The Nebulous Right to Travel as a Possible Limitation on "Child Safety Zones": The Greenwich Sex Offender Ordinance

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I. INTRODUCTION

A proposed ordinance in Greenwich, Connecticut, (hereinafter "Greenwich Ordinance" or "Ordinance") involving sex offenders has caused some debate. The purpose of this Note is to determine whether the Ordinance is Constitutional, both under the United States Constitution and the Connecticut Constitution. Particularly, I plan to focus on the right to travel, as the Ordinance restricts sex offenders' access to certain areas.

Greenwich, Connecticut, has considered a town ordinance that will establish a "Child Safety Zone."[1] The Ordinance would prohibit sex offenders from being present in any of these specific zones.[2] A Child Safety Zone is defined as:

> A public park, playground, beach, recreation and/or teen center, sports facility and field, school or educational facility, including land on which such facilities are located (including such facilities' parking areas), which is used for educational, recreational, sports, youth activities or child-care purposes and which is owned or leased by any municipal agency including, without limitation, the Board of Education. "Child Safety Zone" does not include any public street or highway, nor does it include a sidewalk that is located outside the boundaries of a Child Safety Zone.[3]

For the purposes of the Ordinance, a sex offender is:

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[1] CALL OF THE SEPTEMBER 21, 2009 GREENWICH, CONNECTICUT REPRESENTATIVE TOWN MEETING, CHILD SAFETY ZONE ORDINANCE [hereinafter CSZO], http://greenwichct.virtualtownhall.net/Public_Documents/GreenwichCT_Agendas/Archive2009/rtmCall092109?textPage=1.

[2] *Id.* at CSZO § 3.

[3] *Id.* at CSZO § 2(a).

> Any person who has been convicted or found not guilty by reason of mental disease or defect, in this or any other state, jurisdiction or federal military court, of a "criminal offense against a victim who is a minor" or "a nonviolent sexual offense," a "sexually violent offense" or any felony that the court has found "was committed for a sexual purpose" as those terms are defined in Connecticut General Statutes Sections 54-250, Subsections (2), (5), (11) and (12), and who is required to register with the registry as a result of criminal activity pursuant to any provision of the Connecticut General Statutes, as amended.[4]

There is an exception to this prohibition for offenders whose names have been removed from the registry.[5] There are also limited exceptions for sex offenders entering the Child Safety Zone to vote or attend public meetings,[6] picking up or dropping off their children at school,[7] and attending meetings at their children's schools.[8]

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[4] *Id.* at CSZO § 2(b).

[5] The ordinance does not apply to:

> Any person whose name has been removed from the Connecticut Department of Public Safety' [sic] Sex Offender Registry or from the registry of any other state or in the federal or military system by act of a court or by expiration of the term such person is required to remain on such registry.

Id. at CSZO § 3(a).

[6] *Id.*

> Any sex offender entering into a facility in a Child Safety Zone for the sole purpose of voting in any municipal, state or federal election or referendum, or attending or participating in a municipal public meeting, including but not limited to, public meetings of the Board of Selectmen, municipal departments, or the Representative Town Meeting, provided that the sex offender leaves the facility immediately after voting or after the conclusion of said meeting [is excused from the prohibition].

Id. at CSZO § 3(b).

[7] The prohibition excuses:

> Any sex offender who is a custodial parent and enters a school or educational facility designated as a Child Safety Zone for the purpose of dropping off or picking up his or her child, provided the sex offender leaves the zone immediately after dropping the child off or picking the child up.

CALL OF THE SEPTEMBER 21, 2009 GREENWICH, CONNECTICUT REPRESENTATIVE TOWN MEETING, CSZO § 3(c).

[8] The ordinance does not apply to:

> Any sex offender who is a custodial parent and enters a Child Safety Zone for the sole purpose of meeting with an adult to discuss such child's medical care or condition or educational program, including, without limitation, meeting with

The Child Safety Zone Ordinance has been the subject of local debate. Supporters have been vocal in stating their concern for children's safety. Selectman Peter Tesei stated that the Ordinance "is essentially looking out for children."[9] Former Connecticut Attorney General Richard Blumenthal said, in regard to the Ordinance, that "there's no question that such ordinances restrict some physical activities of convicted sex offenders, and some of those restrictions would seem very reasonable if they help protect children from real dangers and are related to that goal of child protection."[10] However, many others have voiced opposition to or reservations about the Ordinance. Those who do not support the Ordinance are troubled by its breadth and are worried that it may infringe on too many individual rights.[11]

Two outspoken opponents of the Ordinance have a stake in its outcome: Stephanie Paulmeno is the mother of a registered sex offender, and Ernest Drupals is a sex offender himself.[12] Drupals spoke in opposition to the Ordinance in front of the Board of Selectmen in July of 2009, saying that "[a]nimals are treated better" than sex offenders.[13] Drupals was recently sentenced, receiving five years probation for failing to notify the police about an attempted change in residence.[14]

> such child's teachers, faculty members and/or school staff members, provided such Sex Offender leaves the facility immediately upon completion of such meeting.

Id. at CSZO § 3(d).

[9] Neil Vigdor, *Proposed Sex Offender Ordinance Maligned by Questions About its Constitutionality*, GREENWICH TIME, Sept. 24, 2009, *available at* http://www.greenwichtime.com/default/article/Proposed-sex-offender-ordinance-maligned-by-138874.php [hereinafter Vigdor, *Proposed Sex Offender Ordinance*]. Likewise, Sam Romeo, who chairs a Community and Police Partnership Committee in Greenwich, said "Let's not have a sign out in front of town, 'Welcome sex offenders,'" and also expressed concerns that the bill would be "watered-down" by the Legislative and Rules Committee. *Id.*

[10] Neil Vigdor, *Greenwich Becomes Ground Zero in Debate Over Restrictions on Sex Offenders*, CONN. POST ONLINE, Aug. 31, 2009, http://www.ctpost.com/default/article/Greenwich-becomes-ground-zero-in-debate-over-3186.php. [hereinafter Vigdor, *Greenwich Becomes Ground Zero*] Blumenthal cited the high recidivism rate and the harmful effects on children as reasons for supporting restrictions on sex offenders. *Id.*

[11] *Id.* Although not directly opposing the ordinance, Members of the Legislative and Rules Committee and the Parks and Recreation Committee spoke openly about their trepidation regarding the ordinance. Vigdor, *Proposed Sex Offender Ordinance*, *supra* note 9. Among those who argued that the ordinance is absolutely unconstitutional is Andrew Schneider, the executive director of the American Civil Liberties Union of Connecticut. He stated that the ordinance was "restricting the freedom of movement of individuals who have already paid their debt to society." Vigdor, *Greenwich Becomes Ground Zero*, *supra* note 9.

[12] Vigdor, *Proposed Sex Offender Ordinance*, *supra* note 9; Vigdor, *Greenwich Becomes Ground Zero*, *supra* note 10.

[13] Neil Vidgor, *Proposed Sex Offender Ordinance Fuels Debate,* CONN. POST ONLINE, Aug. 31, 2009, http://www.ctpost.com/default/article/Proposed-sex-offender-ordinance-fuels-debate-2879.php.

[14] Drupals said he was planning on moving to Maryland, but could not find a job or housing due to his status as a sex offender. Debra Friedman, *Sex Offender Sentenced to Probation for Recent*

Due to this heated debate, the Representative Town Meeting (hereinafter "RTM") postponed the Ordinance twice in the past.[15] In September of 2010, the motion was postponed indefinitely, meaning that it will not be brought before the RTM again without a new proposal.[16] Proponents of the bill were upset about its defeat, one stating that "[t]his was the coward's way out."[17] Although the Ordinance is no longer before the RTM, an analysis of the proposed Ordinance will provide a background to determine whether an ordinance of this sort is constitutional in Connecticut. Additionally, the same or a similar ordinance may be proposed again in Greenwich, especially with the uproar that occurred after its recent postponement. Although the Greenwich Ordinance seems to have been drawing the most attention, others like it have passed in Connecticut towns. Brookfield, Danbury, New Milford, Ridgefield, and Windsor Locks all have similar ordinances in force.[18] An ordinance, which mirrors the Greenwich Ordinance, was also proposed in Montville, Connecticut.[19] The following analysis could apply to these similar ordinances as well as to the proposed Greenwich Ordinance.

In this Note, I aim to determine whether this proposed Greenwich Ordinance would be constitutional under the right to travel implicit in both federal and state Due Process Clauses. I will begin by briefly examining the history of sex offender legislation in Part II. In Part III, I will discuss the other possible challenges to the Greenwich Ordinance. It is important to note that, although the right to travel is a likely constitutional challenge, there are other possible ways that this ordinance may be deemed unconstitutional. In Part IV, I will discuss both the federal and state rights to travel and apply the law to the Greenwich Ordinance. I start this portion with an examination of the right to travel, in which I delve into some relevant case law. Because this is a nebulous area, the background on the

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Conviction, CONN. POST ONLINE, Dec. 9, 2009, *available at* http://www.ctpost.com/default/article/Sex-offender-sentenced-to-probation-for-recent-281981.php. Drupals had registered in Maryland, although he failed to verify the address with police. Debra Friedman, *Convicted Sex Offender Found Guilty of New Felony Offense*, CONN. POST ONLINE, Oct. 19, 2009, http://www.ctpost.com/default/article/Convicted-sex-offender-found-guilty-of-new-felony-174453.php.

[15] Frank MacEachern, *Sex Offender Ban Fails to Make the Cut Again*, GREENWICH TIME, Sept. 20, 2010, *available at* http://www.greenwichtime.com/default/article/Sex-offender-ban-fails-to-make-the-cut-again-135788.php.

[16] Frank MacEachern, *Proponent of Sex Offender Ban Angered Over Defeat,* GREENWICH TIME, Sept. 21, 2010, http://www.greenwichtime.com/local/article/Proponent-of-sex-offender-ban-angered-over-defeat-668616.php.

[17] *Id.*

[18] SANDRA NORMAN-EADY, LOCAL ORDINANCES RESTRICTING SEX OFFENDERS FROM CERTAIN AREAS, OLR RESEARCH REP. NO. 2009-R-0277, (July 31, 2009), *available at* http://www.cga.ct.gov/2009/rpt/2009-R-0277.htm.

[19] Megan Bard, *Few Attend Montville Hearing on Proposed Sex Offender Law,* THE DAY, Oct. 1, 2010, http://www.theday.com/article/20101001/NWS01/310019826/-1/zip06.

right to travel will inform the subsequent discussion on which standard of review should apply. In this section, I will also examine the Greenwich Ordinance under both standards of review (strict scrutiny and rational basis). Finally, in Part V, I will discuss the policy behind sex offender legislation, and examine other possible ways to achieve those goals without infringing on constitutional rights.

