2023

Zoned In: How Residence Restrictions Lead to the Indefinite and Unconstitutional Detention of New Yorkers Convicted of Sex Crimes

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CARDOZO LAW REVIEW
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ZONED IN: HOW RESIDENCE RESTRICTIONS LEAD TO THE INDEFINITE AND UNCONSTITUTIONAL DETENTION OF NEW YORKERS CONVICTED OF SEX CRIMES

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> *"[T]he Constitution protects all people, and it prohibits the deprivation of liberty based solely on speculation and fear."*
>
> -Justice Sonia Sotomayor[1]

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† Assistant Deputy Public Defender, New Jersey Office of the Public Defender (Passaic Region). I would like to thank Professor Ekow Yankah for his guidance and for fostering my passion for criminal law since 1L year, the editors of the Cardozo Law Review for their diligence throughout the editing process, and my family for their unwavering support since day one.

1 Ortiz v. Breslin, 142 S. Ct. 914, 916–917 (2022) (Sotomayor, J., respecting the denial of certiorari).

INTRODUCTION

In 2008, Angel Ortiz pleaded guilty to robbery and attempted sexual abuse for "sexually threatening a pizza delivery man during the course of a robbery."[2] He was sentenced to a ten-year determinate sentence in New York State prison, followed by a five-year period of post-release supervision.[3] While in prison, Mr. Ortiz participated in alcohol and

2 Appendix (Volume II) at 116a no. 12, Ortiz v. Breslin, 142 S.Ct. 914 (2022) (No. 20-7846).

3 People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1046 (N.Y. 2020).

substance abuse treatment and completed a program that taught him how to prevent reoffending behaviors.[4] He maintained that his participation in the programs at the prison taught him how to regulate his impulses and effectively cope with the substance use disorder that had plagued him for many years.[5]

After completing his prison sentence, Mr. Ortiz was transferred to a residential treatment facility located within Fishkill Correctional Facility to begin the post-release supervision portion of his sentence.[6] Under New York State law, his time in the residential treatment facility, which in all significant ways functioned as an ordinary prison facility, was not to exceed six months.[7] Upon his release, he intended to return to New York City, where he had lived for most of his life, so that he could rebuild his relationship with his eleven-year-old daughter.[8]

Mr. Ortiz proposed dozens of potential addresses to the Department of Corrections; however, each was rejected.[9] Because Mr. Ortiz's conviction involved a sexual threat and he had been convicted of a sexual offense decades earlier, he was subjected to New York's sex offender registry scheme, which prevents individuals with certain convictions from living within one thousand feet of schools.[10]

In November of 2018, Mr. Ortiz was finally released to a homeless shelter located on Wards Island.[11] All told, Mr. Ortiz served twenty-seven extra months in prison solely because he was unable to procure a housing arrangement deemed suitable by the Department of Corrections.[12]

Mr. Ortiz's situation is not unique but rather illustrates a serious constitutional issue affecting incarcerated people throughout the country.[13] In densely populated areas like New York City, finding housing that is located more than one thousand feet away from a school

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4 Appendix (Volume II) at 117a no. 15–16, *Ortiz*, 142 S. Ct. 914 (No. 20-7846).

5 *Id.*

6 *People ex rel. Johnson*, 163 N.E.3d at 1046.

7 *Id.* at 1046.

8 Appendix (Volume II) at 116a no. 7–9, *Ortiz*, 142 S. Ct. 914 (No. 20-7846).

9 *Ortiz*, 142 S. Ct. at 914 (Sotomayor, J., respecting the denial of certiorari).

10 *People ex rel. Johnson*, 163 N.E.3d at 1045.

11 *Id.* at 1047.

12 *Id.* at 1057 (Rivera, J., dissenting).

13 *See generally* Elizabeth Esser-Stuart, Note, *The Irons are Always in the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 TEX. L. REV. 811 (2018) (exploring how sex offender laws restricting residency affect homeless individuals across all fifty states); Adam Liptak, *Their Time Served, Sex Offenders Are Kept in Prison in 'Cruel Catch-22'*, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/us/supreme-court-sex-offenders.html (last visited May 27, 2023).

can be nearly impossible.[14] As a result, many New Yorkers convicted of crimes who would otherwise be released languish in prison until the rare bed opens in one of the city's few shelters that admit sex offenders.[15] Effectively, some incarcerated people's sentences are extended indefinitely due to a policy that severely limits approved housing in a city that already suffers from a housing shortage.[16]

The New York Court of Appeals heard Mr. Ortiz's case, ruling for the first time on the significant constitutional issues presented by the indefinite detention of sex offenders in *People ex rel. Johnson v. Superintendent, Adirondack Correctional Facility*.[17] After the New York Court of Appeals rejected Mr. Ortiz's claim, the United States Supreme Court denied certiorari for jurisdictional reasons.[18] Justice Sonia Sotomayor, however, was compelled to write an accompanying statement to address the "grave" constitutional concerns she identified in the policy.[19] She felt it was inevitable that the issue would ultimately reach the Supreme Court and urged the New York Legislature to modify its policy.[20]

This Note will argue that New York City's detention of individuals convicted of sex offenses for periods of time that exceed the maximum sentence that could be legally imposed for their offenses violates the Eighth Amendment of the United States Constitution. These detentions

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14 Allison Frankel, *Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless, Sex-Offender Registrants*, 129 YALE L.J.F. 279, 283, 285 (2019) ("For individuals subject to sex-offender housing restrictions generally, and for registrants with disabilities in particular, additional legal and practical burdens make finding housing nearly impossible.").

15 Daniel Lambright, *Why We Must Rethink the Way We Treat People Convicted of Sex Offenses*, NYCLU (Apr. 28, 2022, 11:00 AM), https://www.nyclu.org/en/news/why-we-must-rethink-way-we-treat-people-convicted-sex-offenses [https://perma.cc/9BXJ-JCD5] ("Homeless people who are eligible for release from prison must wait for a spot to open in one of the few homeless shelters within the New York City Department of Homeless Services system that is not within 1,000 feet of school grounds. In effect, this means that people who have been convicted of sex offenses must sit in confinement for months or even years after they have served their time until a spot in a shelter is available."); *see also* Esser-Stuart, *supra* note 13, at 815–16.

16 *See Governor Hochul Announces Statewide Strategy to Address New York's Housing Crisis and Build 800,000 New Homes*, N.Y. STATE (Jan. 10, 2023), https://www.governor.ny.gov/news/governor-hochul-announces-statewide-strategy-address-new-yorks-housing-crisis-and-build-800000#:~:text=Governor%20Kathy%20Hochul%20today%20announced,2023%20State%20of%20the%20State. [https://perma.cc/MRE2-4553]("New York State is currently facing a severe, once-in-a-generation housing crisis."); *see also* Frankel, *supra* note 14, at 281.

17 People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041 (N.Y. 2020).

18 Ortiz v. Breslin, 142 S.Ct. 914, 917 (2022) (Sotomayor, J., respecting the denial of certiorari) ("[A] clear split has yet to develop among Federal Courts of Appeals or state courts of last resort . . . .").

19 *Id.* ("New York should not wait for this Court to resolve the question whether a State can jail someone beyond their parole eligibility date, or even beyond their mandatory release date, solely because they cannot comply with a restrictive residency requirement.").

20 *Id.*

fail to meet even the most relaxed standard of judicial review. This Note will argue that detaining individuals because of their inability to find housing deemed suitable under the Sex Offender Registration and Notification Act constitutes cruel and unusual punishment because doing so inflicts a punishment based on homelessness—a status that is imposed upon individuals by the severe restrictions contained in the statute. This Note will also argue that the policy fails to pass constitutional muster because it leads to the indefinite detention of citizens while failing to advance, and potentially serving to undermine, the legislature's stated goal of protecting the public from sexual violence.

This Note will proceed in three parts. Part I will introduce the background and history of sex offender registry laws, tracking their expansion and development over the last three decades. This Part will also explain the mechanics of state and federal statutes with a focus on the New York sex offender registry scheme. Part II will analyze the current state of the law in New York, beginning with an examination of how incarcerated sex offenders who are unable to find suitable housing before they are released may be incarcerated indefinitely. The analysis will then focus on the New York Court of Appeals' decision in *People ex rel. Johnson v. Superintendent, Adirondack Correctional Facility*, wherein the court rejected Petitioners' Due Process and Eighth Amendment claims, upholding New York's policy of indefinitely detaining certain sex offenders.[21] The Note will further analyze Justice Sonia Sotomayor's statement accompanying the Supreme Court's denial of certiorari, in which she outlined her concerns with the constitutionality of the policy. Finally, the Note will argue that the New York Court of Appeals erred in this decision because the policy punishes individuals for the fact that they are made homeless by the policy. It will then discuss how the lack of empirical data supporting the effectiveness of residence requirements in preventing recidivism and promoting public safety renders the policy unconstitutional under even the most relaxed form of judicial review.

