

BARRED FOREVER: SENIORS, HOUSING, AND SEX OFFENSE REGISTRATION^{A1}

*Mary Helen McNeal**
*Patricia Warth***

INTRODUCTION

Mr. Charles Bianco¹ is a 73-year-old retired laborer who lives alone in a small one- bedroom apartment, supporting himself on a modest income derived from his social security check and a small pension. He suffers from pulmonary disease, and because his lung capacity is limited to eighteen percent of normal, he requires oxygen. He has grown frail over the years and is now confined to a wheelchair. Because his second-floor apartment is not handicapped accessible, he is unable to leave without someone carrying him down the stairs.

Mr. Bianco is a social person and he relies on his computer to socialize and play chess in lieu of the interactions he could have were he not confined to his apartment. In 2004, in what he acknowledges was a lapse in judgment, he visited a child pornography site on his computer and downloaded some photographs. An acquaintance in his building reported him to the police, and he was arrested and convicted of a New York state charge of promoting the sexual performance of a child. He was sentenced to 10 years of probation and required to undergo sex offender treatment and register for twenty years as a low risk sex offender under the New York State Sex Offender Registration Act.² Mr. Bianco complied with the requirements of his probation and, at the

^{a1} This project was supported by a research leave from Syracuse University College of Law. Thanks go to those who provided helpful feedback on previous versions of this article, including Nestor Davidson, Nina Kohn, Robert Newman, Jenny Roberts, Florence Roisman, and Alan Rosenthal. Special thanks to research assistants Ivan A. Pavlenko, Josh Eberle, and Frank J. Sciremammano for their outstanding work on this article. Additional thanks to the participants at the Association for Law, Property and Society meeting in Washington D.C. in March of 2012, where these ideas were presented.

* Professor of Law and Director, Elder Law Clinic, Syracuse University College of Law.

** Co-Director, Justice Strategies, Center for Community Alternatives.

1. Mr. Bianco's name is fictitious, though his story is based in part on the story of a client of the Center for Community Alternatives and the Elder Law Clinic.

2. See N.Y. CORRECT. LAW § 168-h(1) (McKinney 2012) (providing that a person who has been classified as risk level one, which is low risk to offend, and who has not been designated a sexual predator, a sexually violent offender, or a predicate sex offender, is required to register for

request of his therapist and probation officer, the court discharged him from probation after 6 years. Mr. Bianco has no other history of criminal conduct.

Mr. Bianco has been seeking housing more appropriate to his age and medical condition. He dutifully completes housing applications, honestly disclosing his conviction when asked; however, because of his current status as a "sex offender registrant," he has been unable to secure alternative housing. While federal law places some restrictions on providers of subsidized housing with respect to *lifetime* sex offender registrants, it does not limit the admissibility of other registrants such as Mr. Bianco. Nevertheless, most landlords and many nursing homes and assisted living facilities will not accept *any* person who is on the sex offender registry, regardless of how remote in time the conviction is or the person's assessed risk level.

When the largest provider of housing for the elderly in his community denied Mr. Bianco's application for subsidized housing, he appealed that decision. He supplied the prospective landlord with a copy of the Certificate of Relief from Disabilities he had received from the court, which creates a legal presumption of rehabilitation,³ and documentation of his early release from probation. He also offered the testimony of both his therapist and social worker about his rehabilitation. Despite compelling evidence that Mr. Bianco is not likely to re-offend and the fact that the law did not prohibit the housing provider from renting to him, the provider still refused to admit Mr. Bianco into its program. Mr. Bianco continues to live alone, confined to his second-floor, physically inaccessible apartment.

* * * * *

Since the early 1990s, the federal government, states, and municipalities have enacted a series of laws and restrictions making it increasingly difficult for people convicted of a sex offense to reintegrate into their communities. These laws and restrictions include sex offender registries, community notification requirements, residency restrictions, and statutory bars to employment, public assistance, and housing.⁴ Many of these laws were enacted in the wake of a high-profile homicide of a child by a stranger⁵ with the goal of protecting children and enhancing public safety.⁶ But these laws

twenty years).

3. *See id.* § 753(2).

4. These policies also include post-sentence civil confinement. Between 1990 and 2007, approximately 20 states enacted statutes which allow for the indefinite, post-sentence confinement of people convicted of a sex offense who have a "mental abnormality" that predisposes them to committing sexual offenses. *A Profile of Civil Commitment Around the Country*, N.Y. TIMES (Mar. 3, 2007), available at http://www.nytimes.com/imagepages/2007/03/03/us/20070304_CIVIL_GRAPHIC.html. While indefinite, involuntary confinement is certainly a life-altering consequence of a sex offense conviction, it does not impact an aging person's ability to obtain housing, and thus is beyond the scope of this article.

5. *See infra* Part I.

6. *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 114 (Markus D. Dubber ed., 2009) [hereinafter LOGAN, KNOWLEDGE] ("Crime reduction has always been a primary goal of registration and

were enacted in an empirical research vacuum, with little evidence to inform policy-makers on the potential efficacy of such policies, and virtually no assessment or even discussion of potential costs and unintended consequences.⁷ Additionally, the high-profile crimes that prompted these laws, and the public rhetoric surrounding their enactment, fostered many erroneous assumptions about people with a past sex offense conviction, significantly enhancing the stigma associated with being a “convicted sex offender.” Today, many assume that the following are irrefutable facts about *all* people convicted of a sex offense: that they have very high recidivism rates; that they are destined to re-offend because there are no effective means of treatment; and that they are pedophiles who prey upon young children and ultimately brutally kill them.⁸

Mr. Bianco was confronted full force with the stigma of being a “convicted sex offender” when he applied for subsidized housing. Despite the compelling evidence that he would be highly unlikely to offend again, he was repeatedly barred by landlords’ blanket rules denying admission to anyone on the sex offense registry. Given the commonly held image of “sex offenders,” such blanket rules are not surprising.

The growing body of research that has developed over the past twenty years, however, reveals that this commonly held image is simply wrong. Indeed, as discussed further in this article, the research reveals that people with past sex offense convictions are not a homogeneous group. Re-offense rates for people with a sex offense conviction are much lower than the public believes, and most significantly for this article, recidivism rates decline with age and length of time in the community after conviction. The research also reveals that registration and community notification policies and residency restrictions are destined to fail because such policies are designed to protect the public against repeat offenders and adults who prey on children unknown to them; however, most sexual crimes are committed by first-time offenders, and most crimes against children are perpetrated by people well known to them. As a result, our communities are investing large amounts of scarce public dollars on registration and notification requirements that do not enhance public safety, rather than investing in preventative measures that show much more promise. Research also demonstrates that stable housing is essential to reintegration into the community for those convicted of sex offenses, and further reduces re-offense rates.⁹

While the research has revealed many flaws in the assumptions underlying sex offender laws, the passage of time has revealed a growing array

notification.”).

7. See Wayne A. Logan, *Megan’s Laws As A Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 401 (2011) [hereinafter Logan, *Political Stasis*] (noting the “dearth of empirical scrutiny to which” sex offender laws and policy have been subjected since enacted in the 1990s).

8. See generally Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES & PUB. POL’Y 137 (2007).

9. See *infra* Part III.

of unanticipated costs and consequences associated with these laws, such as the difficulties people on sex offense registries face in reuniting with their families and accessing treatment, employment, and stable housing.¹⁰ Yet, our laws continue to grow increasingly harsh, with more and more people being subjected to sex offender registration for longer periods of time, often for life.¹¹ As a result, there is an ever growing group of elderly people, such as Mr. Bianco, who are required to register as convicted sex offenders.

Mr. Bianco's inability to access appropriate housing reveals a specific unintended consequence of our increasingly harsh laws that has received little attention in the existing scholarship discussing sex offender laws and policy—that is, the fact that as our population ages and the sex offense registries continue to expand, more elderly and infirm people are being denied access to housing, including independent housing with supportive services, subsidized housing, and assisted living and skilled nursing facilities. Many, like Mr. Bianco, live in housing that is inappropriate for their needs. Others are homeless, living under bridges or in homeless shelters. This lack of access to suitable and stable housing has profound implications for seniors and further exacerbates the challenges many seniors already face, including declining health, a sense of isolation, cognitive decline, and insufficient social interaction.¹²

This article discusses this unintended consequence by exploring the gap between the empirical evidence and the popular perceptions that underlie the laws and policies that prevent seniors, like Mr. Bianco, from securing appropriate housing. Part I offers an overview and history of the registration and community notification laws enacted since the 1990s, focusing on federal legislation which requires states to adopt minimum registration and notification requirements. This section then provides an overview of the multitude of state and municipal laws that restrict where people convicted of a sex offense can live, concluding with a discussion of the non-legal, social stigma associated with being deemed a “registered sex offender.” Part II discusses the demographics of the population on sex offender registries and explains why this population is growing both in size and in age. It also addresses the various housing options available to the elderly on the registries, particularly those who—because of their medical condition or economic status—are in need of federally subsidized or supportive housing, as well as the housing restrictions and bars they face. Part III examines the empirical research and evidence that has developed over the past twenty years, identifying the inaccurate popular

10. See generally HUMAN RIGHTS WATCH, *No Easy Answers: Sex Offender Laws in the U.S.* (2007), available at <http://www.hrw.org/reports/2007/us0907/us0907web.pdf> [hereinafter *No Easy Answers*]; Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54 (2009), available at <http://link.springer.com.www2.lib.ku.edu:2048/article/10.1007%2Fs12103-008-9055-x>.

11. The increasing harshness of our current laws regarding people with a sex offense conviction is discussed further in Part I of this article.

12. See *infra* Part II.

perceptions and assumptions underlying many of the laws and policies previously enacted. Finally, Part IV bridges the gap between the evidence and popular misperceptions by identifying much needed law and policy changes. These policy recommendations capitalize on the wealth of empirical evidence and research, and urge our communities to develop alternative, well-considered policies specifically designed to promote public safety *and* the successful reintegration of people who have a past sex offense conviction.

Current policies pertaining to people convicted of a sex offense were driven largely by assumptions about sexually offending behavior that today, with the hindsight of research, we know to be false. Yet policy-makers face continual pressure to enact even more restrictive laws. To promote safe communities that recognize the basic humanity of all members, we must acknowledge the inaccuracy of those assumptions and their very real and significant human costs. This article initiates a discussion about one such unintended cost, a cost that will only grow more severe as increasing numbers of aging registrants are forced to live and die in inappropriate housing, or worse, on the streets.

I. THE LAW AND POLICIES

This section provides a brief overview of the most significant laws and policies pertaining to people with a past sex offense, beginning with registration and community notification requirements.

A. *Registration and Community Notification*

Though some states had sex offender registries as early as the 1940s,¹³ today's registration laws are far more ubiquitous and extensive, largely because of the active role the federal government has played in requiring states to adopt sex offender registration statutes.¹⁴ In addition, unlike the earlier registration laws, today's laws make registration information available to the public through community notification requirements.¹⁵ Between 1994 and 2006, nine federal laws were enacted compelling states to enact registration and community notification laws.¹⁶ Three of these federal legislative initiatives stand-out as having the most significant impact on states: the Jacob Wetterling Crimes Against Children and Sexually Violent Offender

13. In 1993, at the time federal registration legislation was enacted, 24 states had some form of registration requirements for people convicted of a sex offense. See LOGAN, KNOWLEDGE, *supra* note 6, at 56.

14. See Logan, *Political Stasis*, *supra* note 7, at 398-99 ("A final and quite important factor accounting for modern registration and notification laws stems from the policy involvement of the federal government."). Moreover, federal involvement in state registration and notification laws has not only made state laws "more uniform, but also more demanding—to in effect 'level up' registration and notification policy." *Id.*

15. See *infra* Part I.A.2.

16. See Logan, *Political Stasis*, *supra* note 7, at 379.

Registration Act (Jacob Wetterling Act) and Megan's Law, which together required states to adopt sex offender registries and community notification laws, and the Adam Walsh Child Safety and Protection Act (Adam Walsh Act), which, if implemented, will significantly increase the number of people subjected to sex offense registration and community notification.

1. The Emergence of Registration and Notification Laws: Jacob Wetterling Act and Megan's Law

Enacted in 1994, the Jacob Wetterling Act was prompted by the October 1989 abduction of eleven-year old Jacob Wetterling. Even though there was no evidence that Jacob's abduction was sexual in nature, the Jacob Wetterling Act focused on people convicted of sexual offenses, erroneously assuming that all such people are "sexual pedophiles" destined to repeatedly commit crimes against children.¹⁷ This legislation required states to establish sex offender registries to include those convicted of enumerated crimes;¹⁸ specified the information states were required to obtain from registrants;¹⁹ and required that this information be entered into state and national data system to be made available to local law enforcement agencies where registrants were residing.²⁰ The registration period was 10 years for first time offenders; repeat offenders and "sexually violent predators" were required to register for life.²¹

The Jacob Wetterling Act was designed as a registration, not community notification, statute. Thus, registration information was to be treated as "private data" made available only to law enforcement officials.²² But the view of registration information as "private data" changed dramatically in reaction to the July 1994 rape and murder of seven year old Megan Kanka in Hamilton Township, New Jersey. Megan was murdered by person with a prior history of sex offenses, which fostered a belief that if the community had known of his prior history, Megan would not have been murdered.²³ Within months of Megan's death, New Jersey enacted a community notification law²⁴

17. See Associated Press, *Jacob's Parents Urge Support for Abuser Bill*, STAR TRIB., May 26, 1991, at B7 (quoting Minnesota Senator David Durenberger as stating that "sexual crimes against children are widespread; the people who commit these offenses repeat their crimes again and again...."); see also 139 CONG. REC. H10, 319-21 (daily ed. Nov. 20, 1993) (statement of Rep. Ramstad) ("[C]hild sex offenders are repeat offenders. . . . Child sex offenders repeat their crimes again and again and again to the point of compulsion."). The erroneous nature of these statements is discussed in Part III of this article.

18. See 42 U.S.C. §§ 14071(a)(1)(A)-(C) (repealed 2006).

19. See *id.* § 14071(b)(1) (repealed 2006).

20. See *id.* § 14071(b)(2)(A)-(B) (repealed 2006).

21. See *id.* § 14071(b)(6)(A)-(B) (repealed 2006).

22. *Id.* § 14071(e)(2) (repealed 2006) (states were permitted, though not required, to release "relevant information that is necessary to protect the public concerning a specific person required to register").

23. See MEGAN NICOLE KANKA FOUND., <http://www.megannicolekankafoundation.org/mission.htm> (last visited July 19, 2012) (quoting Maureen Kanka as stating, "If we had been aware of his record, my daughter would be alive today.").

24. See Logan, *Political Stasis*, *supra* note 7, at 374; see also Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES (Nov. 1, 1994), available at <http://>

and by May of 1996, President Bill Clinton signed into law the federal Megan's Law, which amended the Jacob Wetterling Act to mandate community notification.²⁵

By 1999, every state had enacted registration and community notification laws.²⁶ Following the passage of Megan's Law, there were five additional sex offense legislative enactments²⁷ which, among other things, expanded the number of offenses requiring registration and notification²⁸ and the duration of registration and notification.²⁹ Additionally, states were mandated to maintain publicly accessible websites with personal information about registrants.³⁰ By 2007, all fifty states had such websites.³¹

2. Upping the Ante: The Adam Walsh Act

The tinkering with Jacob Wetterling and Megan's Laws ended in July, 2006, when Congress enacted the Adam Walsh Act (AWA),³² named after a 6 year old boy who was abducted and later found murdered.³³ The AWA establishes an entirely new sex offense registration and community notification statutory scheme that: expands the scope of registerable offenses;³⁴ applies to all individuals convicted of a sex offense regardless of the date of conviction;³⁵

www.nytimes.com/1994/11/01/nyregion/whitman-approves-stringent-restrictions-on-sex-criminals.html.

25. See 42 U.S.C. § 14071(e)(1)-(2) (repealed 2006) (amending the "Release of Information" section of the Jacob Wetterling Act to require the release of relevant information in certain circumstances).

26. See LOGAN, KNOWLEDGE, *supra* note 6, at 65.

27. See generally Pam Lychner Sexual Offender Tracking and Identification Act (Pam Lychner Act), Pub. L. No. 104-236, 110 Stat. 3093 (1996); Jacob Wetterling Improvements Act, Pub. L. No. 105-119, 111 Stat. 2440 (1997); Protection of Children and Sexual Predators Act, Pub. L. No. 105-314, 112 Stat. 2974 (1998); Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000); Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003) [hereinafter PROTECT Act].

28. See generally PROTECT Act, *supra* note 27 (amending 42 U.S.C. § 14701).

29. See generally Pam Lychner Act, Pub. L. No. 104-236, 110 Stat. 3093 (1996) (amending 42 U.S.C. § 14701(b)(6)) (expanding the number of registrants subject to lifetime registration).

30. See PROTECT Act, *supra* note 27, at § 301(a).

31. See *No Easy Answers*, *supra*, note 10, at 132-38.

32. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. § 16901 (2006)).

33. See *id.* at § 2(a)-(b) (noting that the Adam Walsh Act was enacted on the 25th anniversary of the abduction and murder of Adam Walsh, a 6-year-old boy who was abducted from a mall in Hollywood, Florida; his remains were found two weeks later).

34. See Pub. L. No. 109-248, § 111 (codified at 42 U.S.C. § 16911(5), (7) (2006)).

35. The Adam Walsh Act itself did not explicitly state that it was retroactive, but instead delegated this decision to the Attorney General. See 42 U.S.C. § 16913(d) (2006). The subsequent Guidelines issued by the Department of Justice adopted a broad retroactive rule. See *National Guidelines for Sex Offender Registration and Notification*, U.S. DEP'T OF JUSTICE 1, 7, available at http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf (last visited Mar. 27, 2013). See also *Smith v. Doe*, 538 U.S. 84 (2003); Office of the Attorney General, *Applicability of the Sex Offender Registration and Notification Act*, 72 FR 8894-01, 8896 (Dec. 29, 2010), available at <https://www.federalregister.gov/articles/2010/12/29/2010-32719/office-of-the-attorn>

requires registrants to update and verify information by appearing in person;³⁶ and makes it a criminal offense for failing to comply with registration requirements.³⁷

Unlike Jacob Wetterling and Megan's Laws, which allowed states discretion on how to classify registrants and permitted individualized assessments of risk for duration of registration and notification purposes,³⁸ the AWA requires a three-tiered classification system that is based exclusively on the crime of conviction and past conviction history.³⁹ Nearly all registrants are subject to community notification through the Internet via state-maintained websites and the National Sex Offender Registry.⁴⁰ The duration of required registration is dictated by the crime-based three-tier classification system: tier I individuals must register for 15 years, tier II individuals for 25 years, and tier III individuals for life.⁴¹ Notably, the AWA's broad scope swoops in juveniles as young as 14 years of age, regardless of whether they were tried as adults or adjudicated a juvenile delinquent in a juvenile or family court.⁴² Because a disproportionate number of adults and juveniles will be deemed high risk,⁴³ the AWA promises to significantly increase the number of lifetime registrants.

Additionally, the AWA will make access to stable and affordable housing even more difficult for people like Mr. Bianco and not merely by increasing

ey-general-applicability-of-the-sex-offender-registration-and-notification-act.

36. See 42 U.S.C. § 16913(c) (2006) (requiring that within 3 days of change of name, address, employment, or student status, registrants personally appear to update information); *Id.* § 16916 (requiring that tier I registrants appear in person to verify information every year, that tier II registrants personally verify every 6 months, and that tier III registrants personally verify every 3 months).

37. See *id.* § 16913(e) (punishable by a maximum penalty of greater than one year in prison).

38. See Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009-39,020 (July 21, 1997).

39. See 42 U.S.C. § 16911(2)-(4) (2006).

40. See *id.* § 16918; see also *id.* § 16921 (establishing the "Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program," which requires the Attorney General to maintain the National Sex Offender Registry).

41. See 42 U.S.C. § 16915(a)(1)-(3) (2006). See also *id.* § 16915(b)(1)-(2) (tier I registrants can reduce the 15-year registration period by 5 years if they "maintain a clean record" for ten years, while tier III registrants can request to be removed from the registry after 25 years if they maintain a "clean record").

42. See Pub. L. No. 109-248, § 111, 120 Stat. 587, 591-93 (codified at 42 U.S.C. § 16911(8)).

43. The research conducted to date on the implementation of the AWA reveals that it categorizes a disproportionately high number of people as "high risk," thereby requiring lifetime registration. See generally Andrew J. Harris et al., *Widening the Net: The Effects of Transitioning to the Adam Walsh Act's Federally Mandated Sex Offender Classification System*, 37 CRIM. JUST. & BEHAV. 503, 515 (2010) (noting that the AWA "tiers appear to classify a disproportionate number of offenders as high risk," and that "from a public safety perspective, the observed net-widening effect compromises the capacity of registration and notification systems to effectively discriminate between those who pose a substantial risk to society and those who pose minimal risk").

the number of people subject to registration and notification, and requiring more people to register for life. Among its notification provisions is the requirement that the Attorney General notify an enumerated list of organizations and agencies of new or updated information about each registrant; this list includes “each . . . public housing agency, in each area in which the individual resides.”⁴⁴

For most jurisdictions, the final date of compliance with the AWA was June 27, 2011.⁴⁵ However, as of February 20, 2013, only 16 states, including Kansas, have been deemed to be in “substantial compliance”⁴⁶ and some states, like New York, have officially stated their intention *not* to comply.⁴⁷ Many states have expressed grave concerns about the broad scope of the AWA, particularly the requirement that those whose crime occurred when they were juveniles be subjected to registration and notification.⁴⁸ States have also objected to the AWA’s rejection of the more reliable individualized-risk approach to tier classification.⁴⁹

Notably, states have voiced concerns about the needless barriers to stable housing created by the AWA. For example, in its 2007 comments on the proposed Guidelines to the Adam Walsh Act, New York noted that compliance would “greatly expand the pool of registerable offenders in New York State,” and would “exacerbate the difficulties that states are now facing in finding appropriate housing for sex offenders,” thereby “undermining public safety by forcing offenders to become homeless or to go underground, thus making it difficult to track their whereabouts.”⁵⁰

44. 42 U.S.C. § 16921(b)(2) (2006).

45. See U.S. DEP’T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING (SMART), *SORNA Extensions Granted* (2010), http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf.

46. U.S. DEP’T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING (SMART), *Update from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART)*, <http://www.ojp.usdoj.gov/smart/newsroom.htm> (last visited Feb. 20, 2013).

