violated behavior or hygiene policies to leave, banishment from the library is not indefinite; the patron may return when he or she complies with library policies.²³⁹

Courts have recognized that some library, Internet, and computer use restrictions are unreasonable. In *United States v. Bender*,²⁴⁰ the Eighth Circuit held that a condition of supervised release that prohibited a sex offender from entering any library lacked sufficient tailoring—even though his offense involved a library computer—because “libraries are essential for research and learning.”²⁴¹ The Eighth Circuit had previously rejected a complete computer and Internet ban in *United States v. Crume*.²⁴² There, the court reasoned that the prohibition of computer and Internet use lacked sufficient tailoring to Crume's offense.²⁴³ Although Crume had committed a grievous sexual crime, only an additional child pornography possession charge involved a computer.²⁴⁴ The court determined that prohibiting Crume from accessing certain types of websites, as opposed to the entire Internet, would be a more appropriately tailored rule.²⁴⁵

234. See *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1270 (3d Cir. 1992). *But cf.* *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 70, 77-79 (D.D.C. 2001) (holding that a policy allowing staff to deny library access to individuals whose appearance was “objectionable (barefooted, bare-chested, body odor, filthy clothing, etc.)” was vague and insufficiently tailored to the government's interest); *Brinkmeier v. City of Freeport*, No. 93-C-20039, 1993 WL 248201, at *1, *5-6 (N.D. Ill. July 2, 1993) (holding that an unwritten library policy excluding individuals who harass or intimidate other patrons or library employees is too broad and an unreasonable limitation on First Amendment rights).

235. *Kreimer*, 958 F.2d at 1246.

236. *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 596 (6th Cir. 2003).

237. *Hill v. Derrick*, No. 4:05-CV-1229, 2006 WL 1620226, at *9 (M.D. Pa. June 8, 2006) *aff'd*, 240 Fed. App'x 935 (3d Cir. 2007).

238. See *Kreimer*, 958 F.2d at 1262.

239. *Id.* at 1264.

240. 566 F.3d 748 (8th Cir. 2009).

241. *Id.* at 753.

242. 422 F.3d 728, 733 (8th Cir. 2005).

243. *Id.*

244. *Id.*

245. *Id.*

In *United States v. Peterson*,²⁴⁶ the Second Circuit also rejected a complete prohibition of computer equipment ownership and Internet access as a release condition for an individual who was convicted of bank larceny and also had a prior incest conviction.²⁴⁷ The court held that the release conditions were not reasonably related to the offender's convictions or the government's interest in preventing the offender from recidivating.²⁴⁸ Although the offender consumed pornography, the court recognized this as a legal activity that did not justify denying him access to online newspapers, books, and magazines.²⁴⁹ Ultimately, these cases recognize that some regulation of sex offenders' activities is reasonable based on their past actions, but restrictions should not be any more excessive than necessary to prevent recidivism.²⁵⁰

However, other circuits are more willing to uphold Internet bans for sex offenders.²⁵¹ The Third Circuit, in *United States v. Thielemann*,²⁵² upheld a condition of release prohibiting Thielemann from "own[ing] or operat[ing] a personal computer with Internet access in a home or at any other location, including employment, without prior written approval of the Probation Office."²⁵³ Although Thielemann pled guilty to one count of receiving child pornography,²⁵⁴ his criminal activity was more malign:

Thielemann offered Phillips \$20 to turn on his web cam and place the [eight-year-old female] victim on Phillips's lap so the victim would see Thielemann's exposed penis. Phillips complied. Thielemann then offered Phillips \$100 to rub the victim's genitals and lift up her skirt, which Phillips also did. . . . Thielemann then asked Phillips to masturbate

246. 248 F.3d 79 (2d Cir. 2001).

247. *Id.* at 80-82.

248. *Id.* at 82-83.

249. *Id.* at 83.

250. See also *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

251.

The Fourth and Fifth Circuits have affirmed complete, immutable bans on computer and internet use. The Ninth, Eleventh, and D.C. Circuits have upheld internet prohibitions that allow for individual use permissions from probation officers or that do not expressly ban internet use in the course of employment. The Third, Eighth, and Tenth Circuits have alternatively affirmed and struck down various types of internet prohibitions.