I. BACKGROUND

A. *Origins of the Sex Offender Notification and Registration Act*

While there have always been horrific crimes committed against women and children, the development of preventative sex offender laws began in earnest in the late 1980s and early 1990s in response to a number

21 *See People ex rel. Johnson*, 163 N.E.3d at 1045–46.

of high-profile crimes.[22] One of the most notable of these crimes occurred in 1989 when an eleven-year-old boy named Jacob Wetterling was abducted while riding his bike in his Minnesota hometown by a masked man and murdered.[23] The crime went unsolved for three decades until his buried body was recovered on a nearby farm.[24] While the perpetrator of this crime was never apprehended, Wetterling's mother,[25] along with others, advocated for a system that would track sex offenders in the hopes of preventing future similar tragedies, with a particular emphasis on protecting children from becoming victims of sexually violent crimes.[26] This event, among others, was the catalyst for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act (Wetterling Act), the first federal sexual assault registry law.[27]

The Sex Offender Registration and Notification Act (SORNA) represents the modern formulation of the federal sex offender registry framework, requiring offenders to register their personal and residential information with the state,[28] and allowing for community notification that a sex offender lives within a certain geographical area.[29] This became the first "comprehensive national system for the registration of those

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22 ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 13–14 (2006) (The creation of sex offender laws "heralded the ominous expansion of a new paradigm of state intervention: surveillance of risk rather than detection of crime, and preventive, rather than punitive, deprivation of liberty.").

23 Cleve R. Wootson, Jr., *A Minnesota Boy Was Kidnapped at Gunpoint in 1989. Police Have Finally Found His Body*, WASH. POST (Sept. 4, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/09/04/a-minnesota-boy-was-kidnapped-at-gunpoint-in-1989-police-have-finally-found-his-body (last visited Mar. 17, 2023). Other high-profile crimes that prompted public demand for more aggressive sex offender restrictions included the murder and rape of Diane Ballasiotes and the murder of a seven-year-old boy in Washington state. *See* JANUS, *supra* note 22, at 14.

24 Wootson, Jr., *supra* note 23.

25 FORTUNE SOC'Y, NOWHERE TO GO: NEW YORK'S HOUSING POLICY FOR INDIVIDUALS ON THE SEX OFFENDER REGISTRY AND RECOMMENDATIONS FOR CHANGE 5 (2019). *See generally* LENORE ANDERSON, IN THEIR NAMES: THE UNTOLD STORY OF VICTIMS' RIGHTS, MASS INCARCERATION, AND THE FUTURE OF PUBLIC SAFETY (2022). Wetterling's parents later expressed that they felt sex offender registry laws had gone too far:

> We've caught a lot of people in the net who could have been helped . . . We've been elevating sex offender registration and community notification and punishment for 20-some years, and a wise and prudent thing would be to take a look at what's working. Instead we let our anger drive us.

See ANDERSON, *supra* note 25, at 216–17.

26 *Legislative History of Federal Sex Offender Registration and Notification*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRAFFICKING, https://smart.ojp.gov/sorna/current-law/legislative-history [https://perma.cc/WWM9-UAX8]; *see also* Wootson, Jr., *supra* note 23.

27 *See* Rachel J. Rodriguez, Note, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?*, 62 RUTGERS L. REV. 1023, 1028 (2010).

28 34 U.S.C. § 20913 (2023).

29 *Id.* § 20923.

offenders," enacted "[i]n order to protect the public from sex offenders and offenders against children."[30] The statute was drafted and codified "in response to the vicious attacks by violent predators" against seventeen women and children who were the victims of murder, sexual assault, or both, between 1984 and 2006.[31]

Section 20911 of the statute enumerates the types of convictions that are covered by the Act[32] and the three tiers of offenders.[33] A "tier I sex offender" is defined as "a sex offender other than a tier II or tier III sex offender."[34] Section 20912 requires each jurisdiction to implement its

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30 *Id.* § 20901.

31 *Id.* The names of the victims are included in the statute:

> (1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing. (2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey. (3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas. (4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa. (5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota. (6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida. (7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida. (8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders. (9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona. (10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts. (11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California. (12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995. (13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004. (14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998. (15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002. (16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later. (17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

Id.

32 *Id.* § 20911. A "sex offense" is defined by the statute as,

> (i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor; (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18; (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note); or (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

Id. § 20911(5)(A).

33 *Id.* § 20911(2)–(4).

34 *Id.* § 20911(2). A "tier II sex offender" is defined as:

own registry of sex offenders and establishes community notification requirements.[35] Section 20913 sets the registry requirements for sex offenders, stating generally:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.[36]

> [A] sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
>
> (i) sex trafficking (as described in section 1591 of title 18);
>
> (ii) coercion and enticement (as described in section 2422(b) of title 18);
>
> (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) 1 of title 18;
>
> (iv) abusive sexual contact (as described in section 2244 of title 18);
>
> (B) involves—
>
> (i) use of a minor in a sexual performance;
>
> (ii) solicitation of a minor to practice prostitution; or
>
> (iii) production or distribution of child pornography; or
>
> (C) occurs after the offender becomes a tier I sex offender.

Id. § 20911(3).

> A "tier 3 sex offender" is defined as:
>
> [A] sex offender whose offense is punishable by imprisonment for more than 1 year and—
>
> (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
>
> (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or
>
> (ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;
>
> (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
>
> (C) occurs after the offender becomes a tier II sex offender.

Id. § 20911(4).

35 "(a) Jurisdiction to maintain a registry. Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter. (b) Guidelines and regulations. The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter." *Id.* § 20912.

36 *Id.* § 20913(a).

B. *Growth of the Reach of SORNA*

Before 1994, few states required those convicted of sex offenses to register their information with law enforcement agencies.[37] In 1944, California passed the nation's first registration law, with Arizona following suit in 1951.[38] Other states passed similar laws over time, with some requiring sex offenders to register identifying information, while others required only habitual offenders to do so.[39]

In the late 1980s and 1990s, however, the concept of the "sexual predator" as a separate and uniquely dangerous group emerged.[40] This trend occurred against the backdrop of extensive media coverage of a relative few egregious crimes, calling for crimes against women and children to be taken more seriously by the criminal justice system.[41] The dominant narrative in the public and political spheres became clear—these crimes were preventable and therefore required a different approach than merely punishing offenders for their crimes with periods of incarceration.[42]

In 1994, the Wetterling Act was passed, requiring each state to implement a sex offender registry.[43] This represented a turning point in sex offense legislation because it imposed a more uniform federal standard, allowing all states to implement their own community notification schemes.[44] It also tied federal funding to compliance, conditioning ten percent of each state's funding on its successful implementation of the law.[45] Therefore, states had a monetary incentive,

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37 *See* Rachel J. Rodriguez, Note, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?*, 62 RUTGERS L. REV. 1023, 1028 (2010).

38 Chloe Wolman, Note, *Putting Reason Before Retribution: Embracing Utilitarian Principles to Reform Contemporary Sex-Offender Registry Laws*, 20 S. CAL. REV. L. & SOC. JUST. 125, 129 (2011).

39 *Id.*

40 *See* JANUS, *supra* note 22, at 13–15.

41 *See id.* at 14–16, 18 ("[B]y the late 1980s, 'society's increased attention to sexual assault' had produced a 'change in its perceived seriousness.'" (quoting GOVERNOR'S TASK FORCE ON CMTY. PROT., STATE OF WASH., FINAL REPORT II-5 (1989))).

42 *See id.* at 16–19 ("Existing penal sentences for violent, recidivist sex offenders were judged to be 'inadequate punishment.'" (quoting MINN. ATT'Y GEN.'S TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN, FINAL REPORT 10 (1989))).

43 Leslie A. Hagen, Assistant U.S. Att'y, W. Dist. of Mich. SMART Off., & John Dossett, Gen. Couns., Nat'l Cong. of Am. Indian, *Consultation: Adam Walsh Child Protection & Safety Act of 2006*, https://www.justice.gov/archive/tribal/docs/fv_tjs/session_3/session3_presentations/Adam_Walsh.pdf [https://perma.cc/NKR9-M3RM].

44 *See* Jane Ramage, Note, *Reframing the Punishment Test Through Modern Sex Offender Legislation*, 88 FORDHAM L. REV. 1099, 1109 (2019).

45 *See id.* at 1108.

in addition to mounting public pressure, to enact aggressive policies related to sex offenders.[46]

In 1996, the Wetterling Act was amended and expanded by Megan's Law, requiring all states to implement a community notification scheme.[47] This law was enacted after seven-year-old Megan Kanka was raped and murdered by her neighbor who lured her into his home with the promise that she could pet his dog.[48] After later learning that the neighbor had two convictions for sex offenses, Megan's parents stated that they would have never allowed their daughter to travel alone in their neighborhood.[49] It was their hope that, if parents knew that a sex offender lived in their neighborhood, they would supervise their children more closely and avoid the homes where they knew sex offenders resided.[50] The New Jersey State Legislature swiftly and unanimously passed Megan's Law,[51] which was federally codified soon after.[52]

The Adam Walsh Child Protection and Safety Act of 2006 further expanded the sex offender registry,[53] establishing a tiered system for sexual offenses, shoring up registration and notification requirements, and establishing the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office), which administers sex offender laws.[54] Those convicted of sex offenses are now required to register in some form in all fifty states and face varying degrees of restrictions on what types of employment and housing they may seek.[55]

C. *Mechanics of SORNA*[56]

While states vary in implementation of their individual sex offender registry laws, all states impose at least two requirements: 1) registration and 2) community notification.[57] Sex offenders are required to provide their personal information to their local jurisdiction, which in turn

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46 *See id.*

47 *See id.* at 1109.

48 *See* Esser-Stuart, *supra* note 13, at 812.

49 *See id.*

50 *See* JANUS, *supra* note 22, at 3 ("In the aftermath of the tragedy, the Kankas led a campaign to require authorities to warn communities about sex offenders in the area.").

51 N.J. STAT. ANN. §§ 2C:7-1–2C:7-11 (West 2023).

52 *See* JANUS, *supra* note 22, at 16.