47. See John Caher, *State Opts Out of Compliance with Adam Walsh Act*, N.Y. L.J. (Oct. 7, 2011), available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202518126486&State_Opts_Out_of_Compliance_With_Adam_Walsh_Act (citing letter from Risa S. Sugarman, Deputy Commissioner and Director, N.Y. State Office of Sex Offender Management, to Linda Baldwin, Director, U.S. Dept. of Justice, SMART Office (Aug. 23, 2011) (on file with author), available at <http://media.navigatored.com/documents/NY+Baldwin+SORNA+notification.pdf>).

48. See Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 1002 (2010). New York, for example, addressed this issue in its 2011 letter to the Department of Justice. See Caher, *supra* note 47.

49. See, e.g., Donna Lyons, *Down to the Wire*, NAT’L CONF. OF ST. LEGISLATURES 26, 27 (2011), available at <http://www.ncsl.org/LinkClick.aspx?fileticket=j9v-XfmR8Wg%3D&tabid>. For example, the California Sex Offender Management Board, in its Statement of Position on the Adam Walsh Act, noted that “using crime of conviction as the primary method of determining offender risk is far less reliable than use of actuarial tools.” See *Adam Walsh Act: Statement of Position*, ST. OF CAL., SEX OFFENDER MGMT. BOARD, <http://www.casomb.org/docs/Adam%20Walsh%20Position%20Paper.pdf> (last visited Mar. 27, 2013).

50. Letter from New York State to Laura L. Rogers, Director, SMART Office (July 31,

Ultimately, it appears that full compliance with the AWA will not be forthcoming—a silver lining on the dark cloud of limited access to housing for people like Mr. Bianco.

B. Residency Restrictions

While registration and notification laws have been driven by federal legislation, residency restrictions have been a creature of state and local law. But like registration and notification laws, residency restrictions have been enacted largely in response to high profile crimes and the desire for a “quick fix” rather than a thoughtful assessment of the research to determine what really works.

State laws restricting where people convicted of a sex offense can reside began emerging in significant numbers in the early 2000s,⁵¹ though the flurry to enact such restrictions increased in 2005 when nine-year old Jessica Lunsford was abducted, raped, and murdered by a registered sex offender.⁵² High profile cases like Jessica Lunsford’s generated a common public belief that residency restrictions could effectively keep communities safe from sexual assaults against children.⁵³ Some politicians, however, have admitted to a much more punitive reason for their support of residency restrictions, speaking of the desire to banish people convicted of sex offenses from certain geographic areas.⁵⁴

Today, at least 20 states have enacted some kind of residency restriction.⁵⁵ These laws are incredibly diverse, with variations in the substance of the restriction itself⁵⁶ and the punishment for failing to comply.⁵⁷ Unlike state

2007) (on file with author), available at http://theparson.net/so/NYguideline_comments.pdf.

51. See generally Amber Leigh Bagley, “An Era of Human Zoning”: *Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1353 (2008) (noting that residency restrictions followed registration and notification requirements by about ten years).

52. See *No Easy Answers*, supra note 10, at 101; THE COUNCIL OF STATE GOVERNMENTS, *Zoned Out: States Consider Residency Restrictions for Sex Offenders* 1, 2 PUB. SAFETY BRIEF (Fall 2008), available at <http://www.ovsom.texas.gov/docs/Council-State-Governments-Zoned-Out-ResidencyRestrictions-2008.pdf> [hereinafter *Zoned Out*].

53. See *Zoned Out*, supra note 52, at 1 (“Unfortunately, Jessica’s murder is only one of a number of high-profile cases that have shaken the confidence and feeling of safety and security citizens have grown to enjoy in their communities. Public fears around sex offenders in the community have increased, and state lawmakers have experienced added pressure to strengthen laws to manage these offenders.”). See also *No Easy Answers*, supra note 10, at 115.

54. For example, in supporting enactment of Georgia’s residency restriction, State Senator and Georgia House Majority Leader Jerry Keen stated: “We want them out of here. If it becomes too onerous and too inconvenient, they may just want to live somewhere else. And I don’t care, as long as it’s not in Georgia.” *No Easy Answers*, supra note 10, at 110. See also Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 125 (2007); Bagley, supra note 51, at 1349-50 (arguing that residency restrictions are, in effect, a form of banishment).

55. *No Easy Answers*, supra note 10, at 100.

56. See IDAHO CODE ANN. § 18-8329 (2006) (barring anyone on the registry from living

restrictions, the number and extent of local residency restrictions is far more difficult to determine because local ordinances are not always well-publicized and because new ordinances are enacted fairly regularly.⁵⁸ A 2007 report by Human Rights Watch estimates that, at that time, there were about 400 municipalities that had enacted residency restrictions,⁵⁹ though it is likely that in the years since this report was written, this number has significantly increased.⁶⁰ Like statewide residency restrictions, municipal residency restrictions vary significantly.⁶¹

Though Mr. Bianco was not subject to a residency restriction when he sought assisted housing, others like him who have special needs because of their age or compromised medical condition find that residency restrictions create an insurmountable barrier to securing appropriate housing. For example, a court in California found that the state's residency restriction prevents people with a past sex offense conviction from finding housing that meets their medical, mental health, and substance abuse treatment needs.⁶² Similarly, had he been under supervision when he sought housing, Mr. Bianco may very well have ended up spending his last days in a homeless shelter like Ariel Berlin, an elderly gentleman with a past sex offense conviction who was banned from his New York City apartment of 40 years because of New York's state-wide residency restriction that applies to people on parole or probation supervision.⁶³

C. Social Stigma and Housing

Today, people on sex offense registries "are the most vilified group in society. People hate and despise them and think they should be locked up for life. . . . They are seen as dangerous sexual predators for whom treatment won't work and who are at high risk to reoffend."⁶⁴ The vilification of people

within 500 feet of a school); CAL. PENAL CODE § 3003.5(b) (West 2006) (prohibiting people who must register as a sex offender from residing within 2000 feet of any school or "park where children regularly gather").

57. See IOWA CODE ANN. § 692A.111 (West 2010) (state's residency restriction violation can lead to an aggravated misdemeanor conviction); GA. CODE ANN. § 42-1-15(g) (West 2008) (violation of the state residency restriction can lead to a felony conviction with no less than 10 years and no more than 30 years imprisonment).

58. Yung, *supra* note 54, at 125. ("Local laws are often not publicized or available online. . . . The number of localities considering or adopting sex offender restrictions continues to grow.")

59. See *No Easy Answers*, *supra* note 10, at 114.

60. See Bagley, *supra* note 51, at 1348-49.

61. See *id.*

62. *In re Taylor*, 147 Cal. Rptr. 3d 64, 82 (Cal. Ct. App. 2012), *review granted and opinion superseded*, 290 P.3d 1171 (Cal. 2013).

63. See *Berlin v. Evans*, 923 N.Y.S.2d 828 (N.Y. Sup. Ct. 2011). According to Mr. Berlin's lawyer, Robert Newman, Mr. Berlin was still living in a homeless shelter awaiting a decision on the state's appeal of his case when he died in November of 2012. See E-mails from Robert Newman, Esq., to Patricia Warth (Dec. 30, 2012 to Jan. 3, 2013) (on file with author).

64. Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders*

with a past sex offense has resulted in vigilantism and even death.⁶⁵

Pin-pointing the source of this stigma is beyond the scope of this article, though there is no question that the ever-growing array of federal, state, and municipal restrictions has fueled it. The public rhetoric surrounding the enactment of laws pertaining to people convicted of a sex offense has played upon the public's fear and, in many cases, perpetuated misleading and inaccurate information about people convicted of sex offenses. In debating enactment of Megan's Law, for example, legislators frequently employed the use of statistical manipulation to garner political support for proposed legislation regarding people convicted of sex offenses and simultaneously appear tough on crime.⁶⁶ It was not unusual for legislators to state that their assertions were supported by research, yet then fail to actually cite this research, as legislators did when they spoke of incredibly high recidivism rates for people convicted of a sex offense and no effective means of treatment.⁶⁷ One representative summarized the problem quite simply, albeit inaccurately, asserting that "[i]t is a known fact that that the scientific community has concluded that most pedophiles cannot control themselves."⁶⁸

Whatever the source of the profound stigma attached to people convicted of a sex offense, its existence results in a "social death" for registrants. For seniors like Mr. Bianco, this social death has life-altering implications, preventing them from finding housing that meets their special needs. As Mr. Bianco learned when seeking assisted housing, today many landlords run criminal background checks and search sex offender registries, automatically

Increase Recidivism and Sexual Violence?, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 141, 141 (2006).

65. See generally *No Easy Answers*, *supra* note 10 (describing many instances of vigilantism against people who are required to register as sex offenders). In April 2006, nineteen year old Stephen Marshall shot and killed two men, Joseph Gray and William Elliot, after he had found the two men (and their addresses) on Maine's sex offender registry. See Emily Bazar, *Suspected Shooter Found Sex Offenders' Homes on Website*, USA TODAY (Apr. 18, 2006, 5:43 AM), available at http://www.usatoday.com/news/nation/2006-04-16-maine-shootings_x.htm. See also Jonathan Martin & Maureen O'Hagan, *Killings of 2 Bellingham Sex Offenders May Have Been by Vigilante, Police Say*, SEATTLE TIMES (Aug. 30, 2005, 2:16 PM), available at http://seattletimes.nwsourc.com/html/localnews/2002456680_sexoffender30m.html (a year earlier, two men on Washington State's sex offender registry were also killed as a result of vigilantism). Some registrants have also committed suicide. For example, the mother of a young man convicted of a sex offense described to Human Rights Watch how the stigma her son faced drove him to take his own life. See *No Easy Answers*, *supra* note 10, at 41.

66. See Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 363 (2001).

67. *Id.* at 335-38.

68. *Id.* at 336-37 (citing 142 CONG. REC. H11,134 (daily ed. Sept. 25, 1996) (statement of Rep. Jackson-Lee)). At times, the rhetorical assertions bordered on ridiculous. For example, during the Congressional discussion on the enactment of the federal community notification legislation ("Megan's Law"), one representative asserted that a study "showed that the average child sex offender molests 117 children." *Id.* at 336 (citing 139 CONG. REC. 31,251 (1993) (statement of Rep. Ramstad)). Another representative asserted that sexual offending "is basically a male homosexual problem." *Id.* at 337.

barring anyone who must register.⁶⁹ Many private homeowners associations are either adopting or exploring the possibility of adopting by-laws that ban people convicted of sex offenses from residing in their communities.⁷⁰ The foregoing are just some of the barriers to housing that people with a sex offense conviction face. Part II of this article details additional barriers.

II. HOUSING OPTIONS FOR SENIORS

In addition to the barriers to housing discussed above, people with a past sex offense conviction face many other limitations securing housing. These include bars to federally subsidized housing, tenant selection policies that afford landlords participating in federally subsidized programs the discretion to turn away those convicted of sex offenses, and an absence of regulations which enable nursing homes and assisted living facilities to exclude people with a prior sex offense conviction. Given this environment, seniors such as Mr. Bianco often are unable to secure housing regardless of the nature of the offense, the passage of time, or evidence of rehabilitation, including the successful completion of treatment and the recommendations of professionals and former landlords. The result is a community of aging and infirm individuals who are effectively barred from access to housing appropriate to their age and medical condition, and potentially from any housing at all.

The risks and consequences of inappropriate housing for the elderly are more severe than for other populations. Many seniors suffer from isolation and depression.⁷¹ Those at highest risk of depression have inadequate social

69. See, e.g., Jenny Michael, *Registered Sex Offenders Struggle to Find Housing*, BISMARCK TRIB. (Sept. 27, 2009, 2:15 AM), available at http://bismarcktribune.com/news/article_ad035516-ab17-11de-968a-001cc4c03286.html (“Few property owners will rent to sex offenders, and when an offender finds a home, the neighbors aren’t always welcoming.”); Lynn Thompson, *Everett Landlord Won’t Rent to More Sex Offenders*, SEATTLE TIMES (Aug. 28, 2008, 8:59 AM), available at http://seattletimes.com/html/localnews/2008143486_sexoffenders28m.html (describing how some landlords who have rented to people with a sex offense conviction have themselves been the victims of vigilantism).

70. See, e.g., *Mulligan v. Panther Valley Prop. Owners Ass’n*, 766 A.2d 1186, 1192 (N.J. Super. Ct. App. Div. 2001) (noting that a number of New Jersey homeowners associations have adopted rules banning sex offenders from residing within the association); see also Dean Narcisco, *Homeowners Association Adding Bans Against Sexual Offenders*, COLUMBUS DISPATCH (Mar. 20, 2011, 11:23 PM), available at <http://www.dispatch.com/content/stories/local/2011/03/21/homeowners-associations-adding-bans-against-sexual-predators.html>. This trend is highlighted by a YouTube video that begins as follows: “Can your association ban sex offenders? This is a hot topic across the nation today.” See Melrosesovereign, *Can Your Homeowners Associations Ban Sex Offenders?*, YOUTUBE (Nov. 11, 2011), <http://www.youtube.com/watch?v=4qU1PPjo7BE>.

71. See, e.g., FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, *OLDER AMERICANS 2012: KEY INDICATORS OF WELL BEING* 1, 30-31 (2012), available at http://www.agingstats.gov/agingstatsdotnet/Main_Site/Data/2012_Documents/Docs/EntireChartbook.pdf (reporting that 13.7 % of those aged 65 and over exhibit “clinically relevant depressive symptoms”). See also *Depression in Older Adults: Signs & Symptoms*, AGINGWISELY, <http://www.agingwisely.com/depression-in-older-adults-signs-symptoms/> (last visited Jan. 3,

support, and contributing causes are loneliness and isolation.⁷² Research demonstrates that social interaction is good for the health of seniors and prevents cognitive and physical decline.⁷³ Isolation and lack of social connections “greatly increase our chances of serious illness, cognitive impairment, dementia and death.”⁷⁴ While appropriate housing—whether an apartment with supportive services, independent living with other seniors, or an assisted living or skilled nursing facility—does not guarantee that seniors will have social interaction, it does greatly enhance the chances of good health, slower cognitive decline, and a longer life.

A. *Relevant Dynamics*

Two important dynamics shape the background of this social problem: an increasing number of seniors on sex offender registries⁷⁵ and a dearth of affordable housing for the elderly.⁷⁶

1. **Increasing Number of Seniors on Sex Offender Registries**

The growing number of elderly people on the registries is the result of three factors. The first two—the enactment of federal laws that expand the number of people required to register and the increasingly long periods of registration—have already been discussed above.⁷⁷ In the wake of the passage of these federal laws, states have expanded their *own* lists of offenses requiring registration, with many including crimes not required by federal law.⁷⁸

2013) [hereinafter AGINGWISELY] (reporting that, according to the National Institutes of Health, of the 35 million Americans aged 65 and older, 2 million suffer from “full blown depression” and another 5 million suffer from more minor forms of depression).

72. See AGINGWISELY, *supra* note 71.

73. See, e.g., DOUGLAS H. POWELL, *THE AGING INTELLECT* 77 (Routledge Taylor & Francis Grp. eds., 2011) (describing a twelve year research study as finding that “people with more social ties exhibited less cognitive decline” and that “[p]oor social connections, infrequent participation in social activities, and social disengagement predicted greater risk of cognitive decline”).

74. *Id.*

75. See, e.g., John Gramlich, *The Ever-Growing Sex Offender Registry*, STATELINE (Apr. 12, 2010), <http://www.stateline.org/live/details/story?contentId=476264> [hereinafter *Ever-Growing Registry*] (reporting that the number of people on sex offender registries grew by over 100,000 from 2007 to 2010 to an estimated total of 750,000 in 2011).

76. See, e.g., FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, *supra* note 71, at 21 (reporting that approximately 40 percent of both older-owner/renter households and older-member households have housing problems. The most prevalent problem is “housing cost burden,” i.e. expenditures on housing and utilities that exceed 30% of income, and that number has been increasing over time.).

77. See *supra* Part I.A.

78. See, e.g., *No Easy Answers*, *supra* note 10, at 39-40 (noting that five states require registration for prostitution-related offenses involving adults, at least 13 states require registration for public urination, and 32 states require registration for public exposure of genitals). See also Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NAT'L PUB. RADIO (May 28, 2010, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=127220896> (noting that given additional registerable offenses at the state level, states are struggling with costs, the challenge of tracking so many people, and the risk of serious offenders slipping through the

Additionally, there are few opportunities to be removed from the list prior to the expiration of the statutorily required registration periods. The Adam Walsh Act includes only a very limited opportunity for some registrants to petition for early release from the registry.⁷⁹ Some states do provide for a petition process for reclassification that may lead to removal; other states allow petitions for a change in registry status.⁸⁰ But those opportunities are limited. New York, for example, provides a very limited opportunity for registrants subjected to lifetime registration, after being deemed of “moderate” risk after 30 years on the registry, to petition to be removed.⁸¹ As a result, the number of people on the registries only increases over time; very few “age off” the list, and a significant percentage of registrants remain on the registry until they die. As the number of people on the registries continues to grow and those on the registries age, they are increasingly likely to be in need of additional supports and stable and affordable housing.

The third factor is that an increasing number of those incarcerated are elderly,⁸² and therefore, an increasing number of those released from prison are elderly. Those in prison, including those convicted of sex offenses, are serving longer sentences,⁸³ resulting in an aging prison population. Between 1995 and 2000, the number of men and women in prison aged fifty-five and older grew from 32,000 to 124,400, an increase of 282%.⁸⁴ While those aged fifty and older currently represent sixteen percent of state and federal prison populations,⁸⁵ it is projected that by 2030, one third of all of those incarcerated

cracks); *Ever-Growing Registry*, *supra* note 75.

79. *See supra* Part I.

80. *See, e.g., No Easy Answers*, *supra* note 10, at 63-64 (praising the Minnesota program that enables registrants to appeal their status every two years to a panel of experts). The report indicates that Massachusetts, Michigan, New York, Ohio, Texas, and Wyoming also allow petitions from lifetime registrants for a change in registry status. *See id.* at 43. Of the 17 states that mandate *all* those required to register to do so for *life*, regardless of the crime, a number of them permit petitions for earlier release for certain offenses. *Id.* at 42.

81. *See* N.Y. CORRECT. LAW § 168-o(1) (McKinney 2006). This narrow relief mechanism, however, is not available to “moderate” risk level registrants who are considered to be violent sexual offenders, sexual predators, or predicate sex offenders. *Id.* § 168-h(2).

82. This dynamic is the result of the confluence of a more “retributive and punitive response to crime,” mandatory sentencing, the war on drugs, an increase in prison capacity, cutbacks in early release programs, and the graying of America. RONALD. H. ADAY, *AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS* 3-10 (Praeger Publishers ed., 2003). *See also* Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551, 551-52 (2009) (noting that the U.S. prison population rose from 682,000 to 2.1 million from 1984 to 2004 due to increased criminal activity during the 1980s and policies favoring incarceration, including mandatory minimum sentences and “three-strike” laws); *Old Behind Bars: The Aging Prison Population in the United States*, HUMAN RIGHTS WATCH 1, 24-32 (Jan. 2012), http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf [hereinafter *Old Behind Bars*].

83. *See* ADAY, *supra* note 82, at 10-11.

84. *See Old Behind Bars*, *supra* note 82, at 19-20.

85. *See* ACLU, *AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* 1, 2 (2012), available at https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf

will be fifty-five and over.⁸⁶ The net effect is an increasing number of seniors released from prison and in need of additional supportive and specialized housing.

2. Dearth of Affordable Housing

Another dynamic underlying the housing crisis for seniors convicted of sex offenses is the dearth of affordable housing. As the number of Americans living below the poverty level has increased,⁸⁷ the number of affordable housing units has declined. In 2003, eighty-one affordable and available units existed for every 100 very low-income households;⁸⁸ by 2010, only fifty-eight affordable and available units existed for every 100 very low-income households.⁸⁹ The situation is even bleaker for extremely low-income households.⁹⁰

For seniors, the availability of affordable housing is only slightly improved. Indeed, the most significant housing problem for seniors is “cost burden”—defined as “expenditures on housing and utilities that exceed thirty percent of household income”—which has been increasing over time.⁹¹

[hereinafter MASS INCARCERATION]. There is no uniform definition of what constitutes the aged in correctional facilities, thus making it difficult to compare statistics and research on the aging prison population. See ADAY, *supra* note 82, at 16 (reporting that most states use the age of 50 as the most common criterion for “old age,” acknowledging that “the typical inmate in his 50s has the physical appearance and accompanying health problems of someone at least ten years older.”). See also *Old Behind Bars*, *supra* note 82, at 17.

86. See MASS INCARCERATION, *supra* note 85, at 5. Additionally, the average age of those being paroled also is on the rise. Timothy Hughes & Doris James Wilson, *Reentry Trends in the US: Characteristics of Releases*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf> (last revised Apr. 14, 2004). The Bureau of Justice Statistics reports that in 1999, an estimated 109,300 state prisoners age 40 and over were paroled, 26% of all those released to parole. *Id.* The number of those aged 45 to 54 and paroled increased by over 9% from 1990 to 1999. *Id.*

87. See U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2005 AMERICAN COMMUNITY SURVEY 1, 14 (2006), available at <http://www.census.gov/prod/2006pubs/acs-02.pdf> (showing a poverty level of 13.3% in 2005).

88. CATHERINE BISHOP, AN AFFORDABLE HOME ON REENTRY: FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS, 4 (National Housing Law Project 2008), available at www.reentry.net/ny/search/download.149254 [hereinafter, AN AFFORDABLE HOME ON REENTRY] (citing U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, AFFORDABLE HOUSING NEEDS 2005: REPORT TO CONGRESS, 4 (2007), available at <http://huduser.org/Publications/pdf/AffHsgNeeds.pdf>). “Very low income” is defined as income earning 31-50% of the “metropolitan median family income” (MMFI). NATIONAL LOW INCOME HOUSING COALITION, HOUSING SPOTLIGHT: THE SHRINKING SUPPLY OF AFFORDABLE HOUSING, 4 (2012), available at <http://nlihc.org/sites/default/files/HousingSpotlight2-1.pdf>.