Criminal Law—Supervised Release—Third Circuit Approves Decade-Long Internet Ban for Sex Offender.—*United States v. Thielemann*, 575 F.3d 265 (3d Cir. 2009), 123 HARV. L. REV. 776, 781 (2010) (internal citations omitted).

252. 575 F.3d 265 (3d Cir. 2009).

253. *Id.* at 270.

254. *Id.* at 269.

with the victim on his lap²⁵⁵

After considering the defendant's conduct, the Third Circuit concluded that the reason for the Internet restriction was "self-evident."²⁵⁶ Thielemann's offenses were directly linked to the Internet, and the government wanted to protect other young children.²⁵⁷ The court noted that the ban's duration was important. This ban from the Internet for ten years²⁵⁸ was considered reasonable, but the Third Circuit had previously rejected a lifelong Internet ban as insufficiently tailored.²⁵⁹ Determining what is a reasonable condition of release is fact-dependent; a one-size-fits-all approach is not appropriate when balancing offenders' liberty interests and public safety.

3. *Bans of Sex Offenders from Public Libraries.*—The United States District Court for the District of New Mexico considered Albuquerque's ban of sex offenders from Albuquerque public libraries in *Doe v. City of Albuquerque*.²⁶⁰ The court acknowledged that the right to receive information was a constitutional right as recognized by the Supreme Court in *Martin v. City of Struthers*,²⁶¹ *Stanley v. Georgia*,²⁶² and *Lamont v. Postmaster General of the United States*.²⁶³ The court also recognized that *Kreimer v. Bureau of Police for the Town of Morristown*²⁶⁴ established the right to some access to a public library.²⁶⁵ Furthermore, the court acknowledged that reasonable time, place, and manner restrictions—such as the requirement that patrons wear shoes in *Neinast v. Board of Trustees of Columbus Metropolitan Library*²⁶⁶—were acceptable in part because they did not directly affect the right to receive information,²⁶⁷ but even content-neutral restrictions needed to be narrowly tailored to a significant government interest.²⁶⁸ The court deemed this especially true when regulations restrict certain patrons, such as the homeless, from "engaging in any conduct within, or use of, the library."²⁶⁹ However, the court stopped short of holding that public library access is a fundamental right.²⁷⁰

Next, the court determined the appropriate level of scrutiny for the forum

255. *Id.* at 268.

256. *Id.* at 278.

257. *Id.*

258. *Id.* at 267.

259. *Id.* at 278 (citing *United States v. Voelker*, 489 F.3d 139, 144-46 (3d Cir. 2007)).

260. No. 08-cv-01041-MCA-LFG (D.N.M. Mar. 31, 2010).

261. 319 U.S. 141, 143 (1943).

262. 394 U.S. 557, 564 (1969).

263. 381 U.S. 301, 307 (1965).

264. 958 F.2d 1242 (3d Cir. 1992).

265. *Doe*, No. 08-cv-01041-MCA-LFG at 13.

266. 346 F.3d 585, 589 (6th Cir. 2003).

267. *Doe*, No. 08-cv-01041-MCA-LFG at 20.

268. *Id.* at 19.

269. *Id.*

270. *Id.* at 21.

implicated.²⁷¹ Because public libraries are designated public fora²⁷² and the regulation was content-neutral, the court required the regulation to be “narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication of ideas.”²⁷³ The City of Albuquerque chose not to state for the record the interest it sought to protect through this regulation.²⁷⁴ However, the city did note that there was an increase both in the number of young teens and the number of adult males between the hours of 3:00 and 5:00 P.M. on weekdays.²⁷⁵ The court therefore assumed that the city’s interest was protecting children.²⁷⁶