II. HISTORY OF SEX OFFENDER LEGISLATION

A. Sexual Psychopath Laws

Michigan enacted the first sex offender civil commitment law, or "sexual psychopath" law, in 1939.[20] Sexual psychopath laws allowed for commitment of sex offenders to mental institutions.[21] These laws became popular during the mid-twentieth century, and were enacted in more than half of all states.[22] The popularity began to decline in the 1970s due to a criticism of this type of treatment.[23] A new breed of sexually violent predator laws began to resurge in popularity in the 1990s.[24] These laws allowed for civil commitment of sex offenders after they had served their sentences.[25]

Some of these second generation laws were challenged on constitutional bases. In *Kansas v. Hendrick*, a sex offender who was to be

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[20] MICH. COMP. LAWS §§ 780.50–.509 (2001) (repealed 1968).

[21] Mary Ann Farkas & Amy Stichman, *Sex Offender Laws: Can Treatment, Punishment, Incapacitation, and Public Safety Be Reconciled?*, 27 CRIM. JUST. REV. 256, 258 n.2 (2002). These laws were enacted in response to publicity of sex crimes. *Id.* at 258. *See* Karol Lucken & Jessica Latina, *Sex Offender Civil Commitment Laws: Medicalizing Deviant Sexual Behavior*, 3 BARRY L. REV. 15, 18–19 (2002) (describing the "yellow journalism" tactics of exaggerating sex crimes in the 1930s and 1940s, leading to the "public paranoia" which precipitated the institution of sex psychopath laws).

[22] W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work? in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 27 (Bruce J. Winick & John Q. LaFond, eds. 2003).

[23] W. Lawrence Fitch, *Sex Offender Commitment in the United States*, 9 J. FORENSIC PSYCHIATRY & PSYCHOL. 237, 238 (1998). "During the 1970s these laws began to fall out of favor. 'The optimism of earlier decades that psychiatry held the cure to sexual psychopathy no longer shone so brightly.'" *Id.* In the 1970s and 1980s, the Group for Advancement of Psychiatry, the President's Commission on Mental Health, and the American Bar Association recommended that the sex psychopath statutes be repealed. *Id.*

[24] Elizabeth Cloud, Note, *Banishing Sex Offenders: Seventh Circuit Upholds Sex Offender's Ban From Public Parks After Thinking Obscene Thoughts About Children*, 28 U. ARK. LITTLE ROCK L. REV. 119, 127 (2005); Fitch & Hammen, *supra* note 22, at 27–28. Washington State was the first to pass a post-sentence civil commitment law in 1990. *Id.* at 28.

[25] Fitch & Hammen, *supra* note 22, at 28. The resurgence of these laws in the 1990s "reflect[ed] not so much a renewed optimism about the efficacy of treatment as a frustration with the criminal justice system's perceived inability to keep sex offenders off the streets." *Id.* at 27–28.

civilly committed pursuant to Kansas's Sexually Violent Predator Act[26] challenged the Act based on Due Process, Equal Protection, Double Jeopardy, and Ex Post Facto Clauses; in addition, he argued that the Act was overbroad and void for vagueness.[27] The Kansas Supreme Court held that the Act violated the Due Process Clause.[28] The United States Supreme Court reversed, holding that the Act's definition of "mental abnormality" satisfied the requirement that there be a finding of "mental illness" before the offender can be civilly committed.[29] Some scholars viewed this decision as "a step backward" in sex offender treatment.[30]

B. Registration Laws

Another type of sex offender law, which required registration, also came into favor in the 1990s. A national registration law was enacted in 1994, and was coined the "Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program."[31] This law required that states set up registration programs in which sex offenders would be required to register their home addresses with the state in which they lived.[32]

Connecticut's sex offender law (commonly referred to as Megan's

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[26] KAN. STAT. ANN. § 59-29a01 (2005).

[27] *In re* Care & Treatment of Hendricks, 259 Kan. 246, 253 (1996).

[28] *Id.* at 261.

> The Kansas Supreme Court . . . declared that in order to commit a person involuntarily in a civil proceeding, a State is required by 'substantive' due process to prove by clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or to others. The court then determined that the Act's definition of 'mental abnormality' did not satisfy what it perceived to be this Court's "mental illness" requirement in the civil commitment context. As a result, the court held that "the Act violates Hendricks' substantive due process rights.

Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (citing *In re* Care & Treatment of Hendricks, 259 Kan. at 259, 261).

[29] *Hendricks*, 521 U.S. at 356.

[30] *E.g.*, Howard V. Zonana, et al., *In the Wake of Hendricks: The Treatment and Restraint of Sexually Dangerous Offenders Viewed from the Perspective of American Psychiatry, in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 131, 143 (Bruce J. Winick & John Q. La Fond, eds., 2003). These authors stated that "[s]ex offender commitment laws represent a perversion of the mental health system to solve a problem of sentencing structure." *Id.* This argument basically states that sex offenders were treated ineffectually for mental health problems instead of being incarcerated or sentenced for proper terms.

[31] 42 U.S.C. § 14071 (2006).

[32] *Id.*

Law[33]) was challenged in the Second Circuit. The court held that the public disclosure of Connecticut's sex offender registry was an unconstitutional violation of the procedural Due Process Clause.[34] The court further held that before the plaintiff's names were placed on the registry and became publicly available, they had a right to a hearing to determine whether they were currently dangerous.[35] The United States Supreme Court reversed, holding that sex offender registry information could be publicly released without first holding a hearing for each offender listed.[36]

C. Residency Restrictions

Another modern category of sex offender legislation is residency requirements. These laws prohibit sex offenders from living near certain areas, typically schools.[37] Some of these statutes have been challenged on constitutional grounds. Courts have generally upheld these laws, although there have been some exceptions in which the laws were declared unconstitutional.[38] In a recent case, the Supreme Court of Kentucky held that the retroactive application of a residency restriction statute to those sex

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[33] The original Megan's Law was enacted in New Jersey, and was named for Megan Kanka, a seven year old who was sexually assaulted and murdered by a sex offender. Doe v. Dep't of Pub. Safety *ex rel.* Lee, 271 F.3d 38, 42 n.4 (2d Cir. 2001).

[34] *Id.* at 61. The court held that due process rights were implicated because this case satisfied the "stigma plus" test, which requires that:

> a plaintiff who complains of governmental defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement.

Id. at 47 (citing Paul v. Davis, 424 U.S. 693, 701–02, 710–11 (1976)).

[35] *Id.* at 49.

[36] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7–8 (2003). The court did not reach the question of whether a liberty interest was implicated under the stigma plus test. *Id.* at 7.

[37] *E.g.*, ALA. CODE § 15-20-26 (Supp. 2010); ARK. CODE ANN. § 5-14-128 (Supp. 2009); GA. CODE ANN. § 42-1-15 (West Supp. 2010); 720 ILL. COMP. STAT. 5/11–9.4 (Supp. 2010); IOWA CODE ANN. § 692A.2A (West 2008); 57 OKLA. STAT. ANN. tit. 57, § 590 (West 2009).

[38] *E.g.*, Santos v. State, 668 S.E.2d 676, 678 (2008) (holding that the law requiring notification of residency changes and precluding the use of "homeless" as an acceptable address was unconstitutionally vague as applied); State v. C.M., 746 So. 2d 410, 415, 420 (Ala. Crim. App. 1999) (holding that retroactive application of an Alabama law which prohibited juvenile sex offenders from residing in their homes if there is another minor residing there violated the Ex Post Facto Clause and the Equal Protection Clause); Elwell v. Twp. of Lower, No. CPM-L-651-05, 2006 N.J. Super. LEXIS 2965, at *37–39, 45 (N.J. Super. Ct. Dec. 22, 2006) (holding that a New Jersey ordinance was unconstitutional under the state due process clause and violated the double jeopardy clause of the New Jersey Constitution).

offenders who committed their crime prior to the statute's passage violated the Ex Post Facto Clause of the Constitution.[39]

D. Greenwich Ordinance

The Greenwich Ordinance represents a new form of residency restriction law. Instead of dictating where the offender may live, this type of law dictates where the offender can visit. This type of regulation has been codified in both criminal state statutes and civil local ordinances.[40] Although these restrictions are common in probation conditions,[41] only fairly recently have they been applied to post-probation sex offenders. These ordinances have been challenged under the right to travel as well as other state constitutional provisions.[42] Some notable cases concerning similar ordinances will be discussed later, but there is very little case law in this area. The Greenwich Ordinance specifically prohibits sex offenders from more areas than other ordinances that have been challenged in the past. For example, the ordinance challenged in *Standley v. Woodfin*[43] only prohibited sex offenders from parks, whereas the Greenwich Ordinance prohibits sex offenders from parks, schools, playgrounds, teen centers, sports facilities, recreation centers, and beaches. For this reason, the Greenwich Ordinance, and others like it in Connecticut, may provide courts with a new challenge in determining if these prohibitions violate the right to travel or other Constitutional rights.

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[39] Commonwealth v. Baker, 295 S.W.3d 437, 447 (Ky. 2009).

> Although the General Assembly did not intend KRS 17.545 to be punitive, the residency restrictions are so punitive in effect as to negate any intention to deem them civil. Therefore, the statute may not constitutionally be applied to those like Respondent, who committed their crimes prior to July 12, 2006, the effective date of the statute. To do so violates the ex post facto clauses of the United States and Kentucky constitutions.

Id.

[40] *E.g.*, 720 ILL. COMP. STAT. 5/11–9.4 (West Supp. 2010); WOODFIN, N.C., ORDINANCE § 130.03(2)(A).

[41] *E.g.*, United States v. Ristine, 335 F.3d 692, 697 (8th Cir. 2003) (upholding a probation condition which prohibited an offender from visiting places where children congregate, such as parks, etc.).

[42] *See* Doe v. Plainfield, 893 N.E.2d 1124, 1127, 1129 (Ind. Ct. App. 2008) (challenging an ordinance which prohibited sex offenders from the town's parks and recreation areas under Article I, Sections 1, 12, and 24 of the Indiana Constitution); Standley v. Town of Woodfin, 661 S.E.2d 728, 729 (N.C. 2008) (challenging an ordinance which prohibited sex offenders from public parks in the town under the Fourteenth Amendment of the United States Constitution and under Article I, Sections 19 and 35 of the North Carolina Constitution).

[43] 661 S.E.2d at 729.

III. POSSIBLE CONSTITUTIONAL CHALLENGES TO THE GREENWICH ORDINANCE

There are many possible constitutional challenges to the Greenwich Ordinance. I will briefly discuss some of these challenges before analyzing the right to travel, one of the most viable ones, in greater depth.

The First Amendment protects freedom of speech and assembly.[44] If the Greenwich Ordinance were to be challenged on this basis, the outcome would be uncertain. It would be likely that the public forum doctrine would apply to portions of the Ordinance. The public forum doctrine states that in certain public places that have typically "been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."[45] The Supreme Court of Connecticut held that Greenwich could not restrict access of nonresidents to Greenwich Point based on the public forum doctrine.[46] In a case in which someone is excluded from a traditional public forum, the restriction is subject to strict scrutiny, requiring that the restriction be narrowly tailored to a compelling governmental interest.[47]

Under the Connecticut Constitution, there is a different standard for determining if a place is a public forum. In *State v. Linares*, the Connecticut Supreme Court held that the Connecticut Constitution offers a broader interpretation of what constitutes a public forum.[48] This interpretation is based on the Supreme Court's decision in *Grayned v. Rockford*, in which the Court held that a public forum is determined not by the tradition of debate with the forum, but by whether the particular expression is compatible with the particular forum.[49]

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[44] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

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

[46] Leydon v. Town of Greenwich, 257 Conn. 318, 346 (2001).

