

## Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless, Sex-Offender Registrants

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**ABSTRACT.** Across New York, people are incarcerated for weeks, months, and even years after their prison release dates. These individuals are not confined for violating prison disciplinary rules or committing new crimes. New York's Department of Corrections and Community Supervision (DOCCS) detains them, instead, because they are homeless.

DOCCS refuses to release prisoners to community supervision without an approved address. But for prisoners required to register as "sex offenders," finding housing means navigating a web of restrictions that are levied exclusively on people convicted of sex crimes and that dramatically constrain housing options, particularly in densely populated New York City. These restrictions amount to effective banishment for registrants with disabilities, who face added obstacles to finding medically appropriate housing and are barred even from New York City's homeless-shelter system.

As this Essay explores, the State of New York, and particularly New York City, pushes its poor, disabled sex-offender registrants into homelessness, and then prolongs registrants' detention because of their homeless status. This detention regime continues unabated, despite studies showing that sex-offender recidivism rates are actually relatively low and that residency restrictions do not demonstrably prevent sex offenses. Rather, such laws consign registrants to homelessness, joblessness, and social isolation.

It does not have to be this way. This Essay suggests litigation strategies to challenge the prolonged detention of homeless registrants on statutory and constitutional grounds. The Essay also offers policy solutions to improve New York City registrants' access to housing and to untether an individual's housing status from their access to liberty. New York simply cannot and should not continue both to restrict registrants' housing options and to detain individuals because they are homeless.

**INTRODUCTION**

Larry\* called me from his prison cell. He was set to be released in a month. He was eager to get back home to his mom, who was helping him secure a job and working an extra job herself to support him upon his release. As the attorney representing Larry in his sex-offender registration proceedings, I had to be the first to explain, through the crackled phone line, that he could not go back to his mom's house. Located down the block from a school, and funded by Section 8 vouchers, the house was off-limits to Larry. Living there would violate his sex-offender residency restrictions. If he did not find another place to live, the prison would keep detaining him. No, I did not know when he would go home.

I sat in the prison medical unit across from Richard,\* bound to his wheelchair, supplemental oxygen supply at the ready, almost three years to the day after he was granted compassionate release. We went over the list again. Relatives: public housing. Nursing home: too close to a school. Apartment: too much money; not wheelchair accessible. We would continue to do this for years.

Manuel's\* paralysis left him hardly able to speak. He was terminally ill and in urgent need of open-heart surgery. Set to be released within weeks, he planned to undergo the surgery back home. But more than a year after his maximum release date, he remained behind bars because no place – not even the homeless shelter – would agree to house him given his medical needs. We wondered if he would make it out alive.

Larry, Richard, and Manuel's backgrounds differed, but each of these men was ensnared in the same cruel catch-22: the New York Department of Corrections and Community Supervision (DOCCS) would not release them from prison until they obtained approved housing, but their poverty, disabilities, and sex-offender registration status made finding housing impossible.

There are currently more than 41,500 sex-offender registrants in New York State, with almost 8,000 in New York City alone.<sup>1</sup> The Center for Appellate Litigation (CAL), a post-conviction public defender office in New York City where I served as a *Yale Law Journal* Fellow from October 2018 to August 2019, represents many of them. Nearly all of CAL's sex-offender-registrant clients are incarcerated beyond their release dates because of their inability to find housing that complies with residency restrictions.

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\* Pseudonym used to protect attorney-client confidentiality.

1. *Registered Sex Offenders by County as of November 5, 2019*, N.Y. ST. DIV. CRIM. JUST. SERVS., [https://www.criminaljustice.ny.gov/nsor/stats\\_by\\_county.htm](https://www.criminaljustice.ny.gov/nsor/stats_by_county.htm) [<https://perma.cc/7UTW-RB9M>].

The barriers CAL’s clients face—lack of affordable and handicap-accessible housing;<sup>2</sup> draconian residency restrictions;<sup>3</sup> prolonged detention<sup>4</sup>—are increasingly facing scrutiny in the press.<sup>5</sup> But the cataclysmic intersection of these issues in New York City remains largely in the shadows. This Essay fills this gap by exploring the laws, policies, and practices that push New York City’s poor, disabled, sex-offender registrants into homelessness and then prolong registrants’ detention because of their homeless status.

Part I of this Essay describes the barriers to finding housing for New York City’s disabled sex-offender registrants. They must find housing that is affordable, not federally subsidized, medically appropriate, and more than one thousand feet from any school.<sup>6</sup> Such housing is often unavailable. While other homeless prisoners may, upon their release, enter New York City’s homeless shelter system, New York City refuses to shelter individuals whose disabilities prevent them from tending to their own daily needs.<sup>7</sup>

In Part II, I explain DOCCS’s policy and practice of detaining people who have nowhere to go upon release until— from their prison cells, without the ability to visit residences, use the internet, or freely make phone calls—detained individuals somehow find a medically appropriate, parole-compliant residence.

Part III unpacks the fear and flawed data that undergird this regime. It explains research showing that sex-offender recidivism rates are comparatively

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2. See, e.g., Justin Davidson, *New York City Is Still a Disaster for the Disabled*, N.Y. MAG.: INTELLIGENCER (July 15, 2019), <http://nymag.com/intelligencer/2019/07/new-york-city-is-still-a-disaster-for-the-disabled.html> [<https://perma.cc/32EK-96RG>]; Caroline Spivack, *NYC’s Affordability Crisis Continues to Deepen, Report Shows*, CURBED (June 20, 2019), <https://ny.curbed.com/2019/6/20/18691426/nyc-affordable-housing-worsen-comptroller-report> [<https://perma.cc/VSP2-ZY5L>].
  3. See, e.g., Editorial, *The Pointless Banishment of Sex Offenders*, N.Y. TIMES (Sept. 8, 2015), <https://www.nytimes.com/2015/09/08/opinion/the-pointless-banishment-of-sex-offenders.html> [<https://perma.cc/XG9C-RS2K>]; Michael Hobbes, *Sex Offender Registries Don’t Keep Kids Safe, but Politicians Keep Expanding Them Anyway*, HUFFPOST (July 16, 2019), [https://www.huffpost.com/entry/sex-offender-laws-dont-make-children-safer-politicians-keep-passing-them-anyway\\_n\\_5d2c8571e4b02a5a5d5e96d1](https://www.huffpost.com/entry/sex-offender-laws-dont-make-children-safer-politicians-keep-passing-them-anyway_n_5d2c8571e4b02a5a5d5e96d1) [<https://perma.cc/A7KM-L9FP>].
  4. See, e.g., Christie Thompson, *For Some Prisoners, Finishing Their Sentences Doesn’t Mean They Get Out*, MARSHALL PROJECT (May 24, 2016), <https://www.themarshallproject.org/2016/05/24/for-some-prisoners-finishing-their-sentences-doesn-t-mean-they-get-out> [<https://perma.cc/L5UE-9472>]; Elizabeth Weill-Greenberg, *This Grandfather Was Granted Parole in 2018. Why Is He Still in Prison?*, APPEAL (May 17, 2019), <https://theappeal.org/this-grandfather-was-granted-parole-in-2018-why-is-he-still-in-prison> [<https://perma.cc/9GVR-3PAP>].
  5. See sources cited *supra* notes 2-4.
  6. See *infra* Section I.A.
  7. See *infra* note 44 and accompanying text.

low; that offenses against strangers, which originally motivated residence restrictions on sex-offender registrants, are relatively rare; and that isolating people from their communities hampers, rather than helps, public safety.

In Part IV, I propose legal challenges to New York's detention scheme. I discuss the state of litigation in New York and across the country, and I propose litigation strategies based on New York's failure to accommodate individuals' disabilities and on violations of substantive due process, equal protection, and the Eighth Amendment.

Finally, in Part V, I build upon scholarship and advocacy materials to suggest policy proposals that, on the one hand, ease registrants' ability to find housing options and, on the other hand, untether registrants' housing status from their access to liberty. Implementation of such solutions would ensure that, at the very least, registrants are no longer both forced into homelessness and also incarcerated due to that homeless status.

#### **1. LEGISLATED HOMELESSNESS: A HOUSING CRISIS FOR NEW YORK CITY'S DISABLED SEX-OFFENDER REGISTRANTS**

Finding housing in New York City can be exasperating for almost anyone, but the additional challenges facing those leaving prison has resulted in a housing crisis among this population. New York is already "one of the world's most expensive cities in which to rent or buy a home,"<sup>8</sup> and the unaffordability problem is only worsening.<sup>9</sup> Unable to earn meaningful income while incarcerated, and subject to heightened education and employment barriers upon release,<sup>10</sup>

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8. Howard Husock, *How New York's Public Housing Fails the City's New Poor*, MANHATTAN INST. 2 (Oct. 2017), <https://media4.manhattan-institute.org/sites/default/files/IB-HH-1017-v2.pdf> [<https://perma.cc/K3LE-2Y2J>]; see also Marissa Perino, *San Francisco Isn't One of the World's Most Expensive Cities, Despite Everyone Complaining How Expensive It Is. But 2 Major U.S. Cities Are*, BUS. INSIDER (Mar. 20, 2019), <https://www.businessinsider.com/most-expensive-cities-in-america-world-ranking-nyc-la-san-francisco-2019-3> [<https://perma.cc/XW3R-YYJ6>] (noting that New York was the world's seventh-most expensive city).

9. See *State of New York City's Housing and Neighborhoods*, N.Y.U. FURMAN CTR. 32 (2013), [http://furmancenter.org/files/sotc/SOC2013\\_HighRes.pdf](http://furmancenter.org/files/sotc/SOC2013_HighRes.pdf) [<https://perma.cc/4W6R-U52D>]; DW Gibson, *New York Spends \$1.2 Billion a Year on Homelessness and Yet the Problem Is Only Getting Worse*, N.Y. MAG.: INTELLIGENCER (Mar. 20, 2017), <http://nymag.com/intelligencer/2017/03/nyc-homelessness-crisis.html> [<https://perma.cc/AM9U-QPN8>]; Spivack, *supra* note 2.

10. Kathleen F. Donovan, *No Hope for Redemption: The False Choice Between Safety and Justice in Hope VI Ex-Offender Admissions Policies*, 3 DEPAUL J. SOC. JUST. 173, 193-94 (2010).

“[p]eople leaving prison and jail are typically among Americans with the most dire housing needs.”<sup>11</sup>

Moreover, the few affordable units are difficult for prisoners to find. Behind bars, this population cannot visit residences, use the internet to search for housing, or access directories of affordable housing options. On top of this, despite recent federal policy guidance warning that blanket rejection of applicants with criminal records may violate the Fair Housing Act, many landlords refuse to rent to people with criminal convictions.<sup>12</sup> For individuals subject to sex-offender housing restrictions generally, and for registrants with disabilities in particular,<sup>13</sup> additional legal and practical burdens make finding housing nearly impossible.

#### A. Sweeping Restrictions on Sex-Offender Registrants

In addition to the barriers that face everyone leaving prison, individuals convicted of sex offenses must navigate a second set of restrictions that, as some scholars and judges have recognized, “threaten to result in effective banishment.”<sup>14</sup> These sweeping regulations, imposed throughout the United States,

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11. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 552 (2005).
  12. See, e.g., Camila Domonoske, *Denying Housing over Criminal Record May Be Discrimination, Feds Say*, NPR: TWO-WAY (Apr. 4, 2016, 1:14 AM), <https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say> [<https://perma.cc/K7G9-N3G2>]; Donovan, *supra* note 10, at 195 (“Even if a returning prisoner was able to pay for private housing, many private landlords refuse to rent to ex-offenders . . .”).
  13. This Essay does not specifically address heightened barriers faced by people of color, LGBTQ individuals, nonbinary individuals, and other marginalized populations. Unsurprisingly, research suggests that—as with all aspects of the criminal-legal system—such populations are overpunished and face greater barriers to re-entry. See, e.g., *Racial and Ethnic Demographics of the New York State Level 3 Sex Offender Population*, N.Y.C.L. UNION 2 (Apr. 2006), [https://www.nyclu.org/sites/default/files/sexoffender\\_analysis\\_121106.pdf](https://www.nyclu.org/sites/default/files/sexoffender_analysis_121106.pdf) [<https://perma.cc/JRH5-KKG6>]; Alissa R. Ackerman & Meghan Sacks, *Disproportionate Minority Presence on U.S. Sex Offender Registries*, 16 JUST. POL’Y J. 1, 1 (2018); Guy Hamilton-Smith, *The Agony & the Ecstasy of #MeToo: The Hidden Costs of Reliance on Carceral Politics*, 14 SW. L. REV. (forthcoming 2019) (manuscript at 23); Sessi Kuwabara Blanchard, *The Struggle to Be Trans in Minnesota’s Sex Offender Program*, APPEAL (July 15, 2019), <https://theappeal.org/transgender-women-minnesotas-sex-offender-program> [<https://perma.cc/DT5Z-52BA>]; Tom Wahl & Nicole Pittman, *Injustice: How the Sex Offender Registry Destroys LGBT Rights*, ADVOCATE (Aug. 5, 2016), <https://www.advocate.com/commentary/2016/8/05/injustice-how-sex-offender-registry-destroys-lgbtq-rights> [<https://perma.cc/CU8Q-DK69>].
  14. *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1227 (D. Colo. 2017); see also *People v. Parilla*, 109 A.D.3d 20, 29 (N.Y. App. Div. 2013) (noting that registries may “increase[] the difficulties and embarrassment a sex offender may endure, even where he has led a law-abiding life since his conviction”); Hamilton-Smith, *supra* note 13, at 12 (“If America had a civil death penalty,

exclusively target people convicted of sex crimes.<sup>15</sup> In New York, as in many states, the consequences of these laws are severe and life-long: publicly labeling individuals “sex offenders”; triggering a maze of registration requirements for which failure to comply can result in felony charges; and restricting where individuals may live.<sup>16</sup> Consequently, as scholar Jill Levenson describes, sex-offender registrants are “legislated into homelessness.”<sup>17</sup>

This regulatory regime was supposed to make society safer. Following a series of horrendous, highly-publicized stranger assaults on children in the early 1990s,<sup>18</sup> Congress and each state scrambled to pass laws to monitor and control

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putting people on its sex offense registries would be it.”); Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1411-12 (2009) (explaining that sex-offender residency restrictions may implicate constitutional concerns and can contribute to “psychological stress” and recidivism); Kari White, Note, *Where Will They Go?: Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 CASE W. RES. L. REV. 161, 174-79 (2008) (arguing that sex-offender residency restrictions “fall into the ‘banishment’ classification”).