Ultimately, the court held that Albuquerque’s ban was not narrowly tailored and did not leave open ample alternative channels for communication.²⁷⁷ The court distinguished Albuquerque’s ban from *Kreimer* and *Neinast*’s acceptable restrictions, where once patrons complied with the rules, they could regain library access.²⁷⁸ Instead, Albuquerque’s ban resembled the *Armstrong* restriction, preventing certain kinds of patrons from engaging in any First Amendment activities inside the library.²⁷⁹ The specific concern was adult male presence from 3:00 to 5:00 P.M., yet the ban of sex offenders was effective for all operating hours.²⁸⁰ Because sex offender status cannot be easily changed by donning appropriate attire or improving hygiene, the court held that there were no alternative channels for communication.²⁸¹ Access to the University of New Mexico’s library was not considered an alternative channel for communication because the university’s collection did not provide as many popular works as the public library, and patrons had to pay for university library privileges.²⁸² Because the Albuquerque ban was not narrowly tailored and did not leave open alternative channels for communication, the court held the executive instruction unconstitutional.²⁸³

V. RECOMMENDATIONS

Protecting children should be a high government priority, and further action is necessary to prevent future sex crimes. To establish child protection as a true

271. *Id.*

272. *Id.* at 23.

273. *Id.* at 25 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

274. *Id.* at 26.

275. *Id.*

276. *Id.* at 27.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 28.

281. *Id.* at 29.

282. *Id.* at 30-31.

283. *Id.* at 42.

priority, governments must take proactive steps requiring time, human labor, and funds. The current strategy of creating blanket bans not only violates sex offenders' rights, but is also difficult to enforce.²⁸⁴ However, less speech-restrictive alternatives exist that could limit the risk posed by sex offenders. Sex offenders' Internet activities on public library computers could be restricted through stronger filters; in turn, those restrictions could be enforced by monitoring electronic logs to ensure that sex offenders are not accessing prohibited websites. In addition, security guards could monitor library activity and ensure all patrons' compliance with library building use rules. By implementing strategies that closely target society's concerns regarding sex offenders, the physical safety of all library patrons will be improved.

A. Courts Should Hold the Remaining Bans of Sex Offenders from Public Libraries Unconstitutional

The remaining legislative bans suffer from many of the same problems as the Albuquerque ban. All prohibit sex offenders from being present on library property;²⁸⁵ therefore, they all prevent a certain type of person from accessing the library. These restrictions are also based on a status individuals cannot change in order to be able to access the library. Because all of these content-neutral bans²⁸⁶ happen to involve public libraries, they also implicate designated public fora, and the appropriate scrutiny should require the regulation to be "narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication of ideas," just as in *Doe v. City of Albuquerque*.²⁸⁷

Bans of sex offenders from public libraries exemplify an increasing body of law where a severe solution is deemed necessary to alleviate an overestimated problem.²⁸⁸ When a restriction addresses a statistically unlikely danger, like a sex

284. See Amy Erickson, *New Library Law Reads: Sex Offenders Stay Out*, LE MARS SENTINEL (July 7, 2009), http://www.accessola.com/olba/bins/content_page.asp?cid=66-827-3301 (noting that the Iowa statute does not specify how library personnel can distinguish sex offenders from other patrons entering the library); Kris Todd, *Library Considers Sex Offender Law Impact*, DAILY REP. (June 16, 2009), <http://www.spencerdailyreporter.com/story/1547582.html> (quoting the Spencer, Iowa city attorney: "You don't have to enforce this law. You don't have to prepare a listing of these offenders and make sure they never set foot in the library.").

285. IOWA CODE ANN. § 692A.113(1)(f) (West, Westlaw through May 19 of 2011 Reg. Sess.); METHUEN, MASS., MUN. CODE ch. 27, §§ 1, 3 (2008); NEW BEDFORD, MASS., CODE § 17-26 (2008); ROWAN CNTY., N.C., CODE § 15-3 (2008); STEPHENVILLE, TEX., CODE § 130.81-.82 (2007).

286. These bans are content-neutral because they prohibit offenders' presence in many places where expressive activities do not occur, such as parks and playgrounds. See *supra* Part II.A.

287. *Doe*, No. 08-cv-01041-MCA-LFG at 25 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

288. See R. George Wright, *Content-Based and Content-Neutral Regulations of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 347 (2006) ("In an age of official insecurity and anxiety, the most difficult constitutional problem may not be controlling arbitrariness

offender attacking a previously unknown child in a public library,²⁸⁹ courts should consider the potential harm—not the hype—and apply a more stringent level of scrutiny to ensure that the restriction is appropriate.²⁹⁰ Ultimately, to be held constitutional, the restriction should be very closely tailored to the governmental interest.