89. NATIONAL LOW INCOME HOUSING COALITION, *supra* note 88, at 1.

90. “Extremely low income” is defined as a household earning 0-30% of the MMFI. *Id.* at 4. In 2010, there were only 30 affordable and available units for every 100 extremely low-income households. *Id.* at 2. The U.S. Department Housing and Urban Development’s (HUD) public housing program, designed to serve the very poor, has lost 200,000 units since 1995 and loses an estimated 10,000 units annually. *Id.*

91. FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, *supra* note 71, at 21. Between 1985 and 2009, the prevalence of cost burden increased from 31 to 40 percent for older-

Studies suggest that little is being done to accommodate the growing number of aging seniors who will need affordable housing in the near future.⁹² Many seniors live in poverty⁹³ and most live on a fixed income.⁹⁴ Declining health limits their ability to work and may generate medical bills in excess of their insurance coverage.⁹⁵ According to 2010 census data, nine percent of all people over age sixty-five live below the poverty line,⁹⁶ totaling approximately 39 million people.⁹⁷ As the number of seniors, particularly poor seniors, increases, funding for affordable senior housing is dwindling.⁹⁸ In 2003, the Government Accounting Office identified the lack of affordable housing as the single biggest challenge facing elderly Americans.⁹⁹ All seniors with limited resources face challenges in securing appropriate and affordable housing—a challenge even more severe for those with a prior sex offense conviction.

owner/renter households and from 18 to 39 percent among older-member households, as compared to all other U.S. households where it increased from 24 to 36 percent over the same period of time. *See id.*

92. *See generally* Patricia E. Salkin, *A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*, 16 *GEO. J. POVERTY LAW & POL'Y* 285 (2009) [hereinafter *A Quiet Crisis*]. *See also* Adrian Sainz, *Demand Grows for Affordable Housing for Seniors*, *SEATTLE TIMES* (Aug. 22, 2009, 12:08 AM), available at http://seattletimes.nwsourc.com/html/realstate/2009708524_seniorhomes23.html (estimating that an additional 730,000 units will be needed by 2020 for those aged 65 and older who will have problems paying for housing).

93. *See* Press Release, Ken Schwartz, Nat'l Council on Aging, One in Six Seniors Lives in Poverty, New Analysis Finds (Jan. 24, 2011), <http://www.ncoa.org/press-room/press-release/one-in-six-seniors-lives-in.html>.

94. Press Release, Seniors Citizens League, Today's Seniors Could See Social Security Checks Slashed by More than \$18,000 Under Popular New Proposal (June 28, 2011), available at <http://www.prnewswire.com/news-releases/todays-seniors-could-see-social-security-checks-slash-ed-by-more-than-18000-under-popular-new-proposal-124640543.html>.

95. *See* SOC. SEC. ADVISORY BD., *THE UNSUSTAINABLE COST OF HEALTH CARE*, 8 (2009), available at http://www.ssab.gov/documents/TheUnsustainableCostofHealthCare_508.pdf (“Declining standards of living are also more likely the longer a person lives and as assets are spent down or eroded by inflation, reliance on Social Security increases, and health care costs grow to ever higher levels.”).

96. *See* U.S. CENSUS BUREAU, *Percent of People 65 Years and Over Below Poverty Level in the Past 12 Months*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/prnductview.xhtml?pid=ACS_10_1YR_GCT1703.US01PR&prodType=table (last visited Mar. 1, 2012). Under a new supplemental measure, poverty among the elderly is estimated at 15.9%. *See* Michael A. Fletcher, *Census Bureau Measures More Americans Living in Poverty*, *WASH. POST*, (Nov. 7, 2011), available at http://www.washingtonpost.com/business/economy/census-bureau-report-more-americans-living-in-poverty/2011/11/07/gIQA AHmlwM_story.html. This rise under the supplemental measure is attributable, at least in part, to out-of-pocket medical expenses. *Id.*

97. *See* U.S. CENSUS BUREAU, *Age by Ratio of Income to Poverty Level in the Past 12 Months*, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B17024&prodType=table (last visited Mar. 25, 2013).

98. *See A Quiet Crisis*, *supra* note 92, at 294.

99. *See* U.S. GEN. ACCOUNTING OFFICE, *ELDERLY HOUSING: PROJECT FUNDING AND OTHER FACTORS DELAYING ASSISTANCE TO NEEDY HOUSEHOLDS 5-8* (2003), <http://www.gao.gov/new.items/d03512.pdf>.

**B. Laws and Policies that Limit Housing Options for Those Seniors
Convicted of Sex Offenses**

Laws and policies that limit housing options for seniors convicted of sex offenses vary depending on the specific nature of the housing—whether it is private rental housing, federally subsidized housing, or a long term care or assisted living facility. Each is discussed below.

1. Private Rental Housing

Federal regulation of private rental housing is limited to fair housing protections, which apply to all types of housing. However, these provisions, described generally here, are of limited usefulness to seniors convicted of sex offenses. Title VIII of the Civil Rights Act of 1968 prohibits discrimination in the sale or rental of housing on the basis of race, color, national origin, religion, and sex in all housing.¹⁰⁰ Congress subsequently passed additional antidiscrimination provisions, including statutes further protecting people with disabilities¹⁰¹ and the Fair Housing Amendments Act of 1988, which added disability and familial status as protected classes.¹⁰² Some state statutes and local ordinances provide similar, and occasionally additional, protections against discrimination in housing.¹⁰³

A person convicted of a sex offense denied housing arguably may be considered a member of a protected class, most likely as a person with a disability due to a mental health disorder that is a contributing factor to the offending.¹⁰⁴ Alternatively, it can be argued that he or she may have been

100. See 42 U.S.C. § 3601 *et seq.* (2012).

101. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability in any program or activity receiving federal financial assistance, a provision that applies to all HUD-supported housing. See 29 U.S.C. 794(a) (2012). With the passage of the Americans with Disabilities Act in 1990, discrimination against the disabled was prohibited in any program, service or activity made available by public entities. See 42 U.S.C. § 12101 *et seq.* (2012).

102. See Americans with Disabilities Act of 1990 42 U.S.C. § 3604(a) (2012). The Fair Housing Amendments Act, which prohibits discrimination based on familial status, created an exemption for “housing for older persons,” defined as housing intended and operated for those over age 55. 42 U.S.C. § 3607(b)(1) (2012). The passage of the Housing for Older Persons Act of 1995 clarified that housing for older persons must have at least one person aged 55 or older in at least 80% of the units. See 46 U.S.C. § 3607(b)(2)(C)(i) (2011).

103. An example of a protected class at the state level is sexual orientation. See INSTITUTE OF REAL ESTATE MANAGEMENT LEGISLATIVE STAFF, LAWS PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (2007), available at www.irem.org/pdfs/publicpolicy/Anti-discrimination.pdf. At least twenty states and the District of Columbia provide this protection. *Id.*; see, e.g., CAL. GOV. CODE § 12920 (Deering 2012) (source of income); MASS. GEN. LAWS ANN. ch.151B § 4(6) (West 2012) (military status); and MASS. GEN. LAWS ANN. ch.151B §4(3B) (West 2012) (genetics). Examples of protections at the local level include prohibiting housing discrimination based upon citizenship status and lawful occupation, see N.Y.C. ADMIN. CODE § 8-107(5) (2012), available at <http://www.nyc.gov/html/cchr/html/ch1.html>; student status, physical appearance, and political beliefs, see MADISON GEN. ORD. § 39.03 (2012); and past criminal convictions, see MADISON GEN. ORD. § 39.03 (2012), available at <http://www.cityofmadison.com/dcr/documents/MGOch39.03.pdf>.

104. Although HUD and the Department of Justice have stated that “sex offenders, by

subjected to illegal discrimination under a disparate impact analysis.¹⁰⁵ Disparate impact claims in the housing discrimination context are receiving growing attention at the federal level. Although the United States Department of Housing and Urban Development (“HUD”) has never interpreted the fair housing laws to require discriminatory intent, it has recently proposed regulations that would provide uniform standards for demonstrating discriminatory effect.¹⁰⁶ HUD’s proposed regulations would further support the disparate impact rationale for discrimination based upon criminal conviction.¹⁰⁷ Despite these possible arguments, those convicted of sex offenses have rarely succeeded in arguing that they have a disability within the meaning of the fair housing laws, the Americans with Disabilities Act (ADA), or the Vocational Rehabilitation Act.¹⁰⁸

Because most seniors with a prior sex offense conviction are not members of the statutes’ protected classes, absent proof of a disparate impact, private landlords may exclude them. In fact, tenant-screening agencies frequently utilize a person’s status as a sex offender registrant as a screening criterion,¹⁰⁹

virtue of that *status*, are not persons with disabilities protected by the [Fair Housing Amendments] Act,” Joint Statement of Dep’t of Housing and Urban Dev. and Dep’t of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), available at <http://www.hud.gov/offices/fheo/library/hud DOJstatement.pdf> (emphasis added), those with an underlying psychiatric condition that contributes to their offending may have some protection under fair housing laws, see AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 570-72 (4th ed. 2000) (listing, for example, frotteurism and pedophilia as psychiatric disorders).

105. See, e.g., NAT’L HOUSING LAW PROJECT, FAIR HOUSING DISPARATE IMPACT CLAIM BASED UPON THE USE OF CRIMINAL AND EVICTION RECORDS IN TENANTS SCREENING POLICIES 23 (Jan. 2011), available at <http://www.nhlp.org/files/PRRAC%20Disparate%20Impact%201-2011.pdf> [hereinafter *Disparate Impact Claim*] (arguing that a disparate impact claim can be made for using an applicant’s criminal records to deny the applicant housing).

106. See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,926 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100) [hereinafter *Discriminatory Effects Standard*]. For one letter in support of the proposed regulations, see Letter From Twenty Advocacy Groups to Dep’t of Hous. and Urban Dev. Regulations Div. (Jan. 17, 2012), available at <http://www.nhlp.org/files/HUD%20Regulation%20Comment%20Letter--%201%2017%20FINAL.pdf>. See also, *Disparate Impact Claim*, *supra* note 105 (arguing that a disparate impact claim can be made for using an applicant’s criminal records to deny the applicant housing).

107. See *Discriminatory Effects Standard*, *supra* note 106.

108. See Joint Statement of Dep’t of Housing and Urban Dev. & Dep’t of Justice, *supra* note 104 (statement regarding fair housing laws and those convicted of sex offenses). This statement advises that “the Act does not protect an individual with a disability whose tenancy would constitute a ‘direct threat’ to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.” *Id.*

109. For example, the American Rental Property Owners and Landlords Association (ARPOLA) sells a screening service which, for an additional cost, will search sex offender registries. See ARPOLA, RESIDENT SCREENING AND TENANT BACKGROUND CHECKS, available at www.arpola.org/national-discournts/tenant-screening (last visited Dec. 14, 2011). Screening for sex offender status is likely to increase, given that the law regarding a landlord’s liability for renting to potentially dangerous persons, of whose background the landlord knew and who later

and a private landlord receiving information that a prospective tenant is on a sex offense registry has unbridled discretion in how to use this information. Because private landlords may refuse to rent based on an offense that occurred at any point in time, they can be even *more* restrictive than those participating in the federally subsidized housing programs.¹¹⁰

2. Federally Subsidized Rental Housing

For many low-income seniors, federally subsidized programs present the most affordable housing option. Federal subsidies include: 1) tenant-based subsidies, such as vouchers that eligible tenants use in the private market; and 2) “project-based” subsidies—i.e., subsidies that are linked to the physical buildings and that include privately-owned buildings as well as “public housing,” which is publically owned and operated by local “Public Housing Authorities”¹¹¹ (PHAs). Congress has determined that for *most* federally subsidized units there should be heightened scrutiny of prospective tenants who may have engaged in criminal activity,¹¹² including a prohibition on admitting anyone subject to a *lifetime* registration requirement under a state sex offender registration statute.¹¹³ PHAs and owners *may* also deny admission to those who, “during a reasonable period of time preceding the date when the

committed a crime, is in flux. Historically, “courts have been reluctant to impose liability on landlords for intervening third-party criminal acts” See 12 Causes of Action 2d 267 § 1 (Originally published in 1999); see also Shelley Ross Saxer, “Am I My Brother’s Keeper?”: *Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 NEB. L. REV. 522, 525 (2001) (citations omitted); 34 Causes of Action 2d 105 § 9 (Originally published in 2007); N.W. by J.W. v. Anderson, 478 N.W.2d 542 (Minn. Ct. App. 1991) (finding the defendant landlords not liable to the infant tenant who was a victim of a sexual assault, or to her mother, for failing to warn them that another tenant was convicted of child molestation). However, the current trend is toward recognizing landlord liability for negligent renting—frequently analogized to negligent hiring, see Saxer, *supra*, at 565—when the crime was both foreseeable and preventable. See 12 Causes of Action 2d 267 § 1. Regardless of the specific foreseeability standard employed in a given jurisdiction, see Saxer, *supra*, at 527, courts should take into account what is known about recidivism—e.g., that it declines with age and the time spent in the community, see *infra* Part III.B.1-2.

110. See *infra* Part II.B.2.

111. For an excellent outline of law and policy regarding federally subsidized housing, see NAT’L HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS (3d ed. 2004 & Supp. 2010). Occasionally, tenants may be eligible for more than one subsidy in a single unit, resulting in two sets of program regulations governing their tenancies. *Id.* at 125. For discussion of federal programs in the context of sex offenders, see, e.g., AN AFFORDABLE HOME ON REENTRY, *supra* note 88.

112. See 42 U.S.C. § 13661 (2012).

113. See 42 U.S.C. § 13663(a) (2012). Additionally, PHAs and owners are required to establish standards that deny housing to those they determine are illegally using a controlled substance, or whose pattern of use or abuse of a controlled substance “may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.” 42 U.S.C. § 13661(b)(1)(2012). A small number of HUD programs are exempt from these screening requirements, including the Low Income Housing Tax Credit program (LIHTC), Shelter Plus Care program, Supportive Housing Program, and Housing Opportunities for People with AIDS Program, though the total number of units represented in the later three programs is small. See AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 7 (citations omitted).

applicant household would otherwise be selected for admission,” have engaged in any “drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees.”¹¹⁴

In the tenant-based subsidy program,¹¹⁵ applicants must meet federal admissions standards and the landlord’s *own* screening criteria. As indicated above, those subject to *lifetime* registration due to a sex offense conviction are barred.¹¹⁶ PHAs also have the discretion to exclude those who have participated in violent criminal activity and “[o]ther criminal activity” under certain circumstances,¹¹⁷ provided that activity occurred “in a reasonable time before admission.”¹¹⁸ PHAs have the discretion to define this timeframe.¹¹⁹

In the project-based subsidy programs, with a few exceptions, owners must follow the same admissions exclusions and discretionary standards discussed above.¹²⁰ Additionally, private landlords who operate buildings with project-based subsidies may establish their own admissions standards, subject to federal regulations and guidelines.¹²¹ Other federally assisted programs have more specific guidelines regarding admissions. For example, in the Section 8 Moderate Rehabilitation Program, owners are required to “adopt written tenant selection procedures . . . reasonably related to program

114. 42 U.S.C. § 13661(c)(1) (2012). *See also* Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule, 66 Fed. Reg. 28,776 (May 24, 2001) (permitting Public Housing Authorities access to official criminal records) (codified at 24 C.F.R. §§ 5.850-5.861 (2012)). All applicants to federally-assisted housing programs are entitled to limited due process protections if denied admission. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970). Applicants are entitled to written notice of the decision that contains the reasons for the denial and information on the process for requesting a review of the decision. *See AN AFFORDABLE HOME ON REENTRY, supra* note 88, at 51-52 (and citations contained therein).

115. For an overview of the Housing Choice Voucher Program, *see, e.g.,* THE OFFICE OF PUBLIC AND INDIAN HOUSING, U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, VOUCHER PROGRAM GUIDEBOOK: HOUSING CHOICE (2001), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook.

116. 24 C.F.R. § 982.553 (a)(2)(i) (2012). The federal regulations authorize the PHA to access law enforcement records for this purpose. *See* 24 C.F.R. § 5.903(a) (2012) and 24 C.F.R. § 5.902(b) (2012) (defining law enforcement agency). For further discussion on registration and notification requirements, *see supra* Part I.

117. 24 C.F.R. § 982.553(a)(2)(ii)(A)(1)-(4) (2012). PHAs also may exclude those who participated in drug-related criminal activity. *Id.*

118. 24 C.F.R. § 982.553(a)(2)(ii)(A) (2012).

119. *See* 24 C.F.R. § 982.553(a)(2)(ii) (2012).

120. 24 C.F.R. § 5.855(a) (2012). To meet this goal, background screening must be conducted; this inquiry may be performed by the owner or the local PHA, under contract with the owner. *See* 24 C.F.R. §§ 5.903(d), .905(b) (2012). If the PHA conducts the screening for the owner, it must obtain the records from a law enforcement agency. *See* 24 C.F.R. § 5-903(d)(1) (2012). If the owner conducts the screening independently, the regulations do not define or limit the source of the records.

121. *See AN AFFORDABLE HOME ON REENTRY, supra* note 88, at 169.

eligibility and an applicant's ability to perform the obligations of the lease."¹²² Interestingly, a small number of federally assisted housing programs, including the Low Income Tax Credit Program (LIHTC), are not subject to the statutory bar on accepting lifetime registrants on sex offender registries.¹²³

Seniors also may rent public housing units, housing built, owned, and operated by PHAs for low-income tenants. PHAs apply federal law and locally developed policies.¹²⁴ Applicants to public housing are subject to the same mandatory restrictions and discretionary exclusion standards described above. Additionally, PHA policies are required to preclude the "admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment."¹²⁵ Public housing regulations also provide that PHAs shall develop tenant selection criteria, which "shall be reasonably related to the individual attributes and behavior of an applicant."¹²⁶ PHAs may consider all relevant information in screening applicants, including crimes of physical violence and "other criminal acts which would adversely affect the health, safety or welfare of other tenants."¹²⁷ A unique aspect of the public housing program is that PHAs are awarded points for implementing policies and procedures that screen out and deny admission to certain applicants with criminal histories.¹²⁸

Thus, although many subsidized programs are not required to exclude those convicted of sex offenses, many have that discretion. The programs with the least discretion are the public housing program and the Low Income Taxpayer Program, making those possible housing options for seniors convicted of sex offenses.¹²⁹

Since the enactment of these admissions restrictions, the federal government has been coordinating efforts to facilitate a successful "reentry" for those returning to our communities from the criminal justice system.¹³⁰ In

122. 24 C.F.R. § 891.610(a) (2012).

123. *See generally* 26 U.S.C. § 42 (2012).

124. *See* 24 C.F.R. § 960.202(a) (2012).

125. 24 C.F.R. § 960.202(a)(2)(iii) (2012).

126. 24 C.F.R. § 960.203(a) (2012). Local policies regarding admissions and occupancy may be found in the annual and five-year plans that PHAs are required to develop and submit to HUD. *See AN AFFORDABLE HOME ON REENTRY*, *supra* note 88, at 168.

127. 24 C.F.R. § 960.203(c)(3) (2012).

128. 24 C.F.R. § 960.203(b) (2012). The articulated goal of this policy is to facilitate meeting the demand of families for assisted housing. *Id.*

129. For a discussion of arguments available to those convicted of sex offenses and seeking subsidized housing, *see AN AFFORDABLE HOME ON REENTRY*, *supra* note 88, at 43-46, 51-58, and 155-61. Applicants to subsidized housing have additional fair housing protections. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance and applies to all HUD-supported housing. *See* Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000d-2000d-7 (2012)). However, discrimination claims in this context are not likely to be viable. *See supra* Part II.B.1.

130. President George W. Bush signed into law the Recidivism Reduction and Second Chance Act of 2007, which authorizes funding for a variety of projects to assist those convicted

June of 2011, HUD Secretary Shaun Donovan notified PHAs of the need to assist those released from prison by enabling them to return to their families and to secure subsidized housing when appropriate.¹³¹ Noting the narrow circumstances when PHAs are forbidden from admitting applicants,¹³² the Secretary encouraged PHAs to exercise their discretion in considering applicants exiting the criminal justice system.¹³³ Secretary Donovan particularly emphasized the value of evidence of rehabilitation and willingness to participate in counseling programs.¹³⁴ In a second letter issued in April of 2012 and directed to owners of HUD-assisted housing, Secretary Donovan encouraged owners to “develop policies and procedures that allow ex-offenders to rejoin the community.”¹³⁵ These recent policy statements reflect a growing awareness of the challenges those convicted of sex offenses and other crimes face in securing suitable housing and encourage flexibility; however, they simultaneously conflict with current statutes and regulations as discussed above.

3. Skilled Nursing and Assisted Living Facilities

Seniors required to register as sex offenders who are in need of supportive living environments and nursing care face similar challenges as those seeking housing in the community. Administrators of skilled nursing facilities¹³⁶ and

of crimes in reintegrating into society. See Pub. L. No. 110-199, 122 Stat. 657 (2007). Refunded annually, this act most recently resulted in an appropriation of \$83 million for reentry programs. See Press Release, U.S. Dep’t of Justice, Attorney General Holder Convenes Federal Reentry Council (Sept. 27, 2011), available at <http://www.justice.gov/opa/pr/2011/September/11-ag-1263.html> (last visited Mar. 25, 2013). Additionally, Attorney General Eric Holder convened the first meeting of the Federal Interagency Reentry Council in 2011, which noted a “reciprocal relationship” between incarceration and homelessness and which established as one of its many goals identifying and supporting housing initiatives that can assist with successful transitions into the community. Fed. Interagency Reentry Council, *Reentry in Brief*, May 2011, available at http://www.nationalreentryresourcecenter.org/documents/0000/1059/Reentry_Brief.pdf.

131. See Letter from Shaun Donovan, HUD Secretary, and Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing, to PHA Directors (June 17, 2011), available at <http://www.fhcmichigan.org/wp-content/uploads/2011/06/Reentry-letter-from-Donovan-to-PHAs-6-17-11.pdf> [hereinafter *First Letter from Secretary Donovan*].

132. These include circumstances when the applicant is a *lifetime* registrant on a sex offender list or has manufactured or produced methamphetamines on the housing premises. See *id.*

133. See *id.*

134. See *id.*

135. See Letter from HUD Secretary Shaun Donovan and Acting Assistant Secretary for Housing-Federal Housing Commissioner Carol J. Galante (undated), announced Apr. 2, 2012, available at <http://www.nationalreentryresourcecenter.org/announcements/in-letter-to-property-owners-hud-secretary-clarifies-agencys-position-on-renting-hud-subsidized-properties-to-people-with-criminal-records> [hereinafter *Second Letter from Secretary Donovan*]. For further discussion, see *In Letter to Property Owners, HUD Secretary Clarifies Agency’s Position on Renting HUD-Subsidized Properties to People with Criminal Records*, THE NATIONAL REENTRY RESOURCE CENTER (Apr. 2, 2012), <http://www.nationalreentryresourcecenter.org/announcements/in-letter-to-property-owners-hud-secretary-clarifies-agencys-position-on-renting-hud-subsidized-properties-to-people-with-criminal-records> (last visited June 4, 2012).