[47] *Id.* at 343.

[48] State v. Linares, 232 Conn. 345, 379 (1995).

[49] *See* Grayned v. City of Rockford, 408 U.S. 104, 116–17 (1972).

> The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. at 116 (citations omitted) (internal quotation marks omitted).

Some of the restrictions within the Greenwich Ordinance may thus be subject to the public forum doctrine. Based on *Leydon,* the section of the Ordinance that prohibits sex offenders from parks would likely be subject to strict scrutiny.[50] However, many of the other places from which sex offenders are excluded under the Ordinance would not be considered traditional public fora. Beaches, schools, sports facilities, and playgrounds would likely not be considered public fora based on the *Perry* and *Leydon* interpretation, as these are not places traditionally associated with public debate. However, under *Linares*, all of the fora would potentially be public fora if the activity were consistent with that forum's nature and its natural activities.

Another possible challenge would be under the Ex Post Facto Clause. The United States Constitution prohibits passing any ex post facto laws.[51] Under this clause,

> the government may not, *inter alia*, enact a law that punishes an act that was innocent prior to the enactment or a law that inflicts a greater punishment than was applicable to the crime when committed . . . The *ex post facto* bar, however, is applicable only to criminal punishments, and does not include retrospective laws of a different character.[52]

If the Greenwich Ordinance were to be challenged under the Ex Post Facto Clause, the main question would be whether the Ordinance is punitive. Similar to the law held to violate the Ex Post Facto Clause in *Commonwealth v. Baker*, the Greenwich Ordinance restricts where a sex offender may visit. However, *Baker* involved a criminal penalty for violating the law, whereas the Greenwich Ordinance punishes a violation with a fine. The fact that the Greenwich Ordinance is a civil fine does not necessarily mean that an ex post facto claim will fail.[53] The plaintiff would need to prove that the legislature intended the fine to be punitive in nature,

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[50] *See Leydon*, 257 Conn. at 340–43 (stating that Greenwich Point has the characteristics of a park, and, as such, is a traditional public forum).

[51] "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. CONST. art. I, § 10, cl. 1.

[52] Hobbs v. Cnty of Westchester, 397 F.3d 133, 157 (2d Cir. 2005) (citations omitted) (internal quotation marks omitted).

[53] "The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. Even fees labeled as civil are occasionally held punitive." Moyer v. Alameida, 184 F. App'x 633, 638 (9th Cir. 2006) (citations omitted) (internal quotation marks omitted).

and not civil.[54] This would likely be a factual question for the finder of fact to determine.

Finally, a third challenge could come under the Equal Protection Clause. The Equal Protection Clause guarantees all persons equal protection under the law.[55] However, if the Ordinance were to be challenged on this basis, it would only be subject to rational basis review, as sex offenders are not a protected class.[56] The potential plaintiff would have to show that he or she was treated differently from those similarly situated, and that the Ordinance was not rationally related to a legitimate state interest.[57] If the plaintiff attempts to argue that he or she is being treated differently from other offenders, all Greenwich would have to prove is that this disparate treatment was rationally related to a legitimate state interest. It seems likely that the government could prevail based on statistics that show sex offenders are more likely to commit another sex offense than other offenders.[58] Therefore, if the legitimate interest is protecting the public (or children specifically) from being victims of sex crimes, a court would probably hold that the distinction between sex offenders and non-sex offenders is rationally related to the goal.

IV. THE RIGHT TO TRAVEL

There is no constitutional provision which specifically guarantees a right to travel.[59] However, there has been a longstanding recognition of this right in various forms. There are three variations of this right: the right to international travel; the right to interstate travel; and the right to intrastate travel. The first two rights have been explicitly recognized by the United States Supreme Court.[60] The third right has been recognized by some lower courts, while other courts have not recognized it.[61]

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[54] *Id.* at 636. Previously, the Supreme Court held that a law requiring sex offenders to register was not punitive and did not violate the Ex Post Facto Clause. Smith v. Doe, 538 U.S. 84, 106 (2003). *But see* United States v. Juvenile Male, 590 F.3d 924, 942 (9th Cir. 2010) (holding that retroactive application of a sex offender registration law to offenders previously adjudicated as juveniles was punitive, and violated the Ex Post Facto Clause).

[55] U.S. CONST. amend. XIV, § 1.

[56] Creekmore v. Att'y Gen., 341 F. Supp. 2d 648, 664 n.38 (E.D. Tex. 2004).

[57] *Id.* at 664.

[58] *See infra* notes 229–30 and accompanying discussion.

[59] *See* GERALD L. HOUSEMAN, THE RIGHT OF MOBILITY 26 (1979) ("[T]he Supreme Court has been content to assure us that the right to travel is a generally established human right long supported by national practice which needs no particular reference point in the Constitution. Despite this assurance there has been support in the past . . . given by the Court to blatant abuses to the right to travel.").

[60] *See generally, e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500 (1964); United States v. Guest, 383 U.S. 745 (1966).

[61] *See infra* Part IV.A.2 for a discussion of courts' holdings regarding this right.

As the right to travel is not specifically guaranteed by a constitutional provision, courts have struggled over where this right is found. Many courts have declined to say where in the Constitution the right falls, but agree that it is implicit within the Constitution.[62] Some courts fail to specify where the right is located due to its "elusive" nature,[63] and one court went so far as to say that the Constitution as a whole guarantees the right.[64] Frequently, courts that have specified a constitutional provision under which the right to travel is encompassed as a right of personal liberty under the Due Process Clause.[65] However, courts have also found the right in various other provisions of the Constitution. For example, other courts have found that the right to travel implicates the Equal Protection Clause when it creates different classes of residents.[66] Scholars have suggested that the right to travel may be based in the Privileges and Immunities Clause of the Fourteenth Amendment;[67]Article Four, Section Two;[68] the Commerce Clause;[69] or the Ninth Amendment.[70]

A. Federal Right to Travel Under the United States Constitution

It is uncertain whether there is a fundamental right to travel under the United States Constitution. Some courts have held that there is a fundamental right to intrastate travel that would subject any possible infringement to strict scrutiny analysis.[71] However, other courts have held the opposite: that the right to travel is not a fundamental right, and as such, is subject to rational basis review.

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[62] *See generally, e.g.*, Williams v. Town of Greenburg, 535 F.3d 71 (2d Cir. 2008); Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005).

[63] *E.g.*, Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902 (1986).

[64] *In re* White, 158 Cal. Rptr. 562, 567 (Cal. Ct. App. 1979).

[65] *See, e.g.*, Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975), *cert. denied*, 429 U.S. 964 (1976); McCollester v. City of Keane, 586 F. Supp. 1381, 1385 (D.N.H. 1984); Tobe v. City of Santa Ana, 892 P.2d 1145, 1167, 1169 (Cal. 1995).

[66] *See Soto-Lopez*, 476 U.S. at 904 ("Because the creation of different classes of residents raises equal protection concerns, we have also relied upon the Equal Protection Clause in these cases.").

[67] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1455 n.3 (2d ed. 1988).

[68] IOANNIS G. DIMITRAKOPOULOS, INDIVIDUAL RIGHTS AND LIBERTIES UNDER THE U.S. CONSTITUTION: THE CASE LAW OF THE U.S. SUPREME COURT 223–24 (2007).

[69] TRIBE, *supra* note 67, at 1455 n.3.

[70] DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 163 (2007).

[71] To be subject to strict scrutiny, a fundamental right must be "deeply rooted in the nation's history and tradition" and "implicit in the concept of ordered liberty." Washington v. Glucksburg, 521 U.S. 702, 721 (1997). For the sake of brevity, unless otherwise stated, "fundamental right" in this note will refer to a fundamental right that is deeply rooted in the nation's history and is implicit in the concept of ordered liberty.

The reasoning behind this variance is difficult to determine, but it is possible that there has been a reluctance to form a rigid definition of the right to travel in order to maintain judicial flexibility.[72] As the survey of cases below will show, courts seem to determine whether the right is fundamental (or the extent to which the right can be infringed) based on the social objectionability of the action that is inhibiting the right to travel, and the social popularity of the group whose rights are being infringed. For example, it is more likely that prohibitions keeping sex offenders from public areas will be upheld as opposed to prohibitions on more socially popular groups, such as homeless people.[73] Likewise, prohibiting someone from one particular building or region is more likely to be upheld than prohibiting a person or group of people from a large area.[74]

In the following section, I will discuss the relevant case law and determine what, if any, rule can be gleaned from this material.

1. *Supreme Court Recognition of a Right to Travel*

The United States Supreme Court has not expressly recognized a right to intrastate travel. However, it has clearly recognized both interstate and international rights to travel. The first inkling of a right to travel in United States law occurred in a dissenting opinion in the *Passenger Cases* in 1849.[75] Chief Justice Taney famously wrote: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[76] However, the majority did not decide the cases on right to travel grounds.[77] Thus, it was not until *Crandall v. Nevada* in 1867 that the Supreme Court officially recognized a right to

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[72] HOUSEMAN, *supra* note 59, at 26. "It could be argued that the reluctance of the Court to tie the right to travel to a specific provision is justified on the grounds that, first, no specific provision does in fact exist, and second, judicial inflexibility on the question could be induced by insistence upon reference to a provision." *Id.*

[73] *Compare* Doe v. Town of Plainfield, 893 N.E.2d 1124, 1132 n.8 (Ind. Ct. App. 2008) *and* Standley v. Town of Woodfin, 661 S.E.2d 728, 731 (N.C. 2008) (neither recognizing a fundamental right for sex offenders to enter parks) *with* Pottinger v. City of Miami, 810 F.Supp. 1551, 1578, 1581 (S.D. Fla. 1992) (recognizing a fundamental right to travel for homeless people to enter parks) *and* Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004) (recognizing a fundamental right to travel and stating that there was a demonstrated likelihood of success on a right to travel claim for homeless people who were discouraged from public areas by police).

[74] *Compare* Williams v. Town of Greenburg, 535 F.3d 71, 79 (2d Cir. 2008) (holding that a prohibition of a former employee from a community center was not an infringement on the right to travel) *with In re* White, 158 Cal. Rptr. 562, 566–67 (Cal. Dist. Ct. App. 1979) (holding that that a probation condition which prohibited a convicted prostitute from high prostitution areas was a violation of the fundamental right to travel).

[75] Smith v. Turner, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting).