The state interest asserted to justify these bans is usually a general one, such as protecting children,²⁹¹ but there are usually three common concerns. First, society seeks to protect children’s physical safety inside libraries.²⁹² Second, legislators seek to prevent the exposure of children to inappropriate behavior and images.²⁹³ Third, concerned individuals seek to prevent sex offenders from contacting minors via the Internet.

The government has a compelling interest in protecting children from physical harm,²⁹⁴ but the fact that some risk is associated with a speech activity is not sufficient for a First Amendment exception.²⁹⁵ In this case, the risk is associated with sex offenders’ physical presence, but that presence in the library is necessary for the sex offender to hear and engage in further protected speech. In *Marsh v. Alabama*,²⁹⁶ the Supreme Court held an Alabama statute criminalizing the conduct of entering or remaining “on the premises of another after having been warned not to do so” unconstitutional as applied to an individual who sought to distribute religious literature.²⁹⁷ Simply entering another’s premises does not involve expressive activity, just as entering the library does not. However, just as the plaintiff in *Marsh* sought entry to others’ property to engage in protected activities, sex offenders seek entry to the library to exercise their right to receive information.

Even though these legislative bans are content-neutral, they are unconstitutional because they lack sufficient tailoring to the government’s interest in child protection. The prohibition of sex offenders from libraries is not

in permitting, but compensating for a chronic tendency to overestimate the likelihood of any damage to public security from public exercises of freedom of speech.”).

289. Of 224 recidivist sex offenders’ offenses studied by the Minnesota Department of Corrections, only six (less than 3%) took place in an “interior public location.” MINN. DEP’T OF CORR., *supra* note 62, at 12.

290. See Wright, *supra* note 288, at 348.

291. See METHUEN, MASS., MUN. CODE ch. 27 (2008); STEPHENVILLE, TEX., CODE § 130.80 (2007); Rowan Cnty. Apr. 21, 2008 Minutes, *supra* note 111, at 19.

292. See Szaniszlo, *supra* note 122 (implying that the City of New Bedford sought to prevent additional rapes on public property).

293. See Encarnacao, *supra* note 113 (citing exposure of teenagers to adult men masturbating while viewing pornography on a library computer as a concern).

294. New York v. Ferber, 458 U.S. 747, 756-57 (1982).

295. See Martin v. City of Struthers, 319 U.S. 141, 145 (1943) (acknowledging the risks of door-to-door pamphlet distribution, including nuisance and subsequent theft from homes, but concluding that the importance of the First Amendment activity outweighed the risks).

296. 326 U.S. 501 (1946).

297. *Id.* at 504, 509.

comparable to *Kreimer*, where an individual's body odor bothered other patrons.²⁹⁸ The bans assume that a sex offender's mere presence threatens child safety because the sex offender may commit a violent act, but children can be safe even if sex offenders are present. Most sex offenders do not offend against children unknown to them,²⁹⁹ so this risk, like the risk of nuisance or theft in *Martin*, is not sufficiently probable to justify denying First Amendment rights to a broad class of citizens. There are also less speech-restrictive ways to protect children in the library, such as hiring security guards or installing cameras.³⁰⁰ Even a narrower ban of sex offenders from the library's children's area would be a more tailored response than comprehensive library bans, which include areas children do not visit.³⁰¹

An overinclusive restriction, or one that "restricts a significant amount of speech that doesn't implicate the government interest,"³⁰² is not narrowly tailored. Because sex offenders include a variety of individuals³⁰³ who have committed a wide range of acts,³⁰⁴ it is unrealistic to assume that all sex offenders will sexually

298. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1247 (3d Cir. 1992).