136. “Skilled nursing facilities” are defined as institutions “generally engaged in providing

assisted living facilities¹³⁷ frequently exclude applicants based on their backgrounds—decisions that are difficult to challenge.¹³⁸ Despite the applicability of antidiscrimination provisions,¹³⁹ those convicted of sex offenses have not successfully argued that they have a disability within the meaning of the fair housing laws, the ADA, or the Vocational Rehabilitation Act.¹⁴⁰ However, some commentators urge facilities to be wary of excluding

residents with skilled nursing care and related services” or “rehabilitation services.” 42 U.S.C. § 1395i-3(C)(5)(A) (2012). This provision defines skilled nursing facility for purposes of certification under the Medicare program. See also 42 U.S.C. § 1396r (2012), which defines “nursing facility” for the purpose of certification under the Medicaid program. The terms “skilled nursing facility” and “long-term care facility” are used interchangeably in this article.

137. An assisted living facility is generally defined as “a congregate residential setting that provides or coordinates personal services, 24-hour supervision and assistance (scheduled and unscheduled), activities, and health related services.” U.S. Dep’t of Health and Human Servs., *A National Study of Assisted Living for the Frail Elderly: Results of a National Survey of Facilities*, 3 (1999), available at <http://aspe.hhs.gov/daltcp/reports/facres.pdf>. See also Andrea C. Barach & Wendy A. Chow, *Government Insured Financing Available for Health Care Facilities-We’re from the Government and We’re Here to Help-Really!*, 13 QUINNIPIAC HEALTH L.J. 203, 213 (2010) (noting the lack of uniformity in definitions); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-97-93, REPORT TO THE HON. RON WYDEN, U.S. SENATE, LONG-TERM CARE: CONSUMER PROTECTION AND QUALITY-OF-CARE ISSUES IN ASSISTED LIVING 3 (1997), available at <http://www.gao.gov/archive/1997/he97093.pdf> (stating that “there is no uniform assisted living model, and considerable variation exists in what is labeled an [assisted living facility].”).

138. Recent scholarship has focused on discrimination against those who are disabled in the nursing home and assisted living context. See, e.g., Eric M. Carlson, *Disability Discrimination in Long Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities* 22-26 (Berkeley Electronic Press, Paper 1628, 2006), <http://law.bepress.com/cgi/viewcontent.cgi?article=7600&context=expresso> [hereinafter *Discrimination in Long Term Care*] (providing a summary of case law applying the Fair Housing Act to nursing homes and assisted living facilities). It is not uncommon for an applicant with severe mental health or cognitive issues to be denied admission based on an assertion that her needs exceed those the facility can provide. Such actions can give rise to a successful discrimination case under federal law. See, e.g., *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002 (3d Cir. 1995) (in a case brought under the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, the Third Circuit reversed the trial court, finding that the patient’s Alzheimer’s disease was a disability under the Act, and that admitting her and offering her necessary services were reasonable accommodation required by the law).

139. Both skilled nursing facilities and assisted living facilities are considered “dwellings” under fair housing law. *Discrimination in Long Term Care*, *supra* note 138, at 22-26 (providing a summary of case law applying the Fair Housing Act to nursing homes and assisted living facilities).

140. A Westlaw search revealed nothing to contradict this statement. *But see* John Doe v. Police Comm’r of Boston et.al., 951 N.E.2d 337 (Mass. 2011). Plaintiff challenged a statute making it illegal for a person characterized as a level three sex offender to reside in a care home or other long term care facility. See *id.* at 338. The court determined that due to the liberty and property interests at stake, Plaintiff “must have an opportunity to establish that he poses minimal risk to the community the statute was intended to protect and, if removed from the rest home, will likely become homeless and expose himself to significant harm.” *Id.* at 343. The court concluded that because of the absence of due process, the statute was unconstitutional as applied to him. See *id.* at 344.

those with disabilities whose condition may have led to their offense.¹⁴¹

The only other anti-discrimination provision in this context, which prohibits discrimination based upon sources of payment,¹⁴² applies strictly to skilled nursing facilities.¹⁴³ Assisted living facilities are governed largely by state law;¹⁴⁴ and a cursory examination of applicable state laws has revealed no additional protections against discrimination.¹⁴⁵

Most skilled nursing or assisted living facilities refuse to admit people convicted of sex offenses simply because they do not want those residents, regardless of the minimal level of risk they may pose.¹⁴⁶ In fact, some states

141. See, e.g., Cynthia A. Alcantara & Nicholas J. Lynn, *Convicted Sex Offenders: Ramifications for Long Term Care*, 11 HEALTH LAW. NEWS 8, 9 (2007) (noting that, although sex offender status is not a disability, “[i]f a long term care facility denies admission to a prospective resident whose mental condition may have led to the sex offense, that prospective resident may have standing to bring a claim against the facility under federal discrimination law”) [hereinafter *Ramifications for Long Term Care*]; JEANNIE A. ADAMS & MICHELLE E. HOGAN, VIRGINIA DEP’T OF HEALTH, DEP’T OF LICENSURE AND CERTIFICATION, CONVICTED SEX OFFENDERS: NEW RESPONSIBILITIES FOR LONG TERM CARE FACILITIES (n.d.), at 3, available at <http://www.vdh.state.va.us/OLC/Laws/documents/Sex%20Offender%20OLC%20Advisory.pdf> [hereinafter NEW RESPONSIBILITIES] (arguing that facilities should be cautious before denying “admission to a prospective resident who has a mental disorder that led to the commission of the offense”).

142. See 42 U.S.C. § 1395i-3(C)(5)(A)(i)(1) (2012); 42 C.F.R. § 483.12(d) (2012). For further discussion of this issue, see, e.g., Jennifer L. Wright, *Medicaid Discrimination in Long Term Care*, 34 ELDER LAW NEWSLETTER, no. 3 (Oregon State Bar), Summer 2002, at 1-4, available at http://www.osbar.org/_docs/sections/elder/newsletters/elder_sum02.pdf (describing ways in which facilities may pressure applicants, residents and family members not to apply for Medicaid). For an article directed to family advocates that addresses this issue, see Eric Carlson, *Twenty Common Nursing Home Problems and How to Resolve Them*, NATIONAL SENIOR CITIZENS LAW CENTER, June 2010, available at <http://www.nslc.org/wp-content/uploads/2011/02/20-Common-Problems-Nov-2010-Final.pdf>.

143. See 42 C.F.R. § 483.12(d).

144. For example, New York defines an assisted living facility as “a facility or facilities established pursuant to this article to provide a comprehensive, cohesive living arrangement for the elderly, oriented to the enhancement of the quality of life, pursuant to the terms of the fee-for-service continuing care contract on a fee-for-service schedule.” HEALTH CARE PROVIDERS—TECHNICAL CORRECTIONS—FEE-FOR-SERVICE CONTINUING CARE, 2004 Sess. Law News of N.Y. Ch. 545 (S. 7733) (McKINNEY’S). To be licensed, the facility must, at a minimum, “provide access to onsite geriatric services, including, but not limited to, nursing facility services, services provided by an adult care facility, home health services, a meal plan, social services and independent living units.” *Id.* California uses the term “residential care facility for the elderly,” which is defined as “a housing arrangement chosen voluntarily by persons 60 years of age or over, or their authorized representative, where varying levels and intensities of care and supervision, protective supervision, or personal care are provided, based upon their varying needs, as determined in order to be admitted and to remain in the facility. Persons under 60 years of age with compatible needs may be allowed to be admitted or retained in a residential care facility for the elderly as specified in Section 1569.316.” CAL. HEALTH & SAFETY CODE, § 1569.2(k) (West 2012).

145. A Westlaw search revealed no additional information regarding this subject matter.

146. *Ramifications for Long Term Care*, *supra* note 141, at 8-13 (noting that federal law does not preclude facilities from discriminating on the basis of sex offender status; and the authors, writing for health lawyers, further emphasize that some state laws may explicitly allow you to deny admission on this basis).

and facilities are becoming less inclusive, responding to public outcry following a small number of incidents of sexual offending.¹⁴⁷ Facilities are considering whether they have a duty to inquire about applicants' criminal backgrounds, law enforcements' duties to inform facilities about registered offenders, and the permissibility and advisability of alerting staff and other residents to a new resident's history.¹⁴⁸ Virginia, for example, requires facilities to notify residents of the sex offender registry and how to access it.¹⁴⁹ In Minnesota, those on sex offender registries and admitted to a nursing home are required to disclose their status to nursing home admissions personnel, who then must notify all residents that a "predatory offender" has been admitted to the facility.¹⁵⁰ Some states have taken even more extreme positions. For example, legislation currently pending in Iowa would ban people considered to

147. See, e.g., Clark Kauffman, *Update in Nursing Home Assault Case: Cubbage to be Confined as Sexually Violent Predator*, DES MOINES REGISTER, Nov. 21, 2011, <http://www.desmoinesregister.com/article/20111121/NEWS01/111121020/1001/news/Update-nursing-home-assault-case-Cubbage-confined-sexually-violent-predator> (resident of nursing home allegedly sexually assaulted another resident); Alex Branch, *Nursing Home Listed as Home to 27 Registered Sex Offenders*, STAR TELEGRAM, (May 28, 2011), <http://www.star-telegram.com/2011/05/28/3111690/lake-worth-nursing-home-listed.html>. For stories expressing concern about people convicted of sex offenses living in nursing homes, despite the absence of any problems, see, e.g., Harve Jacobs, *Special Report: Sex offenders living in nursing homes*, LIVE5NEWS (Feb. 1, 2012), <http://www.live5news.com/story/16651071/special-report-sex-offenders-living-in-nursing-homes>; *More than A Dozen Sex Offenders Living in Kansas Nursing Homes*, LJWORLD (Oct. 17, 2011), <http://www2.ljworld.com/news/2011/oct/17/more-dozen-sex-offenders-living-kansas-nursing-hom/>.

148. For a discussion of these issues, see *Ramifications for Long Term Care*, *supra* note 141, at 8-13 (addressing admissions, existing residents, discharge, and notification to other residents in this context). For a discussion of whether a resident's status as a registered sex offender is protected health information, see, e.g., Patricia A. Markus & Erin E. Jochum, *Balancing Act: Privacy Rights of Convicted Sex Offenders*, SMITH AND MOORE, LLP, HEALTH CARE LAW NOTE, June 2007, available at http://www.healthcarelawnote.com/articles/pdfs/hcln_june2007.pdf (arguing that a resident's status as a registered sex offender falls under an exception to the HIPAA, permitting disclosure when necessary to prevent or lessen a serious threat); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-326, LONG TERM CARE FACILITIES: INFORMATION ON RESIDENTS WHO ARE REGISTERED SEX OFFENDERS OR PAROLED FOR SOME OTHER CRIME 17-18 (2006), available at <http://www.gao.gov/new.items/d06326.pdf> (noting the different views among state, facility, and industry officials about whether HIPAA restricts the release of information about residents convicted of sex offenses to other residents) [hereinafter GAO REPORT].

149. See VA. CODE ANN. §§ 32.1-127, 63.2-1732 (2012). Additionally, facilities must register to receive updates on those added to the state sex offender registry. See VA. CODE ANN. §§ 9.1-914, 32.1-127, 63.2-1732 (2012). For discussion of this legislation, see NEW RESPONSIBILITIES, *supra* note 141. This legislation was implemented in the absence of any problems and a finding of only 19 people convicted of sex offenses residing in long term care and assisted living facilities in the state. *Id.* at 1.

150. MINN. STAT. §§ 243.116 (4b) (b), (d) (d) (2012). See also, Dave Ranney, *Advocates Disagree Over Former Sex Offenders in Nursing Homes*, KANSAS HEALTH INSTITUTE (Feb. 2012), <http://www.khi.org/news/2012/feb/07/advocates-disagree-over-former-offenders-nursing-h/> (last visited May 9, 2012) (discussing testimony on Kansas legislation that would require that residents be notified of admitted residents who are on a major crimes registry).

be “sexually violent predators” from nursing homes and require notification to residents, their emergency contacts, and all visitors when people on sex offender registries are admitted.¹⁵¹ A small number of states have developed alternative housing options for this population. Minnesota created a “forensic nursing home” designed to house aging people convicted of sex offenses and other crimes¹⁵² and Georgia is exploring developing a nursing home for those convicted of sex offenses.¹⁵³

The degree of risk posed by seniors convicted of sex offenses and living in nursing homes or assisted living facilities is unknown. Typically, facilities do not correlate incidents of abuse with a resident’s background or prior conviction.¹⁵⁴ Significantly, of those facility administrators interviewed for a 2006 Government Accounting Office (“GAO”) report, most indicated they had greater concerns regarding the behavior of residents with mental illnesses and cognitive issues than those convicted of crimes.¹⁵⁵ Because of the absence of data linking sexual abuse in facilities with those convicted of sex offenses, the GAO encouraged facilities “to focus on residents’ behaviors versus their prior convictions when assessing the potential for committing abuse.”¹⁵⁶ Due to the small number of those convicted of sex offenses residing in facilities and empirical data that recidivism declines with age, it is suspected that abuse by residents convicted of crimes is not widespread.¹⁵⁷

These elders are and will continue to be living in our communities,

151. IOWA HF-2422 (General Assembly 84), available at <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=false&ga=84&hbill=HF2422>; IOWA S-5219 (general assembly 84). See also Sex Predators Targeted in Bills, DESMOINESREGISTER (Apr. 18, 2012), <http://www.desmoinesregister.com/article/20120419/NEWS/304190074/1007/NEWS05>.

152. See Michael Fischenich, \$8.8 Million St. Peter Facility Scheduled to Open, THE MANKATO FREE PRESS, July 29, 2010, available at <http://mankatofreepress.com/local/x1446649978/-8-8-million-St-Peter-facility-scheduled-to-open>. St. Peter provides “inpatient services and treatment to people who are committed by the court as a sexual psychopathic personality or a sexually dangerous person.” Minnesota Dep’t of Human Servs., *Department Overview*, available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_000256.

153. *Proposal calls for sex offender nursing home*, 11ALIVE (Jan. 24, 2012), <http://origin.11alive.com/news/article/224117/3/Proposal-calls-for-sex-offender-nursing-home> (last visited May 9, 2012). For discussion of the merit of such facilities, see *infra* Part IV.G.

154. See GAO REPORT, *supra* note 148; see also PAMELA BROWN AND JANE K. STRAKER, CRIMINAL OFFENDERS IN OHIO NURSING HOMES: FACILITY PRACTICES, PREVALENCE AND PROBLEMS, BRIEF REPORT, at 1 (2012), available at <http://sc.lib.muohio.edu/bitstream/handle/2374.MIA/4465/Criminal%20Offenders%20in%20Ohio%20Nursing%20Homes%20FINAL.pdf?sequence=1> (noting that “predicting which residents are likely to abuse other residents is problematic; research has not documented the danger that residents with criminal backgrounds pose while living in long-term care facilities and a link has not been shown between reports of resident-to-resident abuse and those who have a criminal record or are registered sex offenders”).

155. See GAO REPORT, *supra* note 148, at 11.

156. *Id.* at 26.

157. See *id.* at 17. For further discussion on the relationship between recidivism and age, see *infra* Part III.B.1.

making it imperative that society address the social and legal issues emerging from these dynamic factors. The confluence of these trends creates a perfect storm that must be addressed, requiring that state and federal policies should be modified to better protect public safety *and* enable those seniors newly released or already living in the community to thrive as law-abiding citizens in their elder years.

III. FAILING TO HEED THE EVIDENCE

Since the enactment of sex offender registration and notification laws on the federal and state level and of the plethora of state and local ordinances restricting residency, a growing body of social science research challenges these laws' underpinnings. Although the United States Supreme Court has endorsed the view that sex offenders pose a high risk of reoffending,¹⁵⁸ and some members of Congress believe recidivism rates are as high as 40, 74, and 90 percent for sex offenders,¹⁵⁹ these statements are factually inaccurate. Also untrue are assumptions about the effectiveness of registration and notification requirements as well as residency restrictions in protecting the public. In fact, research suggests that these policies may enhance re-offense rates and impede law enforcement efforts to monitor those convicted of sex offenses. The empirical research summarized in this section dictates that laws and policies restricting housing opportunities for people like Mr. Bianco, who have been convicted of sex offenses, be modified to promote these individuals' stability and, where appropriate, rehabilitation, and to better protect the public.

A. *The Myth Upended*

As discussed in Part I of this article, the United States' laws and policies are driven by the high profile murders of children and the assumptions that "sex offenders" are a homogeneous group of "predators" and "pedophiles" who are all destined to reoffend. But the reality is far different, and the research consistently demonstrates that recidivism¹⁶⁰ rates for people who have

158. See *Smith v. Doe*, 538 U.S. 84, 93 (2003).

159. See *No Easy Answers*, *supra* note 10, at 25.

160. There is no uniform definition of recidivism. In various studies, it has been defined as: "re-arrest," see Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL'Y & L. 284, 297 (2008) [hereinafter *Does a Watched Pot Boil?*]; "reconviction," see IOWA DEPARTMENT OF HUMAN RIGHTS, *The Iowa Sex Offender Registry and Recidivism*, 4 (2000), available at http://www.humanrights.iowa.gov/cjpp/images/pdf/01_pub/SexOffenderReport.pdf; or "other contacts" with the criminal justice system, see NEW YORK STATE DIVISION OF PROBATION AND CORRECTIONAL ALTERNATIVES, *Research Bulletin: Sex Offender Populations, Recidivism and Actuarial Assessment*, 3 (2006), available at <http://dpc.state.ny.us/pdfs/somgmtbulletinmay2007.pdf> (defines recidivism as including "a new arrest, charge, conviction or incarceration"); Berthold Brunfeld & Kjell Noreik, *Recidivism Among Sex Offenders: A Follow-Up Study of 541 Norwegian Sex Offenders*, 9 INT'L J.L. & PSYCHIATRY 95, 95-102 (1986) [hereinafter *Follow Up Study*] (defining recidivism as "registered by legal sanctions," which could include convictions, fines, security detentions, and suspended prosecutions). Research studies also examine follow-up

been convicted of a sex offense are substantially lower than most people believe,¹⁶¹ and, in fact, are among the lowest of all people convicted of a crime.¹⁶² The Bureau of Justice Statistics reports that “compared to non-sex offenders released from State prison, sex offenders had a lower overall rearrest rate.”¹⁶³ Data on probationers in New York State indicates that for those on probation, “sex offenders are arrested and/or convicted of committing a new sex crime at a *lower* rate than other offenders who commit other new non-sexual crimes.”¹⁶⁴ One study that compared recidivism rates of those convicted of sex offenses with those convicted of other offenses found “the frequency of repeat sexual offences (sic) is rather modest.”¹⁶⁵ A 1994 Bureau of Justice Statistics study of almost 10,000 people convicted of rape and sexual assaults found that within three years, only 3.5 % were convicted of a new sex crime.¹⁶⁶

Research suggests that recidivism rates do vary depending on the type of sex offense,¹⁶⁷ with variables including the nature of the offense, prior offending history, the age of the offender at the time of the crime, history of treatment and/or therapy, and the length of time a person has been offense-free.¹⁶⁸ However, all relevant research indicates that recidivism rates are highest immediately following release, and decline dramatically over time.¹⁶⁹

B. Factors Supporting Desistance from Crime

Among the factors supporting desistance from crime are age, time in the community, and stable housing, which independently and together dictate that existing housing laws and policies should be altered to encourage opportunities

periods of varying amounts of time. *See, e.g., No Easy Answers, supra* note 10.

161. *See* Dwight H. Merriam & Patricia E. Salkin, *Residency Restriction for Convicted Sex Offenders: A Popular Approach on Questionable Footing*, 9 (4) *New York Zoning Law & Practice Report*, 3 (Jan/Feb. 2009) (reporting that the public believes that a mean percentage of 75% and a median percentage of 80% of those convicted of a sex offense will reoffend sexually (citing Levenson, Brannon et al., *Public Perceptions about Sex Offenders and Community Protection Policies*, 7 *ANALYSES OF SOC. ISSUES & PUB. POL’Y* 1, 7 (2007)).

162. *See id.* at 8.

163. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* 2 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

164. NEW YORK STATE DIV. OF PROBATION AND CORRECTIONAL ALTERNATIVES, *RESEARCH BULLETIN: SEX OFFENDER POPULATIONS, RECIDIVISM AND ACTUARIAL ASSESSMENT 4* (2006), available at <http://dpca.state.ny.us/pdfs/somgmtbulletinmay2007.pdf>.

165. *Follow Up Study, supra* note 160, at 101. Eighty-seven percent of those studied showed no recidivism. *Id.* The one exception the authors noted was for the crime of rape. *Id.*

166. *See No Easy Answers, supra* note 10, at 26.

167. *See, e.g., No Easy Answers, supra* note 10, at 27.

168. *See id.* at 26.

169. *See, e.g., No Easy Answers, supra* note 10, at 29; U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

for seniors like Mr. Bianco to acquire stable housing.¹⁷⁰

1. "Aging Out"

For years, research has consistently confirmed one fact: recidivism rates decline with age.¹⁷¹ "[T]he aging effect has been recognized as one of the most robust findings in the field of criminology."¹⁷² This correlation exists regardless of the country or gender of the offender, whether the offender is incarcerated or in the community, the century in which the offender lived, or the type of crime committed.¹⁷³

Age is also a relevant risk factor for those convicted of sex offenses, and in fact, recent research has suggested that aging may be more pronounced than previously thought in lowering recidivism.¹⁷⁴ A Swedish study of those convicted of sex offenses concluded that recidivism rates decreased significantly in older age bands.¹⁷⁵ Another study found that when controlling for factors measured in the Static 99—an actuarial tool used to estimate sexual

170. While there are many theoretical views of desistance, this article adopts the view of John H. Laub and Robert J. Sampson set forth in their article, *Understanding Desistance from Crime*, 28 CRIME AND JUSTICE: A REVIEW OF THE RESEARCH 1-69 (2001) [hereinafter *Understanding Desistance*]. Laub and Sampson describe desistance as follows: "Termination is the time at which criminal activity stops. Desistance by contrast, is the causal process that supports termination of offending. . . . [T]he process of desistance maintains the continued state of nonoffending." *Id.* at 11.

171. *See id.* at 5 ("It is well known that crime declines with age in the aggregate population."); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331 (2009) [hereinafter *Redemption*] (stating that "aging is one of the most powerful explanations of desistance").

172. Howard E. Barbaree, Calvin M. Langton, Ray Blanchard & James M. Cantor, *Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components*, 36 CRIM. JUST. & BEHAV. 443, 444 (2009) [hereinafter *Aging Versus Stable Enduring Traits*] (citing Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials are Used to Identify Sexually Violent Predators: An Application of Bayes's Theorem*, 12 PSYCHOL. PUB. POL'Y & L. 56 (2006)).