[76] *Id.*

[77] *Id.* at 463–64 (1849) (majority opinion).

travel.[78] In that case, the Supreme Court examined a Nevada law that imposed a tax of one dollar on every person leaving the state by railroad, stagecoach, or other transport vehicle, which was to be paid by the owners of the transportation.[79] The Court quoted Justice Taney's dissent, and stated: "[those principles] accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument."[80] Despite this clear statement, some courts have since moved away from the *Crandall* rule. Some cases that exemplify the move away from *Crandall's* standard are *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Selevan v. New York Thruway Authority*, and *Wallach v. Brezenoff*.[81] In *New York v. O'Neill,* the Court held that the right to travel was not implicated by a Florida statute that required a witness to travel to another state to testify in a grand jury proceeding.[82]

In 1964, the Court discussed whether the right to travel internationally was fundamental. In *Aptheker v. Secretary of State*, the plaintiffs challenged the revocation of passports to members of the American Communist Party under Section Six of the Subversive Activities Control Act.[83] The appellants challenged Section Six as unconstitutionally burdening their right to travel in violation of due process of law under the Fifth Amendment.[84] The Court, relying on *Kent v. Dulles*,[85] stated that the

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[78] Crandall v. Nevada, 73 U.S. 35, 44 (1867).

[79] *Id.* at 36. *See also Ex parte* Crandall, 1 Nev. 294, 1865 WL 45 (1865).

[80] *Crandall,* 73 U.S. at 49.

[81] Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707, 711, 712, 714, 717–19 (1972) (stating that a tax is impermissible if: (1) the fee does not discriminate against interstate commerce or travel; (2) "these charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed"; and (3) the fees are not excessive in relation to the costs); Selevan v. New York Thruway Auth., 584 F.3d 82, 86–87, 101 (2d Cir. 2009) (stating that "minor restrictions on travel simply do not amount to the denial of a fundamental right"); Wallach v. Brezenoff, 930 F.2d 1070, 1072–73 (3d Cir. 1991) (noting that *Crandall* has since been distinguished by *Evansville,* applying the *Evansville* factors, and holding that a toll increase was acceptable as it did not impermissibly restrain travel).

[82] New York v. O'Neill, 359 U.S. 1, 3 (1959). The Court stated that there is a necessary limitation of one's rights incident to being a witness in a criminal proceeding. *Id.* at 7. The Court also noted: "More fundamentally, this case does not involve freedom of travel in its essential sense. At most it represents a temporary interference with voluntary travel." *Id.*

[83] *Aptheker*, 378 U.S. at 502–04. *See* Symposium, *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America,* 57 AM. U. L. REV. 1203, 1213 (2008) (comparing the aggressive measures taken against Communism in the 1950s era to the current measures taken to combat terrorism).

[84] *Aptheker*, 378 U.S. at 503–04. The appellants also alleged that the section violated the appellants' freedoms of speech, press, and assembly, the right to trial by jury, and the right to be free from cruel and unusual punishment, although the court did not consider these counts. *Id.* at 504 n.4.

[85] Kent v. Dulles, 357 U.S. 116 (1958).

right to travel was a fundamental right.[86] The Court held that Section Six of the Subversive Activities Control Act unconstitutionally abridged the fundamental right to travel, and, therefore, abridged the appellants' liberty interest under Substantive Due Process.[87] The Court further determined that, although national security was a legitimate and substantial goal, the law was not narrowly tailored, and it was unduly burdensome on the right to travel.[88]

In *United States v. Guest*, the defendants were indicted under 18 U.S.C. § 241[89] for allegedly attempting to prohibit African Americans from the right to move freely between states.[90] In examining the right to travel claim, the Court stated that "[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[91]

Guest continues to have vitality in Supreme Court jurisprudence. In *Shapiro v. Thompson,* the Court examined statutes requiring a one-year residency requirement in order to receive public assistance.[92] The Court cited *Guest* for the concept that there is a fundamental right to interstate travel,[93] and went on to hold that the laws violated that right, under the Equal Protection Clause, as there was no compelling governmental interest.[94]

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[86] *Aptheker,* 378 U.S. at 505–06. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Id.* (quoting *Kent,* 357 U.S. at 125–26).

[87] *Id.* at 507–08.

[88] *Id.* at 508–14.

[89] The statute provided: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . [t]hey shall be fined not more than $5,000 or imprisoned not more than ten years, or both." United States v. Guest, 383 U.S. 745, 747 (1966) (quoting 18 U.S.C § 241 (1964) (internal quotation marks omitted).

[90] *Id.* at 747 n.1. The defendants were indicted, among other counts, for inhibiting the rights of African Americans to "travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." *Id.* at 748 n.1.

[91] *Id.* at 757.

[92] Shapiro v. Thompson, 394 U.S. 618 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651, 671 (1974).

[93] *Shapiro*, 394 U.S. at 631. The Court noted that it would not ascribe the right to any particular provision. *Id.* at 630.

[94] *Id.* at 638. The Court has examined many other cases involving durational residency requirements. These types of requirements—which require citizens to be residents for a certain amount of time—are disfavored by courts. For example, in *Dunn v. Blumstein*, the Court held that Tennessee

Although these cases do not directly discuss a right to intrastate travel, courts have looked to them when examining cases involving this issue. The Second Circuit Court of Appeals stated that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."[95] However, other courts have suggested that there is a distinction drawn between the right to interstate travel—which is fundamental—and the right of intrastate travel. For example, the Fifth Circuit has refused to apply the reasoning of *King* and its progeny and distinguished the two types of travel.[96] Some courts that have distinguished the two rights have relied on the Supreme Court's decision in *Bray v. Alexandra Women's Health Clinic,*[97] which held that the constitutional right to travel was not implicated when women were prevented from accessing an abortion clinic because they were only prevented from traveling intrastate.[98]

Overall, the Supreme Court has not explicitly held that there is a fundamental right to intrastate travel, and courts have varied in their interpretation of Supreme Court cases that examined the right to interstate travel. For those reasons, it is necessary to interpret other cases in order to determine the current state of the law.

2. *Is there a Fundamental Right to Intrastate Travel?*

As there is extensive federal and state case law dealing with the

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state constitutional and statutory provisions which required that a voter be a resident of the state for a least one year and a resident of the county for at least three months to vote in an election were unconstitutional, as they penalized the right to travel, and were not necessary to promote a compelling governmental interest. Dunn v. Blumstein, 405 U.S. 330, 331–33, 340, 360 (1972). Likewise, in *Memorial Hospital v. Maricopa County*, the Court struck down one year residency requirement in order to receive free non-emergency medical care. Memorial Hosp. v. Maricopa Cnty, 415 U.S. 250, 251, 263–70 (1974). However, bona fide residency requirements, which simply require residency, are typically acceptable. *See, e.g.*. McCarthy v. Phila. Civil Serv. Comm'n, 424 U.S. 645, 647 (1976) (upholding a bona fide residency requirement which required employees of the city of Philadelphia to be residents of the city).

[95] King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971). *See also* Williams v. Town of Greenburgh, 535 F.3d 71, 75 (2d Cir. 2008) (following *King* in holding a fundamental right to intrastate travel is not distinguishable from the same right to travel interstate); Valenciano v. Bateman, 323 F. Supp. 600, 603 (D. Ariz. 1971) ("This Court can see no distinction between the constitutional right to travel interstate as held by *Shapiro*, and a constitutional right to travel intrastate . . . .").

[96] Wright v. City of Jackson, 506 F.2d 900, 902 (5th Cir. 1975). *See also* Dickerson v. City of Gretna, No. 05-6667, 2007 U.S. Dist. LEXIS 29460, at *11 (E.D. La. Mar. 30, 2007).

[97] *E.g.,* D.L. v. Unified Sch. Dist. No. 497, No. 00-2439-CM, 2008 U.S. Dist. LEXIS 78500, at *19 (D. Kan. Sept. 3, 2008).

[98] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) ("Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them.").

question of whether there is a fundamental right to intrastate travel, I will examine the case law topically, starting with individual bans from certain areas. I will then discuss group or class-based bans or restrictions. Finally, I will look at general bans or inconveniences.

a. Individual Bans

In the context of individual bans from specific areas, there seems to be a greater willingness to deny a fundamental right to travel than the other two categories. An oft-discussed case in this area is *Doe v. Lafayette*.[99] Doe, a registered sex offender, brought a constitutional challenge against the city of Lafayette, Indiana, after he was prohibited from entering parks and school grounds in the city.[100] Doe challenged this ban under the First and Fourteenth Amendments.[101] He argued his Fourteenth Amendment claim on the basis that there was a fundamental freedom to loiter.[102] The Seventh Circuit held that the right to loiter for innocent purposes, or the right "to enter parks for enjoyment," was not a fundamental right.[103] The court then applied a rational basis standard of review. It held that the legitimate governmental interest was protecting children, and that preventing Mr. Doe from the parks was rationally related to the ban, due to Doe's past problems and his statement that he was a sex addict with inappropriate urges towards children.[104] The court also noted that even if strict scrutiny applied, the court would still have upheld the ban.[105]

In a similar case, a convicted child molester was banned from all properties and programs of Michigan City's park and recreation department.[106] He challenged the ban, claiming that it violated his due process rights.[107] The court reviewed his substantive due process claim, and followed its previous holding in *Doe v. Lafayette*, stating that the

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[99] Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004). *See generally* Cloud, *supra* note 24 (discussing *Doe*); Jacob D. Mahle, Note, *We Don't Need No Thought Control:* Doe v. City of Lafayette, 74 U. CIN. L. REV. 235 (2005) (accord).

[100] *Lafayette,* 377 F.3d at 757. Doe had a history of sexual abuse of children, and admitted that he went to parks to look for children. Doe's probation officer received an anonymous tip. The Parole Officer told the Lafayette Police Department, who then informed the Superintendent of Parks and Recreation and the Superintendent of Schools for Lafayette. Shortly after, Doe was banned from entering the city parks and from entering school grounds. *Id.* at 758–60.

[101] *Id.* at 761.

[102] Doe argued, based on *City of Chicago v. Morales,* 527 U.S. 41, 53 (1999), that there is a fundamental right to be in a public park. *Lafayette,* 377 F.3d at 761.

[103] *Id.* at 771.

[104] *Id.* at 773.

[105] *Id.* The court stated that this ban was narrowly tailored to avoid future crimes by Mr. Doe. *Id.*

[106] Brown v. City of Michigan City, Indiana, 462 F.3d 720, 722 (7th Cir. 2006).

[107] *Id.*

"'right to enter the parks to loiter or for other innocent purposes' . . . although certainly important, is not [a] 'fundamental' [right]."[108] The court then applied rational basis, holding that Brown's ban from the park was rationally related to the legitimate goal of protecting children as Brown's past history and "atypical behavior while in the park" made him a risk to children's safety.[109]

These cases make clear that there is no fundamental right for a potentially dangerous person to enter and remain in parks. These cases are not necessarily controlling for general right to travel cases, as the court focused on the right to loiter in parks specifically.

Other cases concerning individual bans have recognized a fundamental right to travel. In 1979, the California Court of Appeals reviewed a ban that prohibited a woman convicted of prostitution from high prostitution areas in *In re White*.[110] The court held that the right to intrastate travel is a "basic human right . . . [that] is implicit in the concept of a democratic society and is one of the attributes of personal liberty."[111] The court acknowledged that White would have reduced expectations for the right to travel (as she was on probation), but that restrictions on the right to travel still must be narrowly drawn to achieve the purported compelling interest.[112] Based on these considerations, the court required that the municipal court modify or eliminate the condition.[113]

In 2008, the Court of Appeals for the Second Circuit, in *Williams v. Greenburg,* reviewed a challenge to the Town of Greenburg's ban of a former employee from the Theodore D. Young Community Center.[114] The

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[108] *Id.* at 733 (quoting Doe v. City of Lafayette, 377 F.3d 757, 769–70 (7th Cir. 2004)).