53 *Legislative History of Federal Sex Offender Registration and Notification*, *supra* note 26.

54 *Id.*

55 *See generally* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1077–81 (2012).

56 34 U.S.C. §§ 20901–20932 (2023).

57 *See* Rodriguez, *supra* note 37, at 1025.

publishes it on local databases and the Dru Sjodin National Sex Offender Public Website.[58]

1. Who is Subject to SORNA Restrictions?

Each state has some discretion regarding which offenses are registerable.[59] While there is no singular model for state sex offender statutes, the Kansas Sex Offender Registration Act is an illustrative example of a state registration scheme.[60] The Kansas law requires anyone who is convicted of a "sexually violent" crime to register with the state.[61] Under the statute, "sexually violent" crimes include, among other crimes, rape, sexual exploitation of a child, and aggravated sexual battery.[62] New Jersey[63] and California[64] impose similar requirements.

Since the 1990s, the number of registry-eligible offenses has grown exponentially throughout the United States.[65] For example, when Indiana passed its own sex offender registry law, called Zachary's Law, eight crimes were included.[66] Now, the law lists forty crimes that trigger registration, including twenty-one crimes that trigger registration as a "sex or violent offender," and nineteen crimes that trigger registration as "a sex offender."[67]

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58 *See About NSPOW*, DRU SJODIN NAT'L SEX OFFENDER PUB. WEBSITE, https://www.nsopw.gov/en/About [https://perma.cc/77HK-YXKX]; Rodriguez, *supra* note 37, at 1028–29.

59 Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 347–48 (2019).

60 Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH. L. REV. 97, 104 (1998).

61 *Id.*

62 *Id.* (Other offenses covered by the statute include: "indecent liberties with a child; aggravated indecent liberties with a child; criminal sodomy; aggravated criminal sodomy; indecent solicitation of a child; aggravated indecent solicitation of a child;…any conviction for a comparable felony offense in effect prior to the effective date of the Act; any federal or state conviction for a felony offense that, under the laws of Kansas, would be a sexually violent offense; an attempt, conspiracy, or criminal solicitation of a sexually violent crime; or any act which is determined beyond a reasonable doubt at sentencing to have been sexually motivated.").

63 *Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws*, N.J. OFF. OF THE ATT'Y GEN. (June 1998), https://www.nj.gov/oag/dcj/megan/meganguidelines-2-07.pdf [https://perma.cc/659Y-TZGE] (Page 6).

64 *Frequently Asked Questions: California Tiered Sex Offender Registration (Senate Bill 384) For Registrants*, CAL. DEP'T OF JUST. (Feb. 2021), https://oag.ca.gov/sites/all/files/agweb/pdfs/csor/registrant-faqs.pdf? [https://perma.cc/MA4T-885A].

65 Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1081 (2012) ("Since the 1990s, registration-worthy sex offenses have grown dramatically in number and scope.").

66 *Id.*

67 *Id.* at 1081–82.

2. "Presence" Restrictions

One of the most significant ways that sex offender registry requirements impact the lives of those convicted of sex crimes is through housing and "presence" restrictions.[68] These vary by state, but generally prohibit sex offenders from residing within one thousand feet of a school.[69] In many states, sex offenders are not permitted to enter public spaces "where children congregate," significantly limiting their ability to move through society.[70]

3. Community Notification

The federal government compiles sex offenders' personal information in the Dru Sjodin National Sex Offender Website.[71] There, the public can search for suspected sex offenders by inputting a name, address, zip code, county, or city into the online database.[72] The site also includes links to local sex offender databases for all states, territories, and tribes in the United States.[73]

D. *The Sex Offender Registration Act in New York*

Each state has its own sex offender registration and community notification laws.[74] While each state is encouraged to implement the federal guidelines, states are permitted to enhance their laws to make them more, but not less, restrictive in scope.[75] For example, they are permitted to add additional crimes to the list of registry-eligible

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68 *See* Horn, *supra* note 59, at 333.

69 *Id.*

70 *See* Carpenter & Beverlin, *supra* note 65, at 1097.

71 *About NSPOW*, *supra* note 58.

72 *Id.*

73 *Id.*

74 *See* JANUS, *supra* note 22, at 16.

75 MARIEKE BROCK & WM. NÖEL NÖEL, LIBR. CONG., SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: IMPLEMENTATION CHALLENGES FOR STATES—SUMMARY AND ASSESSMENT OF RESEARCH 3–4 (2020); *Sex Offender Registration and Notification Act (SORNA)*, U.S. DEP'T JUST., https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna [https://perma.cc/AK43-ZGYE] ("Within a specified timeframe, each jurisdiction is required to comply with the federal standards outlined in the Sex Offender Registration and Notification Act (SORNA). Jurisdictions include all 50 states, the District of Columbia, the principal U.S. territories, and federally recognized Indian tribes.").

offenses.[76] The effect of sex offender laws in New York, an incredibly densely populated city, illustrates the severe challenges sex offenders face in finding statutorily-suitable housing.[77]

The New York State Sex Offender Registration Act ("SORA") went into effect on January 21, 1996.[78] Like its federal counterpart, SORA "was enacted to assist local law enforcement agencies to protect communities by: 1) requiring sex offenders to register with the State; and[] 2) providing information to the public about certain sex offenders living in their communities."[79]

1. Risk Level Assessment

Under SORA, when an individual is convicted of a sex offense in New York and is set to be released from incarceration, they proceed through an administrative process to determine their risk of reoffense.[80] Everyone who is convicted of a registry-eligible offense is assessed for a risk level by a judge following a court hearing.[81] This assessment is based on a variety of factors, including the age of the victim, whether the offender and victim had a familial relationship, and whether the offender participated in proscribed programs aimed at rehabilitation.[82] Individuals are entitled to an attorney at these proceedings, as well as an appeal.[83] Mirroring the federal law, in New York, there are three levels of sex offenders: "Level 1 (low risk of repeat offense)"; "Level 2 (moderate risk of repeat offense)"; and "Level 3 (high risk of repeat offense and a threat to public safety exists)."[84] In addition to the risk level, the court assesses whether the sex offender should be designated a sexual predator, a

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76 BROCK & NÖEL, *supra* note 75, at 3–4.

77 *Representation of People Convicted of Sex Offenses*, OFF. OF THE APP. DEF., https://oadnyc.org/sex-offenses/[https://perma.cc/6X6Z-SDCM]; Horn, *supra* note 59, at 333 ("[Presence] restrictions effectively bar registered sex offenders from residing in some high-density areas, as in parts of Miami and Los Angeles.").

78 *About the New York State Sex Offender Registration Act (SORA)*, N.Y. STATE DIV. OF CRIM. JUST. SERVS., https://www.criminaljustice.ny.gov/nsor/law.htm [https://perma.cc/RMT2-6ER5].

79 *Id.*

80 *Risk Level & Designation Determination*, N.Y. STATE DIV. OF CRIM. JUST. SERVS., https://www.criminaljustice.ny.gov/nsor/risk_levels.htm [https://perma.cc/VV9X-58A8].

81 *Id.*

82 BD. OF EXAM'RS OF SEX OFFENDERS, SEX OFFENDER REGISTRATION ACT: RISK ASSESSMENT GUIDELINES AND COMMENTARY §§ I–V (2006), https://www.nycourts.gov/reporter/06_SORAGuidelines.pdf [https://perma.cc/NG77-QMG2]. Other factors include: the perpetrator's use of violence, the type of sexual contact, the number of victims, the duration of the sexual misconduct, whether or not the victim suffered from a disability, the criminal history of the perpetrator, the perpetrator's post-offense behavior. *Id.*

83 N.Y. CORRECT. LAW § 168-n(3) (McKinney 2023).

84 *Risk Level & Designation Determination*, *supra* note 80.

sexually violent predator, or a predicate sex offender.[85] Each level carries varying restrictions.[86]

2. Public Notification Requirement Under SORA

As in every other state in the country, sex offenders in New York are required to register with the State, providing a significant amount of personal information.[87] For example, registrants must report their home address[88] and any websites with which they maintain accounts.[89] In addition, all registrants must provide a description of their appearance including their height, weight, and eye color.[90] Registrants must supply a new photo of themselves every one to three years, depending on their designation level.[91] With this information, the State maintains a publicly searchable database where some registrants' information is published online.[92]

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85 *Risk Level Determination*, YONKERS, https://www.yonkersny.gov/live/public-safety/police-department/sex-offender-info/risk-level [https://perma.cc/JA9Y-D3M5].

86 *Id.* ("This designation, along with the risk level, governs the duration of the registration. Level 1 sex offenders must register for 20 years unless they have been given one of the above designations. Level 2 and Level 3 sex offenders are required to be registered for life. If the sex offender has been designated a sexual predator, a sexually violent offender or a predicate sex offender, he or she must register for life regardless of risk level.").

87 N.Y. CORRECT. LAW § 168-b(1)(a)–(f) (McKinney 2023) (Sex offenders must report to the state: "(a) The sex offender's name, all aliases used, date of birth, sex, race, height, weight, eye color, driver's license number, home address and/or expected place of domicile, any internet accounts with internet access providers belonging to such offender and internet identifiers that such offender uses. (b) A photograph and set of fingerprints. For a sex offender given a level three designation, the division shall, during the period of registration, update such photograph once each year. For a sex offender given a level one or level two designation, the division shall, during the period of registration, update such photograph once every three years. The division shall notify the sex offender by mail of the duty to appear and be photographed at the specified law enforcement agency having jurisdiction. Such notification shall be mailed at least thirty days and not more than sixty days before the photograph is required to be taken pursuant to subdivision two of section one hundred sixty-eight-f of this article. (c) A description of the offense for which the sex offender was convicted, the date of conviction and the sentence imposed including the type of assigned supervision and the length of time of such supervision. (d) The name and address of any institution of higher education at which the sex offender is or expects to be enrolled, attending or employed, whether for compensation or not, and whether such offender resides in or will reside in a facility owned or operated by such institution. (e) If the sex offender has been given a level two or three designation, such offender's employment address and/or expected place of employment.) (f) Any other information deemed pertinent by the division.").