173. *See id.* at 443-65.

174. *See* Howard E. Barbaree, Ray Blanchard & Calvin M. Langton, *The Development of Sexual Aggression Through the Life Span: The Effect of Age on Sexual Arousal and Recidivism Among Sex Offenders*, 989 ANN. N.Y. ACAD. SCI., 59, 59-71 (2003) [hereinafter *Sexual Aggression*]. *But see* Leam. A. Craig, *Effect of Age on Sexual and Violent Reconviction*, 55 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 75, 89 (2011) (suggesting that, although recidivism rates for sexual offenses do decline with age, there is a plateau effect between ages 35-44).

175. *See* Seena Fazel, Gabriella Sjostedt, Niklas Langstrom, & Martin Grann, *Risk Factors for Criminal Recidivism in Older Sex Offenders*, 18 SEXUAL ABUSE 159, 159-67 (2006). The authors attribute the declining rate to a combination of lower sexual arousal among older men, increased self-control, and changes in access to victims. *See id.* at 166. The authors do note one exception: for those offenders whose victim was a stranger, there was a greater risk of recidivism. *See id.* at 164. *See also* *Sexual Aggression*, *supra* note 174, at 61-63 (describing a study that measured penile blood volume change while the participants—convicted sex offenders—observed and listened to narratives of sexual interactions, where the researchers concluded that the decrease in erotic response was directly related to age).

offense recidivism rates—the recidivism rate increased slightly between ages eighteen and thirty, and then declined.¹⁷⁶ This study demonstrated recidivism rates at 14.8% for those aged forty and under, and at 2% for those aged sixty and over.¹⁷⁷ In a study taking into account actuarial information reflecting antisocial behavior and sexual deviance as well as age at release, the authors concluded that age at release was a predictor of both violent and sexual recidivism.¹⁷⁸ These findings were consistent across different sex offender subgroups.¹⁷⁹ Until relatively recently, actuarial instruments that measure the risk of reoffending took into account the greater risks of recidivism for those under age twenty-five or thirty, but failed to make any adjustments for older populations.¹⁸⁰ The research on this issue is so robust that social scientists are reevaluating these tools to better account for the effects of aging.¹⁸¹

The above empirical findings, combined with the decreasing mobility and declining health of the elderly who have been convicted of sex offenses, suggest that they present less of a risk to the community than commonly thought. In fact, of those released to the community, they are probably *the least likely* to reoffend.¹⁸²

2. Time in Community

Research indicates that a significant factor in predicting future criminal

176. See generally R.K. Hanson, *Does Static-99 Predict Recidivism Among Older Sex Offenders?*, 18 SEXUAL ABUSE 343 (2006), available at <http://static99.org/pdfdocs/Hanson2006.pdf>.

177. See *id.* at 351.

178. See *Aging Versus Stable Enduring Traits*, *supra* note 172, at 456.

179. See *id.* at 459. Those subgroups reflected individuals with convictions in the following categories: (1) new conviction for nonviolent offense; (2) new conviction for a contact offense with a sexual element; (3) new conviction for a violent offense; and (4) new conviction for any type of crime at all. See *id.* at 449.

180. See Richard Wollert, Elliot Cramer, Jacqueline Waggoner, Alex Skelton & James Vess, *Recent Research Underscores the Importance of Using Age-Stratified Actuarial Tables in Sex Offender Risk Assessments*, 22 SEXUAL ABUSE 471, 472-73 (2010).

181. See *id.* Much of the research to date on recidivism among those convicted of sex offenses has examined those convicted in their youth to middle age, on average. See *Sexual Aggression*, *supra* note 174, at 69. As researchers Barabee et al. note, “If sexual aggression decreases with age, the actuarial estimates of probability of re-offense used routinely in offender assessments are based on samples of men who were released at a time in their lives when they were relatively more likely to reoffend.” *Id.* at 70. They conclude, therefore, that absent the implementation of age-stratification tables, the projected rates of recidivism “overestimate rates for older men” and that “the most stringent methods of control are applied as the offender’s risk for re-offense is decreasing.” *Id.* It is clear that recidivism rates decline with age; however, it is less clear why that is true. While an extended discussion of desistance theories is beyond the scope of this piece, some researchers emphasize the importance of informal social controls, social bonds, structure and meaningful activity, and the “knifing off” of “individual offenders from their immediate environment.” *Understanding Desistance*, *supra* note 170, at 49. Other important factors include “attachment to a conventional other such as a spouse, stable employment, transformation of personal identity, and the aging process.” *Id.* at 13.

182. See Richard Tewksbury & Jill Levenson, *When Evidence is Ignored: Residential Restrictions for Sex Offenders*, CORRECTIONS TODAY, Dec. 2007, available at <http://www.aca.org/publications/pdf/Tewksbury.pdf>.

activity is length of time in the community, particularly when considered in conjunction with other factors supporting desistance from crime.¹⁸³ One study reports that the risk of a police contact was greatest within the first six months of a previous contact.¹⁸⁴ The authors found that the “risk of recidivism for a cohort of offenders returning to the community peaks fairly quickly and then diminishes considerably with the passage of time.”¹⁸⁵ Other studies demonstrate that those who have offended in the past will have the greatest chance of reoffending within the first three years.¹⁸⁶ Ultimately, “the percentage of the population recidivating begins to approach zero after several years of follow-up.”¹⁸⁷ In a Philadelphia study, researchers compared males who had police contacts prior to age seventeen and arrests between the ages of eighteen and twenty-six with those with no police contacts prior to seventeen and no arrests between the ages of eighteen and twenty-six. Researchers concluded that although there remained a difference in the risk of offense between those with no prior offenses and those who offended prior to age seventeen, the difference was “substantively small in magnitude,” and the risk of a future criminal event was similar between the two groups.¹⁸⁸

3. Stable Housing Matters in Preventing Future Crime

The link between stable housing and reintegration is well known. As the Council of State Governments reports in *Reentry Housing Options: The Policymakers' Guide*, “When individuals are released from prison or jail, the ability to access safe and secure housing is critical to successful reentry.”¹⁸⁹ Housing is important not only for the physical space and safety it provides, but

183. Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 1101, 1108 (2006), available at http://reentrypolicy.org/publications/scarlet_letters_recidivism_does_old_criminal_record_predict_future_offending/ScarletLetters.pdf [hereinafter *Scarlet Letters*]. See also *Redemption*, *supra* note 171, at 328 (arguing that the increasing demand for criminal background checks and the accumulation and accessibility of electronic records make it difficult for people with a criminal record to achieve “redemption,” which they define as “the process of ‘going straight’ and being released from bearing the mark of crime”).

184. See *Scarlet Letters*, *supra* note 183, at 1106.

185. *Id.* at 1107 (citing Peter Schmidt & Ann D. Witte, *Predicting Criminal Recidivism Using ‘Split Population’ Survival Time Models*, in 40 JOURNAL OF ECONOMETRICS 141(1989)).

186. See *Redemption*, *supra* note 171, at 331.

187. *Scarlet Letters*, *supra* note 183, at 1107 (citing Schmidt & Witte, *supra* note 185).

188. *Id.* at 1117. In this study, which explored when criminal records are relevant in screening for employment purposes, the authors also concluded that the length of the reference period is important in predicting the relevance of this history. See *id.* Research does indicate that those convicted of violent offenses need to stay clean longer than those convicted of non-violent offenses in order to achieve the same degree of risk-tolerance. See *Redemption*, *supra* note 171, at 343. Similarly, those convicted of an offense at a younger age require more time of remaining offense-free to be comparable to those without conviction history. See *id.*

189. KATHERINE CORTES & SHAWN ROGERS, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, REENTRY HOUSING OPTIONS: THE POLICYMAKERS' GUIDE vii (2010), available at http://reentrypolicy.org/jc_publications/reentry-housing-options/Reentry_Housing_Options.pdf [hereinafter *Policymakers' Guide*].

also for establishing positive connections to the community.¹⁹⁰ In fact, housing has been defined to include “a sense of community, trust and bonds built with neighbors over time; the schools which educate our children; and the businesses which support the local economy and provide needed goods and services.”¹⁹¹ Without linkages to “the services and support that could facilitate their successful reintegration, [people reintegrating] end up reincarcerated for either violating the conditions of release or for committing a new crime.”¹⁹² Many researchers and policymakers believe the “lack of housing in a sex offender population will lead to higher levels of risk and will decrease public safety.”¹⁹³ One study demonstrated that the stress and isolation of having limited housing options contributed to the risk of reoffending. And, in another study, housing problems were linked to reincarceration.¹⁹⁴ Those without stable housing often have few social supports and have greater challenges in obtaining employment, resulting in even greater risks of reoffending.¹⁹⁵

For those convicted of sex offenses who *are* able to secure housing, *where* they live matters.¹⁹⁶ Limited housing options, as discussed above, as well as limited financial resources, may force this group to live in neighborhoods that are “socially disorganized.”¹⁹⁷ These communities often are characterized by

190. *See id.*

191. Special Rapporteur on Adequate Housing, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 81, U.N. Human Rights Council, 13th Sess., A/HRC/13/20/Add.4 (Feb. 12, 2010) (by Raquel Rolnik). *See also* Mark Halsey, *Assembling Recidivism: The Promise and Contingencies of Post-Release Life*, 97 J. CRIM. L. & CRIMINOLOGY 1209, 1220 (2008) [hereinafter *Assembling Recidivism*] (describing the importance of the “psychical dimension” of housing, described as “the ability to cultivate a meaningful sense of place through time”).

192. *Policymakers’ Guide*, *supra* note 189, at viii (citing U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>).

193. RUSSELL LOVING, JENNIE K. SINGER & MARY MAGUIRE, CALIFORNIA SEX OFFENDER MANAGEMENT BOARD, HOMELESSNESS AMONG REGISTERED SEX OFFENDERS IN CALIFORNIA: THE NUMBERS, THE RISKS AND THE RESPONSE 16 (2008), available at http://www.cdcr.ca.gov/news/docs/Housing_2008_Rev_1_5_FINAL.pdf [hereinafter *Homelessness*].

194. *See id.*

195. *See id.* at 17, 19-20.

196. *See id.* at 17. *See also* Elizabeth E. Mustaine & Richard Tewksbury, *Residential Relegation of Registered Sex Offenders*, 36 AM. J. CRIM. JUST. 44, 44-57 (2011) [hereinafter *Residential Relegation*].

197. *Residential Relegation*, *supra* note 196, at 49. Mustaine and Tewksbury offer the following description of social disorganization theory: “Social disorganization explanations focus on identifying issues of community deprivation (economic and social) that are correlated with the presences of undesired events, such as criminal behavior. Social disorganization theory includes aspects of communities lacking social and economic capital, but also community residents having fewer (and lower quality) relationships with other residents. The presumed consequence of low social and economic capital and low levels of social interactions are higher rates of many forms of social pathologies like crime.” *Id.* at 47. The authors describe this process of isolating those convicted of sex offenses as relegation, given that they have few choices. *See id.* at 49. For a similar concept, *see* Charles. E. Kubrin & Erica. A. Stewart, *Predicting Who Reoffends: The Neglected Role of Neighborhood Context in Recidivism Studies*, 44 CRIMINOLOGY 165, 170

low employment, high levels of poverty, lower educational achievement, and fewer homeowners.¹⁹⁸ Community members are less able to exert informal controls, and therefore, the neighborhoods offer more opportunities for those with limited housing options.¹⁹⁹ However, living in such “socially disorganized” communities further limits access to critical social supports and services²⁰⁰ as well as employment and public transportation.²⁰¹ Not surprisingly, residing in such disadvantaged neighborhoods has been found to be a high risk factor for recidivism.²⁰²

Having *stable* housing also is critical. “Unstable” housing includes the inability to maintain housing due to its temporary nature or stressful circumstances, and the inability to meet the demands of routine life, including being a tenant.²⁰³ Frequent moves have been found to be associated with higher rates of recidivism.²⁰⁴ Additionally, stable housing facilitates employment. Housing and employment together have been found to help prevent parole violations and returns to incarceration.²⁰⁵

The important role of housing for those convicted of sex offenses is supported by research on formerly incarcerated people living in homeless shelters, a group with a high risk of recidivism.²⁰⁶ A study of 50,000 people

(2006) [hereinafter *Predicting Who Reoffends*] (describing a “concentrated disadvantage” index for neighborhoods).

198. See *Residential Relegation*, *supra* note 196, at 49.

199. See *id.*

200. See *id.* See also *Predicting Who Reoffends*, *supra* note 197, at 167 (“Not surprisingly, ex-offenders rely on neighborhood resources, services and amenities to successfully reintegrate. Without access to these assets, they are at greater risk to recidivate.”).

201. See *Homelessness*, *supra* note 193, at 17 (quoting Caleb Durling, Comment, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 334 (2006)).

202. See *Predicting Who Reoffends*, *supra* note 197, at 184; see also *Homelessness*, *supra* note 193, at 17-18. In contrast, “neighborhoods with large concentrations of affluent families (relative to poor families), or resource-rich neighborhoods, serve a critical protective function in reducing recidivism.” *Predicting Who Reoffends*, *supra* note 197, at 184.

203. *Assembling Recidivism*, *supra* note 191, at 1221.

204. See *Homelessness*, *supra* note 193, at 18 (citing Matt DeLisi, *Who is More Dangerous? Comparing the Criminality of Adult Homeless and Domiciled Jail Inmates: A Research Note*, 44 INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 59, 59-69 (2000)).

205. See *id.* at 19-20.

206. See generally Stephen Métraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release: Assessing the Risk*, 3 CRIMINOLOGY & PUB. POL'Y 139, 139-60 (2004) [hereinafter *Homeless Shelter Use*]. See also AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 5; COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 259 (2003), available at http://reentrypolicy.org/jc_publications/rpc_report_full/RPC_Report_Full.pdf [hereinafter *Successful Return*] (“Transitional and supportive housing options may facilitate a successful re-entry, but they are not available in sufficient supply.”); *Residential Relegation*, *supra* note 196, at 44-57. But see NINO RODRIGUEZ & BRENNER BROWN, VERA INSTITUTE OF JUSTICE, PREVENTING HOMELESSNESS AMONG

released from New York State prisons to New York City from 1995 to 1998 demonstrated that over half of them were in a homeless shelter within one month of their release.²⁰⁷ Of those, thirty-three percent were reincarcerated within two years.²⁰⁸ The authors recommend additional intervention to secure housing at the time of release and investment in supportive housing programs as an antidote to this high recidivism rate.²⁰⁹

The value of supportive housing also is evidenced in the “housing first” movement, which promotes housing for chronically homeless individuals with simultaneous access to robust community support services.²¹⁰ The success of these initiatives further supports facilitating community placements and housing for aging people convicted of sex offenses. The “housing first” model is built on the premise that housing is a basic right,²¹¹ and that eliminating the

PEOPLE LEAVING PRISON 4 (2003), available at http://www.vera.org/sites/default/files/resources/downloads/IIB_Homelessness.pdf (writing that “[c]urrent research suggests that homelessness and incarceration are linked, though the nature of this relationship remains unclear.”). *Id.*

207. See *Homeless Shelter Use*, *supra* note 206, at 144.

208. See *id.* This study followed subjects for two years. Interestingly, elderly people had an increased use of homeless shelters as the two years progressed and were less likely to be reincarcerated over time. See *id.*

209. See *id.* at 154. These investments might include permanent subsidized housing, access to community services, and opportunities to develop life skills. *Id.* See also *Successful Return*, *supra* note 206, Policy Statement 19, Research Highlight 6 (also encouraging supportive housing, the report states that “[b]y providing a package of subsidized housing alongside a vast range of social services, these programs link recently released people to treatment, jobs, education, and assistance around family reunification—all components of successful reintegration and self-sufficiency”). But see PAMELA LATTIMORE & CHRISTY VISHER, THE MULTI-SITE EVALUATION OF THE SERIOUS AND VIOLENT OFFENDER REENTRY INITIATIVE 7 (2009), available at http://www.urban.org/uploadedpdf/412075_evaluation_svori.pdf (in a study evaluating sixty-nine programs receiving federal funds to provide coordinated services to meet individual needs at reentry, a summary of then-current literature stated that “there is growing consensus that practices focusing on individual-level change, including cognitive change, education, and drug treatment, are likely to be more effective than other strategies, such as programs that increase opportunities for work, reunite families, and provide housing”).

210. For more detailed discussions on the housing first movement, see, e.g., Carol Pearson, Ann Elizabeth Montgomery & Gretchen Locke, *Housing Stability Among Homeless Individuals with Serious Mental Illness Participating in Housing First Programs*, 37 J. OF COMMUNITY PSYCHOLOGY 404, 405 (2009) [hereinafter *Housing Stability*]; Katy Reckdahl, *Housing First Model of Addressing Homelessness is Discussed*, THE TIMES-PICAYUNE, (Mar. 21, 2012, 10:30 PM), http://www.nola.com/politics/index.ssf/2012/03/housing_first_model_of_address.html.

211. For a discussion of theories supporting a right to housing, see, e.g., Dara Smith, *Home is Where the Heart Is: Sexual Orientation Discrimination and the Right to Adequate Housing in International Law*, 40 GEO. WASH. INT’L L. REV. 1343, 1345-52 (2009) (arguing that the United States should, among other things, adopt principles in international law recognizing a right to adequate housing and general anti-discrimination provisions). In particular, the Universal Declaration of Human Rights provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). See also The International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966) (also providing for a right to adequate housing).

chaos of homelessness facilitates faster and lasting stabilization, and encourages community integration and a greater willingness to access services.²¹² Empirical evaluations of “housing first” programs support their viability for stabilizing people for whom housing placement is difficult. For example, a study of the original “housing first” program, Pathways to Housing in New York City, found that eighty-four percent of its participants remained in housing five years later.²¹³ The first multisite study, evaluating programs in New York City, Seattle, and San Diego, concluded that eighty-four percent of the participants, all of whom were chronically homeless with both a mental illness and substance abuse problems, remained in their housing twelve months later.²¹⁴

Additionally, individuals who have been incarcerated for an extended period of time, as has been the case for many convicted of sex offenses, require similar supports for a successful transition back to the community as those provided for the chronically homeless.²¹⁵ Community services and social

212. See, e.g., *Why Housing First?*, DOWNTOWN EMERGENCY SERVICE CENTER, <http://desc.org/housingfirst.html> (last visited Mar. 25, 2013) (pioneering such programs in the Seattle, Washington, region). See also *Supporting Housing is Cost Effective*, NATIONAL ALLIANCE TO END HOMELESSNESS, <http://www.endhomelessness.org/content/article/detail/1200> (last visited Mar. 25, 2013). This approach contrasts with the former model of “housing readiness,” which required substance abusers to be drug and alcohol free and mentally ill people to be stable before accessing permanent housing. See *Housing Stability*, *supra* note 210, at 405.

213. *Housing Stability*, *supra* note 210, at 406 (citing Sam Tsemberis & Ronda F. Eisenberg, *Pathways to Housing: Supported Housing for Street-Dwelling Homeless Individuals with Psychiatric Disabilities*, 51 PSYCH. SERV. 487, 487-93 (2000), available at http://pthny.com/Articles/PTHPublications/tsemberiseisenberg2000_1_.pdf). This number contrasts with those in the residential treatment system, where only 47% remained housed after five years. See *id.*

214. See *id.* at 407-11. The study’s duration was too short to draw any conclusions about the impact of the program on participants’ mental health and substance abuse issues. See *id.* at 414. Additional studies have concluded that the program is very cost effective, even taking into account the costs of the housing. See, e.g., Laura S. Sadowski et al., *Effect of a Housing and Case Management Program on Emergency Department Visits and Hospitalizations Among Chronically Ill Homeless Adults*, 301 J. AM. MEDICAL ASS’N 1771, 1775 (2009) (concluding that for chronically homeless people with health problems, the model is significantly less expensive than providing similar health services for those living on the streets); Mary E. Larimer, et al., *Health Care and Public Service Use and Costs Before and After Provision of Housing for Chronically Homeless Persons with Severe Alcohol Problems*, 301 J. AM. MEDICAL ASS’N 1349, 1349 (2009) (finding that the overall costs were less than treating chronically homeless people without housing). Since “housing first” studies to date have focused only on the seriously mentally ill and substance abusers, some researchers question the viability of the “housing first” model for different subsets of the homeless population, arguing that costs savings may not be as dramatic in other subgroups that lack the medical and mental health needs as the chronically homeless. Stefan G. Kertesz & Saul J. Weiner, *Housing the Chronically Homeless: High Hopes, Complex Realities*, 301 J. AM. MEDICAL ASS’N 1822, 1822-23 (2009) (“When Housing First is offered to a wider subset of the homeless population, the strictly economic benefits will likely diminish or disappear.”). However, aging people who have been convicted of sex offenses have similar needs as the subgroups with which this model has been successful, particularly given that medical needs, as well as medical expenses, increase with age.

215. See generally Gwenda M. Willis & Randolph C. Grace, *Assessment of Community Reintegration Planning for Sex Offenders: Poor Planning Predicts Recidivism*, 36 CRIM. JUST. &

supports are even more critical for the elderly, for these services enhance their physical and mental health and are known to limit cognitive decline. Enabling aging people convicted of sex offenses to secure appropriate housing while simultaneously offering them counseling and other services is likely to be cost effective, sufficiently protective of society, and respectful of the needs of the individual.

C. Registration and Notification Requirements: Our Communities and Children are Not Safer

As described in Part I, the deaths of Jason Wetterling and Megan Kanka prompted the enactment of registration and community notification laws that “were passed with rapid speed and little consideration of their empirical foundation”²¹⁶ and without any discussion of these two important questions: Does registration and community notification enhance public safety? What unanticipated consequences flow from such policies?

Over the past ten years, a number of studies have been conducted to gauge the effectiveness of registration and community notification at reducing sexual crimes. The majority of studies attempt to assess effectiveness by comparing rates of sex offenses (measured by either arrest or conviction) prior to and after enactment of a particular state’s registration and notification laws.²¹⁷ The most rigorous research strongly suggests that registration and community notification laws neither enhance public safety nor effectively protect children from sexual crimes.²¹⁸ For example, in 2005 researchers

BEHAV. 494 (2009) [hereinafter *Poor Planning*] (identifying that planning and support in the areas of accommodation, employment, and social supports are critical in preventing recidivism).

216. Bonita M. Veysey & Kristen M. Zgoba, *Sex Offenses and Offenders Reconsidered. An Investigation of Characteristics and Correlates Over Time*, 37 CRIM. JUST. & BEHAV. 583, 584 (2010).