[109] *Id.* at 734. Brown's atypical behavior included sitting in his vans, watching people on the beach through binoculars, and visiting the park multiple times daily. Brown also had a criminal record for molesting a child. *Id.* at 733.

[110] *In re* White, 158 Cal. Rptr. 3d. 562, 564–65 (Cal. Ct. App. 1979).

[111] *Id.* at 567. The court also acknowledged that other rights, including free assembly and free association are closely related to the right to travel, and that "[f]reedom of movement is basic in our scheme of values." *Id.* The court did not attribute the right to a particular Constitutional provision, instead stating that the right to travel is implicit in the Constitution as a whole. *Id.* at 566–67.

[112] *Id.* at 568. The court stated that any restriction on the right to travel must be viewed "with skepticism," and that if any alternatives exist "which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used." *Id.*

[113] *Id.* at 569.

[114] Williams v. Town of Greenburgh, 535 F.3d 71, 73–74 (2d Cir. 2008). Williams was employed by the Center until 2002, when he was laid off. *Id.* at 73. After he was discharged, he was exercising in the Center, and gained access to a secured locker room to use the sauna. *Id.* at 73. Bland, the Deputy Commissioner of the Department of Community Resources, discovered Williams in the sauna, and a verbal fight ensued, with some physical altercation as well. *Id.* at 73. Bland called the police, who warned Williams that if he returned to the Center without permission, he could be arrested. *Id.* at 73. Williams returned to the Center to retrieve a watch, and was subsequently arrested and banned from the Center. *Id.* at 73–74.

court examined whether the ban impermissibly infringed on the plaintiff's right to travel.[115] The court held that the right to travel within a state is a fundamental right.[116] However, the court held that the fundamental right does not extend to the "right to cross a *particular* parcel of land, enter a chosen dwelling, or gain admittance to a *specific* government building."[117] The court held that the ban did not interfere with the plaintiff's right to free movement.[118]

Samuel Spencer, who lived in Yonkers, New York, visited his sister in Kings County, and was beaten and killed by a group of white residents.[119] Spencer's parents claimed that the "defendants [had] conspired, with racially discriminatory animus, to violate the plaintiff's constitutional right to travel."[120] The Court of Appeals for the Second Circuit reviewed *Spencer v. Casavilla* in 1990, and held that there is a constitutional right to travel, including the right to travel within a single state.[121] The court stated that this right is within the concept of personal liberty, and held that the plaintiff stated a claim on which relief could be granted.[122]

Based on these cases, when an individual is prohibited from a certain place, whether the right to travel is implicated seems to depend on the broadness of the ban. In *White,* since the ban was broad—encompassing all high prostitution areas—the court found that the right to travel was implicated. In *Williams,* however, the plaintiff was only banned from one specific building, so there was no infringement. Finally, in *Spencer* the plaintiff was prohibited from all movement intrastate, which clearly implicated the right to travel.

b. Class-Based Bans or Restrictions

Bans based on status in a particular group typically acknowledge that there is a fundamental right to intrastate travel, although some groups are afforded less protection.

A group whose right to travel is often at issue is minors. Many cases concern curfews and other restrictions on minors. Most cases have acknowledged that there is a fundamental right to travel, but the courts differ on whether minors have the same level of protection as adults.

In *Bykofsky v. Middletown,* the District Court for the Middle District of

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[115] *Id.* at 74.

[116] *Id.* at 75. The court did not specify which Constitutional provision gave birth to such a right.

[117] *Id.* at 76.

[118] *Id.*

[119] Spencer v. Casavilla, 903 F.2d 171, 172 (2d Cir. 1990).

[120] *Id.* at 174.

[121] *Id.*

[122] *Id.* at 174–75.

Pennsylvania examined a curfew ordinance that prohibited minors from remaining on the streets of Middletown, Pennsylvania, during certain hours.[123] The court noted that freedom to movement was a fundamental right, which was implicit in the concept of ordered liberty.[124] The court held that the ordinance was "a constitutionally permissible regulation of the minor's right to freedom of movement upon and use of the streets as guaranteed by the *due process clause* of the *fourteenth amendment*."[125] However, the court noted that minors, whose rights were at issue, have limited rights as compared with adults, and minors' actions may be regulated to an extent that adults' actions may not.[126]

Although the court put strong emphasis on the importance and the fundamental nature of the right to movement, the court applied rational basis as opposed to strict scrutiny.[127] This is likely attributable to the court's conclusion, from its analysis of Supreme Court precedent, that "the conduct of minors may be constitutionally regulated to a greater extent than those [sic] of adults."[128] Under a rational basis balancing test, the court held that the curfew ordinance was a constitutionally permitted regulation of minors' right to due process.[129]

Similarly, in *McCollester*, the District Court for the District of New Hampshire examined a curfew ordinance prohibiting minors from being in public during the specified hours.[130] The court recognized that there is a fundamental right to movement that is found in the Due Process Clause.[131] The court noted that minors may have limited constitutional rights, but

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[123] Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1246 (M.D. Pa. 1975).

[124] *Id.* at 1254. The court observed that "[n]o right is more sacred, or is more carefully guarded, by the liberty assurance of the due process clause than the right of every citizen to the possession and control of his own person, free from restraint or interference by the state." *Id.* at 1255. Note that this court's characterization of the right at issue was much broader than the characterization of the right in *Doe v. Lafayette*. *See* discussion *supra* Part IV.A.2.a.

[125] *Bykofsky*, 401 F. Supp. at 1258 (emphasis added). The court held that the ordinance was a permissible exercise of police power, and the governmental interests advanced were the "safety and welfare of the general community and the minors who reside therein." *Id.*

[126] *Id.* at 1254, 1257.

[127] *Id.* at 1255, 1262 (the court explains that it is not searching for a compelling state interest but is instead balancing the rights of the plaintiff against the states interest's in an effort to assess whether the ordinance is reasonable).

[128] *Id.* at 1254, 1257 (the court held that "the conduct of minors may be constitutionally regulated to a greater extent than those of adults," and that the "conduct of minors upon the street may be regulated and restricted to a greater extent than those of adults."). *See* Bykofsky v. Borough of Middletown, 429 U.S. 964–66 (1976) (Marshall, J., dissenting) (for a discussion of why the Supreme Court should have examined the issue of whether minors are due the same protection of constitutional rights as adults).

[129] *Bykofsky,* 401 F. Supp. at 1258.

[130] McCollester v. City of Keene, 586 F. Supp. 1381, 1383 (D.N.H. 1984).

[131] *Id.* at 1385.

reasoned that the ordinance "does not meet even these diluted standards for regulation of juvenile activities."[132] The court held that the ordinance was overbroad to advance the potential governmental interests.[133]

The Second Circuit, in *Ramos v. Vernon,* also held that minors have a limited right to travel when compared with adults, but applied intermediate scrutiny instead of rational basis review.[134] The curfew ordinance at issue made it "unlawful for any person under eighteen years of age 'to remain, idle, wander, stroll or play in any public place or establishment in the Town during curfew hours.'"[135] The court held that the ordinance implicated the fundamental right to travel[136] and applied the intermediate standard, finding that the ordinance did not survive this scrutiny.[137] The court noted that if the ordinance applied to adults, it would be subject to strict scrutiny, but because the ordinance applied to minors, it would have to be analyzed differently.[138] The reasoning behind this decision is that there are important differences between adults and children that justify treating the two groups differently.[139] The proposed goals of preventing crime and victimization at night were not substantially related to the ordinance, and, therefore, the ordinance violated the Equal Protection Clause.[140]

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[132] *Id.*

[133] *Id* at 1386. It seems that the court took the decreased constitutional rights of minors into account only in determining whether the liberty interest was infringed, and not in its application of the standard, as the court applied strict scrutiny.

[134] Ramos v. Town of Vernon, 353 F.3d 171, 180 (2d Cir. 2003). Applying rational basis

> defines the relevant interest so narrowly that it is not deemed a constitutional right and heightened scrutiny does not come into play. Under this methodology, the characteristic that defines the plaintiffs' class – youth – divests them of a right they would otherwise hold. The second approach recognizes that children, like adults, have a constitutional right to free movement, but then reduces the level of scrutiny to compensate for children's special vulnerabilities.

Id. at 176 (citation omitted). In rejecting the first approach (rational basis), the court stated that "[s]imply denying the existence of a constitutional right is too blunt an instrument to resolve the question of juvenile rights to freedom of movement." *Id.* at 178. The court rejected strict scrutiny because blindness to age was not necessary or prudent in this case. *Id.* at 179–80. Therefore, the court chose intermediate scrutiny as a middle ground between the two other options.

[135] *Id.* at 172.

[136] *Id.* at 176. The court did not specify in which constitutional provision(s) the right to travel is found. *Id.*

[137] *Id.* at 176, 188.

[138] *Id.* The court noted: "The right we evaluate in this case is narrower than an adult's right to free movement, however. It is a minor's right to move about freely with parental consent." *Id.* at 176 n.3.

[139] *Id.* at 179.

[140] Ramos v. Town of Vernon, 353 F.3d 171, 186 (2d Cir. 2003). Although the court analyzed the ordinance under Equal Protection, the same analysis would apply under the Due Process Clause.

Although these cases stand for the proposition that the right to travel is not afforded to minors on the same level as adults, the Ohio Court of Common Pleas, held the opposite and afforded minors the same protection.[141] The court held, based on *Papachristou v. Jacksonville*,[142] that the right to loiter, idle, wander, stroll, or play are fundamental rights arising from the Due Process Clause, and that the proposed ordinance would restrict these rights.[143] The court applied strict scrutiny, and held that there was no compelling state interest shown.[144]

Cases concerning limitations on minors' rights to travel have generally acknowledged the fundamental nature of the right, but many courts have applied a lower standard (either rational basis or intermediate scrutiny) in determining whether the restriction is permissible.

Some other cases involving group-based bans or restrictions are based on the person's homeless status. In *Pottinger,* the District Court for the Southern District of Florida examined ordinances and policies that prohibited homeless people from parks.[145] The court held that there was a fundamental right to intrastate travel, and that a burden on that right is subject to strict scrutiny.[146] After determining that the ordinances and policies burdened the right to travel,[147] the court stated that even assuming that there were compelling interests, there were less restrictive means to achieve the goal.[148]

In *Johnson v. Board of Police Commissioners,* the plaintiffs alleged that the St. Louis Police Department had a policy of discouraging homeless people from public areas.[149] The court stated that "[t]he right to travel is a fundamental constitutional right, arising from the Fourteenth Amendment's substantive due process clause, and includes the freedom to move about

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[141] *In re* Mosier, 394 N.E.2d 368, 376 (1978).

[142] 405 U.S. 156 (1972).