15. Meanwhile, the definition of “sex crime” continues to expand, growing to include prostitution, urinating in public, and consensual sex between teenagers. See Erin Fuchs, *7 Surprising Things That Could Make You a Sex Offender*, BUS. INSIDER (Oct. 9, 2013), <https://www.businessinsider.com/surprising-things-that-could-make-you-a-sex-offender-2013-10> [<https://perma.cc/PFF5-9KAV>]; Chanakya Sethi, *The Ridiculous Laws That Put People on the Sex Offender List*, SLATE (Aug. 12, 2014), <https://slate.com/news-and-politics/2014/08/mapped-sex-offender-registry-laws-on-statutory-rape-public-urination-and-prostitution.html> [<https://perma.cc/TE6G-S5GQ>].
16. See N.Y. CORRECT. LAW § 168-f (McKinney 2019) (describing registration and verification duties); *id.* § 168-t (establishing felony charges for failure to comply with any restriction); *Nowhere to Go: New York’s Housing Policy for Individuals on the Sex Offender Registry and Recommendations for Change*, FORTUNE SOC’Y 2 (2019), <https://fortunesociety.org/wp-content/uploads/2019/05/NowhereToGo.pdf> [<https://perma.cc/LN9E-HZLR>] [hereinafter *Nowhere to Go*] (describing how New York’s classification system for its sex-offender registry “has never been scientifically validated or updated to reflect more recent academic studies,” leaving all registrants subject to intensive supervision); see also *No Easy Answers: Sex Offender Laws in the U.S.*, HUM. RTS. WATCH 100-19 (Sept. 11, 2007), <https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> [<https://perma.cc/3HLM-NRQD>] [hereinafter *No Easy Answers*].
17. Jill S. Levenson, *Hidden Challenges: Sex Offenders Legislated into Homelessness*, 18 J. SOC. WORK 348, 348 (2018).
18. See John J. Goldman, *Details Convey Horror of Megan’s Death*, L.A. TIMES (May 6, 1997, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1997-05-06-mn-55980-story.html> [<https://perma.cc/KAY7-89T2>]; Dirk Johnson, *Small Town Is Shaken by a Child’s Abduction*, N.Y. TIMES, Oct. 30, 1989, at A10; see also ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 13-15 (2006) (describing a string of “heinous and notorious crimes against women and children” in Washington, Minnesota, and New Jersey in the 1980s and 1990s that served as the backdrop for “aggressively innovative legislative responses”).

people who had committed sex crimes.<sup>19</sup> As Eric Janus, a leading academic on sex-offender regulations, describes, “[t]he legislative solution seemed self-evident: give parents the tools to protect their children by notifying them when sex offenders move into their neighborhoods.”<sup>20</sup> Soon, states expanded this regime to limit where sex-offender registrants could live and move in order to “limit offenders’ access to children and their temptation or ability to commit new crimes.”<sup>21</sup>

Today, more than 900,000 people are on sex-offender registries,<sup>22</sup> and at least thirty states restrict where those registrants can live.<sup>23</sup> But, as described in Part III, new studies show that these laws are wholly untethered from empirical data about sex-offense recidivism and do not demonstrably protect society.

In New York, the Sexual Assault Reform Act (SARA) prohibits certain sex-offender registrants<sup>24</sup> from living within one thousand feet of a school during their parole or conditional release.<sup>25</sup> This distance is calculated as the crow flies,

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19. See JANUS, *supra* note 18, at 15-24; Madeleine Baran & Jennifer Vogel, *Sex-Offender Registries: How the Wetterling Abduction Changed the Country*, APM REP. (Oct. 4, 2016), <https://www.apmreports.org/story/2016/10/04/sex-offender-registries-wetterling-abduction> [<https://perma.cc/ZLA6-W9DQ>]; Olivia B. Waxman, *The History Behind the Law That Created a Registry of Sex Offenders*, TIME (May 30, 2017), <http://time.com/4793292/history-origins-sex-offender-registry> [<https://perma.cc/EQT3-L997>].
  20. JANUS, *supra* note 18, at 15.
  21. See *No Easy Answers*, *supra* note 16, at 4.
  22. Hobbes, *supra* note 3.
  23. See *Sexual Offender Residence Restrictions*, ASS’N FOR TREATMENT OF SEXUAL ABUSERS 2 (Aug. 2, 2014), <http://www.atsa.com/pdfs/Policy/2014SOREsidenceRestrictions.pdf> [<https://perma.cc/TZT5-P6P9>]; John Kip Cornwell, *Sex Offender Residency Restrictions: Government Regulation of Public Health, Safety, and Morality*, 24 WM. & MARY BILL RTS. J. 1, 6 n.13 (2015) (compiling statutes).
  24. New York assigns each sex-offender registrant a level based on the individual’s predicted risk of sexual reoffense and the harm that any reoffense might cause: Level 1 (low risk), 2 (moderate risk) and 3 (high risk). SARA applies to people convicted of certain sex crimes who are adjudicated Level 3 or whose victims were minors. N.Y. EXEC. LAW § 259-c(14) (McKinney 2019). The statute technically prohibits people from “entering into or upon” one thousand feet of a school. *Id.* However, “[p]arole officials, recognizing that the literal language of the statute is unenforceable, apply the SARA Law as a residency restriction.” *Nowhere to Go*, *supra* note 16, at 3.
  25. On its face, SARA applies only to people “on parole or conditionally released.” See N.Y. EXEC. LAW §§ 259-c(2), (14) (McKinney 2019). However, DOCCS additionally applies SARA to people serving post-release supervision. The legality of DOCCS’s extension of SARA to people on post-release supervision is currently being litigated by my office. See *Khan v. Annucci*, No. 2587-18, slip op. 66846(U) (Sup. Ct. Kings Cty. 2019).

regardless of whether natural or artificial barriers block direct access to the school.<sup>26</sup>

Given the abundance of schools and population density in New York City, the one-thousand-foot restriction puts most of the City, and practicably all of Manhattan, off-limits to registrants.<sup>27</sup> Even New York's highest court acknowledges the "dearth of SARA-compliant housing in New York City."<sup>28</sup> Making matters worse, DOCCS will not release its proprietary algorithm for calculating the one-thousand-foot buffer zone.<sup>29</sup> Registrants, their loved ones, and even CAL are all left to rely on tape measures or online maps to guess whether a potential apartment is SARA-compliant.

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26. *The Impact and Legality of Sex Offender Residency Restrictions Created by New York's Sexual Assault Reform Act*, N.Y.C. B. (Oct. 2016), [https://s3.amazonaws.com/documents.nycbar.org/files/20073107-SARAResidencyRestrictions\\_CrimCourt.CrimLaw.CJO.Corrections\\_Report\\_FINAL\\_10.24.16.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/20073107-SARAResidencyRestrictions_CrimCourt.CrimLaw.CJO.Corrections_Report_FINAL_10.24.16.pdf) [<https://perma.cc/EVG7-X4NJ>] [hereinafter *Impact and Legality of Sex Offender Residency Restrictions*].

27. *See Nowhere to Go*, *supra* note 16, at 3.

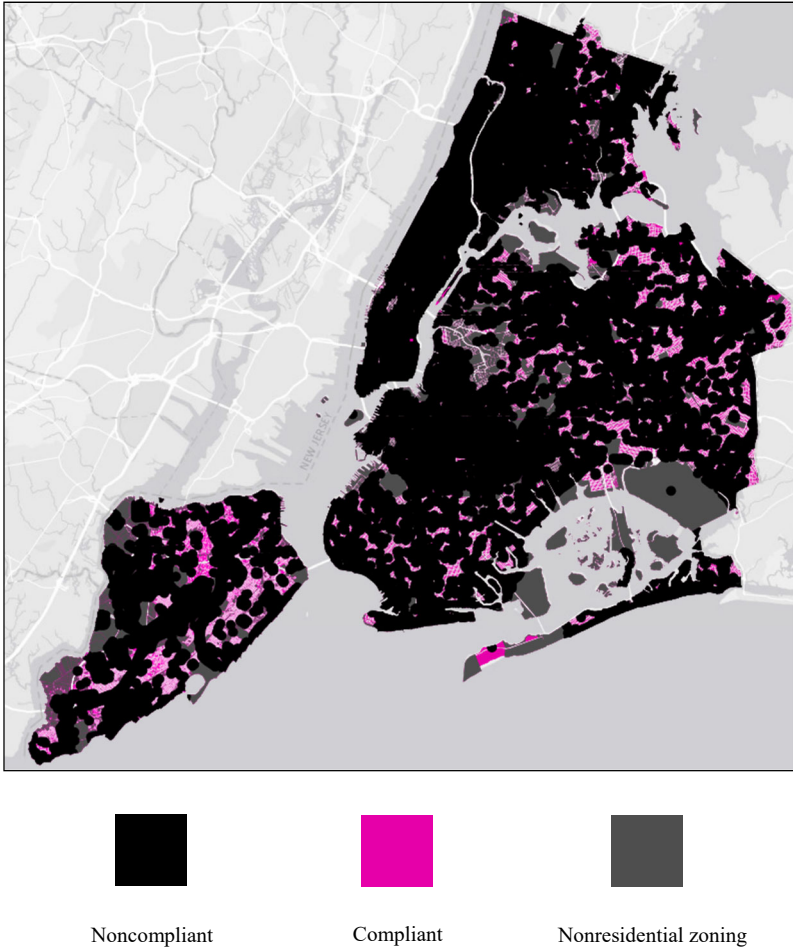
28. *Gonzalez v. Annucci*, 32 N.Y.3d 461, 462 (Ct. App. 2018); *see also* *People ex rel. Simmons v. Superintendent, Hudson Corr. Facility*, No. 8291-14, slip op. 30248(U) at 7 (Sup. Ct. Columbia Cty. Feb. 18, 2015) ("There has been an ongoing problem, in the court's experience, with the ability of the Department of Corrections and Community Services in placing convicted sex offenders in the community . . ."); Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. TIMES (Aug. 21, 2014), <https://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html> [<https://perma.cc/G37X-XTGV>].

29. *See* Shane English, *Sex Offenders Face Housing Maze After Prison Release*, CITY LIMITS (Jan. 17, 2017), <https://citylimits.org/2017/01/17/sex-offenders-face-housing-maze-after-prison-release> [<https://perma.cc/WDY8-G23S>].



PUSHED OUT AND LOCKED IN

FIGURE 1.  
MAP OF SARA-COMPLIANT HOUSING IN NEW YORK CITY<sup>30</sup>



30. *Nowhere to Go*, *supra* note 16, at 3. Image reprinted with permission of the Fortune Society.

But that is not all. Federal law *permanently* bars lifetime sex-offender registrants<sup>31</sup> from admission to federally-subsidized housing.<sup>32</sup> Similar to their reasoning in passing SARA, legislators justified this de jure public-housing ban as protecting public-housing residents from the “crime” and “gang warfare” seen as pervasive in the 1990s.<sup>33</sup> While ensuring the safety of public-housing residents—whose housing options are necessarily limited—is certainly important, as discussed *infra* in Part III, there is no evidence that barring lifetime registrants from public housing prevents sex crimes.

Meanwhile, the public-housing ban’s impact in New York City is stark. Sixty-one percent of New York City sex-offender registrants must register for life.<sup>34</sup> At the same time, “[m]any of the city’s low-income families live in public housing” or rely on “Section 8 housing voucher[s],”<sup>35</sup> and one in fifteen New York City residents lives in New York City Housing Authority (NYCHA)

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31. In New York, registrants adjudicated Level 2 (“moderate” risk) or 3 (“high” risk), or who have a “designation,” must register for life. See *Frequently Asked Questions: New York State’s Sex Offender Registry*, N.Y. ST. DIV. CRIM. JUST. SERVS., <https://www.criminaljustice.ny.gov/nsor/faq.htm> [<https://perma.cc/CY29-TJ69>] [hereinafter *Sex Offender Registry FAQs*].
  32. 42 U.S.C. § 13663 (2018); 24 C.F.R. §§ 5.856, 960.204(a)(4), 982.553(a)(2) (2018). Separate provisions also bar people who abuse drugs and alcohol from admission to public housing. 42 U.S.C. §§ 13661, 13662 (2018). While beyond the scope of this Essay, federal law technically only prohibits the “admission” of “any household that includes” a lifetime sex-offender registrant. *Id.* § 13663. It does not provide for the *termination* of existing tenants. Accordingly, registrants who already live in federally subsidized housing can argue they should be allowed to remain in their homes. Litigation on this front has been successful. See, e.g., *Perkins-Bey v. Hous. Auth. of St. Louis Cty.*, No. 4:11-cv-310, 2011 WL 939292, at \*3-4 (E.D. Mo. Mar. 14, 2011); *Miller v. McCormick*, 605 F. Supp. 2d 296, 312 (D. Me. 2009); *Hous. Auth. of Hartford v. Ali Kenyatta Bros.*, No. HDSP165671, 2013 WL 3766903, at \*8 (Conn. Super. Ct. June 21, 2013); *Bonseiro v. N.Y.C. Dep’t of Hous. Pres. & Dev.*, No. 14793/11, 2012 WL 517198, at \*6-7 (N.Y. Sup. Ct. June 29, 2012).
  33. Donovan, *supra* note 10, at 197. Passed amid the “welfare reform” movement of the 1990s, as Carey describes, the ban also aimed to separate the “deserving” from “undeserving” poor. Carey, *supra* note 11, at 553-54, 560-62. Indeed, HUD asserted that “it is reasonable to allocate scarce resources to those who play by the rules.” *Id.* at 554 (quoting OFFICE OF PUB. & INDIAN HOUS., U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE PIH-96-16(HA), “ONE STRIKE AND YOU’RE OUT” SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (PHAs), § I(b) (Apr. 12, 1996)).
  34. See *Registered Sex Offenders by County as of November 5, 2019*, *supra* note 1. In Bronx, Kings, New York, Queens, and Richmond Counties, a total of 4,881 offenders are categorized as risk level 2 or 3, out of a total 7,971 registered offenders, or sixty-one percent. *Id.*
  35. *New York City Government Poverty Measure: 2005-2016*, MAYOR’S OFF. OPERATIONS 53 (2018), [https://www1.nyc.gov/assets/opportunity/pdf/18\\_poverty\\_measure\\_report.pdf](https://www1.nyc.gov/assets/opportunity/pdf/18_poverty_measure_report.pdf) [<https://perma.cc/K84Q-5SUU>].

housing.<sup>36</sup> Many CAL clients report that they do not have a single relative or friend who lives in non-subsidized housing. As a result, this law makes it extremely difficult for poor registrants to find an apartment and often prevents them from living with loved ones in existing, otherwise-compliant, and medically appropriate housing.<sup>37</sup>

Finally, on top of the federal government's de jure discrimination, private landlords discriminate against sex-offender registrants de facto. Indeed, "tenant-screening agencies frequently utilize a person's status as a sex-offender registrant as a screening criterion, and a private landlord receiving information that a prospective tenant is on a sex-offense registry has unbridled discretion in how to use this information."<sup>38</sup>

These factors dramatically constrain housing options for New York City's sex-offender registrants.