217. A few early studies examined the impact of registration and community notification on people convicted of sex offenses who were required to register as sex offenders versus those who were not required. See, e.g., *The Iowa Sex Offender Registry and Recidivism*, IOWA DEP’T OF HUMAN RIGHTS 1, 1-21 (2000), available at http://www.humanrights.iowa.gov/cjpp/images/pdf/01_pub/SexOffenderReport.pdf (after comparing a group of 233 individuals placed on the Iowa sex offense registry in its first year and a group that was not required to register solely because of the timing of their conviction, researchers found slightly lower rates of recidivism for the group required to register, but determined that “the findings were not statistically significant and could have occurred by chance”).

218. One of the earlier studies, conducted in 2005, examined the impact of registration and community notification in Washington State, concluding that recidivism rates for felony-level sex offenses declined after Washington’s enactment of registration laws in 1990 and, further, that rates of felony-level sex offenses and felony-level violent offenses declined after the state’s 1997 amendment to its registration laws to include community notification. WASH. STATE INST. FOR PUB. POLICY, *SEX OFFENDERS IN WASHINGTON STATE: KEY FINDINGS AND TRENDS* 15 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-03-1201.pdf>. But the authors of the study acknowledged that these results must be viewed with caution because the study did not take into account factors other than the registration and community notification requirements that may have contributed to the reduced recidivism rates, such as the overall reduction in rates of sex crimes and the increased use of incarceration. See *id.*

examined data from ten different states regarding numbers of rapes before and after implementation of registration and notification laws, concluding that the “the passage of sex offender registration and notification laws have had no systematic influence on the number of rapes committed in these states as a whole.”²¹⁹ Similarly, in a 2008 study examining twenty-one years worth of sex offense data in New Jersey (ten years prior to enactment of the state’s registration and notification laws, the year of enactment, and ten years post-enactment), researchers concluded as follows: “Despite wide community support for these laws, there is little evidence to date, including this study, to support a claim that the Megan’s Law is effective in reducing either new first-time sex offenses or sexual re-offenses.”²²⁰

A similar study in New York analyzing thousands of arrests over a twenty-one year period concluded that

the 1996 enactment of SORA [Sex Offender Registration Act] (and thus the beginning of the registry) had no significant impact on rates of total sexual offending, rape, or child molestation, whether viewed as a whole or in terms of offenses committed by first-time sex offenders or those committed by previously convicted sex offenders (i.e., repeat offenders).²²¹

Notably, the research data itself revealed a likely reason for this lack of effectiveness: nearly ninety-six percent of all sex offense arrests in New York are for people who have not previously been convicted of a sex offense.²²² Thus, by focusing solely on people with a previous sex offense conviction, sex offense registration and notification policies target the wrong group of people and ignore the group—those who have not been convicted—responsible for nearly all of the sex offenses. Researchers also identified another potential flaw: while registration and community notification laws are designed to

219. Jeffery T. Walker et al., *The Influence of Sex Offender Registration and Notification Laws in the United States*, ARK. CRIME INFORMATION CENTER 15, <http://www.ilvoices.com/media/96974ddeccb5afb9ffff82e2ffffe41e.pdf> (last visited Mar. 2, 2013). This study found that in six of the states examined, there was no significant increase or decrease in rape offenses following enactment of sex offense registration and notification laws; in three of the states, there was a significant decrease, while in one of the states there was a sharp increase in rape offenses. *See id.* at 14.

220. Kristen Zgoba et al., *Megan’s Law: Assessing the practical and monetary efficacy*, NEW JERSEY DEPARTMENT OF CORRECTIONS 41 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf> [hereinafter Zgoba et al., *Megan’s Law*]. The researchers more specifically concluded that their study suggests that New Jersey’s registration and community notification laws are not effective at “increasing community tenure (the time spent in the community prior to re-arrest); reducing sexual re-offenses; changing the type of sexual re-offense or first time sexual offense (for example, from hands-on to hands-off offenses); or reducing the number of victims involved in sexual offenses.” *Id.* at 39.

221. *Does a Watched Pot Boil?*, *supra* note 160, at 297. The 21 years included ten years before the passage of New York’s Sex Offender Registration Act, the year of enactment, and ten years after. *See id.* at 289.

222. In their research, Sandler, Freeman, and Socia discovered that “approximately 96% of offenders arrested for sexual offenses have no prior sexual offense convictions and, thus, would not have been on the sex offender registry at the time of the offense.” *Id.* at 297.

protect the public from strangers, the vast majority of sex offenses are committed by people known to the victim.²²³

More recent studies have tried to capture possible distinctions between effectiveness of registration laws versus community notification laws, taking advantage of those states in which there was a gap in time between enactment of registration and community notification laws. A 2010 study found a statistically significant reduction in first-time sex offenses following South Carolina's 1995 enactment of registration and notification laws, suggesting that these laws might have a positive deterrent effect.²²⁴ However, the researchers also found that the 1999 enactment of South Carolina's policies making sex offender information available on the internet had no significant impact on first-time sex offenses, suggesting no deterrent value associated with making this information available electronically.²²⁵ A 2011 study found an apparently irreconcilable tension between registration and community notification, concluding that while broad sex offender registration requirements may have some positive impact on deterring people from committing sex offenses, broad community notification actually diminishes public safety by increasing recidivism among those individuals on the registry and subjected to community notification.²²⁶

In sum, the research consistently shows that together, registration and community notification law do not enhance public safety by decreasing the incidence of sexual offending. It is possible, however, that there may be some public safety benefits from sex offense registration alone, without community notification.²²⁷

In addition to the research on the effectiveness of registration and notification laws in improving public safety, there is also a growing body of research and information exploring the unintended consequences of current policies. Researchers have found that community notification requirements have adversely affected registrants' ability to both obtain and maintain

223. *See id.* at 297-98.

224. *See generally* Elizabeth J. Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. & BEHAV. 537 (2010).

225. *See id.* at 548.

226. *See generally* J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 161-93 (2011).

227. *See* Jeffrey Sandler, *Effectiveness of New York State Sex Offender Management Policies: Are We Making Our Communities Safer?*, New York State Alliance of Sex Offender Service Providers (Mar. 26, 2012), available at: <http://www.nysalliance.com/conference/presentations.html> (last visited July 16, 2012). In slide 50 of this presentation, which summarizes the research on registration and community notification, Dr. Sandler states the following: "[The] [m]ajority of research has found no significant, systematic impact of policies, however, [there is] [s]ome emerging evidence of sexual crime reduction associated with registration, [and] [s]ome emerging evidence of sexual crime increase associated with broad notification. [There is] [n]o research to support the ability of registration and/or notification to reduce child molestations." *Id.*

employment and stable housing.²²⁸ In addition, registration and notification requirements affect the family members and loved ones of registrants, often making it more difficult for people required to register to maintain stable family ties and intimate relationships.²²⁹ People required to register also have reported being threatened and harassed because of their status as a “sex offender” and in a smaller number of instances, victimized by violence.²³⁰ Finally, researchers have consistently noted that notification requirements contribute to depression, loneliness, and a sense of isolation among those subjected to such policies.²³¹ This shame and stress can contribute to an increased likelihood of re-offending.²³² For people like Mr. Bianco, the increased sense of depression and social isolation is of a special concern, since seniors are already at increased risk of suffering from poor health and early mortality because of depression and social isolation.²³³

Discussed less frequently are the unintended consequences that affect the community as a whole. Our current registration and notification requirements have significant fiscal costs for communities, requiring a substantial investment of law enforcement time and resources.²³⁴ The broad scope of the requirements has produced a system buckling under the weight of the sheer number of people subjected to these requirements, resulting in registries that contain mistaken and outdated information.²³⁵ In addition, community residents who receive notification about a “sex offender” living in their neighborhood often experience fear and concern, but no sense of what action,

228. See generally Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUSTICE 49 (2005); Jill S. Levenson et al., *Megan's Law and its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 587 (2007) [hereinafter *Community Reentry*]; Alissa R. Ackerman, *Registration and Community Notification Laws: Do the Consequences Outweigh the Benefits?*, 10 SEX OFFENDER LAW REPORT 81, 81 (2009) [hereinafter *Consequences Outweigh*].

229. See generally *Consequences Outweigh*, *supra* note 228.

230. See *id.* For example, in a survey of 298 people required to register, Alissa Ackerman found that almost 35% of the registrants who responded to the survey experienced property damage, more than 25% received harassing telephone calls, and a majority—53%—said that they worried about the safety of their family and friends. See *id.* at 92.

231. See *id.* Jill Levenson and colleagues, for example, found that the “majority of sex offenders reported experiencing psychological distress related to public disclosure, such as shame, embarrassment, and hopelessness.” See *Community Reentry*, *supra* note 228, at 594.

232. Richard Tewksbury & Kristen M. Zgoba, *Perceptions and Coping with Punishment: How Registered Sex Offenders Respond to Stress, Internet Restrictions, and the Collateral Consequences of Registration*, 54 INT. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 537, 539 (2010) (noting as follows: “Increased feelings of vulnerability, anxiety, and stigmatization can be important precursors of stress and are related to greater likelihood of recidivism.”). Additionally, these “unintended” consequences may explain the research discussed above showing that community notification actually increases recidivism. *Id.*

233. See *supra* Part II.

234. See generally Zgoba et al., *Megan's Law*, *supra* note 220.

235. See *No Easy Answers*, *supra* note 10, at 57 (noting reports identifying significant problems with the registries in Massachusetts, Florida, and Kentucky).

if any, they should take to protect themselves and their children.²³⁶

Registration and community notification requirements also create a false belief that effective measures are being taken to reduce sexual crime, diverting attention and resources from potentially more effective measures and policies. These policies focus the attention of law enforcement and the community almost exclusively on people who have been convicted of a sex offense rather than addressing education, treatment, and other measures that might *prevent* those who have *not* been convicted from offending altogether. Finally, some researchers argue that registration and community notification may discourage the reporting of sexual offenses.²³⁷ For example, Sandler et al. write that

[T]he vast majority of sexual offense victims know their perpetrator. Although unintentional, community notification can often lead to identification of the victim, especially when the victim is an offender's child. As such, incest victims may not report the offense to avoid dealing with the impact that public notification would have on their family.²³⁸

D. Residency Restrictions Do Not Protect Our Children.

Residency restrictions, popular with the public, are ostensibly enacted to protect children from sexual crimes committed by strangers with a prior sex offense conviction and are based on the following assumptions: that most sexual crimes against children are committed by a person with a prior sex offense conviction; that strangers commit the majority of sexual crimes against children; and that people with a prior sex offense conviction are more likely to offend if they reside close to children.²³⁹ Research convincingly demonstrates, however, just how faulty these assumptions are, and thus, why residency restrictions cannot achieve the objective of making children safer from sexual crimes.

As described in the previous section, the evidence clearly shows the wrongfulness of the first assumption, and research has consistently shown that a significant majority of sex offenses are committed by "first time offenders" and not people with a prior sex offense conviction.²⁴⁰ The evidence also undermines the second assumption, revealing that the significant majority of sex crimes are committed by people known to the victim, and not strangers.²⁴¹

236. *Id.* at 61.

237. *See Does a Watched Pot Boil?*, *supra* note 160, at 298.

238. *Id.* at 298 (citing Robert E. Freeman-Longo, 8 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 91, 91-100 (1996)).

239. *See* Sandler, *supra* note 227.

240. *Does a Watched Pot Boil?*, *supra* note 160, at 297 (in evaluating 21 years' worth of arrest data in New York state, finding that approximately 96% of arrests for sex crimes were committed by people who were not sexual recidivists).

241. *See* Howard N. Snyder, BUREAU OF JUSTICE STATISTICS, *SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER*

A number of recent studies also have shown that the third assumption is false, and that residential proximity to places where children congregate simply does not affect whether a person convicted of a sex offense will re-offend. For example, in 2003, the Minnesota Department of Corrections examined all of the re-offenses of registered sex offenders who had been deemed a risk level three that occurred over a two year period. Researchers could not find *any* “examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses.”²⁴² The authors further noted that while “[e]nhanced safety due to proximity restrictions may be a comfort factor for the general public . . . , it does not have any basis in fact.”²⁴³ Other research studies have similarly concluded that residential proximity to locations where children tend to live or congregate is not related to repeat sex offenses by people with a prior sex offense conviction.²⁴⁴

Even if we assume that residential restrictions have some value, this value is certainly outweighed by their unintended consequences. One of the most discussed consequences is the creation of significant geographic zones in which it is impossible for a person convicted of a sex offense to lawfully reside.²⁴⁵ Famously, news reports from Miami, Florida, reveal that the lack of available housing caused by residency restrictions has resulted in people convicted of sex offenses living under the Julia Tuttle Causeway.²⁴⁶

CHARACTERISTICS, NAT'L CTR. FOR JUVENILE JUSTICE 10 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf> (finding that only 14% of child sex abuse victims are victimized by strangers; most are victimized by a family member or someone from their social network). See also Lawrence A. Greenfield, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 4 (1997), available at <http://www.bjs.gov/content/pub/pdf/SOO.PDF> (“Three out of four rape/sexual assault victimizations involved offenders . . . with whom the victim had a prior relationship as a family member, intimate, or acquaintance.”).

242. MINNESOTA DEP'T OF CORRECTIONS, LEVEL 3 SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES 9 (2000), available at <http://www.leg.state.mn.us/docs/2003/mandated/030175.pdf>.

243. *Id.*

244. See, e.g., COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 8-9 (2004), available at http://dcj.state.co.us/odvsom/sex_offender/SO_Pdfs/FullSLAFinal01.pdf (finding that sex offenders who recidivate are no more likely than their non-recidivating counterparts to reside near schools or day care centers); Grant Duwe et al., *Does Residential Proximity Matter: A Geographical Analysis of Sexual Recidivism*, 35 CRIM. JUST. & BEHAV. 484, 500 (2008) (concluding that none of the perpetrators in their study had made contact with a victim “near a school, park, playground, or other locations included in residential restriction laws”) [hereinafter *Residential Proximity*]; Paul A. Zandbergen et al., *Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offender Recidivism*, 37 CRIM. JUST. & BEHAV. 482, 498 (2010) (concluding that there is “no empirical association between where a sex offender lives and whether he reoffends sexually against a minor”). It appears that economic factors rather than proximity to children drive where people convicted of sex offenses live. See *Residential Proximity*, *supra* at 486 (citations omitted).

245. See, e.g., *Zoned Out*, *supra* note 52, at 3-4 (depicting via a map how residency restrictions in San Jose, California, impact the areas where a person can reside).

246. See *id.* Legal challenges to residency restrictions have also demonstrated that such

Limiting where people convicted of a sex offense can live—and often pushing such individuals out of urban areas—can also have the unintended consequence of contributing to instability, and thus, making it more likely the person will engage in crime. There is little question that social and economic stability increases the likelihood that a person will not re-offend;²⁴⁷ this is no less true for people convicted of sex offenses.²⁴⁸ Thus, people convicted of sex offenses “who maintained social bonds to communities through stable employment and family relationships had lower recidivism and fewer rule violations than those who had negative or no support.”²⁴⁹ The problem of social isolation is especially acute for seniors like Mr. Bianco, whose age and health condition pose unique obstacles to maintaining family and social supports. Residency restrictions are even more de-stabilizing and isolating, forcing people to move away from areas where employment, family participation, positive social involvement, and treatment are readily available.²⁵⁰

The enactment of residency restrictions often frustrates law enforcement efforts by resulting in enhanced non-compliance with state registries. When there is no lawful place to live, people convicted of a sex offense are forced to live in an “illegal” residence, and therefore, evade re-arrest by not registering their proper address or failing to register altogether.²⁵¹ In Iowa, for example, “the number of ‘lost’ registrants doubled in the wake of a statewide law

restrictions have the effect of banishing people convicted of sex offenses from certain geographic areas. *See, e.g.*, *Doe v. Miller*, 405 F.3d 700, 706 (8th Cir. 2005) (“[T]he district court found that the restricted areas in many cities [in Iowa] encompass the majority of available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence. In smaller towns, a single school or child care facility can cause all of the incorporated areas of the town to be off-limits to sex offenders.”); *see also In re Taylor*, 147 Cal. Rptr. 3d 64, 82 (Cal. Ct. App. 2012), *review granted and opinion superseded*, 290 P.3d 1171 (Cal. 2013) (finding California’s residency restriction law unconstitutional as applied).

247. *See* Jill S. Levenson & Andrea L. Hern, *Sex Offender Residency Restrictions: Unintended Consequences and Community Reentry*, 9 JUST. RES. & POL’Y 59, 62 (2007) (citing JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 105 (Oxford Univ. Press ed., 2003)).

248. *See id.* (citing COLO. DEP’T OF PUB. SAFETY, *REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY* 5 (2004), *available at* http://dcj.state.co.us/odvsom/sex_offender/SO_Pdfs/FullSLAFinal01.pdf).

249. *Id.*

250. *See* JILL S. LEVINSON, *SEX OFFENDER RESIDENCE RESTRICTION: A REPORT TO THE FLORIDA LEGISLATURE* 8 (2005), *available at* <http://www.ccoso.org/library%20articles/Florida%20residence%20restrictions%20-%20Levinson%20report.pdf>.

251. Ellen Perlman, *Where Will Sex Offenders Live? Creating Buffer Zones Around Schools and Other Public Places Can Make Entire Cities Off-Limits*, *GOVERNING THE STATES AND LOCALITIES* (June 2006), <http://www.governing.com/topics/public-justice-safety/Sex-Offenders-Live.html> (“If it becomes too difficult for sex offenders to find affordable places to live, or they are harassed and forced to move, they may stop playing by the book and change residences without notifying authorities, register false addresses, or simply disappear. The registry becomes less reliable and law enforcement has a harder time doing its job.”).

sharply limiting where registrants could live.”²⁵²

Because the evidence regarding residency restrictions indicates that such policies are counter-productive, it is not surprising that a broad array of professionals, including those involved in the treatment of people convicted of sex offenses,²⁵³ law enforcement and corrections,²⁵⁴ and even some victims’ rights organizations,²⁵⁵ have opposed the adoption of residency restrictions. It is disappointing that in the face of this reasoned opposition from law enforcement officials, states and municipalities continue to ignore their advice and residency restrictions continue to be popular among the public.

E. Reintegration Planning Helps Prevent Recidivism

Researchers have found a relationship between high-quality, pre-release reintegration plans and recidivism rates.²⁵⁶ In a New Zealand study of people convicted of child molestation who had completed a prison rehabilitation program, researchers examined release plans that addressed accommodation, employment, social needs, and individual needs, including physical and mental health needs and treatment.²⁵⁷ The study compared the reintegration plans of

252. LOGAN, KNOWLEDGE, *supra* note 6, at 113. See also Perlman, *supra* note 251 (“Since Iowa began enforcing the statewide residency laws last September [2005], nearly 300 sex offenders on the state’s list of 6,000 are unaccounted for—twice as many as the previous 150 whose whereabouts were unknown.”); *Zoned Out*, *supra* note 52, at 3 (quoting an Iowa law enforcement official as noting a four-fold increase in the number of people who were not registering after enactment of Iowa’s state-wide residency restriction).

253. See ASSOCIATION OF TREATMENT FOR SEXUAL ABUSERS, <http://www.atsa.com/sexual-offender-residence-restrictions> (last visited July 19, 2012).

254. See, e.g., *Sex Offender Housing Restrictions*, KANSAS DEPARTMENT OF CORRECTIONS, <http://www.dc.state.ks.us/publications/sex-offender-housing-restrictions> (recommending against broad housing restrictions and stating that any restrictions on where a person convicted of a sex offense can live should be—and are—supervision issues). See also *infra* Part V.C.

255. See, e.g., *Residency Restrictions*, JACOB WETTERLING RESOURCE CENTER, <http://www.jwrc.org/KeepKidsSafe/SexualOffenders101/ResidencyRestrictions/tabid/84/Default.aspx> (last visited July 19, 2012) (which does not support residency restriction laws).

256. See, e.g., Gwenda M. Willis & Randolph C. Grace, *The Quality of Community Reintegration Planning for Child Molesters: Effects on Sexual Recidivism*, 20 SEXUAL ABUSE 218 (2008) [hereinafter *Quality of Community Reintegration*]; *Poor Planning*, *supra* note 215; Carwyn D. Scoones et al., *Beyond Static and Dynamic Risk Factors: The Incremental Validity of Release Planning for Predicting Sex Offender Recidivism*, 27 J. INTERPERS. VIOLENCE 222 (2012) [hereinafter *Incremental Validity*]. See also Sophie R. Dickson et al., *Can the Quality of High Risk Violent Offender Prisoner Release Predict Recidivism Following Intensive Rehabilitation? A Comparison with Risk Assessment Instruments*, PSYCHOL., CRIME & LAW 12, 12-19 (2012). Building on the work of Willis and Grace, Sophie R. Dickson et al. studied the quality of release plans for high risk violent offenders who had completed treatment programs. See *id.* They concluded that the quality of such plans was as good a predictor of re-imprisonment as the standard risk assessment tools used. See *id.* at 14. One difference they noted from the conclusions of Willis and Grace was that with the violent offender population, plans regarding employment needs were more critical than plans for accommodation. See *id.*

257. See *Quality of Community Reintegration*, *supra* note 256, at 223.

recidivists²⁵⁸ and non-recidivists, and determined that “the quality of reintegration planning was poorer for the recidivists.”²⁵⁹ While the authors caution against concluding, absent additional research, that this is a causal relationship, they do emphasize that when controlling for many other factors, the one constant item scoring lower for the recidivists was accommodation planning.²⁶⁰

Subsequent research has supported these general findings,²⁶¹ and researchers concluded that measuring the quality of reintegration plans proved to be as reliable a predictor of recidivism as other risk assessment tools.²⁶² A later study reinforced the value of reintegration planning, finding a strong correlation between poor plans and re-imprisonment among those convicted of violent felonies who had completed a rehabilitation program.²⁶³ This correlation was stronger than that of the other three risk analyses with which it was compared.²⁶⁴ Recognizing that these studies were based on plans, not actual reintegration, Gwenda Willis sought to evaluate the relationship between the plans and actual reintegration. She and co-author Lucy Johnston found that a high quality reintegration plan did result in better integration into the community, although predictably, the connection between planning and actual integration diminished over time.²⁶⁵

This empirical data reinforces the critical role housing plays in enabling those convicted of sex offenses to become productive members of our communities. As researchers Willis and Grace write:

[P]hysiological, safety, and social needs must be secured before higher order values such as self-esteem, respect for others, and morality can be realized. It seems unrealistic to expect released sex offenders to live as law-abiding, respectful members of society while they struggle to attain basic human needs.²⁶⁶

Maintaining these basic human needs is even more challenging for seniors such as Mr. Bianco, whose health conditions limit his mobility, and thus renders appropriate housing even more critical for him and other seniors in similar situations.