88 *Id.* § 168-b(1)(a).

89 *Id.*

90 *Id.*

91 *Id.* § 168-b(1)(b).

92 *Sex Offender Management*, N.Y. STATE DIV. OF CRIM. JUST. SERVS., https://www.criminaljustice.ny.gov/nsor/ [https://perma.cc/83XR-3UJQ].

3. Housing Requirements: SARA

In 2001, New York adopted the Sexual Assault Reform Act (SARA), restricting where sex offenders on probation or parole supervision could reside.[93] Specifically, the statute prohibits sex offenders convicted of sexual crimes involving individuals under the age of eighteen from entering proscribed areas including "school grounds."[94] In 2006, the law was amended to define "school grounds" as "any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked vehicle located within one thousand feet of the real property boundary comprising any such school."[95] The New York State Department of Corrections and Community Supervision (DOCCS) determines whether an address satisfies the one thousand feet rule by running it through an algorithm that is not made available to the general public.[96]

II. STATE OF THE LAW

A. *The Consequences of New York's Indefinite Detention Policy*

1. Description of the Problem

Under SARA, many individuals placed on the sex offender registry are prohibited from residing within one thousand feet of a school.[97] In densely populated cities, like New York City, it is nearly impossible to find housing that meets this requirement, particularly for those who lack the means to pursue multiple options for housing and, therefore, require access to a shelter.[98] This is an especially pronounced problem because the sex offender registry is disproportionately populated by people of

93 FORTUNE SOC'Y, *supra* note 25, at 3.

94 *Id.*

95 *See id.*; N.Y. EXEC. LAW § 259-c(14) (Mckinney 2023); N.Y. PENAL Law § 220.00(14)(b) (Mckinney 2023) (defining "school grounds").

96 Shane English, *Sex Offenders Face Housing Maze After Prison Release*, CITY LIMITS (Jan. 17, 2017) https://citylimits.org/2017/01/17/sex-offenders-face-housing-maze-after-prison-release/ [https://perma.cc/4XCT-7E28] ("Though this seems like a small detail, how the state measures 1,000 feet is crucial: measuring 1,000 feet from the property line, 1,000 feet from the street or 1,000 feet from a school building change what addresses are available to released offenders.").

97 *See* Frankel, *supra* note 14, at 281.

98 *Id.*

color, a group that already faces difficulties in securing housing.[99] In fact, only nine out of the two hundred shelters in New York City are geographically SARA-compliant.[100] Of those nine, some still refuse to accept sex offenders as residents.[101] Three are located on Wards Island in the middle of the Harlem River.[102]

Individuals on the sex offender registry who are subject to residency restrictions cannot be released from prison until they have procured SARA-eligible housing that is approved by DOCCS prior to their release.[103] If an individual requires housing in one of New York City's few SARA-complaint shelters, DOCCS typically waits until their maximum release date to place them on a waitlist.[104] While they await SARA-compliant housing, they may remain in prison well beyond their sentence, with no definite end point to their detention.[105]

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99 Alissa R. Ackerman & Meghan Sacks, *Disproportionate Minority Presence on U.S. Sex Offender Registries*, JUST. POL'Y J. 1, 9–10 (2018). *See generally Racial Inequities in Housing*, OPPORTUNITY STARTS AT HOME, https://www.opportunityhome.org/resources/racial-equity-housing/[https://perma.cc/DF8S-QBLP].

100 Christie Thompson, *For Some Prisoners, Finishing a Sentence Doesn't Mean Getting Out*, CITY LIMITS (May 24, 2016), http://citylimits.org/2016/05/24/for-some-prisoners-finishing-a-sentence-doesnt-mean-getting-out [https://perma.cc/V83S-N2FA].

101 Arvind Dilawar, *Doe Fund Fights Sex Offender Relocation To Its East Williamsburg Shelter*, GOTHAMIST, (Sept. 11, 2015), https://gothamist.com/news/doe-fund-fights-sex-offender-relocation-to-its-east-williamsburg-shelter [https://perma.cc/J2E7-SVPL].

102 Thompson, *supra* note 100.

103 Frankel, *supra* note 14, at 293.

104 *See id.* at 295.

105 Thompson, *supra* note 100.

Note: Areas shown are calculated based on address points rather than school grounds boundaries and may not represent the full extent off limits to offenders. *Shelter doesn't accept sex offenders

Sources: City documents; New York State law; New York City Department of City Planning

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2. The Myth of Residential Treatment Facilities

DOCCS has attempted to justify the indefinite detention of sex offenders in prisons through the use of "residential treatment facili[ties]."[107] Under Corrections Law section 73, sex offenders may be transferred at the end of their sentence to a residential treatment facility (RTF), which, despite a residential requirement, is characterized as a form of post-supervision release.[108] Under the statute, the state is not permitted to detain individuals longer than six months in an RTF; however section 73(10) allows RTFs to be used as a means to house

106 *Representation of People Convicted of Sex Offenses*, *supra* note 77 (depicting areas of New York City, including shelters, that are off-limits to SARA-eligible sex offenders due to their proximity to schools).

107 *Id.*

108 N.Y. CORRECT. LAW § 73 (McKinney 2023).

individuals who would normally be subject to community supervision without a specified time limit.[109] The statute includes a definition of RTF:

> [C]orrectional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released.[110]

In reality, according to those detained at RTFs, they are held under the exact same conditions that they were while serving their official prison sentences and receive no reentry services.[111] They are typically treated no differently than inmates serving their sentences—they are subjected to the same clothing requirements and are required to use the same medical and dining facilities.[112] Further, like other inmates, they are forbidden from leaving the prison property.[113] Essentially, these individuals say their stay in the RTF amounts to an extension of their term of incarceration.[114]

B. People *ex rel.* Johnson v. Superintendent, Adirondack Correctional Facility

In 2020, the New York Court of Appeals ruled for the first time on the constitutionality of detaining sex offenders beyond their maximum sentences in the absence of SARA-compliant housing.[115] In *People ex rel. Johnson*, the court rejected the habeas petitions of two individuals who were kept in RTFs under prison-like conditions after they fulfilled their sentences.[116] The court held that DOCCS had not violated the Petitioners'

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109 *Id.* § 73(10).

110 N.Y. CORRECT. LAW § 2(6) (McKinney 2023).

111 Alcantara v. Annucci, No. 2534-16, slip op. at *1, *3 (N.Y. Sup. Ct. Feb. 24, 2017) (detailing how Petitioners alleged they were detained in facilities far from their home communities, with "little or no opportunity for employment, education, or training in the communities near these facilities, and there is inadequate opportunity for on-the-job training and employment within the facilities themselves.").

112 Frankel, *supra* note 14, at 296 (explaining that individuals incarcerated in RTFs are "'treated much the same as inmates in the general population,' wearing the same 'prison uniform,' using 'the same commissary, mess hall, and sick hall as the rest of the population,' and, like other prisoners, they are forbidden from leaving the prison grounds.").

113 *Id.*

114 *Id.*

115 People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1045 (N.Y. 2020).

116 *Id.*

Eighth Amendment or Due Process rights.[117] The United States Supreme Court denied the Petitioners' application for certiorari in this case for jurisdictional reasons, with an accompanying statement by Justice Sonia Sotomayor expressing her concerns about the constitutionality of New York's policy.[118]

1. Facts

Two individuals brought claims against DOCCS based on their detention in RTFs.[119] The first petitioner, Fred Johnson, had been sentenced to an indeterminate prison sentence of two years to life, as well as lifetime parole supervision following two convictions for sex offenses.[120] He was also designated as a Level Three sex offender, which restricted where he could live.[121] He appeared before the Parole Board in June of 2017, informing the Board that participating in a sex offender rehabilitation program had taught him how to control his impulses and he was ready to safely leave the prison.[122] He was granted an "open parole date" of August 10, 2017.[123] Because of his sex offender risk level, Mr. Johnson was told that he was not permitted to leave the prison until he provided an address that was not within one thousand feet of a school.[124] After being unable to find a residence that met this requirement, Mr. Johnson asked to be released into the New York City shelter system.[125] Due to a shortage of beds in facilities that met this requirement, Mr. Johnson was placed on a waiting list until a bed opened up in November of 2019.[126]

The second petitioner, Angel Ortiz, was sentenced to ten years imprisonment, followed by five years of parole supervision.[127] Additionally, he was designated a sexually violent Level Three sex offender under SORA because his conviction included sexually threatening a pizza delivery person during a burglary.[128] He was therefore

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117 *Id.* at 1052–56.

118 Ortiz v. Breslin, 142 S. Ct. 914, 914 (2022) (Sotomayor, J., statement respecting the denial of certiorari).

119 *People ex rel. Johnson*, 163 N.E.3d at 1045.

120 *Id.*

121 *Id.* at 1045–46.

122 *Id.* at 1045.

123 *Id.*

124 *Id.* at 1045–46.

125 *Id.* at 1046.