### *B. Increased Burdens for the Disabled*

For registrants with disabilities, affordable housing options are even sparser.<sup>39</sup> Not only must these individuals find housing that is far enough from a school and affordable, but that housing must also be handicap-accessible and otherwise medically appropriate.

New York City has few wheelchair-accessible buildings, and accessible apartments—fitted with elevators and wide entryways—tend to be more expensive than the old, narrow walk-up buildings that pepper the city.<sup>40</sup> Likewise, more

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36. *NYCHA 2019 Fact Sheet*, N.Y.C. HOUSING AUTH. (2019), [https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet\\_2019\\_08-01.pdf](https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet_2019_08-01.pdf) [<https://perma.cc/F3GA-YNXX>].

37. *See Nowhere to Go*, *supra* note 16, at 5.

38. Mary Helen McNeal & Patricia Warth, *Barred Forever: Seniors, Housing, and Sex Offense Registration*, KAN. J.L. & PUB. POL'Y 317, 335-36 (2013); *see also* Karen Augé, *State and Local Laws Push More Registered Sex Offenders into Low-Income Colorado Communities*, COLO. SUN (July 24, 2019), <https://coloradosun.com/2019/07/24/registered-sex-offenders-low-income-neighborhoods> [<https://perma.cc/TC32-QZ39>].

39. *See* Gillian B. White, *Nowhere to Go: The Housing Crisis Facing Americans with Disabilities*, ATLANTIC (Dec. 15, 2015), <https://www.theatlantic.com/business/archive/2015/12/renting-with-a-disability/420555> [<https://perma.cc/B5TF-6ZD5>].

40. *See, e.g.*, Glenn Collins, *Accessible Homes? Not Really, Say Disabled Residents*, N.Y. TIMES (Aug. 24, 2008), <https://www.nytimes.com/2008/08/25/nyregion/25handicap.html> [<https://perma.cc/CNA3-Z6HE>]; White, *supra* note 39.

than half of the city's subway stations are not handicap-accessible, making many cheaper neighborhoods untenable options for the disabled.<sup>41</sup>

Further, many disabled individuals require someone to administer medicine, care for open wounds, or handle cooking and cleaning. Nursing homes and assisted living centers – the former for those with acute needs and the latter for people with greater levels of independence – are sound housing options for individuals with disabilities. But three main barriers prohibit poor, disabled, sex-offender registrants from accessing these facilities.

First, nursing home care is expensive. New York City nursing homes cost, on average, more than four hundred dollars per day.<sup>42</sup> Some facilities accept public benefits. However, a prisoner's Medicaid and supplemental security income (SSI) applications typically are not processed until the individual is released, resulting in a coverage gap, before the reinstatement of benefits but after release, during which nursing homes must absorb the cost of care.<sup>43</sup> Facilities are therefore reluctant to accept prisoners immediately upon their release.

Second, many nursing homes and assisted-living centers in New York City are within one-thousand feet of a school. While there is no public directory of SARA-compliant nursing homes, Lynn Cortella, a registered nurse who formerly worked with DOCCS to facilitate placements for sex-offender registrants, stated that, in New York City, “hardly any nursing or assisted living facilities comply with SARA.”<sup>44</sup> My colleagues and I routinely witnessed the truth of Cortella's statement as our clients struggled to find any facility far enough from a school.

Finally, many facilities, either in policy or in practice, simply refuse to accept sex-offender registrants.<sup>45</sup> As the Vera Institute explained, “[p]eople released

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41. *Service Denied: Accessibility and the New York City Subway System*, N.Y.C. COMPTROLLER (July 17, 2018), <https://comptroller.nyc.gov/reports/service-denied-accessibility-and-the-new-york-city-subway-system> [<https://perma.cc/US2Y-KABE>].

42. *See Estimated Average New York State Nursing Home Rates*, N.Y. ST. DEP'T HEALTH, [https://www.health.ny.gov/facilities/nursing/estimated\\_average\\_rates.htm](https://www.health.ny.gov/facilities/nursing/estimated_average_rates.htm) [<https://perma.cc/U3DU-S6S3>].

43. Telephone Interview with Lynn Cortella, former DOCCS nurse (May 5, 2019) (on file with author).

44. Declaration of Lynn Cortella, *Sanchez v. Dep't of Corr. & Cmty. Supervision*, No. 19-cv-3567 (S.D.N.Y. June 14, 2019) (ECF No. 67); *see also* Rebecca Silber et al., *A Question of Compassion: Medical Parole in New York State*, VERA INST. 30 (Apr. 2018), <https://nyshealthfoundation.org/wp-content/uploads/2018/04/a-question-of-compassion-full-report-april-2018-1.pdf> [<https://perma.cc/Y4HX-6CHT>] (noting that sex-offender residency restrictions create barriers to entering nursing homes and assisted living centers).

45. *See* Silber et al., *supra* note 44, at 30; McNeal & Warth, *supra* note 38, at 336; Peter Rugg, *The Puzzle of Housing Aging Sex Offenders*, ATLANTIC (June 1, 2017), <https://www>.

from prison with significant medical needs are seen to inhabit two salient roles – ‘patient’ and ‘ex-offender’ – which, together, can elicit a conflict in values for service providers.”<sup>46</sup> This bind has proved true in Cortella’s and my office’s experiences. Facilities routinely reject even debilitated, wheelchair-bound registrants who have been granted release to parole, expressing fears that those registrants could wheel themselves into another patient’s room and commit an assault.<sup>47</sup>

Given the inherent vulnerability of nursing-home and assisted-living-center patients, these safety concerns are understandable. But there is no evidence that housing sex-offender registrants is linked to heightened abuse in such facilities.<sup>48</sup> Moreover, many individuals requiring medical care are elderly, and studies show that sex-offense recidivism markedly declines with age.<sup>49</sup> And, in many cases, the facilities’ arguments seem specious. For instance, following litigation, DOCCS contacted dozens of nursing homes for Manuel. All of the facilities rejected him because he was a sex-offender registrant – even though he was adjudicated the lowest risk of reoffending and is physically incapable of moving on his own. His and other clients’ experiences suggest that nursing homes may be less concerned about safety and more concerned about the reputational consequences of housing and caring for a “sex offender.”

### C. No Shelter for the Disabled

New York City’s disabled sex-offender registrants are, consequently, frequently rendered homeless.<sup>50</sup> Thankfully, New York City has a right-to-shelter mandate, meaning the City must temporarily house any person who needs

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theatlantic.com/health/archive/2017/06/aging-sex-offenders/528849 [https://perma.cc/H5Z9-WWTG]; Interview with Lynn Cortella, *supra* note 43.

46. Silber et al., *supra* note 44, at 30.

47. Interview with Lynn Cortella, *supra* note 43.

48. McNeal & Warth, *supra* note 38, at 343.

49. See, e.g., Seena Fazel et al., *Risk Factors for Criminal Recidivism in Older Sexual Offenders*, 18 SEXUAL ABUSE: J. RES. & TREATMENT 159 (2006); David Thornton, *Age and Sexual Recidivism: A Variable Connection*, 18 SEXUAL ABUSE: J. RES. & TREATMENT 123, 132 (2006) (demonstrating that the odds of being reconvicted for a sex offense decline by about 2% with each year of increasing age).

50. See *People v. McFarland*, No. 7581-09, 2012 WL 2367876, at \*7 (N.Y. Sup. Ct. 2012), *rev’d on other grounds*, 120 A.D.3d 111 (N.Y. App. Div. 2014) (emphasizing that for people who are “in failing health” with “very limited mobility” and are “living on government assistance,” the chances of finding an apartment in New York City “which [is] not within 1000 feet of a school” is probably non-existent).

shelter.<sup>51</sup> Many of CAL's sex-offender-registrant clients enter the shelter system upon their release from prison. But despite its mandate, the City refuses to shelter individuals with serious medical needs.<sup>52</sup> New York City's disabled registrants are left stranded.

Prisoners subject to SARA face myriad barriers to entering the shelter system. As of 2018, there are only four SARA-compliant shelters in all of New York City.<sup>53</sup> Further, New York City's Department of Homeless Services (DHS) requires men<sup>54</sup> seeking shelter to first report to the 30th Street intake office, often referred to as "Bellevue," for placement.<sup>55</sup> Bellevue, however, is within one thousand feet of a school.<sup>56</sup> For years, homeless registrants subject to SARA were nevertheless released from prison to Bellevue to await a SARA-compliant placement.<sup>57</sup> Ever since a politician in 2014 caused an outcry over this practice, however, DOCCS has applied SARA to even the intake shelter.<sup>58</sup> Despite their right to shelter, then, registrants cannot visit the location necessary to exercise that right.

DOCCS's "solution" to this predicament is to keep homeless registrants in prison and put them on a "waiting list" for one of the precious few SARA-compliant beds.<sup>59</sup> The "size of the list or how it is administered" remains unknown, but the average waiting time is "approximately two to three years."<sup>60</sup> This, alone, is profoundly troubling.

For New York's disabled residents, however, the homeless-shelter system is not even an option. DHS refuses to shelter people who meet their medical

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51. See *Callahan v. Carey*, 307 A.D.2d 150, 151 (N.Y. App. Div. 2003) (describing right to shelter consent decree); *Shelter*, N.Y.C. DEP'T HOMELESS SERVS., <http://www1.nyc.gov/site/dhs/shelter/shelter.page> [<https://perma.cc/F954-23JU>].

52. See *infra* notes 61-64 and accompanying text.

53. *Gonzalez v. Annucci*, 117 N.E.3d 795, 799 (N.Y. 2018); see also *Nowhere to Go*, *supra* note 16, at 4. Further, since SARA-compliant housing in New York City is so scarce, registrants typically have trouble finding housing beyond the shelter system, making turnover of the City's few SARA-compliant beds rare.

54. Most, but not all, SARA clients in our office are men, and accordingly this Essay does not address specific challenges for female or non-binary registrants.

55. See *Nowhere to Go*, *supra* note 16, at 4.

56. *Id.*

57. See *Goldstein*, *supra* note 28.

58. See *id.*

59. See *Gonzalez*, 117 N.E.3d at 809 (Wilson, J., dissenting); *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, No. 526801, slip op. 05359 at 3 (N.Y. App. Div. July 3, 2019) (Garry, P.J., concurring). As discussed below, it appears that DOCCS only puts individuals on the waiting list once they reach their maximum release dates.

60. *Johnson*, slip op. at 3 (Garry, P.J., concurring).

“Absolute Exclusion Criteria.”<sup>61</sup> The criteria cover individuals who cannot “independently manage activities of daily living” or who have other medical issues requiring, for instance, an oxygen tank, peritoneal dialysis, or a catheter that they cannot manage themselves.<sup>62</sup>

The City rejects any obligation to shelter disabled individuals even in the face of the right-to-shelter mandate and DHS’s own regulations, which require “modification[s]” to “policies or practices” to reasonably accommodate the disabled.<sup>63</sup> And it maintains this position despite a 2017 federal settlement, known as the “*Butler* settlement,” which requires DHS to “provide Reasonable Accommodations on an individualized basis” for shelter applicants with disabilities “in a manner that provides for meaningful access to shelter or shelter-related services.”<sup>64</sup>

As a result, New York City’s disabled sex-offender registrants typically reach their release date with no place to go.

## II. PROLONGED DETENTION OF HOMELESS PRISONERS

Completing a sentence without finding housing means remaining in a prison cell. As a condition of community supervision – be it parole,<sup>65</sup> conditional release,<sup>66</sup> or post-release supervision<sup>67</sup> – registrants must secure an approved, parole-compliant address.<sup>68</sup> DOCCS will not release prisoners until this condition is met.<sup>69</sup> Meanwhile, DOCCS disclaims any obligation to help these individuals

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61. See *HCF-DHS Referral Form: Screening Tool for Referral from Health Care Facilities: Single Adult*, N.Y.C. DEP’T HOMELESS SERVS. (June 22, 2018), <https://www1.nyc.gov/assets/dhs/downloads/pdf/DHS-Institutional-Referral-Forms.pdf> [https://perma.cc/U4WM-R7MP].

62. See *id.*

63. N.Y.C. DEP’T HOMELESS SERVS., PROCEDURE NUMBER 15-211, REASONABLE ACCOMMODATION PROCEDURE FOR CLIENTS WITH DISABILITIES (Mar. 27, 2015) [hereinafter PROCEDURE NUMBER 15-211].

64. Stipulation of Settlement at 7, *Butler v. City of New York*, No. 15-cv-3783 (S.D.N.Y. May 15, 2017), [https://www.coalitionforthehomeless.org/wp-content/uploads/2017/08/Butleretalv\\_CityofNewYorketal\\_15-CV-3783-StipulationofSet.pdf](https://www.coalitionforthehomeless.org/wp-content/uploads/2017/08/Butleretalv_CityofNewYorketal_15-CV-3783-StipulationofSet.pdf) [https://perma.cc/SRF6-B4M4]. The City of New York maintains this position in federal litigation with the CAL office, in which I served as lead counsel. See *City Defendants’ Motion to Dismiss, Sanchez v. Dep’t of Corr. & Cmty. Supervision*, No. 19-cv-3567 (S.D.N.Y. May 31, 2019) (ECF No. 61).