299. See *SALTER*, *supra* note 30, at 235-40 (categorizing attacks by strangers as low-risk and noting that if they do occur, the stranger has often been stalking the child for a significant period of time); Lenore M.J. Simon, *Matching Legal Policies with Known Offenders*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY*, *supra* note 33, at 149-50 (noting that strangers commit less than 10% of sex crimes against children); Merriam & Salkin, *supra* note 60, at 98 (noting that usually, "it is not strangers who seek out victims at schoolyards, playgrounds, and bus stops. While the most shocking of sex crimes involves the abduction of a young child—a complete stranger to the sex offender—who is then sexually abused and murdered, statistically this is an outlier.").

300. See *infra* Part V.D.

301. Libraries should also provide a separate computer area for children and families. This would help prevent assault of children while inattentive caretakers are on the computer. See Szaniszló, *supra* note 122 (reporting that a six-year-old boy was raped in the stacks while his mother was on a computer a few feet away); AM. LIBRARY ASS'N, *supra* note 164 (describing an incident at the Des Moines Public Library where a sex offender took a twenty-month-old-girl while her babysitter was on the computer).

302. EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 220 (3d ed. 2008).

303.

Sex offenders are not all alike. . . . Some commit violent sexual rapes and assaults on strangers. Others commit sex crimes against members of their own families. . . . And, there are other offenders who engaged in unusual sexual activity, such as exposing themselves or voyeurism. To consider all of these different types of offenders and their offenses under a single descriptive category of "sex offenders" is misguided.

LAFOND, *supra* note 22, at 43-44.

304. A nineteen-year-old male who engages in consensual sex with his fifteen-year-old girlfriend and an individual who abuses over two hundred children are currently indistinguishable in some jurisdictions when identified with the label of "sex offender." Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*,

abuse a child if allowed in the library. Although some of the bans are limited to sex offenders whose victims were minors,³⁰⁵ or to higher level offenders,³⁰⁶ they still encompass many individuals who probably do not pose a significant danger to children in the library. Even individuals who sexually abused children in the past are unlikely to be sufficiently uninhibited to molest a child in a public place.³⁰⁷ Furthermore, although SVPs cannot control their behavior, these individuals are also unlikely to assault a child in a public library because they are usually placed in inpatient treatment facilities and do not travel freely in the community.³⁰⁸ By distinguishing among different levels of sex offenders actually present in the community, bans could be more tailored by varying the severity of restrictions according to the risks each level of offenders presents.

Nevertheless, denial of some library activities—such as access to online pornography—might further the government’s compelling interest in child protection. Some sex offenders view pornography as part of their offense preparation.³⁰⁹ For many offenders, “pornography affects the offense cycle by strengthening cognitive distortions, reducing inhibitions, and reinforcing deviant sexual arousal.”³¹⁰ However, a more narrow restriction of sex offenders’ Internet privileges would be sufficient to address this concern.³¹¹

The government also has a legitimate interest in preventing sex offenders’ communication with children.³¹² Some sex offenders use the Internet to engage in sexual conversations with minors, and these conversations present public safety concerns.³¹³

78 UMKC L. REV. 241, 243-44 (2009).

305. IOWA CODE ANN. § 692A.113 (West, Westlaw through May 19 of 2011 Reg. Sess.); STEPHENVILLE, TEX., CODE § 130.82 (2007).

306. METHUEN, MASS., MUN. CODE ch. 27, § 1 (2008); NEW BEDFORD, MASS., CODE § 17-26(1)(a)(ii)(a) (2008).

307. *But see* Eric Pierce, *Man Arrested for Sexual Assaults at Library*, DOWNEY PATRIOT (Apr. 23, 2010), http://www.thedowneypatriot.com/view/full_story/7179860/article-Man-arrested-for-sexual-assaults-at-library?instance=pierce_left_column.

308. Hall, *supra* note 25, at 186.

309. Brian W. McKay, Note, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 207 (2003).

310. *Id.* at 206; *see also* Abby Simons, *Library Sex Offender Incident Fuels Internet Filter Push*, DES MOINES REG., Nov. 21, 2005 (on file with author) (reporting that a sex offender who allegedly molested a child in the library restroom had used library computers to view pornography).

311. *See infra* Part V.B.

312. *See* BERKMAN CTR. FOR INTERNET & SOC’Y, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES 4 (Dec. 31, 2008), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report-Executive_Summary.pdf (“Sexual predation on minors by adults, both online and offline, remains a concern.”).