[143] *Mosier*, 394 N.E.2d at 373.

[144] *Id.* at 376. The court also discussed at length the "ridiculous results" of this ordinance, including specific instances in which a minor would be inconvenienced. *Id.* at 373.

[145] Pottinger v. City of Miami, 810 F.Supp. 1551, 1555 (S.D. Fla. 1992).

[146] *Id.* at 1579. The court did not specify where the right to travel was found within the Constitution. *See generally id.*

[147] *Id.* at 1581. "In sum, whether characterized as a penalty, a deterrent or a purposeful expulsion, enforcement of the ordinances against the homeless when they have absolutely no place to go effectively burdens their right to travel." *Id.*

[148] *Id.* at 1582. The court was skeptical about the City's stated interests of "keeping its parks and streets free of litter, vandalism and general deterioration; in preventing crime and ensuring safety in public parks; and in promoting tourism, business and the development of the downtown area . . ." *Id.*at 1581. The court did acknowledge that "[t]he City's interest in maintaining public areas for the purpose of preventing health hazards would be compelling." *Id.* at 1582 n.36.

[149] Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 932 (E.D. Mo. 2004).

and loiter for innocent purposes."[150] The court held that the plaintiffs had demonstrated a likelihood of success on their right to travel claim[151] and granted a preliminary injunction in favor of the plaintiffs.[152]

These cases demonstrate that a prohibition based on a person's status as homeless is likely to be subject to strict scrutiny, as the right to travel is likely to be characterized as fundamental in such cases.

Other group classifications concern people who have been arrested for particular crimes. In 1997, the Illinois Supreme Court examined an ordinance that prohibited gang members from loitering in public places within the City of Chicago in *Chicago v. Morales*.[153] The court held that the ordinance was void for vagueness,[154] and was an impermissible restraint on liberty in violation of substantive due process.[155] In discussing substantive due process, the court held that "[a]mong those protected personal liberties which have long been recognized are the general right to travel . . . the right of locomotion, the right to freedom of movement . . . and the general right to associate with others," and stated that "[t]he gang loitering ordinance impinges upon all of these personal liberty interests.[156] The court held that because the ordinance arbitrarily infringed the right to movement, it violated substantive due process.[157]

In *Johnson v. Cincinnati,* the Sixth Circuit examined an ordinance that "exclude[d] an individual for up to ninety days from the 'public streets, sidewalks, and other public ways' in all drug-exclusion zones if the individual [was] arrested or taken into custody within any drug-exclusion zone for one of several enumerated drug offenses."[158] The court concluded that there was a constitutional right to intrastate travel.[159] Applying strict

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[150] *Id.* at 949.

[151] *Id.*

[152] *Id.* at 954.

[153] City of Chicago v. Morales, 687 N.E.2d 53, 58 (Ill. 1997), *aff'd*, 527 U.S. 41 (1999). A plurality of United States Supreme Court affirmed that the ordinance was unconstitutional, but held so only on vagueness grounds, and did not reach whether the ordinance was void for impermissibly burdening the freedom to travel. *Morales,* 527 U.S. at 55. The gang ordinance read: "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section." *Morales,* 687 N.E.2d at 58.

[154] *Morales*, 687 N.E.2d at 59–64.

[155] *Id.* at 64–65.

[156] *Id.* at 65 (citations and explanatory parenthetical clauses omitted).

[157] *Id.* The court did not seem to apply strict scrutiny, as the court simply held that the ordinance "unreasonably infringes upon personal liberty." *Id.* Likewise, the court did not examine First Amendment claims, as that would have "command[ed] a much higher level of scrutiny." *Id.*

[158] Johnson v. City of Cincinnati, 310 F.3d 484, 487 (6th Cir. 2002).

[159] *Id.* at 498. The court found this right to be within the Due Process Clause. *Id.*

scrutiny, the court determined that there was a compelling governmental interest[160] and that the ordinance was not narrowly tailored to achieve the interest.[161]

These cases show that when a law specifically applies to groups that have committed a particular crime, the court is likely to apply a heightened standard of review (although *Morales* applied an arbitrary standard, and not strict scrutiny) and acknowledge the fundamental right to travel.

Finally, a group that is often affected by laws concerning the right to travel is sex offenders. In *Doe v. Moore,* the Eleventh Circuit Court of Appeals considered whether an act that required sex offenders to report and register when they move was unconstitutional.[162] The court considered whether the act violated the right to travel,[163] and held that the act did not "unreasonably burden" that right.[164] Although the state gave examples of some cases in which the right to travel should be protected,[165] it did not provide a definition for what is an "unreasonable burden" on that right.

In 2008, the Supreme Court of North Carolina reviewed a constitutional challenge to an ordinance that banned registered sex offenders from public parks in the town of Woodfin.[166] Although the court noted that it had previously held that the right to intrastate travel is fundamental,[167] the court ultimately stated that the offender's right to enter

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[160] *Id.* at 502. The compelling governmental interest the court recognized was "to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas . . . ." *Id.*

[161] *Id.* at 505. The court stated: "without some affirmative evidence that there is no less severe alternative, we cannot conclude that the Ordinance, in its present form, survives constitutional scrutiny." *Id.*

[162] Doe v. Moore, 410 F.3d 1337, 1339 (11th Cir. 2005).

[163] The court did not mention where the right would be found within the Constitution. *See generally id.*

[164] *Id.* at 1349.

[165] The court noted that "[i]n the predominant case law, the right to travel protects a person's right to enter and leave another state, the right to be treated fairly when temporarily present in another state, and the right to be treated the same as other citizens of that state when moving there permanently." *Id.* at 1348.

[166] Standley v. Woodfin, 661 S.E.2d 728, 729 (N.C. 2008).

[167] *Id.* at 730. The Court noted:

> [T]his Court has recognized a right to *intrastate* travel, stating that the right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause, Article I, § 17, of the Constitution of North Carolina. [T]he right to travel on the public streets is a fundamental segment of liberty, and as such its absolute prohibition "requires substantially more justification than would otherwise be required for state action.

Id. (citing State v. Dobbins, 277 N.C. 484, 497, 178 S.E.2d 449, 456–58 (1971)) (internal citations omitted) (internal quotation marks omitted).

parks was not encompassed by the right to intrastate travel.[168] The court considered whether the right to "freely roam in parks"[169] was a fundamental right, and held that it was not.[170] The court applied rational basis, holding that the ordinance was "rationally related to the legitimate government interest of protecting park visitors from becoming victims of sexual crimes."[171]

Similar to *Standley*, *Doe v. Plainfield* challenged an Indiana ordinance that prevented registered sex offenders from all public parks in the town of Plainfield.[172] The challenge in *Doe* was brought under Article I, Section 1 of the Indiana Constitution,[173] which is similar to Due Process Clause of the Federal Constitution.[174] The court then had to determine if the right to enter public parks was considered a "core value" that was necessary for a facial challenge based on Article 1, Section 1,[175] and held that it was not.[176] The court reasoned that, in order for a right to be classified as a core value, the right must have a legacy of historical significance, and held that the right to enter parks did not.[177]

Based on these cases, the ability to restrict sex offenders' right to travel is unclear. It is possible that a restriction on sex offenders' right to enter parks may not be characterized as implicating the right to travel, and, therefore, be subject to rational basis. However, it may be possible that a broader restriction will be subject to an "unreasonable burden" standard. Similarly, because the Greenwich Ordinance implicates more than just the right to enter parks, a court may distinguish these cases, and rely on other right to travel case law.

c. General Bans or Inconveniences

Restrictions on the right to travel that apply to the public at large vary

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[168] *Id.*

[169] *Id.*

[170] *Id.* at 731. The court stated that the right to freely enter parks was not on par with other rights previously held to be fundamental, such as the right to have children and the right to marital privacy. Standley v. Woodfin, 661 S.E. 2d 728, 731. (N.C. 2008).

[171] *Id.* at 732.

[172] Doe v. Plainfield, 893 N.E.2d 1124, 1127 (Ind. Ct. App. 2008).

[173] *Id.* at 1129. Article I, Section 1 reads: "W[e] declare, that all men are born equally and have certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." *Id.* at 1131–32 n.7.

[174] *See id.* at 1132 n.8.

[175] *Id.* at 1130 (citing City Chapel Evangelical Free Inc. v. South Bend, 744 N.E.2d 443, 450 (Ind. 2001); Price v. State, 622 N.E.2d 954, 961 (Ind. 1993)).

[176] *Id.* at 1132.

[177] *Plainfield*, 893 N.E.2d at 1131–32.

in outcome. Some courts have held that the right to intrastate travel is a fundamental right and have therefore applied strict scrutiny, whereas others have declined to do so.

In 1995, the District Court for the Southern District of New York examined constitutional claims related to an automobile checkpoint.[178] The court recognized the "constitutional right to intrastate travel,"[179] and recognized that any intrusion on the right to travel would possibly be subject to strict scrutiny.[180] The court then held, after examining those cases that did implicate a right to travel, that the checkpoint did not violate the right to travel.[181]

In *Five Borough Bicycle Club v. City of New York*, the District Court for the Southern District of New York examined the City of New York's regulations that required group bicycle rides to obtain a permit before the event.[182] The court stated that although there is a "basic right" to travel, and although the Second Circuit recognized a constitutional right to free movement,[183] that right is not "unbounded."[184] Although the court noted that if a regulation did intrude on the right to travel, it would be subject to strict scrutiny, it held that the regulations did not impede or punish the

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[178] Maxwell v. New York, No. 93 Civ. 5834 (MBM), 1995 U.S. Dist. LEXIS 5467, at *1–2 (S.D.N.Y. Apr. 25, 1995).

[179] The court did not articulate where in the Constitution the right to travel is found. *Id.* at *22.

[180] *Id.*

> [The right to travel] is not absolute. A government intrusion on the right to travel will be upheld if the intrusion is deemed necessary to promote a compelling governmental interest. At the very least, governmental restrictions upon freedom to travel are to be weighed against the necessity advanced to justify them, and a restriction that burdens the right to travel too broadly and indiscriminately cannot be sustained.

Id. (citations omitted) (internal quotation marks omitted).

[181] *Id.* at *23–24.

[182] Five Borough Bicycle Club v. N.Y.C., 483 F. Supp. 2d 351, 357 (S.D.N.Y. 2007). The bicycle riders were seeking a preliminary injunction, which requires a showing of likelihood of success on the merits. *Id.* at 360.

[183] The court failed to acknowledge where the right is found. *See id.* at 361–62.

[184] *Id.* at 362. The court noted that "[c]ourts appear to be split on whether the Constitution contemplates a right to free movement, restriction of which would trigger strict scrutiny analysis." *Id.* at 362 n.68. The court held that

> [a] statute implicates the constitutional right to travel when it actually deters such travel, or when impedance of travel is its primary objective, or when it uses any classification which serves to *penalize* the exercise of that right. Furthermore, travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right.