65. See N.Y. PENAL LAW § 70.40 (McKinney 2019) (describing parole and conditional release).

66. See *id.*

67. See *id.* § 70.45 (describing postrelease supervision).

68. See *Nowhere to Go*, *supra* note 16, at 4.

69. See *id.*; Weill-Greenberg, *supra* note 4; Thompson, *supra* note 4.

find a place to live. And, while DOCCS ostensibly transfers people who have completed their *maximum* prison terms to residential “treatment” facilities, such facilities are, in reality, simply prison cells by another name.

DOCCS claims that conditioning a prisoner’s release on obtaining approved housing helps law enforcement track individuals that are considered a “high risk” of reoffending in order to prevent crimes.<sup>70</sup> Yet, as discussed in Part V, ample alternatives could address legitimate safety concerns without confining people beyond their release dates.

#### A. No Help Finding Housing

Despite the demonstrated barriers to finding housing discussed in Part I, DOCCS maintains that it has no obligation to affirmatively help registrants find a place to live.<sup>71</sup> DOCCS disclaims such a duty even though, as former DOCCS nurse Lynn Cortella described in a 2019 federal court declaration, DOCCS is “well-equipped” for this task.<sup>72</sup> DOCCS maintains records of where disabled prisoners have previously been placed, keeps lists of SARA-compliant nursing home and assisted living facilities, and has the capacity to “confirm whether a previously unknown proposed address complie[s] with SARA.”<sup>73</sup> These resources are “not generally available to the public nor to prisoners directly.”<sup>74</sup> Further, DOCCS employs nurses and social workers who have “specialized knowledge” and are well-suited “to finding medically appropriate placements.”<sup>75</sup>

Prisoners, meanwhile, are confined to their cells with no ability to use the internet or leave to visit residences, limited access to phone calls or resources to find housing, and no authoritative map of SARA-compliant residences. While their loved ones sometimes can help find housing, often our clients’ families have limited English-language abilities, computer literacy, financial resources, knowledge of the housing market, and time away from work to search for housing. Further, individuals with disabilities may be physically incapable of even picking up a phone or writing a letter. For example, Manuel suffered a stroke that left him unable to write or speak, let alone find a place to live.

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70. See *Nowhere to Go*, *supra* note 16, at 4.

71. In 2018, New York’s highest court, the Court of Appeals, held that DOCCS has no duty to substantially assist sex offenders with finding housing. *In re Gonzalez v. Annucci*, 117 N.E.3d 795, 797 (N.Y. 2018).

72. Declaration of Lynn Cortella, *supra* note 44, at ¶ 5.

73. *Id.* ¶ 7.

74. *Id.* ¶ 8; see also *id.* ¶ 6.

75. *Id.* ¶¶ 9-10. In addition, the Department of Health has the ability to help individuals find medically appropriate, SARA-compliant placements. See *id.* ¶¶ 13-14.



Even when an individual proposes an address, DOCCS typically fails to act quickly to determine its compliance with SARA. In my office’s experience, DOCCS generally does not attempt to verify that a proposed address is parole-compliant until at or near an individual’s release date. Nor does DOCCS typically put individuals on the infamous shelter “waitlist” until that individual has reached their maximum release date.<sup>76</sup> These policies and practices inherently prolong individuals’ housing search and, thus, their detention.

### *B. Continued Confinement*

Registrants subject to SARA thus routinely face prolonged detention. The duration and type of detention depends on the individual’s form of community supervision: discretionary parole or conditional release, on the one hand, and mandatory post-release supervision (PRS), on the other hand. Both wreak inordinate damage in their own ways.

#### *1. Functional Denial of Early Release*

If an individual who has been granted parole or conditional release cannot find approved housing, DOCCS continues to incarcerate that individual. Such individuals will serve their *entire* sentences behind bars.

The disparity between an individual’s early release date and maximum release date can be stark. Larry was sentenced to four to twelve years’ imprisonment, but he was granted merit parole release after just two years based on his excellent behavior in prison. If Larry cannot find SARA-compliant housing, he will be forced to serve every day of his twelve-year sentence—an additional ten years beyond his parole-release date. Since felony sex offenses can trigger sentences of twenty-five years or even life imprisonment, other registrants risk indefinite confinement.<sup>77</sup> These individuals are thus wholly denied the benefit of their early release solely because they are homeless.

Yet, the moment these same individuals reach their maximum prison release dates, if they are not subject to a term of PRS, DOCCS lets them go. No longer subject to community supervision—which triggers SARA<sup>78</sup>—these individuals can walk straight into the 30th Street intake shelter and obtain a shelter placement, or into an apartment or nursing facility located next to a school. People

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76. Interview with Lynn Cortella, *supra* note 43.

77. See N.Y. PENAL LAW § 70.80 (McKinney 2019).

78. While no longer subject to SARA’s residency restrictions, these individuals are still required to register as “sex offenders” under SORA for twenty years or life, depending on their risk level and designation. See N.Y. PENAL LAW § 168-h (McKinney 2019).

are thus confined for years for failing to find housing that, ultimately, they can typically access after they fully serve their sentences.<sup>79</sup>

## 2. *Prison by Another Name*

People serving a term of PRS following their incarceration face an *additional* form of detention even after their maximum release dates. PRS is a form of community supervision akin to supervised release in the federal system.<sup>80</sup> Under New York's sentencing regime, the majority of sex-offender registrants serve sentences that carry PRS. These terms range from five to twenty-five years.<sup>81</sup>

If an individual with a sentence that carries PRS has not found housing by their maximum release date, DOCCS places them in facilities called "Residential Treatment Facilities," or RTFs, during their PRS. RTFs are ostensibly "community based residence[s]" that provide job training, education, and assistance finding housing, akin to a halfway house.<sup>82</sup> But in reality, life in an RTF is indistinguishable from prison.<sup>83</sup>

DOCCS has administratively designated wings of thirteen state prisons as RTFs.<sup>84</sup> There, prisoners remain "behind razor-wire fences" in medium- and maximum-security facilities far from their communities.<sup>85</sup> They are "treated much the same as inmates in the general population,"<sup>86</sup> wearing the same "prison uniform," using "the same commissary, mess hall, and sick hall as the rest of the population," and, like other prisoners, they are forbidden from leaving the prison grounds.<sup>87</sup> Further, for any rule violations or crimes committed while

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79. This is by no means to suggest that SARA should apply beyond an individual's community supervision. See *Report on Legislation by the Corrections and Community Reentry Committee*, N.Y.C. B. (Mar. 2018), <https://s3.amazonaws.com/documents.nycbar.org/files/2017350-HousingSexOffendersBudget.pdf> [<https://perma.cc/TZC9-DB4G>] [hereinafter *Report on Legislation*] (discussing the harms of a proposal to expand SARA).

80. See N.Y. PENAL LAW § 70.45 (McKinney 2019) (describing PRS).

81. See *id.*

82. See N.Y. CORRECT. LAW § 2(6) (McKinney 2019).

83. See *Alcantara v. Annucci*, No. 2536-16, 2017 WL 1838729, at \*8 (Sup. Ct. Albany Cty. Feb. 24, 2017); Thompson, *supra* note 4.

84. See N.Y. COMP. CODES R. & REGS. tit. 7, §§ 100.20(c), 100.50(c), 100.75(c), 100.83(c), 100.90(c), 100.92(c), 100.94(c), 100.96(b), 100.100(d), 100.101(c), 100.109(c), 100.111(d), 100.115(c) (2019).

85. *People ex rel. Simmons v. Superintendent, Fishkill Corr. Facility*, No. 4771/14 (Sup. Ct. Dutchess Cty. Nov. 18, 2014).

86. *People ex rel. Scarberry v. Connolly*, No. 3963/14, slip op. 60160(U) (Sup. Ct. Dutchess Cty. Nov. 21, 2014). Indeed, many of our clients are actually housed *in* general population.

87. See *id.* (summarizing hearing testimony concerning RTF conditions).

in the RTF, they face a PRS violation, potentially triggering up to five years in prison,<sup>88</sup> along with prison disciplinary sanctions.

The New York legislature limited DOCCS' authority to place people serving PRS in RTFs to "a period not exceeding six months" following the completion of their prison term.<sup>89</sup> A separate statute, however, authorizes the use of RTFs generally "as a residence for persons who are on community supervision," with no temporal limitation.<sup>90</sup> DOCCS contends, accordingly, that it can hold prisoners in RTFs for the entire period of their PRS<sup>91</sup> – potentially more than two decades. As a result, New York's disabled sex-offender registrants can easily spend months, years, or even decades in confinement after their release dates because they are poor and homeless.

### III. FRIGHTENING AND WRONG: NEW YORK'S FLAWED RESPONSE TO SEX OFFENSES

New York's legislated homelessness and detention regime is not necessary to protect communities from harm. Instead, as this Part shows, the regime is a counterproductive response to fear and flawed data that diverts attention away from addressing root causes of sexual harm.

The sex-offender regulations described throughout this Essay are grounded in the notion that people who commit sex offenses will continue to commit sex offenses, prowling public spaces for their next victims.<sup>92</sup> The U.S. Supreme Court itself has upheld sex-offender regulations to protect public safety, citing sex-offender recidivism rates as a "frightening and high" eighty percent.<sup>93</sup>

This data lacks any scientific basis. The "frightening" figure promoted by the Supreme Court has been traced to one unsupported sentence in a mass-consumption magazine.<sup>94</sup> In fact, legislators conducted "little if any research" before

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88. N.Y. PENAL LAW § 70.45(1) (McKinney 2019).

89. *Id.* § 70.45(3).

90. See N.Y. CORRECT. LAW § 73(10) (McKinney 2019).

91. See *Alcantara v. Annucci*, No. 2536-16, 2017 WL 1838729, at \*5-6 (Sup. Ct. Albany Cty. Feb. 24, 2017) (collecting cases); *People ex rel. Johnson v. Superintendent, Fishkill Corr. Facility*, 47 Misc. 3d 984, 987 (Sup. Ct. Dutchess Cty. March 3, 2015).

92. See *Impact and Legality of Sex Offender Residency Restrictions*, *supra* note 26; Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C.J.L. & SOC. JUST. 319, 323-26 (2016); Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL'Y & L. 284, 285 (2008).

93. See *McKune v. Lile*, 536 U.S. 24, 33-34 (2002); see also *Smith v. Doe*, 538 U.S. 84, 103 (2003).

94. Ira Mark Ellman & Tara Ellman, "Frightening and High": *The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 496-500 (2015).

adopting this sex-offender regulatory regime.<sup>95</sup> One former Department of Justice official described the legislative process as merely “the familiar Washington race to see who can be tougher on crime,” absent any consultation with “professionals working with and treating sexual abusers.”<sup>96</sup>

In reality, new studies show that sex-offense recidivism rates after conviction<sup>97</sup> are between 1.7% and 6.6%.<sup>98</sup> In contrast, people convicted of robbery

95. JANUS, *supra* note 18, at 16.

96. *Id.*; see 142 CONG. REC. S3423 (daily ed. Apr. 17, 1996) (statement of Sen. Joe Biden) (“If any states fail to act [to establish registration systems] . . . there . . . [will] be a black hole where sexual predators can hide . . . . We now seek to build a system where all movements of sexually violent and child offenders can be tracked and we will go a long way toward the day when none of these predators will fall between the cracks.”); 142 CONG. REC. H4453 (daily ed. May 7, 1996) (statement of Rep. Charles Schumer) (“I think that what people have to understand is . . . that sexual offenders are different . . . . Long prison terms do not deter them. All too often, special rehabilitation programs do not cure them. No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children to molest, abuse and in the worst cases, to kill. So we need to do all we can to stop these predators.”); see also Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1568–70 (2014).

97. Confusion about sex-offense recidivism rates often stems from different usages of the term “recidivism.” This Essay defines recidivism as renewed criminal behavior *after* a criminal-legal system intervention such as arrest or conviction. Cf. *Recidivism*, NAT’L INST. J., <http://nij.gov/topics/corrections/recidivism/pages/welcome.aspx> [<https://perma.cc/GV96-4B4Y>] (defining recidivism as “a person’s relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime”). Accordingly, recidivism statistics cited here do not include individuals who commit additional sex crimes *before* such an intervention. Cf. Barbara Bradley Hagerty, *An Epidemic of Disbelief*, ATLANTIC (July 22, 2019, 11:17 AM EST), <https://www.theatlantic.com/magazine/archive/2019/08/an-epidemic-of-disbelief/592807> [<https://perma.cc/J23F-7JY5>] (discussing the “sheer number of repeat offenders” who have never been caught). While people may repeatedly commit sex crimes, once an individual is apprehended, as the studies cited in this Essay show, they typically do *not* sexually reoffend.

98. See Brief for the Association for the Treatment of Sexual Abusers et al. as Amici Curiae Supporting Petitioner at 8–10, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15–1194) (citing studies); *Nowhere to Go*, *supra* note 16, at 8; *accord No Easy Answers*, *supra* note 21, at 28–30. As discussed below, sex crimes remain drastically underreported. Accordingly, recidivism rates may somewhat underestimate the actual number of sex crimes. See Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST., (Oct. 4, 2018), <https://www.brennancenter.org/blog/sexual-assault-remains-dramatically-underreported> [<https://perma.cc/85R4-7FHF>]. Nevertheless, according to researchers, “the consistency of findings across hundreds of recidivism studies indicates that we’re not underestimating by much.” Steven Yoder, *What’s the Real Rate of Sex-Crime Recidivism?*, PAC. STANDARD (June 14, 2017), <https://psmag.com/news/whats-the-real-rate-of-sex-crime-recidivism> [<https://perma.cc/TS99-AXDS>].

recidivate at a rate of nearly 67%.<sup>99</sup> And according to a 2019 U.S. Department of Justice study, “[s]ex offenders were less likely than other released prisoners to be arrested during the 9 years following release.”<sup>100</sup>

Meanwhile, a study of sex crimes in New York revealed that 95.9% of people arrested for registrable sex offenses between 1986 and 2006 were “first-time offenders” – individuals who therefore, at the time of the offense, were *not* subject to sex-offender registration or residency restrictions.<sup>101</sup> As the study’s authors described, since such laws “were specifically designed to limit the ability of *convicted* sex offenders to reoffend,” this finding “casts doubt on the [laws’] ability . . . to actually reduce sexual offending.”<sup>102</sup>

Further, the stranger attacks on children that catalyzed residency restrictions are exceedingly rare: nearly 90% of child victims know their sexual assaulter.<sup>103</sup> Research repeatedly and “unequivocally finds that sex offenders are more likely to victimize family members, intimate partners, or acquaintances.”<sup>104</sup> The Fortune Society, a New York-based re-entry organization, thus concluded that residency restrictions like SARA are “useless in preventing non-stranger and intra-family offenses.”<sup>105</sup> As Levenson, who writes extensively on sex-offender

99. *Recidivism Among Federal Violent Offenders*, U.S. SENTENCING COMM’N 27 (Jan. 2019), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124\\_Recidivism\\_Violence.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf) [<https://perma.cc/NRE5-5XKW>]. These statistics are by no means provided to suggest that we should require people who commit *other* crimes to register, as some states already (problematically) do. See Emmanuel Felton, *Public Crime Registries Rarely Work, So Why Do They Continue to Grow?*, PAC. STANDARD (June 14, 2017), <https://psmag.com/news/public-crime-registries-rarely-work-so-why-do-they-continue-to-grow> [<https://perma.cc/N8S7-BMXE>]. Rather, these statistics show the dearth of data supporting the sex-offender registration regime.