313. McKay, *supra* note 309, at 210; *see also* BERKMAN CTR. FOR INTERNET & SOC’Y, *supra* note 312, at 4 (noting that in many cases where adults solicit minors, the minors were “aware that they were meeting an adult male for the purpose of engaging in sexual activity”). However, other findings include that minors solicit sex from each other more frequently than adults solicit minors,

Bans of sex offenders from public libraries are not narrowly tailored to further the government interest in protecting children from sex offenders on the Internet because they are underinclusive.³¹⁴ The library bans do not prevent sex offenders' Internet access and communication with children at other locations, such as sex offenders' homes. The bans are also overinclusive; they prevent sex offenders from engaging in protected First Amendment activities, including reading, that are unrelated to the state interest in protecting children.

Furthermore, a complete ban of sex offenders is also not narrowly tailored to the concern that children will be exposed to inappropriate behavior and images. It is possible that an individual who is not a registered sex offender might look at pornography on a computer and masturbate in the library. Although bans of sex offenders from public libraries may limit their access to pornography to use in grooming potential victims,³¹⁵ a blanket ban from the library is not necessary to further this goal. Stricter filters and monitoring would be sufficient.³¹⁶ Therefore, the bans lack narrow tailoring.

Governmental bodies may attempt to justify bans of sex offenders from libraries by arguing that alternative avenues to information exist, such as television and radio.³¹⁷ However, unlike public library computers, these media do not allow offenders the same opportunities—namely, the ability to apply for employment or other programs online. Although these legislative bans are content-neutral, they do not withstand the requisite scrutiny because they lack sufficient tailoring to the government's interests and fail to provide ample alternative channels for communication.

B. Subject Sex Offenders to More Stringent Internet Filters

Libraries should apply more restrictive Internet filters to sex offenders' public library computer accounts to disable access to pornographic and social

and that cyber-bullying is a much greater online threat than sexual solicitation. *Id.* Although these teen-created threats pose the greatest problems, it is highly unlikely that legislatures would deny Internet access to all individuals under the age of eighteen. The House of Representatives has, however, considered requiring schools and libraries receiving federal funding to prevent minors from accessing social networking sites via school and library computers. *See* Deleting Online Predators Act of 2007, H.R. 1120, 110th Cong. (2007).

314. Underinclusive restrictions fail "to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech." VOLOKH, *supra* note 302, at 221.

315. McKay, *supra* note 309, at 208.

316. *See infra* Part V.B-C.

317. *But see* Schneider v. State, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). Another problem is that some materials, such as local history archives and genealogy records, are available only at one library. *See, e.g., Genealogy Resources Available at Our Library*, TEX. STATE LIBRARY & ARCHIVES COMM'N, <http://www.tsl.state.tx.us/arc/genfirst.html> (last updated Mar. 31, 2011).

networking websites. Although this tactic still restricts speech, it does so only to the extent necessary to serve the governmental interest in child protection. This closer tailoring would allow such a library policy to survive a First Amendment challenge.

Internet filters have been previously challenged. In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,³¹⁸ the court held that blocking pornography via computer software was a content-based prior restraint on First Amendment activity.³¹⁹ The court held the mechanism unconstitutional because the library could not show that its interests in preventing sexual harassment and obstructing access to child pornography required blocking all pornography.³²⁰

However, an important distinction exists between *Mainstream Loudoun* and the proposed implementation of more stringent Internet filters for sex offenders. Specifically, the proposed filters would apply only to sex offenders, not all adults, as in *Mainstream Loudoun*. Evidence that pornography can trigger sex offenders to abuse children could be offered to support a carve-out from *Mainstream Loudoun*. Nevertheless, without substantial empirical evidence to prove a nexus between pornography and child molestation, a court will likely reject it. The Supreme Court has described the link between pornography and attacks as “contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”³²¹ However, the Court provided this reasoning because sex offenders’ crimes should not prevent law-abiding citizens from consuming virtual child pornography.³²² If only sex offenders’ access were at issue, a court might be more willing to consider restrictions because they would be narrowly tailored to a government interest in preventing recidivism by convicted sex offenders.