126 *Id.*

127 *Id.*

128 *See id.*; Appendix (Volume II) at 116a no. 12, Ortiz v. Breslin, 142 S.Ct. 914 (2022) (No. 20-7846).

subject to housing restrictions under SARA.[129] Mr. Ortiz earned sufficient "good time credits" to be granted an early parole date.[130] Mr. Ortiz asked that he be released to his mother's home, but DOCCS rejected her address because it was too close to a school.[131] Mr. Ortiz proposed a dozen other addresses, but all were rejected.[132] Like Mr. Johnson, Mr. Ortiz was unable to find SARA-compliant housing, and, thus, he was not released on his parole date.[133]

The maximum expiration date of Mr. Ortiz's sentence elapsed in March of 2018, seventeen months after his parole date; however, he was still not released.[134] Instead, he was transferred to two different RTFs where he was held in total for an additional eight months.[135] Mr. Ortiz was finally released when a bed in the New York City shelter system opened up on Wards Island in November of 2018.[136] Mr. Ortiz was subjected to largely the same conditions as those serving their sentence of incarceration.[137] In total, Mr. Ortiz was incarcerated for over two years longer than he would have were it not for SARA requirements, including eight months past the maximum sentence that could have been imposed for the crime of conviction.[138]

2. Procedural History

In November of 2017, Mr. Johnson filed a writ of habeas corpus seeking immediate release from incarceration.[139] He argued that continuing to confine him in prison after the Parole Board granted him an open release date violated substantive due process because it infringed upon his fundamental right to be free from arbitrary confinement.[140] The New York Supreme Court denied Mr. Johnson's writ in March of 2018, and the Appellate Division affirmed its decision in July of 2019.[141]

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129 *People ex rel. Johnson*, 163 N.E.3d at 1046.

130 *Id.* at 1078 (Rivera, J., dissenting).

131 *Id.* (Rivera, J., dissenting).

132 *Id.* at 1078 (Wilson, J., dissenting).

133 *Id.* at 1078 (Wilson, J., dissenting).

134 *Id.* at 1046–47, 1078 (Wilson, J., dissenting).

135 *Id.* at 1047.

136 *Id.* at 1046–47.

137 Ortiz v. Breslin, 142 S. Ct. 914, 914 (2022) (Sotomayor, J., respecting the denial of certiorari) ("Ortiz spent eight months in two of these facilities, where he lived behind barbed wire, in a general prison population, in conditions nearly identical to those in which he served his sentence.").

138 *People ex rel. Johnson*, 163 N.E.3d at 1057–58 (Rivera, J., dissenting).

139 *Id.* at 1046.

140 *Id.* ("'[A]pplying SARA's housing restrictions to keep him in prison, after an open parole date for his release has been set, violates substantive due process by infringing on his fundamental right to be free from confinement.'").

141 *Id.*

In June of 2018, Mr. Ortiz filed a petition for a writ of habeas corpus, challenging his confinement.[142] In his writ, Mr. Ortiz argued DOCCS violated his substantive due process right to serve his sentence of post-release supervision outside of prison and his Eighth Amendment right to be free from cruel and unusual punishment.[143] As an alternative to his release, while on the waiting list for a SARA-compliant shelter, Mr. Ortiz requested that he be permitted to reside in the prison facility under shelter-like conditions, which would have allowed him to leave the facility freely.[144] Notably, neither Mr. Ortiz nor Mr. Johnson challenged DOCCS's ability to restrict where they could live post-release on the basis of SARA restrictions placed on them due to their risk level designations.[145]

Because neither Mr. Ortiz nor Mr. Johnson were still incarcerated by the time their case was heard by the New York Court of Appeals, the court converted their respective habeas claims into declaratory judgment actions.[146] While the court found that the issues presented in the Petitioners' appeal would normally lie outside the scope of its review,[147] the court agreed to hear the case because the issues presented by their appeals were likely to repeatedly arise without judicial scrutiny.[148]

After the court denied the Petitioners' claims, Mr. Ortiz applied for certiorari to the United States Supreme Court.[149] While the Supreme Court denied certiorari, Justice Sonia Sotomayor issued a statement articulating her concerns regarding the constitutionality of the law, and her confidence that the issue of indefinite detention of sex offenders would inevitably reach the Court.[150]

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142 *Id.* at 1047.

143 *Id.* ("DOCCS violated both his substantive due process 'right to serve his term of postrelease supervision in the community' and the constitutional prohibition on cruel and unusual punishments.").

144 *Id.* (requesting "that he 'be allowed to treat Queensboro [Correctional Facility] as a residence—albeit with a curfew, like other shelters—rather than a prison.'" (alteration in original)).

145 *Id.* at 1046–47.

146 *Id.* at 1048.

147 *Id.*

148 *Id.* (acknowledging the issues raised in Mr. Ortiz's appeal "'are important issues that are likely to arise in other cases but also likely to evade review'").

149 *See* Ortiz v. Breslin, 142 S. Ct. 914, 914 (2022) (Sotomayor, J., respecting the denial of certiorari).

150 *Id.* at 914, 917.

3. The New York Court of Appeals' Decision

a. Due Process Claims and Legal Standard

In evaluating Mr. Johnson's claim, the New York Court of Appeals determined that Mr. Johnson had no fundamental right to early release.[151] Therefore, it concluded that the proper constitutional test for the court to apply was whether there was a rational basis, the most relaxed level of judicial review, for New York's policy of housing SARA-eligible individuals in RTFs until SARA-eligible housing becomes available.[152]

The court found that Mr. Ortiz's claim presented a "closer question" because he was confined after his maximum sentence had expired.[153] Although the court agreed that he lacked a fundamental right to release, it also found that because he was unable to leave the prison without violating the terms of his release, his claim would be "self-defeating."[154] Therefore, the court also applied rational basis review to Mr. Ortiz's claim.[155]

While the court noted that the effectiveness of SARA had been questioned, the court stated it did not have the authority to rule on potential problems with the policy.[156] Applying rational basis review, the court found that DOCCS's policy of confining sex offenders in prison-like conditions while they awaited a vacancy in a SARA-compliant shelter was rationally related to the legitimate government objective of preventing sex offenders from residing within one thousand feet of schools.[157] Further, the court made clear that its role was not to determine whether or not the government's objective was essential, or even compelling.[158] It held that even if less restrictive means of ensuring

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151 *People ex rel. Johnson*, 163 N.E.3d at 1050 ("'There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.'" (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979))).

152 *Ortiz*, 142 S. Ct. at 914 (Sotomayor, J., respecting the denial of certiorari); *see* People *ex. rel.* McCurdy v. Warden, Westchester Cnty. Corr. Facility, 163 N.E.3d 1087, 1088 (N.Y. 2020). The question before the court was whether the federal constitution allowed for this policy. *People ex rel. Johnson*, 163 N.E.3d at 1050–51.

153 *People ex rel. Johnson*, 163 N.E.3d at 1051.

154 *Id.*

155 *Id.* at 1052.

156 *Id.* ("[W]e have no occasion to evaluate these policy claims.").

157 *Id.* at 1053 ("Applying this undemanding level of judicial review, the temporary confinement of sex offenders in correctional facilities, while on a waiting list for SARA-compliant NYCDHS housing, is rationally related to a conceivable, legitimate government purpose of keeping level three sex offenders more than 1,000 feet away from schools.").

158 *Id.* ("[U]nder the rational basis test, we do not evaluate whether the government purpose is a vital or compelling one. Moreover, the challenged detentions were rationally related to the purpose of SARA in that they ensured that petitioners—who, as level three sex offenders, are considered to pose a high risk of recidivism—had no contact with minors while awaiting confirmation of appropriate residence.").

SARA compliance were available, the government was not required to discontinue its use of correctional facilities to achieve this goal.[159] Ultimately, the court found that once it determined that the suitable constitutional test for the policy was rational basis review, it did not have the ability to assess the legitimacy or effectiveness of New York's indefinite detention policy.[160]

b. Eighth Amendment Claim

The court also rejected Mr. Ortiz's Eighth Amendment claim.[161] The court articulated the three-part test for evaluating such claims.[162] First, the Eighth Amendment places a limitation on the types of punishments that may be imposed on individuals convicted of crimes.[163] Second, it prohibits punishments that are egregiously disproportionate to the crime of conviction and, third, it limits what may be classified and punished as a criminal offense.[164]

The focus of Mr. Ortiz's claim was that his confinement beyond the maximum expiration date for his sentence was a violation under the third factor because his confinement was based on a status that "may be contracted innocently or involuntarily."[165] In other words, Mr. Ortiz argued that the state imposed an additional punishment upon him because he was unable to procure SARA-eligible housing and was, therefore, homeless.[166]

The court disagreed with Mr. Ortiz's assertion that he was punished merely because of his status as a homeless New Yorker.[167] The court found that the use of RTFs to house homeless sex offenders did not represent a particular hostility to sex offenders, but rather was reflective of the persistent lack of SARA-eligible housing located in New York City.[168]

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159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.* ("'The Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes[.]'"(citing Ingraham v. Wright, 430 U.S. 651, 667 (1977))).

164 *Id.* ("'[S]econd, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.'" (quoting *Ingram*, 430 U.S. at 667)).

165 *Id.* (quoting Robinson v. California, 370 U.S. 660, 667 (1962)).

166 *Id.*at 1054.

167 *Id.*

168 *Id.* at 1055 ("DOCCS's use of RTFs reflects the extreme difficulties in finding affordable New York City housing that is not within 1,000 feet of a school . . . DOCCS's confinement of Ortiz in an RTF, consistent with statutory authorization, did not constitute deliberate indifference to his plight as a sex offender who is subject to SARA.").