100. Mariel Alper & Matthew R. Durose, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)*, BUREAU OF JUST. STAT. 4 (2019), <https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf> [<https://perma.cc/5WQP-KHS7>].

101. Sandler et al., *supra* note 92, at 297. First-time offenders were implicated in 95.9% of arrests for rape and 94.1% of arrests for child molestation. *Id.*

102. *Id.* (emphasis added).

103. *No Easy Answers*, *supra* note 16, at 4; see also Roger N. Lancaster, Opinion, *Sex Offenders: The Last Pariahs*, N.Y. TIMES (Aug. 20, 2011), <https://www.nytimes.com/2011/08/21/opinion/sunday/sex-offenders-the-last-pariahs.html> [<https://perma.cc/LUE7-2YW7>]; Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, U.S. DEP’T JUST. 10 (2000), <https://www.bjs.gov/content/pub/pdf/saycrle.pdf> [<https://perma.cc/XK48-NAR7>]; cf. Guy Hamilton-Smith, *Sex Registries as Modern-Day Witch Pyres: Why Criminal Justice Reform Advocates Need to Address the Treatment of People on the Sex Offender Registry*, APPEAL (Dec. 12, 2017), <https://theappeal.org/sex-registries-as-modern-day-witch-pyres-why-criminal-justice-reform-advocates-need-to-address-the-aca3aaa47fo3> [<https://perma.cc/73Y2-VNXU>].

104. Sandler et al., *supra* note 92, at 298.

105. *Nowhere to Go*, *supra* note 16, at 8.

regulations, described, “[t]he myth of stranger danger may lead to a false security for parents, whose children are at greatest risk of being abused by someone they know and trust.”<sup>106</sup>

Even for those people who likely will reoffend against strangers, however, no evidence shows that restricting where they *live* will prevent their crimes.<sup>107</sup> As numerous scholars and some judges<sup>108</sup> have acknowledged, “residential proximity to places where children congregate simply does not affect whether a person convicted of a sex offense will reoffend.”<sup>109</sup> As one article’s title put it: “There’s Literally No Evidence that Restricting Where Sex Offenders Can Live Accomplishes Anything.”<sup>110</sup> Likewise, no evidence shows that permanently barring lifetime registrants from public housing will prevent sexual assaults.<sup>111</sup>

Instead, the evidence reveals that residency restrictions lead to homelessness, unemployment, and isolation—all factors associated with increased recidivism.<sup>112</sup> People are significantly less likely to commit crimes when they have

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106. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL’Y 137, 143 (2007). Even so, it is important to note that intrafamilial recidivism rates are even *lower* than sex-offense recidivism rates in general. See R. Karl Hanson & Monique T. Bussière *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998).
107. See, e.g., *Impact and Legality of Sex Offender Residency Restrictions*, *supra* note 26; J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161 (2011).
108. See *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, No. 526801, slip op. 05359 at 4 (N.Y. App. Div. July 3, 2019) (Gary, P.J. concurring) (“[T]here is little evidence that SARA’s residence restrictions serve the laudable purposes for which they were optimistically enacted”); *State v. Floyd Y.*, 56 Misc. 3d 271, 275 (Sup. Ct. N.Y. Cnty. 2017) (“There is no evidence the 1,000 foot rule promotes public safety.”).
109. McNeal & Warth, *supra* note 38, at 357 nn.240-41, 358 n.244.
110. Jesse Singal, *There’s Literally No Evidence that Restricting Where Sex Offenders Can Live Accomplishes Anything*, N.Y. MAG (Aug. 25, 2014), <http://nymag.com/scienceofus/2014/08/sex-offender-housing-restrictions-are-pointless.html> [<https://perma.cc/3APQ-8K3S>].
111. Carey, *supra* note 11, at 580; Donovan, *supra* note 10, at 198. To the contrary, focusing on excluding people convicted of crimes may detract attention from decay, concentrated poverty, and other factors known to be correlated with increased crime. *Id.* at 200-01.
112. See generally Donovan, *supra* note 10, at 201-02; *Impact and Legality of Sex Offender Residency Restrictions*, *supra* note 26; *No Easy Answers*, *supra* note 16. Residency restrictions are compounding New York City’s already-burgeoning homelessness crisis by legislating into homelessness people who would otherwise have a place to live, but are prevented from doing so simply because their home is too close to a school or is federally subsidized. See *State of the Homeless 2019: House our Future Now!*, COAL. FOR THE HOMELESS (Apr. 2019), <https://www.coalitionforthehomeless.org/wp-content/uploads/2019/04/StateOfThe-Homeless2019.pdf> [<https://perma.cc/LG77-ZEHU>]; *Nowhere to Go*, *supra* note 16, at 6. Nearly all of CAL’s sex-offender clients experience homelessness at some point after prison, but about half of them only do because of SARA and the public-housing ban.

stable housing, a job, and a supportive social network.<sup>113</sup> By banishing people from their homes and their communities, then, residency restrictions actually *increase* recidivism risk factors.<sup>114</sup>

Further, the United States' focus on a rare, mythologized, "stranger danger" threat comes at the expense of the "more disruptive and unsettling yet important and neglected work of understanding the pervasiveness of sexual harm" in our communities.<sup>115</sup> As scholar Allegra McLeod emphasizes, despite effectively banishing "sex offenders" from society, sexual harm remains widespread – "in U.S. military programs, in the nation's elite colleges and universities, in the locker room showers at Pennsylvania State University, at the hands of the prestigious Horace Mann School's 'Prep School Predators,' and in prisons, parishes, and families around the country."<sup>116</sup> And this sexual violence often goes unreported,

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113. See, e.g., Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 194-96 (2009) ("Sex offenders who maintained social bonds to communities through stable employment and family relationships had lower recidivism rates than those without jobs or significant others."); *Impact and Legality of Sex Offender Residency Restrictions*, *supra* note 26, at 5 (showing that residency restrictions can "prevent sexual offenders from accessing the very things that are proven to help offenders maintain a law-abiding life and successfully reenter society").
114. See Carey, *supra* note 11, at 552; McNeal & Warth, *supra* note 38, at 360; Steven Yoder, *New Evidence Says US Sex-Offender Policies are Actually Causing More Crime*, QUARTZ (Dec. 21, 2016), <https://qz.com/869499/new-evidence-says-us-sex-offender-policies-dont-work-and-are-actually-causing-more-crime> [<https://perma.cc/GX23-DQLZ>].
115. McLeod, *supra* note 96, at 1562; see also Sujatha Baliga, *A Different Path for Confronting Sexual Assault*, VOX (Oct. 10, 2018), <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle> [<https://perma.cc/8NBQ-LUSM>]; Alexandra Brodsky, *Can Restorative Justice Change the Way Schools Handle Sexual Assault?*, NATION (Apr. 14, 2016), <https://www.thenation.com/article/what-if-punishment-wasnt-the-only-way-to-handle-campus-sexual-assault> [<https://perma.cc/38YY-HWAV>]; Stephanie Harrelson, *I Was Sexually Assaulted. And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*, APPEAL (July 18, 2019), <https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me> [<https://perma.cc/T39A-FBGW>]; Sandler, *supra* note 92, at 298 (noting that, perversely, "attention and resources are diverted from the most common types of sexual offenses (those committed by first-time sex offenders and those who have a pre-established relationship with the victim) to ones perpetrated by the [rare] stereotypical sex offender").
116. McLeod, *supra* note 96, at 1556. Since McLeod's essay in 2015, the #MeToo era has further revealed the depths of sexual harm across all parts of society. See Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary> [<https://perma.cc/242A-4Z6K>]; Hamilton-Smith, *supra* note 13, at 24 (noting, in the context of the #MeToo era, that, to the extent we identify or label people who commit sexual violence as "rapists and monsters and predators[,] we elide over the realities of sexual harms by painting a picture of a criminal that looks nothing like the average college date rapist") (internal quotation marks omitted).

the culture that perpetuates it unchallenged, and those survivors who do come forward, unbelieved.<sup>117</sup>

Patty Wetterling, whose son Jacob's brutal abduction and murder spurred today's sex-offender registration regime, now advocates against the restrictions passed in his name.<sup>118</sup> "[I]t's a trap," she explained:

We want people to be angry about sexual assault. And then, when they're angry about it, they want to toughen it up for these people, you know, these bad boys who do this. And if we can set aside the emotions, what we really want is no more victims. Don't do it again. So, how can we get there? Labeling them and not allowing them community support doesn't work.<sup>119</sup>

New York's disabled sex-offender registrants are thus languishing in prison because they cannot comply with residency restrictions that, at best, miss the mark of improving public safety, and, at worst, actively hinder it.

#### IV. LEGAL CHALLENGES

Given the serious infringements of individual liberty and the limited or even counter-productive impact on public safety, New York's prolonged detention regime is legally unsound. This Part explores potential legal challenges to New York's system of detaining people solely because they have nowhere to live. It first summarizes the state of litigation in New York and across the country. Then, building on prior scholarship and lawsuits, it suggests new legal arguments with a focus on "reasonable accommodation" theories under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504); the Substantive Due Process Clause; the Equal Protection Clause; and the Eighth Amendment.

##### A. *The State of the Law*

New York's overarching system of detaining homeless sex-offender registrants has thus far largely withstood judicial scrutiny.<sup>120</sup> Lawyers have

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117. See Kimble & Chettiar, *supra* note 98; McLeod, *supra* note 96, at 1556-57, 1619-20.

118. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2018).

119. Baran & Vogel, *supra* note 19.

120. Based on my review of cases and consultations with CAL attorneys, most cases thus far have been brought in state court via Article 78 proceedings (challenging an agency determination) or habeas corpus petitions. Recently, some cases, including one litigated by CAL, have challenged aspects of this detention regime in federal court. See *Sanchez v. N.Y. State Dep't of Corr. & Cmty. Supervision*, No. 19-cv-3567 (S.D.N.Y. Aug. 5, 2019) (challenging the prolonged confinement of a disabled, homeless, sex-offender registrant beyond his medical



challenged this system on myriad grounds, including 1) DOCCS's failure to help registrants find housing; 2) the legitimacy of a prisoner's RTF confinement; and 3) the constitutionality of prolonged detention under the Due Process Clause, Equal Protection Clause, and Eighth Amendment.<sup>121</sup>

Litigation in the first category has largely halted in the wake of a 2018 New York Court of Appeals holding that DOCCS has no statutory obligation to substantially help prisoners find SARA-compliant housing.<sup>122</sup> Decisions in the second category have been mixed, with some lower courts holding that confinement far from an individual's community, and without educational and job opportunities, means that the facility is not a legitimate RTF,<sup>123</sup> and others upholding such confinement based, essentially, on the facility's designation as an RTF.<sup>124</sup>

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parole release date); *M.G. v. Cuomo*, No. 19-cv-0639 (S.D.N.Y. Jan. 23, 2019) (class action challenging prolonged detention of disabled individuals who lack medically appropriate housing but are not subject to SARA).

121. Litigants have also raised an array of legal theories not directly relevant to this Essay, including: Ex-Post Facto Clause challenges, such as in *Williams v. Dep't of Corr. & Cmty. Supervision*, 136 A.D.3d 147 (N.Y. App. Div. 2016) (holding SARA does not violate ex-post facto clause); challenges to SARA as applied to people serving sentences for non-sex offenses, as in *People ex rel. Negron v. Superintendent, Woodburne Corr. Facility*, 170 A.D.3d 12 (N.Y. App. Div. 2019) (holding SARA does not apply to people presently serving sentences for non-sex offenses) and *People ex rel. Durham v. Annucci*, 170 A.D. 1634 (N.Y. App. Div. 2019) (holding SARA does apply to people presently serving sentences for non-sex offenses); and challenges to confinement in an RTF beyond the six-month limitation in Penal Law § 70.45(3), as in *People ex rel. McCurdy v. Warden, Westchester Cty. Corr. Facility*, 164 A.D.3d 692 (N.Y. App. Div. 2018) (holding DOCCS can detain registrants beyond the six-month limitation).
122. See *Gonzalez v. Annucci*, 117 N.E.3d 795, 801-02 (N.Y. 2018).
123. See, e.g., *People ex rel. Simmons v. Superintendent, Hudson Corr. Facility*, No. 8291-14, slip op. 30248(U) (Sup. Ct. Columbia Cnty. Feb. 18, 2015) (holding that Hudson Correctional Facility is not a legitimate RTF because it lacks programming and is not in petitioner's community); *People ex rel. Scarberry v. Connolly*, No. 3963/14, slip op. 60160(U) (Sup. Ct. Dutchess Cnty. Nov. 21, 2014) (holding Fishkill Correctional Facility is not a valid RTF for a petitioner from Nassau County); *People ex rel. Simmons v. Superintendent, Fishkill Corr. Facility*, No. 4771/14 (Sup. Ct. Dutchess Cnty. Nov. 18, 2014) (holding Fishkill is an invalid RTF because the detained individual is "still substantially treated like non-RTF inmates in the FCF" and is held far from his community in Manhattan); *Muniz v. Uhler*, No. 2014-531, slip op. 33134(U) (Sup. Ct. N.Y. Cnty. Feb. 2, 2014) (holding that Woodbourne Correctional Facility is not a valid RTF because it is not located in prisoner's community in the Bronx). The Court of Appeals has not definitively weighed in on this issue.
124. See, e.g., *Rivera v. Annucci*, No. 412/2016, slip op. 03188 (Sup. Ct. Dutchess Cnty. June 21, 2016) (upholding detention because Fishkill Correctional Facility "has been designated as a residential treatment center"); *Roldan v. Superintendent, Hudson Corr. Facility*, No. 8430-15 (Sup. Ct. Columbia Cnty. June 4, 2015) (holding that confinement in Hudson Correctional Facility RTF is authorized); *People ex rel. Johnson v. Superintendent, Fishkill Corr. Facility*, 9 N.Y.S.3d 761, 767 (Sup. Ct. 2015) (holding that confinement in Fishkill RTF is legitimate since "[i]t is undisputed that the Department has designated Fishkill Correctional Facility as a residential treatment facility"); *Vega v. Superintendent, Fishkill Corr. Fac.*, No. 3759/2014 (Sup.