Id. at 362–63 (citations omitted) (internal quotation marks omitted).

right, and denied the injunction.[185]

In *Tobe v. Santa Ana,* the Supreme Court of California examined an ordinance that prohibited camping and storage of camping equipment in specific public areas.[186] Plaintiffs included homeless people and persons charged with violating the ordinance.[187] The court noted that California courts "have taken a broader view of the right of intrastate travel, but have found violations only when a direct restriction of the right to travel occurred."[188] The court also stated that California courts did not subject ordinances that do not directly burden the right to travel to a strict scrutiny analysis.[189] In applying these principles, the court noted that there is not a right to remain in a particular place, or a "right to live or stay where one will."[190] The court ultimately held that the ordinance did not impermissibly burden the right to travel.[191]

This line of cases analyzes the right to travel as a right that can be indirectly restricted, inconvenienced, or infringed. Therefore, ordinances and laws may burden or limit the right to travel without subjecting the law to constitutional analysis.

Other cases applying to the general public have held that there is a fundamental right to travel. The Court of Criminal Appeals of Oklahoma held that an anti-loitering ordinance was unconstitutional, as it was vague and overbroad, which violated the Due Process and Equal Protection Clauses.[192] The court held that "[t]here can be no limits on a person's freedom to move interstate, even if he is indigent or undesirable."[193]

In *Bruno v. Civil Service Commission,* the Connecticut Supreme Court reviewed a challenge to a requirement that, in order to take an examination to qualify for a recreation superintendent job in the town of Bridgeport, an

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[185] *Five Borough Bicycle Club*, 483 F. Supp. 2d at 362–63, 380.

[186] Tobe v. City of Santa Ana, 892 P.2d 1145, 1150 (Cal. 1995). The Court of Appeals had invalidated the ordinance on constitutional grounds. *Id.*

[187] *Id.* at 1151.

[188] *Id.* at 1163 (citations omitted).

[189] *Id.* at 1163–64. The court held that if an ordinance indirectly or incidentally burdens the right to travel, such a burden would be subject to a rational basis analysis only. *Id.* This interpretation varies from courts which have found a fundamental right to travel, but have stated that an indirect burden or minor inconvenience is not a burden at all.

[190] *Id.* at 1165. The court noted that trespass laws apply, and that people can be prohibited from public or private property. *Id.*

[191] Tobe v. City of Santa Ana, 892 P.2d 1145, 1166 (Cal. 1995). The court noted that there is no governmental obligation to "facilitate their exercise of the right to travel." *Id.* at 1165.

[192] Hayes v. Mun. Court of Okla. City, 487 P.2d 974, 975 (Okla. Crim. App. 1971).

[193] *Id.* at 979. The court did not find the right to travel within a specific Constitutional provision. *See id.*

applicant must have lived in the city for a year prior to taking the exam.[194] The court determined that the right to travel is a fundamental right,[195] and that, as such, the requirement was subject to strict scrutiny.[196] The court held that "the means employed by the commission are certainly not the least drastic means available; there exist other means which accomplish the result without infringing on individual liberties."[197]

Yet another group of cases within this subcategory have held that there is not a fundamental right to travel. In *McCullen v. Coakley,* the plaintiffs challenged a Massachusetts act that created a thirty-five foot zone surrounding driveways and entrances of reproductive health care facilities.[198] In determining whether the act violated the plaintiffs' liberty interest under the Due Process Clause, the court held that even assuming that there is a right to loiter, that right is not fundamental, and would not be subject to strict scrutiny analysis.[199] The court held that the act passed rational basis.[200]

In *Anthony v. Texas,* the Texas Court of Appeals examined a policy of the town of Henderson that allowed police officers to ban persons from public parks at their discretion.[201] The court held that although plaintiff

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[194] Bruno v. Civil Serv. Comm'n of Bridgeport, 192 Conn. 335, 337 (1984). The text of the rule states:

> No person shall be admitted to an examination for any class of positions in the classified service who has not been a bona fide resident of the City of Bridgeport for at least twelve consecutive months immediately prior to the date of the examination; provided that such requirement of residence may be suspended by the Commission as to any class or classes of positions requiring highly professional, scientific or technical qualifications, or in case where through low compensation for services such a requirement is disadvantageous to the public interest, but all such cases with the reasons therefore, shall be reported in the annual report of the commission to the mayor."

Id. at 337–38, n.1.

[195] *Id.* at 346. The court cited *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) and *United States v. Guest*, 383 U.S. 745, 757 (1966) for the proposition that "[t]he right to travel has long been recognized and protected as a fundamental right which is firmly established in the law." *Id.* The court recognized the similar right to intrastate travel. *Bruno*, 192 Conn. at 347. However, the court did not recognize the right within a specific Constitutional provision. *Id.*

[196] *Id.* at 349. The court noted that rational basis is an insufficient analysis when a fundamental right is implicated. *Id.*

[197] *Id.* at 351. Some of the proposed interests included acquaintance with the city, keeping absenteeism down, and incurring economic benefits for the town. *Id.* at 350. The court held that other less injurious means existed, such as testing candidates with their familiarity with the town, and requiring residency while holding the position. *Id.* at 351.

[198] McCullen v. Coakley, 573 F. Supp. 2d 382, 385 (D. Mass. 2008).

[199] *See id.* at 424.

[200] *Id.* at 424–25. The court had held (previously in the decision) that the act passed intermediate scrutiny, so the court did not actually subject the act to rational basis review. *Id.*

[201] Anthony v. Texas, 209 S.W.3d 296, 301 (Tex. Crim. App. 2006). The plaintiff challenged the policy on due process grounds. *Id.*

had a liberty interest in using the park, he did not have a fundamental right to use the park.[202] Therefore, the court applied rational basis, and held that the policy was rationally related to a legitimate state interest, as "there is a rational relationship between a policy allowing exclusion from the park of individuals who breach the peace and the maintenance of order in a public park."[203]

These cases again show that the characterization of the right makes the difference. In these cases, the right was characterized as the right to use the park or the right to loiter instead of the right to travel intrastate. Therefore, the more narrow the characterization, the more likely it is that the ordinance or law will be subject to rational basis instead of strict scrutiny.

Overall, what can be clearly determined from the case law is that: (a) it is easier for a law which restricts sex offenders to be characterized as a more narrow right or survive scrutiny; (b) the narrower the classification of the right, the more likely the right will not be held fundamental; and (c) not all inconveniences or impositions on the right to travel will be subject to constitutional analysis.

3. *Application to Greenwich Ordinance*

Because the law is unsettled in this area, and because there is very little mandatory authority in this jurisdiction,[204] I will apply both a strict scrutiny and a rational basis standard to the Greenwich Ordinance, and attempt to predict an outcome under each standard.

a. Strict Scrutiny

The first step under a strict scrutiny analysis is to determine whether there is a compelling governmental interest. In the explanatory comments of the Greenwich RTM on September 21, 2009, it was stated that "[t]he purpose of the ordinance is to protect children in the community from registered sex offenders."[205] Courts have consistently recognized "that there is a compelling interest in protecting the physical and psychological

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[202] *Id.* at 305. The court was not persuaded by the plaintiff's reliance on *Chicago v. Morales*, as they noted a plurality opinion has limited precedential value. *Id.*

[203] *Id.* at 306.

[204] The only Connecticut authority on the right to travel involved a durational residency requirement. As the reviewing court may not find the case applicable due to the difference in subject manner, it is proper to examine both levels of scrutiny.

[205] *Explanatory Comments of the September 21, 2009 RTM Meeting*, THE TOWN OF GREENWICH, CT, *available at* http://greenwichct.virtualtownhall.net/Public_Documents/GreenwichCT_Agendas/rtmExplanos0909.

well-being of minors."[206] Therefore, the Greenwich Ordinance and similar ordinances certainly promote a compelling governmental interest in the protection of children. Although not mentioned within the legislative history, it is helpful to determine whether other compelling interests are advanced by the Ordinance. A possible compelling interest advanced by the Ordinance is protecting the public. Public safety is recognized as a compelling governmental interest.[207] Another possible interest is preventing or reducing recidivism.[208]

The next step in applying strict scrutiny is determining if the Ordinance is narrowly tailored to advance the compelling interest. In determining whether the Ordinance is narrowly tailored, it is important to note that the Supreme Court, when examining whether an anti-picketing ban violated free speech, stated that "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."[209] Likewise, if an ordinance is under-broad or over-broad to achieve an interest, it is not narrowly tailored.[210]

The first possible interest is protecting children. The Ordinance is likely not narrowly tailored if the purpose is to protect children. All sex offenders do not pose a risk to children, and there is no differentiation between those offenders who committed crimes against children and those who did not.[211] Also, not all activities that are prohibited, such as picnicking, swimming, sunbathing, and many more, are dangerous to children. Therefore, under the test articulated by the Supreme Court, the Ordinance was not narrowly tailored to achieve the interest of protecting children.

Likewise, there are other criminals who may pose a risk to children who are not prevented from going to the parks and other public areas mentioned in the ordinance. Clearly, the Ordinance is under-broad in that it does not address all possible risks to children in these public places. Also, the sex offenders are prevented from going into the parks, beaches, and other prohibited areas at all times, not simply when children would be

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[206] Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). *Accord* N.Y. v. Ferber, 458 U.S. 747, 757 (1982); Hobbs v. County of Westchester, 397 F.3d 133, 150 (2d Cir. 2005).

[207] *E.g.*, Tanks v. Greater Cleveland Reg'l Transit Auth., 930 F.2d 475, 480 (6th Cir. 1991) (holding that protecting public safety is a compelling governmental interest).

[208] *E.g.*, United States v. Kincade, 379 F.3d 813, 839 (9th Cir. 2004) (noting that the Supreme Court "has frequently stressed the pressing need to reduce recidivism among the offender population" and referring to this as an "enormous" interest).

[209] Frisby v. Schultz, 487 U.S. 474, 485 (1988).

[210] *E.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

[211] Greenwich town attorneys offered to amend the ordinance to apply only to sex offenders whose crimes involved children. Vigdor, *Proposed Sex Offender Ordinance*, *supra* note 9. However, the last version of the ordinance to be presented to the RTM did not include this provision.

likely to congregate. In this sense, the Ordinance is also over-broad. Based on all of these considerations, the Ordinance would likely be held to be not narrowly tailored to achieve the interest of protecting children.

The second possible interest is protecting public safety. Again, there are many activities that sex offenders are prevented from doing that are not injurious to public safety. Similarly, a court would likely hold that the Ordinance was not narrowly-tailored. Likewise, the Ordinance is also under-broad and over-broad. It is under-broad because it does not protect the public against many other threats to safety, including other criminals. It is over-broad in that there is no determination of whether or not the sex offender is dangerous to the public.[212]

The final possible interest is preventing offenders from reoffending. The Ordinance is unlikely to be held to be narrowly tailored to achieve this interest as well. Preventing access to some potential victims does not necessarily reduce or prevent recidivism. Greenwich would have to convince a court that this were true in order for the Ordinance to pass strict scrutiny on this ground.[213]

b. Rational Basis

In the application of rational basis review, it must first be determined whether there is a legitimate governmental interest. As stated above, the Ordinance advances compelling interests, so it would also be held to advance legitimate interests. The next step would be to determine whether the Ordinance is rationally related to one of the possible interests.