The court also rejected Mr. Ortiz's argument that the statutory definition of an RTF indicates that it should operate more like a shelter, as opposed to a prison.[169] Furthermore, the court found it significant that the second facility Mr. Ortiz was transferred to was located near a school, which would have made it impossible for Mr. Ortiz to come and go, as he requested, without violating the terms of SARA.[170]

c. Dissent[171]

Dissenting, Justice Rivera argued that the proper test for evaluating the Petitioners' claims was heightened intermediate review because it was clear that the indefinite detention policy was used to reduce the state's administrative burden and did not serve a correctional purpose.[172] As a result, Justice Rivera concluded that the state's power in enacting this policy was "at its lowest ebb," while Petitioners' implicated liberty interests were embedded in legislative priorities regarding reentry and public safety, as well as fundamental constitutional rights.[173] Therefore, Justice Rivera would have held that the correct legal standard was heightened intermediate review, a burden that the state "plainly fail[ed]" to satisfy.[174]

Justice Rivera further stated that while the state has a legitimate interest in protecting children, DOCCS's policy failed to satisfy even the more relaxed standard applied by the majority because it does not further that interest.[175] She noted that residency requirements are unsupported by scientific research[176] and "do next to nothing" to protect children.[177] Significantly, she highlighted Petitioners' uncontested claim that between 2005 and 2014, when sex offenders were permitted to live in non-SARA-compliant homeless shelters, there was "not a single reported

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169 *Id.* at 1055–56 ("We disagree with Ortiz's claims that Correction Law § 73(10) . . . 'cannot be read in conjunction with the other subsections of' Correction Law § 73 . . . .The legislature . . . allow[ed] DOCCS leeway to design its RTF programs and facilities.").

170 *Id.* at 1056.

171 Justice Wilson also wrote a dissent, however this note focuses on the dissent written by Justice Rivera.

172 *Id.* at 1056 (Rivera, J., dissenting); *see also* Clark v. Jeter, 486 U.S. 456, 461 (2008) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.").

173 *People ex rel. Johnson*, 163 N.E.3d at 1056 (Rivera, J., dissenting) ("[T]he liberty interests at issue derive from a constellation of State and City statutory and regulatory schemes intended to foster reentry into the community and prevent recidivism and, in certain cases, implicate indisputably fundamental rights.").

174 *Id.* (Rivera, J., dissenting).

175 *Id.* at 1065 (Rivera, J., dissenting) ("DOCCS' chosen means of effectuating the State's legitimate interest in protecting children beggars all rationality.").

176 *Id.* (Rivera, J., dissenting).

177 *Id.* at 1064 (Rivera, J., dissenting).

sex offense involving a child perpetrated by a stranger living in a homeless shelter less than 1,000 feet from a school."[178]

Justice Rivera further emphasized that the state legislature clearly considers providing affordable housing to every New Yorker and assisting with the reintegration of formerly incarcerated people into society to be important goals, and thus DOCCS's policies blatantly undermined the stated goals of lawmakers.[179]

4. United States Supreme Court Denial of Certiorari and Statement by Justice Sonia Sotomayor

In February 2022, the Supreme Court, without issuing an opinion, unanimously denied Angel Ortiz's application for certiorari.[180] Justice Sotomayor, however, wrote an accompanying statement expressing that while she agreed that the Court could not have heard the case because it did not meet the Court's requirements, it seemed inevitable that the issue of indefinite detention of sex offenders would reach the Court.[181]

She stated that New York's policy of detaining sex offenders past their maximum sentences presented "serious constitutional concerns."[182] She concluded that Mr. Ortiz may have had a liberty interest in early release, and certainly had a protected interest in release once his maximum sentence elapsed.[183] Justice Sotomayor further articulated that, leaving aside her determination that New York State's denial of Mr. Ortiz's fundamental interest demanded heightened scrutiny, the policy failed to meet even a more relaxed standard because it was not rationally related to the government objective of protecting the public from sexual violence.[184] She emphasized that courts, scholars, and law enforcement have increasingly acknowledged that residency restrictions do not decrease recidivism and may actually create the very conditions that lead

178 *Id.* (Rivera, J., dissenting).

179 *Id.* at 1065 (Rivera, J., dissenting) ("DOCCS' SARA incarceration irrationally thwarts the New York State and City legislatures' goals of fostering the successful reintegration of formerly incarcerated individuals into the community.").

180 Ortiz v. Breslin, 142 S. Ct. 914, 914 (2022) (Sotomayor, J., respecting the denial of certiorari).

181 *Id.* at 914, 917 ("Because of the grave importance of these issues and the frequency with which they arise, it seems only a matter of time until this Court will come to address the question presented in this case.").

182 *Id.* at 914.

183 *Id.* at 915.

184 *Id.* at 915–16.

to reoffense.[185] She urged the New York legislature to modify its policy before the issue would ultimately be resolved by the Court.[186]

III. ANALYSIS

A. *New York's Indefinite Detention Policy is Unconstitutional*

As Justice Sotomayor described in her statement, the policy of indefinitely detaining sex offenders presents pressing constitutional questions.[187] According to Justice Sotomayor, the policy implicates citizens' fundamental right to be released from incarceration upon completion of their sentences.[188] The majority in *People ex rel. Johnson* erred in concluding that New York's indefinite detention policy is constitutional under the rational basis review standard.[189] In her dissent, Justice Rivera correctly determined that the policy is unconstitutional because indefinite detention implicates sex offenders' fundamental liberty interests.[190] Justice Rivera also rightly concluded that even applying the most relaxed legal standard, New York's indefinite detention policy is not rationally related to the objective of increasing public safety.[191] Further, the policy violates the Eighth Amendment because it imposes an additional punishment upon those who are rendered homeless by the policy itself.

1. Indefinite Detention Requires a Heightened Level of Scrutiny

Unlike individuals convicted of nonsexual crimes, sex offenders with a certain sex offender risk level designation who cannot obtain SARA-suitable housing cannot be released into the community.[192]

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185 *Id.* at 916.

186 *Id.* at 917 ("New York should not wait for this Court to resolve the question whether a State can jail someone beyond their parole eligibility date, or even beyond their mandatory release date, solely because they cannot comply with a restrictive residency requirement. I hope that New York will choose to reevaluate its policy in a manner that gives due regard to the constitutional liberty interests of people like Ortiz.").

187 *See infra* Section II.B.4.

188 *See infra* Section II.B.4.

189 *See generally* People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041 (N.Y. 2020).

190 *See infra* Section II.B.3.c.

191 *See infra* Section II.B.3.c.

192 *People ex rel. Johnson*, 163 N.E.3d at 1048 ("New York statutes allow DOCCS to place a SARA-restricted sex offender temporarily in an RTF, until SARA-compliant housing is identified".); *see Sex Offender Management*, *supra* note 92.

Therefore, they are forced to simply remain under prison-like conditions for an indefinite period of time until a bed opens up for them at one of the three approved shelters in New York City.[193] Under New York Correction Law section 73(10), "[t]he commissioner is authorized to use any residential treatment facility as a residence for persons who are on community supervision" without specifying a time limit on the detention.[194]

As Justice Rivera correctly stated in her dissent, the Petitioners' fundamental rights were implicated when they were detained beyond their sentences.[195] Justice Sotomayor agreed with Justice Rivera's analysis in her statement accompanying the Court's denial of certiorari, arguing that Mr. Ortiz had a fundamental liberty interest to release, at the very latest, after the expiration of his maximum sentence.[196] As a result, she concluded that the policy demanded a higher level of scrutiny than rational basis review, writing "[e]ven absent such scrutiny . . . New York's policy of indefinite detention may not withstand even rational-basis review."[197] While there is no fundamental right to early release from incarceration, a protected liberty interest may arise when a federal or state statute creates the expectation of a right.[198] In New York, incarcerated individuals who receive a sufficient number of "good behavior" credits[199] are entitled to conditional release.[200] Therefore, the Petitioners had a statutorily-created right to early release.[201]

New York's indefinite detention policy means that some sex offenders are effectively denied the option of early release, which is available to individuals convicted of most other crimes.[202] Therefore, an individual who is set to be released after two years for good behavior in prison may be forced to remain incarcerated until at least the end of their maximum sentence which could amount to an additional decade or

193 *See infra* Section II.B.1.

194 N.Y. CORRECT. LAW § 73(10) (McKinney 2023).

195 *People ex rel. Johnson*, 163 N.E.3d at 1056 (Rivera, J., dissenting).

196 Ortiz v. Breslin, 142 S. Ct. 914, 915 (2022) (Sotomayor, J., respecting the denial of certiorari) ("In my view, under these New York state and city policies, Ortiz may well have held a liberty interest at the point that he became entitled to conditional release. At the very least, however, Ortiz indisputably held a liberty interest in his release at the expiration of his full sentence.").

197 *Id.* ("The State's denial of Ortiz's liberty interest in his release demands heightened scrutiny.").

198 Wilkinson v. Austin, 545 U.S. 209, 221–22 (2005) (A protected liberty interest "may arise from an expectation or interest created by state laws or policies."); *see also* Sandin v. Conner, 515 U.S. 472, 483–84 (1995) ("States may under certain circumstances create liberty interests . . . protected by the Due Process Clause").

199 N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2023).

200 N.Y. PENAL LAW § 70.40(1)(b) (McKinney 2023).

201 *Ortiz*, 142 S. Ct. at 915 (Sotomayor, J., respecting the denial of certiorari).