This Part focuses on the third category of litigation: constitutional challenges. New York’s Court of Appeals has not addressed the constitutionality of detaining sex-offender registrants beyond their release dates solely due to a lack of parole-compliant housing. Lower courts have largely upheld this regime with little explanation. Essentially, these courts have held that prisoners lack a “fundamental right” to be free from community supervision conditions.<sup>125</sup> Under an explicitly or implicitly deferential review, they have determined that New York’s “legitimate government interest of protecting ‘children from the risk of recidivism by certain convicted sex offenders’” bears a rational relationship to “keeping certain sex offenders at a distance from schoolchildren.”<sup>126</sup> As discussed in Section C below, the one court to consider SARA’s constitutionality under strict scrutiny held the law unconstitutional as applied to a disabled sex-offender registrant.<sup>127</sup>

Registrants have had more success outside New York, however. While by no means a mass movement,<sup>128</sup> courts around the country are increasingly invalidating laws that restrict where sex-offender registrants may live<sup>129</sup> and that

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Ct. Dutchess Cnty. Oct. 27, 2014) (same); *People ex rel. White v. Superintendent, Woodbourne Corr. Facility*, No. 1362-14, 2014 WL 4776161 (Sup. Ct. Sullivan Cnty. Sept. 25, 2014) (holding that confinement is legitimate since the Woodbourne RTF is properly designated).

125. *See, e.g., People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, No. 526801, slip op. 05359 (N.Y. App. Div. July 3, 2019) (finding that there is no fundamental right to parole release absent having secured SARA-compliant housing); *Williams v. Dep’t of Corr. & Cmty. Supervision*, 24 N.Y.S.3d 18, 31 (App. Div. 2016) (finding that SARA did not implicate a “liberty interest, let alone a fundamental right”); *Saxton v. O’Meara*, No. 146942, slip op. 31120 at 5 (Sup. Ct. St. Lawrence Cnty. June 17, 2016) (finding that a prisoner without SARA-compliant housing “who has reached the conditional release date of his/her determinate sentence but not the maximum expiration date” was not entitled to release).
126. *Johnson*, slip op.; *see also Williams*, 24 N.Y.S.3d at 32 (“[U]nder this highly deferential [rational basis] standard, SARA does not violate any of petitioner’s substantive due process rights.”).
127. *Arroyo v. Annucci*, 85 N.Y.S.3d 700, 708-09 (Sup. Ct. Albany Cnty. 2018) (holding that SARA violated due process as specifically applied to a detained, homeless, disabled, sex-offender registrant who posed no demonstrable public-safety threat).
128. Many courts have upheld sex-offender residency restrictions. *See, e.g., Duarte v. City of Lewisville*, 858 F.3d 348, 352-56 (5th Cir. 2017) (local Texas residency restriction did not violate procedural due process or equal protection); *Weems v. Little Rock Police Dep’t.*, 453 F.3d 1010, 1015-17 (8th Cir. 2006) (under rational basis review, Arkansas’s residency restriction did not violate substantive due process, equal protection, or the constitutional right to travel); *Doe v. Miller*, 405 F.3d 700, 708-09, 711-13 (8th Cir. 2005) (under rational basis review, Iowa’s residency restriction did not violate procedural due process or interfere with the right to travel); *State v. Willard*, 756 N.W.2d 207, 212-15 (Iowa 2008) (under rational basis review, the Iowa residency restriction did not violate the Equal Protection or Due Process clauses); *People v. Leroy*, 828 N.E.2d 769, 776-77 (Ill. App. Ct. 2005) (upholding a sex-offender residency restriction law against a substantive due process challenge).
129. *See, e.g., Doe v. Cooper*, 842 F.3d 833, 842 (4th Cir. 2016) (holding that a movement restriction is unconstitutionally vague); *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016)

prolong detention solely because registrants cannot find compliant housing.<sup>130</sup> And scholars have highlighted the unconstitutionality of residency restrictions on these and other constitutional grounds, including procedural and substantive due process, equal protection, the Eighth Amendment, and the Ex Post Facto Clause.<sup>131</sup>

New York's detention scheme is vulnerable to the same constitutional infirmities. Further, given DHS's refusal to include the disabled in the City's right to shelter, New York City is fertile ground for litigation under disabilities laws—a fact largely left out of the literature to date.

### B. Failure to Accommodate

Local, state, and federal disabilities laws can serve as robust and flexible tools to challenge New York's prolonged detention regime. These statutes require government entities to make individualized exceptions to existing regulations, policies, and statutes in order to reasonably accommodate disabled individuals' access to programs and services.<sup>132</sup> Accordingly, the prisoners described in this

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(“[O]ffense-based public registration has, at best, no impact on recidivism.”); *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951, 960 n.10 (E.D. Wis. 2017) (explaining that a residency restriction “could be counterproductive”); *City of Ft. Lauderdale v. Anderson*, Nos. 17-003615MO10A, 13-010799MO10A (Fla. Broward Cty. Ct. 2018), <https://mitchellhamline.edu/sex-offense-litigation-policy/wp-content/uploads/sites/61/2018/12/Order-Granting-Motion-to-Dismiss.pdf> [<https://perma.cc/NYM6-FMME>] (holding that a residency restriction that significantly restricted affordable housing stock violated the ex post facto clause); *In re Taylor*, 343 P.3d 867 (Cal. 2015) (holding that blanket enforcement of residency restrictions violated the Due Process clause); see also Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 519 (2007) (describing successful efforts to dismantle Georgia's sex-offender residency restrictions); *Sex Offense Litigation and Policy Resource Center*, MITCHELL HAMLIN SCH. L., <https://mitchellhamline.edu/sex-offense-litigation-policy> [<https://perma.cc/TT2Z3W7J>] (collecting sex-offender restriction cases).

130. See, e.g., *Murphy v. Raoul*, No. 16-cv-11471, 2019 WL 1437880, at \*16-17 (E.D. Ill. Mar. 31, 2019) (indefinitely detaining homeless, indigent sex-offender registrants violated the Fourteenth and Eighth Amendments); *State v. Adams*, 91 So.3d 724, 741 (Ala. Crim. App. 2010) (same); *State ex rel. Olson v. Litscher*, 233 Wis.2d 685, 689 (2000) (“Whether or not a place has been found for an inmate, he or she must be released on his or her mandatory [parole] release date.”); see also *State ex rel. Riesch v. Schwarz*, 692 N.W.2d 219, 225 (2005) (holding that a prison “is not free to hold inmates indefinitely for such problems as failure to find suitable housing on its part” but can detain prisoners where they “violate” their “rules and conditions for release” “immediately and simultaneously with their scheduled mandatory release dates,” such as refusing to comply with a parole condition).

131. See, e.g., Michael J. Duster, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 778-79 (2005); Saxer, *supra* note 14, at 1413-20.

132. These laws include Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (2018); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (2018); the Fair Housing

Essay can argue that DOCCS, the City of New York, and other agencies must make reasonable accommodations for the disability-related barriers they face to securing housing—and, thus, their freedom.

To state a reasonable accommodation claim, a plaintiff must show that (1) they are “a qualified individual with a disability;”<sup>133</sup> (2) the defendant “is an entity subject to the acts;” and (3) they were denied the ability to benefit from defendant’s services, programs, or activities “by reason of [their] disability.”<sup>134</sup> Then, (4) the plaintiff must allege the “existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.”<sup>135</sup> This Part focuses on the third and fourth elements.

To satisfy the third element, a plaintiff must demonstrate that the discrimination they experience is due to their disability. This may appear challenging for the individuals discussed in this Essay, who suffer intersectional discrimination on the basis of not only their disability, but also poverty, homeless status, sex-offender status and—in certain cases—race, sex, nationality, and other factors.

But disability laws account for the myriad barriers faced by these marginalized populations. A plaintiff can show discrimination “‘by reason of such disability’ even if there are other contributory causes for the exclusion or denial” so long as the disability was a “substantial cause of the exclusion or denial.”<sup>136</sup> Further, reasonable accommodations may require making changes to neutral rules

Act (FHA) as amended by the Fair Housing Amendments Act (FHAA), 42 U.S.C. § 3604(f) (2018); the New York Human Rights Law (NYHRL), N.Y. Exec. Law § 296 (McKinney 2019); and the New York City Human Rights Law (NYCHRL), N.Y.C., N.Y., ADMIN. CODE § 8-107 (2019). See *McElwee v. City of Orange*, 700 F.3d 635, 640-41 (2d Cir. 2012) (quoting *Powell v. Nat’l Bd. of Med. Exam’rs*, 364 F.3d 79, 85 (2d Cir. 2004)); *Forest City Daly Hous., Inc. v. Town of North Hempstead*, 175 F.3d 144, 150 (2d Cir. 1999).

133. To satisfy this element, the plaintiff must show that, “with or without reasonable modifications to rules, policies, or practices, . . . [the plaintiff] meets [the program’s] *essential* eligibility requirements.” *McElwee* 700 F.3d at 640 (quoting 42 U.S.C. § 12131 (2018)) (emphasis added). Importantly, courts are concerned not with all *formal* eligibility requirements but only with those that are “essential,” that is, “those requirements without which the ‘nature’ of the program would be ‘fundamentally altered.’” *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 158 (2d Cir. 2013). Further, an individual is qualified even if they can only meet those essential criteria with a reasonable accommodation. Accordingly, for instance, a disabled registrant can argue that they are “qualified” for a homeless-shelter placement even if they fail to satisfy the City’s formal medical criteria, discussed in Part I. This is because, presumably, the “essential” eligibility criterion is homelessness. See *Callahan v. Carey*, 762 N.Y.S.2d 349, 352 (App. Div. 2003). Even if the City’s medical criteria are deemed “essential,” a disabled individual could still satisfy them “with” a reasonable accommodation—such as a home-health aide or handicap-accessible shelter space.

134. *Wright v. New York State Dep’t of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016).

135. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995).

136. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 291 (2d Cir. 2003).

that do not *directly* relate to a plaintiff's disability, but that account for the "practical impact" of their disability.<sup>137</sup>

For example, the Second Circuit held that disabled New York City residents who struggled to access public-assistance benefits were facing discrimination "due to" their disabilities, even though non-disabled people *also* had difficulties accessing these benefits, because their disabilities created significant and "unique physical hurdles."<sup>138</sup> Likewise, registrants can allege that their disabilities substantially contribute to their inability to secure the housing necessary to access their release from prison.

The next challenge, under the fourth element, is proposing a "reasonable" accommodation. Courts have made clear that reasonable accommodations often require making "affirmative accommodations to ensure that facially neutral rules do not in practice discriminate against individuals with disabilities."<sup>139</sup> This may entail making changes to "traditional rule[s] or practice[s],"<sup>140</sup> and even preempting inconsistent laws and regulations.<sup>141</sup>

Importantly, even in the prison context, a defendant cannot deny a reasonable accommodation based "upon general safety and security concerns."<sup>142</sup> Instead, whether a proposed accommodation is reasonable "involves a fact-specific, case-by-case-inquiry"<sup>143</sup> that considers, among other things, the "overall size"

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137. *Giebeler v. M & B Assoc's.*, 343 F.3d 1143, 1150 (9th Cir. 2003) (discussing *U.S. Airways v. Barnett*, 535 U.S. 391, 406 (2002)).

138. *Henrietta D.*, 331 F.3d at 265, 291; *see also Giebeler*, 343 F.3d at 159 (requiring reasonable accommodation for a rental application where an individual's disability led to unemployment, which in turn led to poverty, which in turn rendered the applicant unable to rent an apartment); *Martinez ex rel. Martinez v. Lexington Gardens Assocs.*, 336 F. Supp. 3d 270, 274-75 (S.D.N.Y. 2018) (requiring a reasonable accommodation allowing a woman, who was otherwise ineligible for public housing due to her credit history (a factor unrelated to disability), to live in a unit in order to care for her ailing and disabled sister who had no other caretaker); *Freeland v. Sisao LLC*, No. 07-cv-3741, 2008 WL 906746, at \*5 (E.D.N.Y. Apr. 1, 2008) (similar).

139. *Henrietta D.*, 331 F.3d at 275 (emphasis added).

140. *See Reg'l Econ. Comm. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 53 (2d Cir. 2002) (internal citation and quotation marks omitted).

141. *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 163-64 (2d Cir. 2013) (holding that exempting the plaintiff from a time bar in a state statute could be considered a reasonable accommodation); *see also Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 45-46 (Mass. 2017) (holding that allowing an employee to use medical marijuana "in violation of Federal law" may be a "reasonable accommodation").

142. *Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 79 (2d Cir. 2016).

143. *Mary Jo C.*, 707 F.3d at 153 (quoting *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995)).

of the entity's program, the "composition and structure" of the workforce, and "[t]he nature and cost of the accommodation needed."<sup>144</sup>

Registrants can propose ample, cost-effective accommodations that will allow them to find housing, and thus secure their freedom, without harming the public. These solutions, detailed in Part V, would help individuals find housing and reduce the legal barriers constricting their housing choices. For instance, registrants with debilitating disabilities – or who otherwise pose no demonstrable threat to the public – can argue that lifting SARA and/or the public-housing ban is a reasonable accommodation. While no court appears to have ordered this precise relief, courts have lifted other restrictions on subsidized housing as reasonable accommodations,<sup>145</sup> and ordered individuals exempt from SORA and SARA based on their lack of safety risk.<sup>146</sup>

Further, registrants can ask DOCCS to help them find housing or to pay for temporary housing, for instance through its "emergency temporary housing" funding pursuant to Directive 9222.<sup>147</sup> Likewise, disabled registrants can assert that the City of New York must reasonably accommodate their medical needs in the shelter system or otherwise provide them with medically-appropriate housing. Both DOCCS and the City of New York have asserted that these accommodations would fundamentally alter their programs.<sup>148</sup> But as described in Part V, such accommodations are reasonable.