258. For the purposes of this study, recidivist is defined as one who has been reconvicted of a sexual offense since leaving prison. *See id.*

259. *Id.* at 234.

260. *See id.*; *see also Poor Planning*, *supra* note 215, at 506.

261. *See generally Poor Planning*, *supra* note 215; *Incremental Validity*, *supra* note 256.

262. *See Poor Planning*, *supra* note 215, at 508.

263. *See Dickson et al.*, *supra* note 256, at 13. However, the study found no correlation between plan quality and reconviction. *See id.*

264. *See id.* Unlike the initial Willis and Grace study, which found planning for accommodation to be critical, this study found planning for employment to be the most significant variable. *See id.* at 14.

265. *See generally Gwenda M. Willis & Lucy Johnston, Planning Helps: The Impact of Release Planning on Subsequent Reentry Experiences of Child Sex Offenders*, 18 J. OF SEXUAL AGGRESSION 194 (2012).

266. *Poor Planning*, *supra* note 215, at 510.

These robust research studies demonstrate that the facts regarding aging people convicted of sex offenses and recidivism and desistance patterns do not support the numerous restrictions on the types and location of housing available to them. In fact, these restrictions perpetuate instability and lack of access to treatment and other support systems, and interfere with efforts to secure stable employment and social reintegration.

IV. POLICY RECOMMENDATIONS

A. *Provide a Mechanism for Law-Abiding People to Be Removed from the Sex Offender Registry*

At present, there are no meaningful mechanisms for the estimated 747,000 people on sex offender registries²⁶⁷ to be removed from the list prior to the exhaustion of the registration period, regardless of successful completion of therapy, recommendations of parole or probation offices, or other examples of a commitment to living a law abiding life.²⁶⁸ Yet, empirical research, discussed previously, demonstrates that those convicted of sex offenses reoffend at a lesser rate than those convicted of most other offenses, and that recidivism declines with age and the passage of time in the community.²⁶⁹

Maintaining a person on the registry who poses little risk of re-offending is counter-productive for two reasons. First, as Mr. Bianco's case so aptly illustrates, being on the registry means being subjected to community notification, which makes it extremely difficult for a person to find housing, a critical component of living a law-abiding and healthy life, particularly for seniors.²⁷⁰ Second, maintaining a person on the registry longer than necessary imposes a needless yet costly burden on law enforcement officials, and consequently, the public.²⁷¹ There must be a mechanism to remove from the registry law-abiding people who have objectively demonstrated their ability to live safely in our communities. For those states that elect *not* to adopt the Adam Walsh Act,²⁷² the solution is relatively simple: enact a review process

267. See, e.g., THE NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/sex-offender-map.pdf.

268. Some states have very limited removal mechanisms. For example, in New York, a person deemed a level 2 offender must register for life; however, if a person has not been designated as a sexually violent offender, a sexual predator, or a predicate sex offender, he or she may, after 30 years on the registry, petition a court to be removed from it. See N.Y. CORRECT. LAW § 168-o(1) (McKinney 2012).

269. See *supra* Part III.B.1-2.

270. See *supra* Part II; see also *infra* Part IV.B., recommending that, with limited exceptions, registrants not be subjected to community notification.

271. See *supra* Part III.C.

272. States that have adopted the Adam Walsh Act are bound by its definitions of offense-based risk assessments, registry tiers, and statutory terms of registration, see *supra* Part I.A.3, and therefore are foreclosed from implementing an independent review process allowing for removal from the registry. Therefore, federal law also should be amended to include a review mechanism that includes the criteria outlined above, which takes into account what we know today about

enabling those on the sex offender registry to petition to be removed.²⁷³

While the petition process and the relevant criteria for removal should be tailored to individual states' statutory schemes, all state procedures should incorporate basic components.²⁷⁴ First, there should be a periodic review by an entity, other than the one that maintains the registry, such as a court, a multi-disciplinary review team, or both.²⁷⁵ Second, all registrants who have been compliant with supervised release conditions, completed all required treatment, complied with all registration requirements, and have not been convicted of any additional crimes since the initial risk assessment should be permitted to petition for removal at some point in time after they have been in the community without re-offending.²⁷⁶ Third, given the consequences of continued placement on the registry, counsel should be permitted at these proceedings and appointed for those who are indigent. And fourth, registrants petitioning for removal from the list should have a right to administrative or judicial review of the initial decision, with the right to counsel and an opportunity to present all relevant evidence, including witness testimony.²⁷⁷ The costs associated with appointment of counsel will pale in comparison to the cost of maintaining and monitoring an ever-growing registry.

Additionally, each state should articulate the relevant criteria to be considered on a petition to be removed from the registry. Factors should include length of time since the offense and length of time in the community; individual characteristics, including substance abuse history and responses to treatment, age, and employment status; relevant medical or mental health conditions that minimize the risk of reoffending; availability and utilization of community supports;²⁷⁸ and how removal from the registry can promote the

recidivism, desistance, and age, as well as consider registrants' behavior since being placed on the registry.

273. Mechanisms available in some states to petition for a reduction in risk level serve as useful models for petitioning for removal from the registry. *See, e.g.*, MINN. STAT. § 244.052 (2011); N.Y. CORRECT. LAW § 168-o.

274. In most instances, it will be the person on the registry requesting removal. It also may be beneficial to provide that others, including law enforcement or corrections agents, may petition on behalf of the registrant. *See, e.g.*, MINN. STAT. § 244.052, subdiv. 3(h) (providing that law enforcement or corrections agents may petition for change in risk level, although the level could be raised or lowered in this process).

275. *See, e.g.*, MINN. STAT. § 244.052, subdiv. 3(b)(1)-(5) (providing that risk assessment reviews shall be made by a review team composed of a correction official, law enforcement officer, treatment professional, case worker, and victim services professional).

276. Again, this tracks the Minnesota petition process for a reduction in risk assessment. *See* MINN. STAT. § 244.052, subdiv. 3(i). Statutes that require lifetime registration upon conviction of certain crimes would have to be amended to allow individuals registered for life to petition to be removed from the registry.

277. *See, e.g.*, MINN. STAT. § 244.052, subdiv. 6(b) (administrative review process in Minnesota for risk assessment review); N.Y. CORRECT. LAW § 168-o(3)-(4) (judicial review of petition for modification of sex offender risk level).

278. *See* MINN. STAT. § 244.052, subdiv. 3(g).

person's commitment to successfully reintegrate into the community.²⁷⁹

Under this proposal, Mr. Bianco would be a good candidate for discharge from registration, as evidenced by his advanced age and compromised health, his full compliance with the conditions of supervision, his successful completion of sex offender treatment, his law-abiding behavior over the past several years, his receipt of a Certificate of Relief from Disabilities, and the professional opinions of those who have worked with him over the past several years that he is unlikely to re-offend. Being discharged from registration requirements would remove the insurmountable barrier to appropriate housing that Mr. Bianco currently faces.

B. Maintain the Confidentiality of Information on the Registries and Allow for Only Limited and Targeted Community Notification.

Registration and community notification requirements were enacted in an evidence vacuum, driven more by public reaction to high-profile crimes than to consideration of best practices.²⁸⁰ As previously discussed, researchers have started to fill this vacuum, and their work is revealing many un-intended consequences that stem from these policies.²⁸¹ While limited research suggests that registration *without community notification* may have some public safety benefits, the research also reveals that the very broad community notification policies that have been enacted since establishment of the registries are counter-productive, leading to increased recidivism rates.²⁸² Given this, it would be foolhardy to continue down the current path of increasing the scope and level of both registration and community notification.²⁸³ Instead, we should roll back these current overly broad community notification policies. This roll-back can be achieved by going back to our former policies that maintained the confidentiality of information on sex offender registries, but allowed for limited and targeted community access to information on the registries.²⁸⁴ Under this approach, the significant majority of registrants are not subjected to having the community as a whole notified of their registration information; rather, their registration information is used for law enforcement

279. See, e.g., N.Y. PENAL LAW § 1.05(6) (McKinney 2012) (providing that a person's successful reintegration and reentry into the community is one of the state's penological goals).

280. See *supra* Part III.C; see also *Does a Watched Pot Boil*, *supra* note 160, at 298.

281. See *Does a Watched Pot Boil?*, *supra* note 160, at 298.

282. See *id.*; see generally Prescott & Rockoff, *supra* note 226.

283. As set forth in Part I.A of this article, registration was initially viewed as a law enforcement tool, and not as a means of broad community notification. It is only since the enactment of Megan's Law that registration and community notification have been tied together, and the Adam Walsh Act furthers this trend. See generally, *supra* Part I.A.3; Harris et al., *supra* note 43.

284. See, e.g., *No Easy Answers*, *supra* note 10, at 17-18; *The Registration and Community Notification of Adult Sex Offenders*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/registration-and-community-notification-adult-sexual-offenders> (last visited July 29, 2012).

purposes only.²⁸⁵

The information about registrants that can be released to the public should be limited and targeted in two ways. First, only information about registrants who have been assessed to be of high risk of re-offending should be released to the public. Importantly, only well-researched and validated methods of risk-assessment should be utilized to determine whether a registrant is high-risk.²⁸⁶ Second, community-notification should be conducted only on an individualized, need-to-know basis.²⁸⁷ Thus, for example, entities that serve children, such as schools and daycare centers, should have access to information about high-risk registrants who live in geographic proximity to their locations.

Consistent with these recommendations, on-line sex offender registries should be eliminated as a form of community notification, since this method is neither targeted nor individualized. Implicit in this recommendation is the repeal of the federal Adam Walsh Act, which broadens notification requirements and premises notification on crime of conviction, not an individualized assessment of risk.²⁸⁸ Research on the efficacy of registration should continue; it may show that registration, even when coupled with only very limited community notification policies, is counter-productive and unnecessary, in which case the registries should be discontinued altogether.

This proposed limited notification scheme would allow people like Mr. Bianco, who is of low risk of reoffending and poses no danger to other seniors, to find affordable housing that meets the special needs he has because of his age and compromised health.

285. This recommendation essentially rolls-back Megan's Law and the Adam Walsh Act to the Jacob Wetterling Act as originally enacted. *See supra* Part I.A (noting that under the Jacob Wetterling Act, the registries were to be used primarily for law enforcement purposes).

286. *See, e.g., No Easy Answers, supra* note 10, at 17-18. This recommendation capitalizes on the wealth of research about sex offense recidivism and risk-assessment that has emerged over the past twenty years. *See, e.g., Bonita M. Veysey and Kristen M. Zgoba, Sex Offenses and Offenders Reconsidered. An Investigation of Characteristics and Correlates Over Time*, 37 CRIM. JUST. & BEHAV. 583, 585 (2010) (noting that our current sex offense policies were "passed at a time when the field of specialized risk assessment for sexual offenders was in its relative infancy").

287. *See, e.g., No Easy Answers, supra* note 10.

288. *See generally supra* Part I.A.3. Because the Adam Walsh Act bases notification on crime of specific conviction, "it is unlikely that . . . [AWA] . . . will accurately predict which sex offenders will reoffend and which ones will not." Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Policy Initiative?* CRIM. JUST. POL'Y REV. 10, June 25, 2009. *See also Registration and Community Notification of Adult Sex Offenders*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/registration-and-community-notification-adult-sexual-offenders> (last visited July 29, 2012) ("Unlike actuarial models which have been tested for predictive validity, offense based classification is unproven as a strategy for predicting future offending.").

C. Eliminate Residency Restrictions that Limit Where Broad Classes of People Convicted of Sex Offenses Can Lawfully Reside.

The unintended consequences of residency restrictions have caused corrections and law enforcement officials—those who are responsible for treating and managing people convicted of sex offenses—to strongly oppose such restrictions despite their popular support. According to Roger Werholtz, Secretary of the Kansas Department of Corrections:

Residency restrictions don't contribute to public safety. In fact, the consensus of experts in the field of sex offender management supported by available research and experience indicates they do just the opposite. They destabilize offenders, punish their families and thwart law enforcement efforts to effectively supervise sex offenders, make sex offender registries less reliable and mislead communities into believing they've discovered a magic bullet for protecting their children.²⁸⁹

Many state sex offender management boards have also publicly opposed residency restrictions,²⁹⁰ as have prosecutors,²⁹¹ and even some victims' rights organization.²⁹²

Given the failure of residency restrictions to enhance public safety, it makes sense to endorse the 2007 recommendation of Human Rights Watch calling for the abolishment of residency restrictions that apply to whole

289. *Zoned Out*, *supra* note 52, at 4. This article quotes many law enforcement and corrections officials who oppose residency restrictions, including an official from the Florida Department of Corrections and the Executive Director of the American Probation and Parole Association.

290. See, e.g., *Homelessness Amongst California's Sex Offenders: An Update*, CALIFORNIA DEP'T OF CORR., CALIFORNIA SEX OFFENDER MGMT. BD. (2011), available at http://www.cdcr.ca.gov/Parole/Sex_Offender_Facts/docs_SOMB/Housing_2008_Rev.pdf (noting that residency restrictions contribute to the high rate of homelessness in the population of people convicted of a sex offense, "which is the greatest obstacle to the effective management of sex offenders in California"). The Kansas Sex Offender Policy Board similarly issued a report opposing residency restrictions. See *Zoned Out*, *supra* note 52, at 7. The Colorado Sex Offender Management Board also has opposed residency restrictions, recommending the following in a 2004 report: "Placing restrictions on the location of correctionally supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism." *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community*, COLORADO DEP'T OF PUB. SAFETY, DIV. OF CRIMINAL JUSTICE, SEX OFFENDER MGMT. BD. 4 (2004).

291. See Iowa County Attorneys Association, Statement on Sex Offender Residency Restrictions in Iowa (Dec. 11, 2006), available at www.iowa-icaa.com/ICAA_STATEMENTS/Sex_Offender_Residency_Statement_Dec_11_06.pdf. (calling upon the Iowa State Legislature to repeal a recently enacted state-wide residency restriction).

292. See *Residency Restrictions*, JACOB WETTERLING RESOURCE CTR., www.jwrc.org/KeepKidsSafe/SexualOffenders101/ResidencyRestrictions/tabid/84/Default.aspx (last visited July 29, 2012) ("Because residency restrictions have been shown to be ineffective at preventing harm to children, and may indeed actually increase the risks to kids, JWRC does not support residency restriction laws. Such laws can give a false sense of security while sapping resources that could produce better results used elsewhere.").

categories of people convicted of sex offenses in favor of periodically reviewed case-by-case restrictions as determined by courts, probation, or parole officers.²⁹³ This recommendation is justifiable and consistent with the research discussed in Part III.D above. Eliminating such broad residency restrictions would have allowed senior Ariel Berlin, discussed earlier in this article, to return to his apartment of forty years so that he would not have had to die after spending more than a year needlessly living in a homeless shelter.

D. Amend Federal Housing Law and Regulations

Current law enables PHAs and owners to, in effect, “adopt[] misguided ‘zero tolerance’ policies that arbitrarily exclude needy applicants” from subsidized housing.²⁹⁴ The following statutory and regulatory changes implicitly acknowledge the important role of stable housing in preventing recidivism, are consistent with HUD Secretary Donovan’s recent directives encouraging broad discretion to admit those reentering the community from the criminal justice system,²⁹⁵ and would further other federal efforts to assist formerly incarcerated individuals in successfully transitioning back to their communities.

1. Eliminate Provisions Permanently Barring Lifetime Registrants

The federal ban on lifetime registrants from most federally assisted housing fails to take into account differences in those individuals convicted of sex offenses, variations in the offenses, length of time since conviction, and differing state laws regarding who must register and for how long. This “broad brush” approach precludes many potentially good tenants from accessing affordable housing and is inconsistent with research proving the critical role of housing in maintaining stability and preventing recidivism.²⁹⁶ It also fails to acknowledge the reality that most of those convicted of sex offenses do not reoffend.²⁹⁷

Regulations should be amended to compel PHAs and owners to look beyond registration status and make individualized determinations.²⁹⁸ PHAs and owners should consider the following criteria in making case-by-case

293. See *No Easy Answers*, *supra* note 10, at 118 (this recommendation mirrors that of the Association of Treatment for Sexual Abusers).

294. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 566 (2005) [hereinafter *No Second Chance*].

295. See *First Letter from Secretary Donovan*, *supra* note 131; *Second Letter from Secretary Donovan*, *supra* note 135.

296. See *supra* Part III.B.3.

297. See *supra* Part III.A. Additionally, state law differences in who is placed on sex offender registries result in wildly differing housing consequences in different geographic communities.

298. Currently, PHAs are required to consider mitigating and other factors for those applying to the public housing program. See 24 C.F.R. § 960.203(d) (2012). However, there are no similar requirements for other subsidized housing programs. See *AN AFFORDABLE HOME ON REENTRY*, *supra* note 88, at 43.

determinations: 1) “time, nature and extent of applicant’s conduct, including the seriousness of the offense”;²⁹⁹ 2) recentness of the offense;³⁰⁰ 3) evidence of rehabilitation;³⁰¹ and 4) factors suggesting favorable conduct in the future.³⁰² Acknowledging empirical research demonstrating that recidivism rates decline with age³⁰³ and the reality that the health and physical limitations that accompany old age make it more challenging for many individuals to reoffend, regulations also should require PHAs and owner to consider the following additional factors: 1) current age;³⁰⁴ 2) physical and mental health; and 3) willingness to receive appropriate services or treatment if indicated.³⁰⁵ Prospective tenants should be afforded an opportunity to describe mitigating circumstances and rehabilitation, and to provide letters of support *before* a decision is made.³⁰⁶ Finally, the PHA or owner shall bear the burden of proving, based on a preponderance of the evidence, that it has sufficient grounds for denial of admission.³⁰⁷

2. Where PHAs and Owners Have Discretion, Adopt Specific Tenant Selection Standards

Involvement in criminal activity alone³⁰⁸ or a nondescript fear for safety

299. 24 C.F.R. § 960.203(d) (2012).

300. *See* AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 43.

301. *See* 24 C.F.R. § 960.203(d)(1)(i) (2012).

302. *See* AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 43 (citing “One Strike and You’re Out” Screening and Eviction Guidelines for Public Housing Authorities (PHAs), PIH 96-16 (HA) (issued Apr. 12, 1996, expired Apr. 30, 1997), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10981.pdf).

303. *See supra* Part III.B.1 for further discussion of age and recidivism rates.

304. For a sample list of criteria PHAs should consider, including age, *see Model PHA Policies on Screening Applicants for a Criminal Record*, NATIONAL HOUSING LAW PROJECT, <http://www.nhlp.org/node/1253> (last visited Mar. 25, 2013).

305. *See also* AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 109. For screening guidelines for landlords renting units without federal subsidies, *see* NATIONAL HOUSING LAW PROJECT, *Best Practices: Screening Applicants for a Criminal Record*, available at <http://www.nhlp.org/files/NPH%20training%20-%20best%20practices-1.pdf>.

306. While all applicants are entitled to due process proceedings to challenge admissions decisions, most are unable to secure legal representation to assist in such challenges. *See, e.g., No Second Chance*, *supra* note 294, at 591 (noting the many barriers housing applicants face in securing legal assistance, including insufficient resources to hire an attorney; legal services programs serving the poor often do not accept subsidized housing admissions cases, and if they do, they are unable to meet the demand; and the applicants’ inability to access legal assistance is exacerbated by their lack of housing).

307. *See, e.g.,* AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 109. Placing the burden on the PHA or owner is appropriate given that stable housing is critical in preventing recidivism. Additionally, because it is the PHA or owner suggesting that a particular applicant should be excluded, the PHA or owner should be required to justify that decision. *See also* Joint Statement of Dep’t of Housing and Urban Dev. & Dep’t of Justice, *supra* note 104, stating that “A determination that an individual poses a direct threat must be based upon an individualized assessment, not fear, speculation, or stereotype.”

308. Interestingly, the statute refers to criminal activity, not criminal conviction. For further discussion of this failure to limit the screening to criminal convictions, *see, e.g., No Second Chance*, *supra* note 294;

should not be a sufficient basis for excluding prospective tenants,³⁰⁹ particularly given today's knowledge of the importance of stable housing and its role in reducing recidivism. To avoid the "arbitrary rejection of applicants without careful assessment of any real safety risks they might pose,"³¹⁰ HUD should revise its regulations to mandate that the factors listed in recommendation D.1. be considered for applicants to all federally supported programs before denying admission.³¹¹

3. Explicitly Define "Reasonable Period of Time" As Three Years or Less

Current regulations provide that PHAs and owners should determine whether relevant criminal activity occurred "within a reasonable time of the admission decision";³¹² however, "reasonable time" is not defined. A new regulation should define reasonable time to be no more than three years. This timeframe is consistent with a Congressional interpretation of "reasonable time" in the context of evictions from subsidized housing due to criminal drug activity³¹³ and Congressional support for the general principle of rehabilitation.³¹⁴ The absence of a definition of "reasonable time" results in

Marie Claire Tran-Leuning, *When Discretion Means Denial: The Use of Criminal Records to Deny Low-Income People Access to Federally Subsidized Housing in Illinois*, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW (Aug. 2011), available at <http://povertylaw.org/sites/default/files/webfiles/when-discretion-means-denial.pdf>.

309. See AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 13. See also Robert Stanton, *HUD: Ex Inmates Need Help to Stay Off Streets in Houston*, HOUS. CHRON. (July 19, 2011), <http://www.chron.com/news/houston-texas/article/HUD-Ex-inmates-need-help-to-stay-off-streets-in-2080673.php> (quoting HUD Secretary Donovan's statement that "ex-offenders who do not find stable housing in the community are more likely to recidivate than those who do [find housing]"); *supra* Part IV.B.3 (discussion of the "housing first" movement).

310. *No Second Chance*, *supra* note 294, at 554. The author continues: "It is hard to avoid the suspicion that moral judgments, public prejudices and fears, and political opportunism play a role in the selection of those criteria. It is hard to find any other convincing explanation, for example, for federal legislation that would deny a sixty-year-old access to public housing because of a single sex offense committed decades earlier." *Id.*

311. See Tran-Leuning, *supra* note 308, at 29 (recommending that HUD mandate an examination of mitigating circumstances for all types of subsidized housing). See also NATIONAL HOUSING LAW PROJECT, Powerpoint, *Accessing Affordable Housing, The Rights of Previously Incarcerated Individuals* (Jan. 29, 2009), available at http://www.nhlp.org/files/Webinar%201-29_0.pdf; AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 44 (listing factors PHAs and owners should consider, as found in various regulations and handbooks).

312. AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 11 (citing 42 U.S.C. § 13661(c) (2012)).

313. *Id.* (citing 42 U.S.C. § 13661(a) (2012)). Congress also provided that if mitigating circumstances exist, the ban could be for less than 3 years. See 42 U.S.C. § 13661 (2012). A three-year ban in this context demonstrates Congress's recognition that "an individual should be given another chance and an opportunity to demonstrate rehabilitation or changed circumstances." AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 10.

314. See *id.* In this excellent article on formerly incarcerated individuals' access to subsidized housing, Catherine Bishop outlines arguments supporting a narrow interpretation of "reasonable time." *Id.* at 11-12. Her additional arguments are as follows: 1) Congress explicitly acknowledged that applicants denied admission due to criminal activity can reapply and

applicants such as Mr. Bianco excluded from federally supported housing who present little or no threat.³¹⁵

4. Demonstrate a Nexus Between Criminal Activity and Health and Safety Concerns

Statutory provisions permit PHAs and owners to exclude those who have been convicted of “violent criminal activity” or of “other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees.”³¹⁶ This broad, discretionary standard should be amended to require the PHA or owner to demonstrate a nexus between the conviction and health and safety for all prior criminal activity. Regulations governing the *public housing* program obligate PHAs to demonstrate and document how an applicant’s involvement in a particular crime threatens health and safety.³¹⁷ This requirement should be formally incorporated into the law and applied to *all* HUD-assisted housing programs that restrict applicants with a criminal history. Additionally, the requirement of showing a nexus between prior criminal activity and health and safety, which currently applies only to “other criminal activity,” also should apply to “violent criminal activity,” for crimes subsumed within that definition do not necessarily pose a threat to the health and safety of other tenants and building staff.³¹⁸

demonstrate that they have not engaged in criminal activity for a “reasonable time,” *id.* at 11 (citing 42 U.S.C. § 13661(c)(2) (2012)); thus, if Congress had intended prior criminal activity to bar applicants permanently, or even for an extended period of time, it would not have included this provision; and 2) in the context of the use of illegal drugs, Congress defined “currently engaged in” to mean “the individual has engaged in ‘the behavior recently enough to justify a reasonable belief that the individual’s behavior is current,’” *id.* at 12 (citing 42 U.S.C. § 1437(t)(7) (2012)). HUD has interpreted this provision to allow a PHA to exclude an applicant for possessing illegal drugs *only* if the incident occurred within *one year* of the application. *Id.* (citing HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE 7420.10G, para. 5.7, 5-37 (2001)).

315. See *Public Housing Authority and Landlord Admission Policies for People with Criminal Records and Addiction Histories*, LEGAL ACTION CTR., available at http://www.lac.org/doc_library/lac/publications/Housing_Policies_for_People_with_Criminal_Records_and_Addiction_Histories_LAC_one-pager__2_.pdf (recommending that HUD promulgate regulation defining “reasonable time”). For a different approach, see Tran-Leuning, *supra* note 308, at 15 (arguing that HUD should provide guidance to PHAs on what amount of time is reasonable). See also *Does Your PHA Deny Admission or Assistance on the Basis of an Old Criminal Record?*, NAT’L HOUSING LAW PROJECT, <http://www.nhlp.org/node/1231> (last visited Mar. 25, 2013).

316. 42 U.S.C. § 13661(c)(1) (2012).

317. See AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 13 (citing HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, sec. 7.7, 96 (2003)); Screening and Eviction For Drug Abuse and Other Criminal Activity-Final Rule, HUD Notice H 2002-22, para. X (issued Oct. 29, 2002, expired Oct. 31, 2003), available at <http://www.hud.gov/offices/adm/hudclips/notices/hsg/02hsgnotices.cfm>.

318. Violent criminal activity is defined as “any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage.” 24 C.F.R. § 5.100 (2012). There is nothing in this definition, though, that requires a landlord to consider the extent

E. Enact Federal Laws and Policies That Affirmatively Protect People Convicted of Sex Offenses from Needless Discrimination in Housing

In addition to rolling back the federal laws that create counter-productive barriers to stable housing for people with a prior sex offense conviction, we recommend enacting federal legislation and promulgating policies that affirmatively protect people with a prior conviction, including a sex offense conviction, from counterproductive housing discrimination. Over the past several years, at least five municipalities have enacted ordinances that prohibit landlords from needlessly discriminating against people based on their past criminal justice involvement: Champaign, Illinois,³¹⁹ Urbana, Illinois,³²⁰ Appleton, Wisconsin,³²¹ Madison, Wisconsin,³²² Dane County, Wisconsin,³²³ and Newark, New Jersey.³²⁴ Other municipalities are currently considering such legislation.³²⁵ These ordinances are models for the enactment of federal protections that strike the proper balance between landlords' interests in protecting their property and tenants and the community's need to promote public safety by ensuring that people with conviction histories, including a history of being convicted of a sex offense, obtain stable housing. Key features of these ordinances include the following: 1) an anti-discrimination statement;³²⁶ 2) time limits on how far back in time a conviction is to be considered;³²⁷ 3) standards for assessing relevance of the conviction;³²⁸ and 4)

to which the conduct was at all related to where the offender *resided* at the time.

319. For a list of the various municipal ordinances that protect against housing discrimination based on past criminal justice involvement, *see generally* NATIONAL LAW HOUSING PROJECT, www.nhlp.org/node/1528 (last visited July 29, 2012). For Champaign, Illinois' ordinance, *see* MUNICIPAL CODE, CITY OF CHAMPAIGN ch. 17, art. I, §§ 17.3-17.45, art. V, §§ 17.71, 17.75 (2012), *available at* <http://library.municode.com/index.aspx?clientId=10520&stateId=13&stateName=Illinois>.

320. *See* URBANA CODE OF ORDINANCES ch. 12, art. III, §§ 12-37, 12-64 (2009), *available at* <http://urbanaindinois.us/citycode/TOC016>.

321. *See* MUNICIPAL CODE OF CITY OF APPLETON ch. 8, art. II, §§ 8-26, 8-30, 8-31 (1992), *available at* <http://www.appleton.org/i/p/municode.pdf>.

322. *See* MADISON CODE OF ORDINANCES ch. 39, § 39.03 (2012), *available at* <http://library.municode.com/index.aspx?clientId=50000&stateId=49&stateName=Wisconsin>.

323. *See* DANE COUNTY CODE OF ORDINANCES tit. 6, ch. 31, §§ 31.02-31.11 (2009), *available at* <http://danedocs.countyofdane.com/webdocs/pdf/ordinances/ord031.pdf>.

324. *See* Newark, N.J., Ordinance 12-630 (Sept. 19, 2012), *available at* <http://newark.legistar.com/LegislationDetail.aspx?ID=1159554&GUID=6E9D1D83-C8D7-4671-931F-EE7C8B2F33FD&Options=&Search>.

325. *See, e.g.*, S. F. HUMAN RIGHTS COMM'N, <http://www.sf-hrc.org/index.aspx?page=145> (last visited July 30, 2012); SEATTLE OFFICE FOR CIVIL RIGHTS, www.seattle.gov/civilrights/protections.htm (last visited July 30, 2012).

326. Madison's ordinance, for example, begins with the following statement: "Declaration of Policy. The practice of providing equal opportunities in housing . . . to persons without regard to . . . arrest record, conviction record . . . is a desirable goal of the City of Madison and a matter of legitimate concern to its government . . . Denial of equal opportunity in housing compels individuals and families who are discriminated against to live in dwellings below the standards to which they are entitled." MADISON CODE OF ORDINANCES § 39.03(1).

327. Three of the ordinances—Appleton, Dane County, and Madison—time limit

consideration of rehabilitation.³²⁹

In terms of guiding landlords on how to consider an applicant's past conviction history, Newark, New Jersey's ordinance is perhaps the best model. Newark requires landlords to consider six factors in making a decision, three of which go to the amount of time that has elapsed and any evidence of the applicant's rehabilitation.³³⁰ The remaining factors require that the landlord consider the nature of the applicant's past convictions and how this conviction will affect the applicant's suitability as a tenant, requiring the landlord to ask: "Would the applicant as a tenant have an opportunity for the commission of similar offense(s)? Are the circumstances leading to the offense(s) likely to reoccur?"³³¹ Had the landlords who had been considering Mr. Bianco's tenancy asked these questions, they would have realized that renting him an apartment in a building for seniors would enable him to establish healthy social relationships with other tenants so that he no longer needs to rely on his computer for socialization, which would significantly reduce, if not eliminate, his risk of re-offending altogether.

There is no reason that these ordinances cannot be replicated at the federal level.³³² Minimally, HUD, which has long been charged with enforcing

background checks to two years in the community, while Champaign's ordinance has a five year time limit. See MUNICIPAL CODE OF THE CITY OF APPLETON ch. 8, art. II, § 8-30(2) (though convictions that are subject to the state's sex offender registration requirements are excepted from this time limit); DANE COUNTY CODE OF ORDINANCES tit. 6, ch. 31, § 31.11(1)(e); MADISON CODE OF ORDINANCES ch. 39, § 39.03(4)(d)(2); MUNICIPAL CODE CITY OF CHAMPAIGN ch.17, art. I, § 17.45, art. V, § 17-75(e). Newark's ordinance time limits a background check to eight years for felony level offenses and five years for lower level offenses. Newark, N.J., Ordinance 12-1630, Art.11, Section IV. Such time limits are consistent with the evidence showing that most recidivism occurs during the time frame immediately following a person's release to the community, see *supra* Part III.A, and are consistent with our recommendations regarding federal regulations for subsidized housing.

328. The Dane County and Madison ordinances all provide that a landlord can refuse to rent because of a past conviction only where "the circumstances of the offense bear a substantial relationship to tenancy." DANE COUNTY CODE OF ORDINANCES tit. 6, ch. 31, § 31.11(1)(e); MADISON CODE OF ORDINANCES ch. 39, § 39.03(4)(d)(1). As with subsidized housing, a non-descript, generalized fear about safety is an insufficient reason to deny housing to a person with a sex offense conviction. Newark's ordinance lists six factors landlords must consider, three of which require the landlord to consider the nexus between the nature of the offense and the tenancy. Newark, N.J., Ordinance 12-1630, Art.11, Section V ("Required Considerations").

329. One of the ordinances, Champaign, explicitly encourages landlords to consider the housing applicant's evidence of rehabilitation. See MUNICIPAL CODE CITY OF CHAMPAIGN ch.17, art. I, § 17.45 ("[L]andlords are encouraged to consider the rehabilitative efforts of individuals and the period since the conviction and the circumstances of the conviction when deciding to discriminate on the basis of conviction information."). This is a critical feature to include in anti-discrimination legislation, because it reminds landlords that *most* people convicted of a sex offense do not re-offend, but instead take affirmative steps to live a law-abiding, productive life in the community.

330. NEWARK, N.J., ORDINANCE 12-1630, Art.11, § V(ii),(v), and (vi).

331. NEWARK, N.J., ORDINANCE 12-1630, Art.11, § V(i), (iii), and (iv).

332. While this piece is focused on people with a past sex offense conviction, we nonetheless endorse anti-discrimination policies that protect all people with a conviction history

housing anti-discrimination law,³³³ should perform an affirmative role in this context, consistent with the role the federal government has played for more than three decades in promoting and enforcing similar anti-discrimination policies in the employment context.³³⁴

F. Enhance Reintegration Planning and Coordination

Given the empirical work on the relationship between reintegration planning and recidivism,³³⁵ additional resources should be devoted to careful planning for release. Researcher Willis writes that “incorporating a systems-based framework may increase the effectiveness of sex offender reintegration. Such a framework would involve close linkages between all people and organisations(sic) involved with released sex offenders.”³³⁶ A critical component of such plans is housing. If the proposals recommended here are implemented, professionals working with those convicted of sex offenses will have more options for appropriate housing placements. In working with seniors with past sex offense convictions, professionals can coordinate with preexisting networks that assist seniors in maintaining critical social contacts and in avoiding the isolation that often accompanies aging.

as a means of promoting public safety and addressing the racial inequities that inevitably arise from ostensibly race-neutral criminal background check policies because of the disparate impact our criminal justice system has on communities of color. For an analysis of disparate impact in the employment context and evidence of the federal government’s role in addressing it; see, e.g., EQUAL EMP’T OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (describing how an ostensibly race-neutral policy of screening out employment applicants based on a past criminal record has a disparate impact on communities of color, and thus, absent proof of a business necessity, violates Title VII of the Civil Rights Act of 1964) [hereinafter EEOC ENFORCEMENT GUIDELINES].

333. For a discussion of the role of HUD’s Office of Fair Housing and Economic Opportunity in enforcing antidiscrimination laws and policies, see U.S. DEP’T OF HOUSING AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo/aboutfheo (last visited May 9, 2012).

334. See EEOC ENFORCEMENT GUIDELINES, *supra* note 332. The EEOC’s recently amended Guidelines strengthen the policy that has been in place since 1987. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964* (1987), available at <http://www.eeoc.gov/policy/docs/convict1.html> (last visited Jan. 4, 2012); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (1987), available at <http://www.eeoc.gov/policy/docs/convict2.html> (last visited Jan. 4, 2012).

335. See *supra* Part III.E.

336. Gwenda M. Willis, *From Prison into the Community: The Impact of Release Planning on Sexual Recidivism for Child Molesters* 124 (2009) (unpublished Ph. D. thesis, University of Canterbury), available at http://ir.canterbury.ac.nz/bitstream/10092/2542/1/thesis_fulltext.pdf [hereinafter Willis, *Thesis*].

G. Nursing Homes and Assisted Living Facilities Should Make Acceptance Decisions Based on a Behavioral Assessment

There is no data suggesting that those who have been convicted of a sex offense are likely to reoffend if admitted to a nursing home or an assisted living facility.³³⁷ Facility admissions personnel, therefore, should assess applicants with a sex offense conviction as they would any other applicant and not exclude an applicant simply because of his status on a sex offender registry. The other recommendations in this Section also will assist those applying to these facilities. Limiting the community notification requirement to those at high risk to reoffend would, in most instances, make it inapplicable to seniors seeking institutional care, given the evidence that age and time in the community diminish the risk of reoffending.³³⁸ This limitation would also eliminate other residents' unnecessary fear. The anti-discrimination provision recommended above, should, like other fair housing provisions, be applicable to nursing homes and assisted living facilities, and therefore, would assist seniors convicted of a sex offense in being admitted.

As discussed in Part II, some states and communities are developing special nursing facilities for those convicted of sex offenses who are living in the community and need assisted living or nursing care. These efforts should be opposed. Recognizing that a separate facility may offer efficiency and a sense of security for staff and communities, this ghettoization further stigmatizes those convicted of sex offenses. It deprives them of the opportunity to reintegrate into the community and to socialize with a broad spectrum of society. It is also likely to result in facilities with substandard care in an industry that historically has struggled to maintain competent, caring staff and facilities that meet basic health standards.³³⁹ Relegating those convicted of sex offenses to separate facilities creates too many temptations to deprive them of their basic human needs.

H. Community Education

The general public must be educated about this wealth of empirical data and be informed of the challenges confronting those convicted of sex offenses as they age. As an alternative to mass media portrayals of those convicted of sex offenses,³⁴⁰ which usually arise in the context of sensational cases, new avenues to educate the general public must be created. These avenues should have an emphasis on positive portrayals, accurate information about recidivism risks, particularly as they relate to age, and the positive impact of reintegration on recidivism.³⁴¹

337. See *supra* Part III.A.

338. See *supra* Part III.B.1-2.

339. See, e.g., IQ NURSING HOMES, <http://www.iqnursinghomes.com/unsanitary-condition-s-in-nursing-home--9-27553.html> (last visited July 7, 2012).

340. See Willis, *Thesis, supra* note 336, at 127.

341. See *id.* at 126. Given the challenges of altering public attitudes, Willis recommends

The Federal Reentry Council Report emphasizes that the public does “not recognize the extent to which policies set up a person released from prison for failure, with little hope of redemption.”³⁴² Stating that the public feels “little personal stake in the safe and successful return of people released from prison or jail,”³⁴³ it offers the following recommendation: “Help the public appreciate that preparing people in prison or jail for their release and providing support to them upon their return makes families and communities stronger, safer, and healthier.”³⁴⁴ This recommendation should be followed.³⁴⁵

The Federal Interagency Reentry Council itself, in collaboration with state and local governments, is one entity that could and should be engaged in positive educational efforts. Private funders, community service providers, housing advocates, and housing providers all need to be educated about the importance of thoughtful reintegration efforts, particularly the necessity of access to appropriate housing and the effective use of resources to maximize rehabilitation for seniors convicted of sex offenses.

Among the critical points that must be communicated are the following: 1) The recidivism rate dramatically declines as people age, and therefore, the elderly are among the least likely to reoffend; 2) There is no evidence that residency restrictions and community notification requirements result in fewer offenses; indeed, it may result in more risk, not less; 3) Generally, people convicted of sex offenses reoffend at a lower rate than commonly believed; 4) Careful reintegration planning, particularly provisions for housing, employment and social contacts, lessens the risk of recidivism; and 5) All those convicted of sex offenses are not the same. Current policy regarding treating them as a homogeneous group results in an inefficient expenditure of law enforcement resources, with funds designed to prevent further crime being expended on those unlikely to reoffend, and funds to assist offenders being spent on those holding little promise of rehabilitation.

As facts regarding recidivism and reintegration among those convicted of

further research on how best to convey accurate information to the public. *See id.* at 128.

342. COUNCIL OF STATE GOVERNMENTS, REENTRY POLICY COUNCIL, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY, POLICY STATEMENT 7: EDUCATING THE PUBLIC ABOUT THE RE-ENTRY POPULATION (2005), available at <http://reentrypolicy.org/Report/PartI/ChapterI-B/PolicyStatement7> (last visited July 5, 2012).

343. *Id.*

344. COUNCIL OF STATE GOVERNMENTS, REENTRY POLICY COUNCIL, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY, POLICY STATEMENT 7: EDUCATING THE PUBLIC ABOUT THE RE-ENTRY POPULATION, RECOMMENDATION D (2005), available at <http://reentrypolicy.org/Report/PartI/ChapterI-B/PolicyStatement7/Recommendation7-D> (last visited July 7, 2012).

345. REPORT OF THE RE-ENTRY POLICY COUNCIL offers a wide array of recommendations, many of which address issues ripe for community education. *See* COUNCIL OF STATE GOVERNMENTS, REENTRY POLICY COUNCIL, <http://reentrypolicy.org/Report/TOC> (last visited July 10, 2012). We support any efforts to better educate the public, professionals, and policy makers about evidence-based approaches that support those convicted of sex offenses in reintegrating into the community, as well as those who waste resources better spent elsewhere.

sex offenses, particularly the aging, become better known and understood, a broader base of support will develop. This base can advocate for the changes in laws and policies recommended here. Hopefully, it can influence housing policy at the grassroots level, particularly as communities engage in the multiple planning processes required by HUD for its assisted housing programs.³⁴⁶ Housing advocates, educated with empirical data, can work with neighborhood organizations to understand how expanded housing options can enhance public safety. Housing providers can educate entities critical to their operations, including insurers, in understanding where the risks of liability exist and where they do not.³⁴⁷ Hopefully, these educational efforts ultimately will augment the public's investment in developing solutions that will provide additional housing and make our communities safer.

CONCLUSION

Approximately 750,000 people in this country are required to register as sex offenders. Many are obligated to register for life regardless of the nature of their crime, their age at the time of the crime, and whether or not they continue to pose a danger to the community. The multitude of federal, state, and local laws passed in the last two decades impose draconian penalties on people convicted of sex offenses, including not just registration but also broad community notification and restrictions on where they can live. These laws and policies have fostered the stigma of being a "registered sex offender" and have made it increasingly difficult for people to successfully reintegrate into their communities and to live dignified, normal lives.

Charles Bianco's story illustrates just how unfair and counter-productive these laws and policies have become. His story also provides a compelling reason to re-examine our laws and policies and to ask ourselves if they actually accomplish the goal of reducing sexual offending. Are the stigma that Mr. Bianco endures and the difficulties he has experienced finding adequate housing necessary to protect the public? The rich body of research that has emerged over the past twenty years about sexual offense recidivism and the efficacy of our current laws convincingly tells that the answer to this question is no.

The crimes against Jacob Wetterling, Megan Kanka, Adam Walsh, and Jessica Lunsford were tragic and horrible. It is understandable that at the time,

346. See AN AFFORDABLE HOME ON REENTRY, *supra* note 88, at 92-98. Points of impact where influence can be exerted include the PHA's Five Year and Annual Plan; the Consolidated Plan required when applying for HUD block grant programs; the Qualified Allocation Plan that establishes project selection and allocation standards for housing created under the Low Income Housing Tax Credit Program; the Continuum of Care plan that addresses the housing needs of the homeless; and the Olmstead Plan—i.e., a state-wide plan to increase the state's ability to enable people with mental disabilities to live in the community rather than in an institution. See *id.*

347. See *supra* Part II.B.2 and note 109 (discussion of landlord liability). Landlords should be educated about the empirical research regarding recidivism, and most importantly, that it declines with age and the time spent in the community, see *supra* Part III.B.1.

we responded to these crimes by adopting measures we thought would better protect the public from future crimes. But we know far more now than we did then. Today, we know that most people convicted of sex offenses do not reoffend. We also know that recidivism declines with age and time spent in the community, particularly among those convicted of sex offenses. We know that registration and community notification requirements and residency restrictions that paint with a broad brush, treating all those convicted of sex offenders uniformly, are overly inclusive, expensive, and difficult to maintain. Moreover, they are ineffective at protecting children and the larger community.

Most importantly, we know the value of stable housing. We know it is essential in preventing further crime. It enables people convicted of sex offenses to reconnect with family and loved ones who can assist them in this transition. It facilitates securing financial support in the form of employment or public benefits. Housing enables seniors who have been convicted of a sex offense to access medical and other services necessary for their survival. It provides opportunities for social interaction, and therefore, limits isolation and stress—factors that can lead to re-offending and conditions to which the elderly are particularly susceptible.

Public policy should be grounded in what we have learned from two decades of experience. It should also be grounded in basic fairness. And, as HUD Secretary Shaun Donovan wrote in April of 2012:

[P]eople who have paid their debt to society deserve the opportunity to become productive citizens . . . to set the past aside and embrace the future. Part of that support means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live.³⁴⁸

This is especially true for seniors, like Mr. Bianco, whose needs for housing and supportive services are greater than most and whose likelihood of reoffending is the least. Mr. Bianco and others like him are a compelling reason to change current laws and policies to better protect public safety and ensure that people with a past sex offense conviction have an opportunity to age in a manner that maintains their dignity as human beings.

348. *Second Letter from Secretary Donovan, supra* note 135.