202 N.Y. PENAL LAW § 70.40(1)(a)(i).

more.[203] This means that those convicted of sex offenses can spend months, or even years, longer in prison than those convicted of other crimes, simply because they are unable to find housing that meets the requirements of the sex offender registry statute.[204]

As Justice Sotomayor and Justice Rivera rightly stated, even if the Petitioners did not have a fundamental right to *early* release, they certainly had the right to be released from incarceration once they had served the maximum duration of their sentences.[205] Indeed, the expiration of one's sentence is not merely a hope, but rather a legitimate expectation grounded in the state's regulatory scheme.[206] Because the Petitioners', and by extension all similarly situated individuals', fundamental rights are implicated by the indefinite detention policy, the New York Court of Appeals should have applied a heightened level of constitutional review.

2. Indefinite Detention Does Not Meet Rational Basis Review

In her dissent, Justice Rivera correctly emphasized that New York's indefinite detention policy does not meet even a relaxed rational basis review standard.[207] As Justice Sotomayor noted, the lack of empirical data supporting the utility of such policies, the breadth of research showing that overly strict residency restrictions for sex offenders may lead to decreased public safety, and a growing body of state court cases striking down such policies all show that indefinite detention is not rationally related to the goal of protecting the public from sexual violence.[208]

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203 Frankel, *supra* note 14, at 297 (DOCCS maintains that it has the authority to detain individuals in RTFs for the entirety of their post-release supervision sentence, which could amount to more than two decades).

204 *Id.*

205 *Ortiz*, 142 S. Ct. at 915 (Sotomayor, J., respecting the denial of certiorari) ("At the very least . . . Ortiz indisputably held a liberty interest in his release at the expiration of his full sentence.").

206 People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1068 (N.Y. 2020) (Rivera, J., dissenting) ("[The majority's] parsimonious view of individual liberty ignores that once a person *is* granted parole or exceeds the maximum expiration date of the carceral portion of their sentence, they possess far 'more than a hope or a unilateral expectation of release.'" (citing Green v. McCall, 822 F.2d 284, 288 (2d Cir. 1987)); *see* Victory v. Pataki, 814 F.3d 47, 60 (2d Cir. 2016) ("[A] New York inmate who has been granted an open parole release date has a legitimate expectancy of release that is grounded in New York's regulatory scheme.").

207 *People ex rel. Johnson*, 163 N.E.3d at 1065 (Rivera, J., dissenting) ("DOCCS' chosen means of effectuating the State's legitimate interest in protecting children beggars all rationality.").

208 *Ortiz*, 142 S. Ct. at 916.

There is no empirical data demonstrating that detaining individuals beyond their maximum release date serves to improve public safety.[209] In fact, there is more evidence that shows residency restrictions are based on unfounded assumptions about individuals who commit sex offenses.[210] There is a common public perception that sex offenders are more likely to reoffend than those convicted of other crimes.[211] This perception is reaffirmed by sensational media reports of sexual crimes, and by the courts themselves.[212] A prime example of this phenomenon is when Justice Kennedy, writing for the majority in *Smith v. Doe*, asserted that recidivism rates among sex offenders is "frightening and high," with a reoffense rate as high as 80%.[213] This statement has appeared in over one hundred lower court opinions and is used to justify ever-expanding restrictions placed on sex offenders.[214] As it turns out, this 80% figure was taken from an article published in Psychology Today, a magazine intended for public consumption that is not peer-reviewed.[215] The statistic was included in an article about a particular counseling program run by psychologists but was not based on any scientific study or empirical data.[216]

This myth is also perpetuated by the ways that empirical research is packaged and presented to the public.[217] For example, in May of 2019, the United States Department of Justice released a report entitled, "Recidivism of Sex Offenders Released from State Prison: A 9-Year

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209 *See generally* PATRICK A. LANGAN, ERICA L. SCHMITT, & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003).

210 RICHARD G. WRIGHT, SEX OFFENDER LAWS 3 (2d ed. 2014) ("[P]olicy makers have chosen to allow sex offender laws to be driven by the demonization of offenders, the devastating grief experienced by a subset of victims, exaggerated claims by law enforcement and prosecutors, and media depictions of the most extreme and heinous sexual assaults.").

211 Radley Balko, *The Big Lie About Sex Offenders*, Opinion, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/03/09/the-big-lie-about-sex-offenders (last visited May 27, 2023).

212 WRIGHT, *supra* note 210, at 5; Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT 495, 508 (2015).

213 *See* Ellman & Ellman, *supra* note 212, at 495–96 (citing Smith v. Doe, 538 U.S. 84 (2003) (holding that an Alaska law preventing registered sex offenders from using various social media sites was constitutional in part because of the supposedly high recidivism rates among sex offenders)).

214 Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html (last visited Feb. 25, 2023).

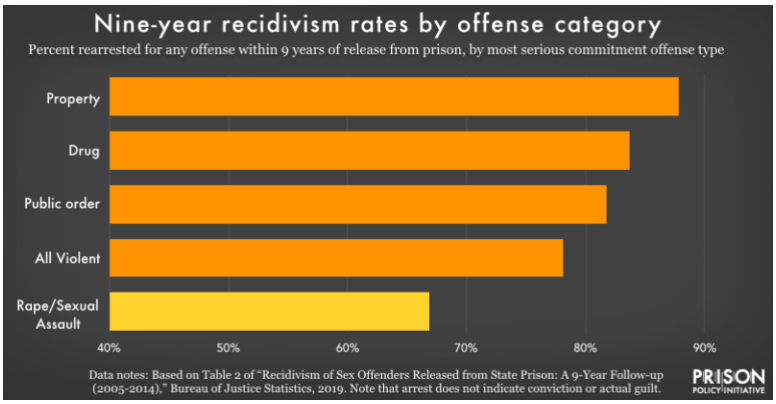
215 *Id.*

216 *Id.* ("Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80 percent do . . .").

217 *See* Balko, *supra* note 211.

Follow-Up (2005–14).”[218] The report “used criminal-history data and prisoner records to analyze the post-release offending patterns of former prisoners both within and outside of the state where they were imprisoned.”[219] In the “highlights” section of the report, authors emphasized statistics that supported the idea that sex offenders were very likely to reoffend.[220] A Department of Justice press release highlighted similar findings, beginning with the contention that “[s]tate prisoners released after serving time for rape or sexual assault were more than three times as likely as other released prisoners to be re-arrested for rape or sexual assault during the 9 years following their release”[221]

When viewed empirically, however, the data contained within the 2019 Department of Justice report actually shows that those who are convicted of sex offenses are *less likely* to reoffend than those who are convicted of nonsexual crimes.[222]



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218 MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14) (2019).

219 *Id.* at 1.

220 *Id.* (“Within 9 years of their release from prison in 2005—Rape and sexual assault offenders were less likely than other released prisoners to be arrested, but they were more likely than other released prisoners to be arrested for rape or sexual assault; Released sex offenders were more than three times as likely as other released prisoners to be arrested for rape or sexual assault (7% versus 2.3%) . . . Released sex offenders accounted for 5% of release in 2005 and 16% of arrests for rape or sexual assault during the 9-year follow-up period.”).

221 Press Release, U.S. Dep't of Just., Released Sex Offenders Were Three Times as Likely as Other Released Prisoners to Be Re-Arrested for a Sex Offense (May 30, 2019), https://bjs.ojp.gov/content/pub/press/rsorsp9yfu0514pr.pdf [https://perma.cc/SBS5-VSUK].

222 Wendy Sawyer, *BJS Fuels Myths About Sex Offense Recidivism, Contradicting its Own New Data*, PRISON POL'Y INITIATIVE (June 6, 2019), https://www.prisonpolicy.org/blog/2019/06/06/sexoffenses [https://perma.cc/4LSE-NMMG] (“[P]eople convicted of sex offenses are actually much less likely than people convicted of other offenses to be rearrested or to go back to prison.”).

223 *Id.*

In stark contrast to the assertions in the 2019 report, a research brief released by the Sex Offender Management Assessment and Planning Initiative found that residence restrictions do not prevent the risk of reoffense.[224] In fact, according to the report, residence restrictions tend to *increase* the risk of reoffense because they undermine offenders' ability to obtain employment and housing and interfere with their access to family support.[225]

In essence, the report concluded that there was no data-supported reason to continue to implement housing restrictions as a means to prevent sex offenders from reoffending.[226] Yet still, laws related to sex offenders were very often passed without any empirical support, undermining their utility to public safety and the efficient use of public resources.[227]

It is clear from these studies that sex offender laws are not based on science or criminological data, but on misguided assumptions that are repeated and reinforced through court decisions and laws.[228] Indeed, there is significant evidence that the residential restrictions placed on sex offenders are based not on empirical evidence, but on unfounded assumptions about their effectiveness and the political goals of the legislators that enact them.[229]

While courts have historically upheld sex offender laws, Justice Sotomayor rightly highlighted several courts that have struck down residency restriction schemes on the basis that they provide no reduction in recidivism among sex offenders and may actually create the very

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224 CHRISTOPHER LOBANOV-ROSTOVSKY, U.S. DEP'T OF JUST., ADULT SEX OFFENDER MANAGEMENT 4 (2015) ("[T]he evidence is fairly clear that *residence restrictions are not effective*." (emphasis added)).

225 *Id.* ("[T]he research suggests that residence restrictions may *actually increase offender risk* by undermining offender stability and the ability of the offender to obtain housing, work, and family support." (emphasis added)).

226 *Id.* ("There is *nothing to suggest this policy should be used at this time*." (emphasis added)).