When discussing the rational basis standard of review, the Supreme Court noted that:

> [T]his standard of review, although deferential, is not a toothless one. The rational basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, the Court has explained that these limitations amount to a prescription

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[212] It is worth noting that the argument that a sex offender must be determined to be currently dangerous was struck down in regard to community notification. *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003). However, the court noted that "[p]laintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Id.* In the case of the Greenwich ordinance, where there is a clear focus on safety and a harsher result for the sex offender, the fact of current dangerousness might be relevant to the statutory scheme. Under this reasoning, the Greenwich Ordinance could be challenged under Procedural Due Process as well.

[213] This argument would be more likely to succeed under a rational basis review, which does not require narrow tailoring.

that all persons similarly situated should be treated alike.[214]

Under the fairly deferential rational basis standard, the Greenwich Ordinance may be upheld. The Ordinance may be considered rationally related to the goal of keeping children safe, as sex offenders have a fairly high rate of recidivism.[215] However, it could be argued that because the Ordinance (as currently written) applies to all sex offenders, that there is no rational relationship to children's safety.

When applied to the interest of keeping the public safe, it is more likely that this ordinance is rationally related to the goal. Sex offenders are fairly likely to re-offend, so prohibiting them from places where groups typically congregate may be rationally related to the goal of safety. However, a plaintiff opposing this ordinance may argue that the Ordinance is not rationally related to public safety absent a finding of present dangerousness.[216]

Finally, when rational basis review is applied to the goal of preventing or reducing recidivism, it is possible that a court would hold that keeping sex offenders away from potential future victims would be rationally related to reducing recidivism.

B. State Right to Travel Under the Connecticut Constitution

In Connecticut, a plaintiff who was to challenge the Greenwich Ordinance would be able to bring state constitutional claims as well. "It is beyond debate that federal constitutional and statutory law establishes a *minimum* national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights."[217] In determining whether the Connecticut Constitution provides greater protection than the federal Constitution, it is necessary to look at common law before the Connecticut Constitution was passed. "In determining the scope of our state constitution's due process clauses, we have taken as a point of departure those constitutional or quasi-constitutional rights that were recognized at common law in this state prior to 1818."[218]

Based on this precedent, it is necessary to determine whether common law prior to 1818 recognized a right to travel as a fundamental right. I will

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[214] Lyng v. Int'l Union, 485 U.S. 360, 375 (1988) (citations omitted) (internal quotation marks omitted).

[215] *See* discussion *infra* Part V.

[216] McCullen v. Coakley, 573 F. Supp. 2d 382, 424–25 (D. Mass. 2008).

[217] State v. Morales, 657 A.2d 585, 590 (Conn. 1995) (citation omitted).

[218] State v. Ross, 646 A.2d 1318, 1354 (Conn. 1994).

examine statements in period documents that suggest a right to travel before 1818.

The Constitution of 1638 (or Civil Compact), which the towns of Windsor, Hartford, and Wethersfield adopted, states "[t]hat no man's life shall be taken away; no man's honor or good name shall be stained; no man's person shall be arrested, restrained, banished, dismembered, nor any way punished . . . ."[219] The fact that this Constitution did not allow for banishment or restraint shows that there was a commitment to letting persons freely move about without fear of being prohibited from, or confined to, a particular place.

In Zephaniah Swift's *A System of the Law of the State of Connecticut*, in a chapter entitled "Of the Right of Personal Liberty," he states, "no man can be restrained of his liberty; be prevented from removing himself from place to place, as he chooses; be compelled to go to a place contrary to his inclination, or be in any way imprisoned, or confined, unless by virtue of the express laws of the land."[220] This excerpt certainly suggests that there was recognition of a fundamental right to travel within Connecticut prior to the adoption of the Constitution. This quote shows that there was a commitment to the ability for people to travel between places without restriction.

Swift also recounts a law that was abolished for concerns about its effect on free movement. "By former law, a residence in a town one year without warning, or one year after warning without prosecution, gave a settlement. This law was soon found to be very inconvenient, and restrained people from removing from place to place, as convenience and interest required."[221] This law was intended to prevent people from moving to another town, and immediately becoming public charges.[222] The law was remedied by requiring a certificate before moving. However, that provision was also found to be inconvenient and restricted movement.[223] Finally, a law was passed that allowed persons the freedom to move to another town, but if during the first six years of the person's residence there, he or she becomes a public charge, he or she "may be removed to the last place of his legal settlement."[224] This case shows that

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[219] THE CODE OF 1650, BEING A COMPILATION OF THE EARLIEST LAWS AND ORDERS OF THE GENERAL COURT OF CONNECTICUT (1822). I have translated this quotation, and those that follow, into modern language from the period language. To avoid excessive omissions and replacements, I have not denoted this change within the quotations.

[220] 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 180 (1795).

[221] *Id.* at 168.

[222] *Id.*

[223] *Id.*

[224] *Id.* at 169.

the laws of the time valued "the liberty of removal"[225] over other important concerns, and that laws were adapted in order to prevent unnecessary restrictions on this right.

Based on the little that was written about the right to travel or the right to movement under the right of due process before the Connecticut Constitution passed in 1818, it seems that the individual liberty to move about freely, within a state, was highly valued. With this evidence, it may be possible that a Connecticut court would hold that even if there is no fundamental right to intrastate travel under the federal Due Process Clause, there is an implicit right under the Connecticut Due Process Clause. If a court were to interpret a fundamental right under the state constitution, the Ordinance would be subject to strict scrutiny. Therefore, the Ordinance may be more likely to fail under state constitutional claims.

V. POLICY DISCUSSION

If this type of ordinance is held unconstitutional, the question still remains: How can we keep citizens, especially children, safe, while still protecting the constitutional rights of the sex offenders? One reason often cited for the restrictions on sex offenders is the high rate of recidivism.[226] However, the efficacy of many studies on recidivism has been questioned.[227] The most cited set of statistics comes from 1994, from the Bureau of Justice Statistics.[228] These statistics show that the re-arrest rate for sex offenders, at 43 percent, was lower than other offenders at 68 percent.[229] Another study that compiled a meta-data analysis of sixty-one studies, including 28,972 offenders, showed that "the sex offense

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[225] *Id.* at 168.

[226] *E.g.*, Smith v. Doe, 538 U.S. 84, 103 (2003) ("The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.'") (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)).

[227] R. Karl Hanson, *Who is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 63 (Bruce J. Winick & John Q. LaFond, eds. 2003).

[228] These statistics have been cited both for the proposition that sex offenders have a high likelihood to re-offend, and that sex offenders have comparatively low rates of recidivism. *See* Jesse J. Cooke, Note, *Beyond an Unfortunate "Occurrence": Insurance Coverage and the Equitable Redress of Victims of Sexual Predator Priests,* 36 ARIZ. ST. L.J. 1039, 1053 (2004) (citing the Bureau of Justice Statistics 1994 study for the fact that sex offenders "have a high likelihood of recidivism."); Franklin E. Zimring & Chrysanthi S. Leon, *A Cite-Checker's Guide to Sexual Dangerousness,* 13 BERKELEY J. CRIM. L. 65, 72 n.41 (2008).

[229] MATTHEW R. DUROSE, PATRICK A. LANGAN & ERICA L. SCHMITT, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 2 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf. The felony re-arrest rate (of those who were arrested) for sex offenders was also lower than the felony re-arrest rate for non-sex offenders. *Id.*

recidivism rate was 13.4%."[230] Based on these statistics, it seems that, although the recidivism rate may be high, it does not necessarily follow that sex offenders are more likely to re-offend than other prisoners. Yet, they receive harsher punishments, particularly post-incarceration.

On the other hand, it is important to note that "[c]ompared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime."[231] Thus, sex offenders' recidivism is more likely to implicate the rights of others, as their crimes have victims, whereas other recidivist offenders may commit crimes without victims, such as property crimes. There is a legitimate fear that sex offenders will re-offend, and it seems logical for the government to enact laws and ordinances in order to protect members of society from sex offenders. However, I would argue that we cannot do so at the expense of the offenders' constitutional rights.

I propose that there are alternate ways to balance the rights of sex offenders with public safety. First, if we have a legitimate fear that sex offenders will offend again, we could put in place longer sentences.[232] Likewise, we could attempt to provide treatment through psychological and psychiatric counseling in order to help prevent the offender from re-offending.[233] Also, we could implement a longer or stricter parole or supervised release programs, in order to assure compliance with the law, while still lawfully restricting the offender's rights.[234] Finally, we could

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[230] R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998).

[231] DUROSE ET AL., *supra* note 229, at 1.

[232] *See* Bruce J. Winick & John Q. LaFond, *Conclusion* to PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 335 (Bruce J. Winick & John Q. LaFond, eds. 2003) ("In states where penal law is inadequate to authorize sufficiently lengthy imprisonment for repetitive offenders, this problem can easily be remedied through statutory amendment."); Ronnie Hall, Note, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of "Sexually Violent Predators" in Texas*, 13 TEX. WESLEYAN L. REV. 175, 211 (2006) (arguing that longer prison sentences may be a better alternative to sexually violent predator laws). The author also suggests that frequent plea bargaining by prosecutors for these crimes may be a result of civil commitment laws. *Id.*

[233] Bruce J. Winick & John Q. LaFond, *Conclusion* to PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 335 (Bruce J. Winick & John Q. LaFond, eds. 2003). "While empirical research on sex offender treatment efficacy is inconclusive, emerging cognitive-behavioral and relapse prevention models hold much promise, at least for motivated offenders." *Id.* In this area, it is important that more research is done on the causes of sex offenses, as this may provide answers on how to properly treat these offenders. *Id.* at 337–38.

[234] *See, e.g.*, United States v. Genovese, 311 F. App'x 465, 466–68 (2d Cir. 2009) (upholding supervised release conditions requiring registration as a sex offender, and undergoing evaluation and treatment); United States v. Daniels, 541 F.3d 915, 927–29 (9th Cir. 2008) (upholding supervised release conditions that prohibited plaintiff from possessing sexually explicit materials, prohibited plaintiff from loitering within 100 feet of a place where minors frequent, prohibited plaintiff from being employed in a job which would cause him to come in contact with persons under 18, and prohibited plaintiff from being employed in a job producing or selling sexually explicit materials);United States v.

keep measures such as the Greenwich Ordinance and residency restrictions in place, but do so only after a hearing in which it was determined that the offender is likely to offend again and poses a present risk.[235]

VI. CONCLUSION

It is uncertain whether the Ordinance would violate the right to travel. It seems likely if the Ordinance were subject to strict scrutiny and less likely if it is not. However, under the Connecticut Constitution, a higher protection may be given to the right to travel under the Due Process Clause. Even if none of these challenges are successful, there are other possible challenges that may succeed. It is important that legislators take these concerns into account, and attempt to balance the rights of sex offenders—nebulous rights like the right to travel—with the need to protect the public.

Johnson, 446 F.3d 272, 278–83 (2d Cir. 2006) (upholding polygraph testing, ban on direct and indirect contact with minors, and a ban on internet as supervised release conditions).

[235] *See* author's comments *supra* note 212.