A more recent case, *United States v. American Library Ass’n*,³²³ supports public libraries’ use of Internet filters.³²⁴ The Court held that the federal government could require public libraries receiving federal funds to use Internet filtering software to prevent patrons’ access to pornography.³²⁵ However, the statute at issue—the Children’s Internet Protection Act³²⁶—allowed the filter to be disabled “to enable access for bona fide research or other lawful purposes.”³²⁷ Other federal funding requirement statutes also allowed library employees to disable Internet filters for adults.³²⁸ If sex offenders had a unique authorization connected to their usernames, an Internet system could be configured so that

318. 24 F. Supp. 2d 552 (E.D. Va. 1998).

319. *Id.* at 570.

320. *Id.* at 566-67.

321. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (2002).

322. *Id.*

323. 539 U.S. 194 (2003).

324. *Id.* at 214 (plurality opinion).

325. *Id.*

326. 20 U.S.C. § 9134(f) (2006).

327. *Id.* § 9134(f)(3).

328. *Am. Library Ass’n*, 539 U.S. at 201.

employees could not disable the filters. Although sex offenders usually are adults who would normally be allowed to have the filters disabled, the risk offenders pose to children on the Internet could be sufficient to justify limited access.

C. Track Sex Offenders' Internet Viewing Trails

The most narrowly tailored solutions to sex offender computer use issues allow sex offenders to access email and informative websites but preclude access to pornography, social networking, and instant messaging websites.³²⁹ Parole officers can enforce paroled sex offenders' computer and Internet use restrictions through unannounced inspections of sex offenders' computer hard drives.³³⁰ Public libraries could employ an analogous strategy and use library employees to monitor lists of websites sex offenders access on library computers as tracked by spyware.³³¹ Although spyware's capabilities exceed the ability to track offenders' Internet browsing habits,³³² a simple review of the website addresses sex offenders visit would be sufficient to ensure that sex offenders have not accessed prohibited websites.

This method is the least invasive way to confirm that sex offenders are not visiting websites that might lead to further sexual abuse. Reviewing the list of website addresses an individual sex offender visits does not invade an offender's privacy any more than viewing an offender's record of checked-out books. Librarians' commitment to confidentiality³³³ should safeguard sex offenders' privacy. However, there might be Fourth Amendment search implications.³³⁴

D. Increase Surveillance of Library Patrons

Children harmed in public libraries are often accompanied by inattentive caretakers.³³⁵ Consequently, employing more security staff would provide

329. However, with Internet monitoring software such as Cyber Sentinel, which sends an e-mail to an offender's probation officer based on dangerous keywords, it might be possible to allow sex offenders to access social networking websites while keeping children safe. See John Schwartz, *Internet Leash Can Monitor Sex Offenders*, N.Y. TIMES, Dec. 31, 2001, at C4, available at <http://www.nytimes.com/2001/12/31/business/internet-leash-can-monitor-sex-offenders.html>.

330. *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003).

331. See Rebecca Porter, *Who's Watching Your PC?*, TRIAL, Aug. 2004, at 44.

332. See *id.*

333. See *Code of Ethics of the American Library Association*, AM. LIBRARY ASS'N (Jan. 22, 2008), <http://www.ala.org/ala/issuesadvocacy/proethics/codeofethics/codeethics.cfm> ("We protect each library user's right to privacy and confidentiality with respect to information sought or received, and resources consulted, borrowed, acquired or transmitted.").

334. The Fourth Amendment provides "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. For a general discussion of the Fourth Amendment implications of government surveillance of electronic communications, see Johnny Gilman, Comment, *Carnivore: The Uneasy Relationship Between the Fourth Amendment and Electronic Surveillance of Internet Communications*, 9 COMMLAW CONSPECTUS 111 (2001).