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144. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606 n.16 (1999) (internal citation omitted).

145. See *Martinez ex rel. Martinez v. Lexington Guardian Assocs.*, 336 F. Supp. 3d 270, 280 (S.D.N.Y. 2018) (ordering a public-housing provider to allow a relative, who was otherwise ineligible for such housing, to live with, and care for, her disabled sister); *Sinigallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 340-44 (E.D.N.Y. 2012) (granting a preliminary injunction allowing a public-housing tenant, who "in an unprovoked attack, struck a neighbor," to remain in his home, despite a policy that would otherwise have required his termination, because evicting him would cause irreparable harm and he had "not engaged in any further acts of violence").

146. *Yunus v. Robinson*, No. 17-cv-5839, 2019 WL 168544, at \*1, \*11 (S.D.N.Y. Jan. 11, 2019) (preliminarily enjoining DOCCS from requiring an individual who posed "virtually no risk" of sexual reoffense to register under SORA and abide by SARA, as registration would cause "significant harms" to the plaintiff without protecting public safety); *Arroyo v. Annucci*, 85 N.Y.S.3d 700, 706-09 (Sup. Ct. Albany Cnty. 2018) (exempting a disabled registrant from SARA on due-process grounds).

147. *Emergency Housing - Community Supervision, Directive No. 9222*, N.Y. ST. DEP'T CORR. & CMTY. SUPERVISION 1 (Dec. 3, 2018), <http://www.doccs.ny.gov/Directives/9222.pdf> [<https://perma.cc/MW77-X3R5>] [hereinafter *Directive No. 9222*] (authorizing temporary funding to assist in individuals' "reintegration and transition to the community" where housing is not otherwise available) [hereinafter *Directive No. 9222*].

148. See State Defendants' Motion to Dismiss, *supra* note 191, at 19; City Defendants' Motion to Dismiss, *supra* note 64, at 21-23.

As this discussion demonstrates, a reasonable accommodation theory creates space for ample creative and individually tailored remedies.<sup>149</sup>

### C. Substantive Due Process

New York's scheme is also susceptible to substantive due-process challenges. The Fourteenth Amendment's "guarantee of 'due process of law'" includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."<sup>150</sup> Accordingly, if a registrant can show that residency restrictions are infringing their "fundamental rights" without protecting public safety, they have a strong argument that residency restrictions are violating substantive due process.<sup>151</sup>

#### 1. Identifying a Fundamental Right

"[M]uch of the struggle" in litigating a substantive due-process challenge "lies in defining the right."<sup>152</sup> Scholars and litigants have highlighted a number of fundamental rights at stake when an individual is subject to a residency restriction and/or detained beyond their release date. Primarily, challenges center

149. Although it is beyond the scope of this Essay, the government also violates the integration mandate of the ADA and Section 504 by segregating individuals in prisons despite determinations—for instance, via parole grants—that the individuals can safely receive treatment in their own communities. See 28 C.F.R. § 35.130(d) (2018) (integration mandate); *id.* § 35.152(b)(2) (applying the integration mandate to prisons).

150. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Absent a violation of a fundamental right, the government must show merely that the restriction is "rationally connected to a governmental interest." *Id.* at 303. Even where a fundamental right is implicated, however, if the individual is incarcerated, some courts apply the *Turner v. Safley* standard, 482 U.S. 78 (1987), which considers whether a "prison regulation" is "'reasonably related' to legitimate penological objectives" based on "first whether there is a 'valid, rational connection' between the regulation and the legitimate governmental interest used to justify it; second, whether there are alternative means for the prisoner to exercise the right at issue; third, the impact that the desired accommodation will have on guards, other inmates, and prison resources; and fourth, the absence of 'ready alternatives.'" *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2001) (quoting *Turner*, 482 U.S. at 89-90); see also *Murphy v. Raoul*, 380 F. Supp. 3d 731, 752-53 (N.D. Ill. 2019) (applying the *Turner* standard to a prolonged detention case). However, *Turner's* logical underpinning arguably does not apply where a prisoner challenges unlawful community supervision restrictions rather than conditions of prison life.

151. See *Duster*, *supra* note 131, at 744-45.

152. Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C. L. L. REV. 483, 491 (2007).

on freedom from bodily restraint, the right to family autonomy, and freedom of movement.<sup>153</sup>

The most straightforward claim for individuals detained beyond their release dates is a violation of their right to freedom from bodily restraint, which “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”<sup>154</sup> As one New York state court stated with respect to a prisoner detained past his maximum release date, “[e]xtended discussion of whether petitioner’s liberty is a fundamental right at stake in this litigation is hardly necessary.”<sup>155</sup>

In addition, restricting where an individual may live implicates their fundamental right to family autonomy. Courts recognize that the right of a family to remain together is “perhaps the oldest of the fundamental liberty interests recognized” in the United States.<sup>156</sup> Accordingly, New York federal courts have struck down parole restrictions that bar familial contact.<sup>157</sup>

The major hurdle to litigating a family-integrity claim is that most residency restrictions, including SARA, do not explicitly forbid people from living with their relatives.<sup>158</sup> But in practice, SARA breaks up families. Many of CAL’s clients are functionally prohibited from living with their loved ones simply because their loved one’s house is too close to a school or is federally subsidized. Between

153. See *id.* at 490–93 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984)); Duster, *supra* note 131, at 748–51.

154. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); see also *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O’Connor, J., concurring) (citing *Foucha*); Kevin Costello, Comment, *Without a Country: Indefinite Detention as Constitutional Purgatory*, 3 U. PENN. J. CONST. L. 503, 516–34 (2001) (discussing challenges to indefinite detention in the immigration context).

155. *Arroyo v. Annucci*, 85 N.Y.S.3d 700, 707 (Sup. Ct. Albany Cnty. 2018).

156. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); see also *Roberts*, 468 U.S. at 619–20 (“Family relationships, by their nature, involve deep attachments and commitments,” and provide vital “emotional enrichment.” These relationships are “central to any concept of liberty.”). This right also protects relationships with extended family members. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).

157. See *United States v. Myers*, 426 F.3d 117, 126, 129 (2d Cir. 2005) (applying strict scrutiny to a supervised release condition restricting contact with children in a child pornography case, and remanding for a factual assessment of the condition’s justifications); *Doe v. Lima*, 270 F. Supp. 3d 684, 703–04 (S.D.N.Y. 2017), *aff’d*, *Doe v. Cappiello*, 758 F. App’x 181 (2d Cir. 2019) (holding that a parole condition prohibiting a parolee convicted of rape from all contact with the parolee’s child violated substantive due process).

158. Bains, *supra* note 152, at 492 (describing pushback against residency restrictions that forbid people from living near schools and prevent them from living with family, and frustration that circumstances “outside of those created by the residency restriction” are impinging on family unity).



the dearth of SARA-compliant housing in New York City and financial constraints, the families of CAL clients are often unable to relocate. Thus, “[a]rguably, any restrictions placed on a sex offender that limits where he can live” violate the right to family integrity.<sup>159</sup>

Likewise, residency restrictions implicate an individual’s fundamental right to freedom of movement. While the Supreme Court has not directly ruled on this issue, the Second Circuit has found that the fundamental right to travel includes not only travel between states but also within a state.<sup>160</sup> On their face, restrictions like SARA and the public-housing ban prohibit people from sleeping in certain places – not from moving freely.<sup>161</sup> But as with the right to family integrity, in practice “[residency restrictions make] the right to freely travel and move nonexistent.”<sup>162</sup> Barring people from sleeping anywhere within one thousand feet of a school or in public housing – even if they are allowed to visit that location during the day – surely impinges their freedom of movement.

## 2. *Less Restrictive Ways to Protect*

If a court agrees that a fundamental right is at stake, the law will be struck down unless the government can show that the law is narrowly tailored to serve a compelling government purpose.<sup>163</sup> Under this strict scrutiny standard, due-process challenges to residency restrictions and resultant prolonged detention are promising.

As courts have concluded, “[t]hat the protection of children from sexual assault is a compelling state interest is beyond argument.”<sup>164</sup> To withstand judicial

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159. Debra Weiss, *The Sex Offender Registration and Community Notification Acts: Does Disclosure Violate an Offender’s Right to Privacy?*, 20 *HAMLIN L. REV.* 557, 583 (1996). Further, as Duster notes, “[s]uch application of these residency laws implicates not only the offender’s rights if the offender is a minor, but also the rights of their parents [or other relatives], who are void of culpability.” Duster, *supra* note 131, at 748.

160. *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008) (“[I]ndividuals possess a fundamental right to travel within a state.”); *see also King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) (“It 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.”).

161. *See Bains, supra* note 152, at 492. SARA has been interpreted as a residency restriction, not a movement restriction. *See Nowhere to Go, supra* note 16, at 3.

162. Duster, *supra* note 131, at 751.

163. *See Reno v. Flores*, 507 U.S. 292, 302 (1993).

164. *Arroyo v. Annucci*, 61 Misc. 3d 930, 940 (Sup. Ct. Albany Cnty. 2018); *see also Doe v. Miller*, 405 F.3d 700, 714 (8th Cir. 2005) (promoting “the safety of children” is compelling state interest); *Williams v. Dep’t of Corr. & Cmty. Supervision*, 136 A.D.3d 147, 160 (N.Y. App. Div.

scrutiny, however, the government must show that “mere proximity of a residence to schools,” or that living in a public-housing facility, actually “increases the risk of harm or recidivism.”<sup>165</sup>

The evidence shows no such impact. As described in Part III, sex-offender recidivism rates are comparatively low, and only a small fraction of those crimes are committed against strangers. Most importantly, no studies show that restricting where people live prevents them from committing these crimes.<sup>166</sup> Accordingly, there is no rational relationship between barring people from living in public housing or near schools and protecting the public.

This divergence between residency restrictions’ aims and effects results, in large part, from their gargantuan breadth.<sup>167</sup> SARA applies to anyone whose victim was under eighteen, even if a court determines the perpetrator poses a *low* risk of ever sexually reoffending, and to anyone who is considered at a “high risk” of reoffending, even if the individual poses no particular threat to *children*.<sup>168</sup> Further, SARA does not differentiate between those who found their victims in schoolyards and playgrounds—the perpetrators targeted under the statute—on the one hand, and those who assaulted victims in the victims’ own homes, on the other hand.

Similarly, the federal public-housing ban covers anyone subject to lifetime registration under a state sex-offender registration law. But numerous states, from Arkansas to Oregon, require *all* people convicted of sex crimes to register for life—whether convicted of rape, indecent exposure, stalking, or creating child pornography—and regardless of an individual’s likelihood of reoffending generally, and against others in their building specifically.<sup>169</sup> Moreover, the ban applies

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2016) (“SARA’s legitimate governmental interest is the protection of children against people who have shown themselves capable of committing sex crimes.”).

165. Duster, *supra* note 131, at 752.

166. See McNeal & Warth, *supra* note 38, at 357 nn.240-41, 244; Singal, *supra* note 110.

167. See Duster, *supra* note 131, at 748 (noting residency restrictions apply “without regard to any determination of a threat posed by the registrant”).

168. See N.Y. EXEC. LAW § 259-c(14) (McKinney 2019).

169. See *50-State Comparison Relief from Sex Offender Registration Obligations*, RESTORATION RTS. PROJECT (Nov. 1 2017), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations> [<https://perma.cc>]; *Fifty State Survey of Adult Sex Offender Registration Requirements*, NIC/WCL PROJECT ON ADDRESSING PRISON RAPE (2009), <https://www.csom.org/pubs/50%20state%20survey%20adult%20registries.pdf> [<https://perma.cc/FFL2-8MUQ>]; Carey, *supra* note 11, at 580. While New York only requires Level 2 and Level 3 registrants to register for life, such individuals constitute the majority of registrants in the state. See N.Y. ST. DIV. CRIM. JUST. SERVS., *supra* note 1.

forever, even though studies show that people are far less likely to recidivate as they age.<sup>170</sup>

On top of this, neither ban accounts for individuals, like many of CAL's clients, who become so disabled that it would be physically difficult, or even impossible, for them to reoffend.

Meanwhile, less restrictive measures can protect the public without resulting in the prolonged detention of poor, homeless individuals.<sup>171</sup> For instance, as discussed further in Part V, courts could conduct individualized assessments to ascertain whether someone poses a specific risk of reoffending based on where they live.<sup>172</sup> Alternatively, DOCCS and local public-housing authorities could make exemptions to SARA and/or the public-housing ban for one select address, which DOCCS could fully vet. Or, DOCCS could craft narrowly tailored bans based on an individual's particularized risk. Finally, DOCCS could release registrants into non-parole-compliant housing and monitor them.<sup>173</sup>

While many courts have rejected due-process challenges to residency restrictions, such challenges generally either were evaluated under a rational-basis standard or involved nonincarcerated plaintiffs.<sup>174</sup> Some courts considering situations analogous to those discussed here, however, have exempted individuals from residency restrictions on due-process grounds.

For instance, in *Arroyo v. Annucci*, a New York court held that SARA violated substantive due process as applied to an elderly, ill, disabled, Level 1 ("low risk") sex-offender registrant who was being incarcerated beyond his release date

170. See Fazel et al., *supra* note 49, at 164; Thornton, *supra* note 49, at 123.

171. See, e.g., *Murphy v. Raoul*, 380 F. Supp. 3d 731, 757-58 (N.D. Ill. 2019) (discussing alternatives to the approved address requirements for the release of sex-offender registrants); *State v. Adams*, 91 So.3d 724, 742-43 (Ala. Crim. App. 2010) (similarly discussing alternatives to approved address requirements).

172. See Duster, *supra* note 131, at 755-56. Of course, as with all risk assessments, such determinations would have to be conducted carefully and with attention to the potential for bias based on race, poverty, and other factors, particularly if an actuarial risk assessment tool were used. See Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [https://perma.cc/P5TB-JKVP].