227 *Id.* at 1 ("Despite the intuitive value of using science to guide decisionmaking, laws and policies designed to combat sexual offending are often introduced or enacted in the absence of empirical support. However, there is little question that both public safety and the efficient use of public resources would be enhanced if sex offender management strategies were based on evidence of effectiveness other than other factors.").

228 *See* Balko, *supra* note 211; David Feige, *The Supreme Court's Sex Offender Jurisprudence is Based on a Lie*, SLATE (Mar. 7, 2017, 11:47 AM), https://slate.com/news-and-politics/2017/03/sex-offender-bans-are-based-on-bad-science.html [https://perma.cc/UG65-69AH]; Liptak, *supra* note 214.

229 Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 190 (2009) ("Some legislators believe [residence restrictions] are necessary for the safety of children, while critics believe the restrictions have flourished because politicians see an easy way to boost their popular appeal. Other legislators, not particularly convinced of the restriction's effectiveness, feel compelled to defend their town from a restriction-induced migration of sex offenders.").

conditions that lead to reoffense.[230] For example, in *Does #1–5 v. Snyder*, the Sixth Circuit struck down the retroactive application of residency restrictions for sex offenders because they had not been presented with any evidence that the law accomplished its goal of protecting the public.[231] The court pointed to empirical studies showing that residency restrictions have no impact on recidivism, at best, and, at worst, serve to *increase* reoffense.[232]

The Sixth Circuit's ruling in *Does #1–5 v. Snyder* highlights the deficiencies in the New York Court of Appeals' ruling in *People ex rel. Johnson*. Instead of evaluating whether there was any relationship between the indefinite detention policy and protecting the public, the New York Court of Appeals misapplied rational basis review to hold that it had no authority to evaluate whether the policy had any relationship to the stated goals of the legislature.[233] Indeed, as Justice Sotomayor noted in her statement, the courts must intercede when the state infringes upon their citizens' fundamental liberties.[234]

3. Indefinite Detention Violates the Eighth Amendment

New York's indefinite detention policy is a violation of the third prong of the Eighth Amendment because it imposes an additional punishment on individuals who are unable to procure SARA-eligible housing and are therefore homeless. The Eighth Amendment limits the state's ability to punish its citizens. The Supreme Court has articulated that:

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230 Ortiz v. Breslin, 142 U.S. 914, 916 (2022) (Sotomayor, J., respecting the denial of certiorari); *see also* G.H. v. Twp. of Galloway, 951 A.2d 221, 236 (N.J. Super. Ct. App. Div. 2008) (holding that municipal ordinances prohibiting convicted sex offenders from living within a certain distance from school, parks, and daycare centers invalid because it did nothing to advance the goals of Megan's Law, instead, "municipalities are racing to exclude [convicted sex offenders] from their communities, banishing them to live elsewhere.").

231 Does #1–5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016) ("Tellingly, nothing the parties have pointed to in the record suggests that the residential restrictions have any beneficial effect on recidivism rates.").

232 *Id.* at 705–06 ("Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism. . . . In fact, one statistical analysis in the record concluded that laws such as SORA actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities.").

233 People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1086 (N.Y. 2020) (Wilson, J., dissenting). The writ of habeas corpus has existed for centuries so that courts may free those wrongfully held by executive authority. We make a mockery of the writ when we justify the unlawful detention by letting two executives point the finger at each other, or one justify its actions because it believes the other will violate the law.

234 *Ortiz*, 142 S. Ct. at 917 (Sotomayor, J., respecting the denial of certiorari) ("When the political branches fall short in protecting these guarantees, the courts must step in.").

> [T]he Cruel and Unusual Punishments Clause [of the Eighth Amendment] circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes . . . second, it proscribes punishment grossly disproportionate to the severity of the crime . . . and third, it imposes substantive limits on what can be made criminal and punished as such.[235]

The Supreme Court has also held that the state may not impose a punishment based on a condition that "may be contracted innocently or involuntarily."[236] New York's policy of detaining individuals beyond the maximum sentence that could be imposed for their crime of conviction implicates the third prong of the Eighth Amendment because it imposes an additional punishment upon those rendered homeless by the statute's housing restrictions.

A growing number of federal and state courts have addressed whether the indefinite detention of sex offenders is a violation of the Eighth Amendment.[237] For example, the Northern District of Illinois held in *Murphy v. Raoul* that Illinois's policy restricting where a sex offender can live during a sentence of Mandatory Supervised Release (MSR) violated the Eighth Amendment because the Plaintiffs were detained indefinitely after the statutory scheme made it impossible for them to find suitable housing.[238] Under Illinois' statutory scheme, virtually all criminal sentences carried an MSR ranging in length from three years until natural life.[239] The MSR could not be completed until the incarcerated person was released from prison.[240] Sex offenders, however, were severely restricted as to where they could reside.[241] Like in Mr. Ortiz's case, this meant that sex offenders were detained indefinitely if,

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235 Ingraham v. Wright, 430 U.S. 651, 667 (1977).

236 Robinson v. California, 370 U.S. 660, 667 (1962).

237 State v. Talbert, 727 S.E.2d 908, 911 (N.C. App. 2012) (holding that a registered sex offender's probation was improperly revoked because "defendant's lack of personal resources—social, familial, and financial—severely limited his ability to obtain a suitable residence while incarcerated"); Werner v. Wall, 836 F.3d 751, 757 (7th Cir. 2016) (Legislature decided to rescind after defendant who had spent 54 days beyond his sentence in a county jail).

238 Murphy v. Raoul, 380 F. Supp. 3d 731, 764 (N.D. Ill. 2019) ("The IDOC exercises the sole discretion to approve or deny an inmate's proposed host site based on a variety of statutes and regulations that restrict where sex offenders may live while on MSR. Ultimately, a parole agent must authorize the placement. The only time a person can apply for the termination of his or her indeterminate MSR term is after successfully serving three years of that term outside of prison. So, for someone who is homeless, it is virtually impossible to comply with the IDOC's application of the host site requirement.").

239 *Id.* at 737.

240 *Id.*

241 *Id.* at 739.

or until, they were able to obtain suitable housing.[242] The court ultimately held that the Petitioners' extended detention represented an additional punishment imposed upon them because they were indigent, a condition that they could not control.[243]

Indeed, the same challenge in securing housing also applied to the Petitioners in *People ex rel. Johnson*,[244] and to all sex offenders subject to SARA living in New York City, where there are almost no residential buildings that are located outside of statutorily proscribed areas.[245] Further, the already arduous difficulties that individuals face when attempting to secure housing are intensified for those who are disabled and in need of special living accommodations.[246] The number of wheelchair accessible apartment buildings in New York City is extremely limited, and very few nursing homes and assisted living facilities are located more than one thousand feet away from schools.[247]

The severity of the restrictions placed on sex offenders makes it sufficiently difficult for them to comply with New York's sex offender law that they may be forced into homelessness.

CONCLUSION

Justice Sotomayor's message was clear: the indefinite detention of sex offenders presents grave and pressing constitutional concerns that will not be resolved unless state policies resembling New York's are changed, or the courts intervene.[248]

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242 *Id.* ("[S]omeone who the PRB approves for release after serving his or her entire term of imprisonment will remain indefinitely confined if the individual is unable to identify a host site that passes muster.").

243 *Id.* at 738 ("Many offenders successfully complete their entire court-ordered terms of incarceration yet remain detained indefinitely because they are unable find a residence due to indigence and lack of support.").

244 People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1078 (N.Y. 2020) (Wilson, J., dissenting) ("As Mr. Ortiz and Mr. Johnson's stories both demonstrate, the process of seeking release from prison is, for homeless sex offenders, a Sisyphean task with Ixionian result.").

245 Carpenter & Beverlin, *supra* note 65, at 1115 ("Residency restrictions have expanded to such a degree that many parts of the country are off-limits to the offender.").

246 Frankel, *supra* note 14, at 289 ("New York City has few wheelchair-accessible buildings, and accessible apartments—fitted with elevators and wide entryways—tend to be more expensive than the old, narrow walk-up buildings that pepper the city.").

247 *Id.* at 290 ("While there is no public directory of SARA-compliant nursing homes, Lynn Cortella, a registered nurse who formerly worked with DOCCS to facilitate placements for sex-offender registrants, stated that, in New York City, 'hardly any nursing or assisted living facilities comply with SARA.' My colleagues and I routinely witnessed the truth of Cortella's statement as our clients struggled to find any facility far enough from a school.").

248 *See generally* Ortiz v. Breslin, 142 S.Ct. 914 (2022).

Despite the New York Court of Appeals majority holding in *People ex rel. Johnson*, New York's policy of detaining individuals beyond their maximum sentence because they are unable to procure SARA-compliant housing is plainly unconstitutional. The policy violates sex offenders' fundamental right to be released from prison after serving their sentence. Further, the policy fails to meet even the most relaxed form of judicial review because the state has not shown that it benefits public safety. Indeed, there is virtually no evidence proving that this policy serves to protect the public at all, and a growing body of research shows that restrictive residence constraints create hardships that lead to recidivism. Finally, the policy violates sex offenders' Eighth Amendment rights because it punishes them for being homeless, a status imposed upon them by the sex offender statute itself.

Justice Sotomayor rightly urged New York to fix their constitutionally infirmed policy to ensure that no citizens are forced to languish in prison in service of a policy that does nothing to protect the public. Though the public is justified in its disgust for sexual violence, this does not justify a policy that both tramples upon citizens' constitutional rights and fails to prevent harm.