335. See sources cited *supra* note 301.

additional individuals to monitor threats to children's safety.³³⁶ Uniformed security also serves as a deterrent to abuse; sex offenders would be aware of this surveillance, which would demonstrate the gravity of violations of the library's building use rules or state and federal laws. Unlike sex offender bans, this increase in security would serve as a preventative measure against not only known sex offenders, but also other individuals who have not been caught and identified as sex offenders. Additional security personnel would also be able to enforce library policies that are more targeted towards protecting children—for example, New Bedford Free Public Library's rule that young children be attended at all times and its prohibition of adults talking to minors if the adult is not the child's relative or caregiver.³³⁷ The presence of security staff would also deter harm to all library patrons, regardless of whether a dangerous individual is a sex offender or not.³³⁸

Although there are many advantages to employing security staff, many libraries cannot afford current operating costs, let alone additional staff expenses.³³⁹ Uniformed security guards serve as an additional deterrent because they are identifiable, but there may be less expensive alternatives that are just as effective. Libraries could encourage patrons to develop a "neighborhood watch" system in the library where patrons watch for suspicious patrons, especially in the vicinity of unattended children. Neighborhood watch programs have been found to be somewhat effective at reducing neighborhood crime³⁴⁰ and could be effective in the library as well. Ultimately, children need to be monitored; this function can be performed by a paid employee or a concerned citizen. If libraries implemented a watch program, they could post "library watch" signs to inform

336. Sometimes security guards are the only "eyes" watching out for children. An unaccompanied twelve-year-old girl with learning disabilities was sexually assaulted in a Michigan library while she was walking down an aisle. *See People v. Xiong*, No. 270213, 2007 WL 2781027, at *1 (Mich. Ct. App. Sept. 25, 2007).

337. *Policy on Library Behavior*, NEWBEDFORD-MA.GOV, <http://www.newbedford-ma.gov/Library/policyBehavior.html> (last visited June 5, 2011). The Boston Public Library also limits the use of the library's children's rooms to "children, their parents, guardians, teachers, and caregivers, and people researching children's literature." *Safe Child Policy*, BOS. PUB. LIBRARY (Mar. 23, 2004), <http://www.bpl.org/general/policies/safechild.htm>.

338. Security guards are physical reminders of the consequences associated with wrongdoing. People are less likely to commit crimes in locations with security guards. *See Bank Robber: Security Guards Deter People Like Him*, ASSOC. PRESS NEWSWIRE, Mar. 10, 2008 (on file with author).

339. *See, e.g., Jennifer Buske, County Executive Offers Budget Full of Cuts; Proposals Include Reducing Staff, Closing Libraries and Halting Road and Park Projects*, WASH. POST, Feb. 18, 2010, at T17; Heather Scofield, *Libraries in Danger of Closing; Volusia Officials Look for Ways to Cut Costs*, DAYTONA BEACH NEWS J., Dec. 1, 2009, at 1C.

340. KATY HOLLOWAY ET AL., U.S. DEP'T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., CRIME PREVENTION RESEARCH REVIEW NO. 3: DOES NEIGHBORHOOD WATCH REDUCE CRIME? 28 (2008), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e040825133-res-review3.pdf>.

individuals that others are watching. These signs would serve the notice function in lieu of a uniformed security guard.

Installing security cameras in low traffic and low visibility areas like the stacks might also act as a deterrent and would be less expensive than security staff. Although one might argue that this could chill speech by discouraging patrons from examining specific books, this is unlikely because the cameras would be positioned to capture the aisle where inappropriate activity might take place. It is unlikely that the zoom and angle would be sufficient to allow a person to identify the title of any book. Library personnel examining the footage would also have a duty to maintain patrons' confidentiality, just as they would for items checked out.³⁴¹

CONCLUSION

Sexual abuse of children is an indisputably horrendous offense, and offenders should be punished accordingly. However, sex offenders who have served their sentences remain United States citizens whose rights should be respected. First Amendment jurisprudence does not allow speech activities to be regulated in ways that are not closely tailored to achieving a significant governmental interest.³⁴² Protecting children from sexual abuse is a significant governmental interest; nevertheless, states and municipalities can achieve this interest more effectively through less speech-restrictive measures than blanket bans of sex offenders from public libraries. If libraries implemented increased electronic surveillance and employed security personnel, sex offenders could exercise the First Amendment rights that some governments currently deny, and society would receive more effective protection for child and adult library patrons alike.

341. See *supra* note 333 and accompanying text.

342. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).