173. Of course, monitoring carries its own consequences, from lack of privacy, to restrictions on movement, to increased potential for arrest for violating any condition, to significant financial costs. Any monitoring regime would thus need to be administered carefully, with due attention paid to these risks. See James Kilgore & Emmett Sanders, *Ankle Monitors Aren't Humane. They're Another Kind of Jail*, WIRED (Aug. 4, 2018), <https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail> [https://perma.cc/T77P-KPKJ].

174. See *supra* note 128 (collecting cases ruling against registrants); see also Bains, *supra* note 152, at 492 (detailing several challenges that arise when plaintiffs allege that a residency restriction is unconstitutional on substantive due-process grounds).

because he lacked approved housing.<sup>175</sup> The plaintiff confronted all of the hurdles described throughout this Essay: none of his relatives had parole-compliant housing; nursing homes were either too close to schools or refused to accept him due to his sex-offender registration status; and DHS rejected him because of his medical needs. Under these circumstances, the court concluded, SARA’s “unconstitutionality as applied to” the petitioner was “an inescapable conclusion.”<sup>176</sup> Similarly, in *Yunus v. Robinson*, a New York federal court issued a preliminary injunction that exempted from all SORA requirements, including SARA, a man who posed “virtually no risk” of sexual reoffense.<sup>177</sup> In this context, the court determined, New York’s sex-offender regulatory scheme infringed on his liberty without furthering the government’s purported public safety interest.<sup>178</sup>

*Arroyo* and *Yunus* provide a solid foundation to argue that there is no legitimate—let alone compelling—reason to infringe on poor, disabled individuals’ rights to freedom from bodily restraint, family integrity, and freedom of movement by barring them from living near schools or in public housing and then detaining them for their inability to find housing that meets those restrictions.

#### D. Discrimination Against the Poor

Registrants additionally can argue that detention due solely to an inability to afford parole-compliant housing constitutes wealth-based discrimination, in violation of the Fourteenth Amendment’s Equal Protection Clause.

The Supreme Court has made clear that the Equal Protection Clause prohibits states from locking up a person because the individual in question is poor.<sup>179</sup> But that is precisely what DOCCS is doing to the registrants described in this Essay. If any of CAL’s clients had money, they would not be detained beyond their release dates. Financially well-off disabled registrants can secure rooms in private nursing homes, handicap-accessible buildings, or with family members

175. 61 Misc. 3d 930 (Sup. Ct. Albany Cnty. 2018).

176. *Id.* at 941.

177. No. 17-cv-5839, 2019 WL 168544, at \*11 (S.D.N.Y. Jan. 11, 2019). The court determined that the plaintiff posed no risk of sexual reoffense in large part because he was convicted of a crime that was not sexual in nature. *Id.*

178. *See id.*

179. *See, e.g., Tate v. Short*, 401 U.S. 395, 399 (1971) (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970) (plurality opinion)) (“[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full”); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (incarceration for “involuntary nonpayment of a fine or court costs” constitutes “an impermissible discrimination that rests on ability to pay”); *see also Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”).

who do not need government funding.<sup>180</sup> None of these options are available to the poor people I have represented this past year. Thus, “indigent sex-offense releasees in [New York] remain incarcerated when similarly situated wealthy sex-offense releasees are not solely because the indigent releasees cannot afford to pay for housing outside of prison.”<sup>181</sup>

Courts review equal-protection claims under strict scrutiny if the challenged scheme implicates a “suspect class” or “fundamental right.”<sup>182</sup> While courts have largely held that sex-offender registrants and prisoners are not “suspect classes,”<sup>183</sup> as discussed above in Section IV.C, there are strong arguments that New York’s detention regime implicates fundamental rights.<sup>184</sup> Accordingly, such claims may be reviewed under strict scrutiny.

Courts have invalidated schemes that, as here, result in the prolonged detention of sex-offender registrants who cannot afford housing. For instance, in 2010, Alabama’s highest court struck down its state’s sex-offender residency scheme because, among other things, “indigent homeless sex offenders who have served their prison sentences remain incarcerated solely because they have no funds with which to secure lodging and to obtain an address upon release from prison.”<sup>185</sup> Likewise, in 2019 an Illinois federal court held that detaining poor sex-offender registrants “while non-indigent sex offenders roam free” bears “no reasonable relation to public protection.”<sup>186</sup> “Quite the contrary,” the court determined, “the condition at issue here—indigency—is itself no threat to the safety or welfare of society.”<sup>187</sup>

The same reasoning applies to DOCCS’ prolonged detention policy. As-applied challenges brought by the registrants discussed throughout this Essay may be even stronger: where an individual—due to their disability or otherwise—

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180. While able-bodied individuals can ultimately be released to a New York City homeless shelter, as discussed above in Part I, the City will not shelter any individual incapable of providing for their own daily needs.

181. *Murphy v. Raoul*, 380 F. Supp. 3d 731, 755 (N.D. Ill. 2019).

182. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 437 (1985).

183. See, e.g., *United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001) (“Sex offenders are not a suspect class.”); *Rose v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999) (describing that “sex offenders are not a suspect class for purposes of Fourteenth Amendment analysis” (citing *Artway v. Att’y Gen.*, 81 F.3d 1235, 1267 (3d Cir. 1996))).

184. See *Bains*, *supra* note 152, at 493 (noting that “as in the substantive due process context, plaintiffs would have a strong chance of prevailing if they could identify a fundamental right that has been infringed”).

185. *State v. Adams*, 91 So.3d 724, 739 (Ala. Crim. App. 2010).

186. *Murphy*, 380 F. Supp. at 756–57.

187. *Id.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 669 n.9 (1983)); accord *Adams*, 91 So.3d at 742.

poses no demonstrable safety threat, there is no valid reason to continue incarcerating them purely because they are poor.

*E. Discrimination Based on Homeless Status*

Finally, New York's detention regime is vulnerable to Eighth Amendment challenges. The Eighth Amendment's prohibition on cruel and unusual punishment "proscribes more than physically barbarous punishments"; it embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."<sup>188</sup> Accordingly, the Eighth Amendment forbids penalizing a person's "'status' or 'chronic condition,'" as opposed to their voluntary conduct.<sup>189</sup> Thus, it is cruel and unusual to penalize someone for conduct that is "inseparable from their involuntary condition of being homeless."<sup>190</sup>

DOCCS detains sex-offender registrants because they are homeless.<sup>191</sup> Each of my clients discussed in this Essay, for instance, will be released the instant they obtain parole-compliant housing. Until that moment, they will remain incarcerated.

The same courts that struck down their states' detention regimes under the Equal Protection Clause also invalidated those schemes under the Eighth Amendment. These courts concluded that "for someone who is homeless, it is virtually impossible to comply" with the requirement that they obtain housing in order to secure their release.<sup>192</sup> Under these circumstances, the failure to

<sup>188</sup>. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

<sup>189</sup>. *Robinson v. California*, 370 U.S. 660, 665 (1962).

<sup>190</sup>. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992); *see also* *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018) (finding that when homeless individuals have nowhere else to go, the government cannot punish them for living in an otherwise-forbidden area "on the false premise that they had a choice in the matter").

<sup>191</sup>. *See* The New York State Defendants' Memorandum of Law in Support of Their Motion to Dismiss and in Opposition to Plaintiff's Motion for a Preliminary Injunction at 9, *Sanchez v. N.Y. State Dep't of Corr. & Cmty. Supervision*, No. 19-cv-3567 (S.D.N.Y. May 31, 2019) (ECF No. 62) (hereinafter *State Defendants' Motion to Dismiss*) ("Plaintiff . . . has not yet been released to parole supervision due to an inability to find housing willing to accept him, that is compliant with New York's Sexual Assault Reform Act . . . and that can accommodate his medical needs.").

<sup>192</sup>. *Murphy v. Raoul*, 380 F. Supp. 3d 731, 764 (N.D. Ill. 2019); *accord Adams*, 91 So.3d at 755. Additionally, a federal court in Colorado invalidated the state's use of a sex-offender registry as cruel and unusual punishment as applied to the plaintiffs, since the registry caused "ostracism and shaming; effective banishment and shunning" and "significant restriction on familial association," as well as "actual and potential physical and mental abuse by members of the public" who learned of plaintiff's registration status, despite "no evidence that any Plaintiff presents an objective threat to society." *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1231 (D. Colo. 2017).

secure housing is “not voluntary conduct merely related to, or derivative of, the status of homelessness, but [is] entirely involuntary conduct that [is] inseparable from [their] status of homelessness.”<sup>193</sup> Accordingly, the regimes violated the Eighth Amendment.<sup>194</sup>

For the same reasons, litigators can argue that detaining sex-offender registrants across New York solely because no housing can accommodate their poverty, disabilities, and parole restrictions contravenes the Eighth Amendment.

## V. A WAY FORWARD: POLICY PRESCRIPTIONS

New York’s system of legislating individuals into homelessness and detaining them due to their homeless status is unlawful, unnecessary, and untenable. But it is not inevitable. While sexual violence tragically occurs throughout the world, the United States is “the only country . . . with blanket laws prohibiting people with prior convictions for sex crimes from living within designated areas.”<sup>195</sup> New York and other states can protect their communities from sexual harm without permanently marking and banishing the perpetrators of that harm.<sup>196</sup>

To be sure, amid a burgeoning criminal-justice reform movement in New York and nationally, sex-offender registrants have largely been left behind,<sup>197</sup>

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193. *Murphy*, 380 F. Supp. 3d at 764 (quoting *Adams*, 91 So.3d at 754).

194. *Id.* The *Murphy* court clarified that it is of no moment that individuals are not charged with “a crime of being homeless” because “[a]ll the Eighth Amendment calls for is punishment” and “[p]rolonged incarceration is indeed punishment within the meaning of the Eighth Amendment.” *Id.*

195. *No Easy Answers*, *supra* note 16, at 10.

196. Though it is beyond the scope of this Essay, communities should consider incorporating victim-survivor-centered responses to sexual harm. See, e.g., Baliga, *supra* note 115; Brodsky, *supra* note 115; Harrelson, *supra* note 115; McLeod, *supra* note 96, at 1618-19.

197. For instance, while Governor Cuomo supported sweeping—and vital—criminal-justice reforms in 2019, see *New York’s Bail Reform Law: Major Components and Implications*, CTR. FOR CT. INNOVATION (Apr. 2019), <https://www.courtinnovation.org/publications/bail-reform-NYS> [<https://perma.cc/MT8L-VVGN>]; and *Overhauling New York’s Criminal Justice System*, N.Y. ST. (2018) <https://www.ny.gov/programs/restoring-fairness-new-yorks-criminal-justice-system> [<https://perma.cc/DU2M-2CAQ>], he simultaneously supported enhanced restrictions on sex-offender registrants, including expanded residency restrictions and even a ban on subway access, see *Governor Cuomo Announces 30-Day Budget Amendment to Protect New York’s Children from Sex Offenders*, N.Y. ST. (Feb. 12, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-30-day-budget-amendment-protect-new-yorks-children-sex-offenders> [<https://perma.cc/A4RU-7U22>]; and *Gov. Cuomo Supports Banning Sex Offenders from Subway*, CBS N.Y. (Mar. 20, 2019, 5:22 PM), <https://newyork.cbslocal.com/2019/03/20/sex-offender-new-york-city-subway-ban> [<https://perma.cc/WXQ9-XDQZ>]; see also Burgess Everett & Elana Schor, *Cotton Wields Sex Offender Report to Tank*

consigned as “pariahs” deserving of banishment.<sup>198</sup> But rational, evidence-based approaches to sexual violence are, albeit slowly, gaining traction. Kansas and Colorado have rejected statewide residency restrictions based on empirical findings that such laws do not demonstrably improve public safety.<sup>199</sup> The Iowa County Attorneys Association in 2006 issued a statement urging the state to repeal its residency restriction on these grounds.<sup>200</sup> In 2019, Michigan’s Attorney General filed amicus briefs arguing that Michigan’s sex-offender registration scheme constitutes counterproductive punishment.<sup>201</sup> The New York City Bar Association has spoken out against New York’s residency restrictions and resultant prolonged detention.<sup>202</sup> And a bill introduced by Representative Alexandria Ocasio-Cortez in September 2019 would repeal the federal law that bars admission to public housing based solely on prior criminal convictions.<sup>203</sup>

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*Prisons Bill*, POLITICO (Nov. 26, 2018, 9:19 PM), <https://www.politico.com/story/2018/11/26/tom-cotton-criminal-justice-reform-senate-republicans-trump-1015149> [https://perma.cc/5AKC-HU3N]; *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> [https://perma.cc/3L4H-BCTE] (describing voting rights restoration for individuals with felony convictions, except those “convicted of murder or felony sexual offenses”).

198. See Lancaster, *supra* note 103; Amy R. Ramos, *Sex Offender Boundaries Deemed Ineffective*, PAC. STANDARD (May 3, 2017), <https://psmag.com/news/sex-offender-boundaries-deemed-ineffective-4562> [https://perma.cc/W3AG-B2NG]; Lenore Skenazy, *Bogus ‘Sex Offender’ Labels Are Ruining Lives*, N.Y. POST (July 25, 2016, 8:40 PM), <https://nypost.com/2016/07/25/bogus-sex-offender-labels-are-ruining-lives> [https://perma.cc/Z7T3-9448].
199. See *M-4 Sex Offenders and Sexually Violent Predators*, KAN. LEGIS. RES. DEP’T 4-5 (2015), <http://www.kslegresearch.org/KLRD-web/Publications/2015Briefs/2015/M-4-SexOffendersandSexuallyViolentPredators.pdf> [https://perma.cc/5KCY-VW7W]; *Zoned Out: States Consider Residency Restrictions for Sex Offenders*, COUNCIL OF ST. GOV’TS 7 (2008), <https://www.csg.org/knowledgecenter/docs/pubsafety/ZonedOut.pdf> [https://perma.cc/UM3B-U4BZ] [hereinafter *Zoned Out*].
200. Iowa Cty. Att’y Ass’n, *Statement on Sex Offender Residency Restrictions in Iowa*, NAT’L JUV. JUST. NETWORK (2006), [http://www.njjn.org/uploads/digital-library/resource\\_323.pdf](http://www.njjn.org/uploads/digital-library/resource_323.pdf) [https://perma.cc/8J9B-C9M4].
201. Brief of Amicus Curiae Michigan Attorney General Dana Nessel, *People v. Betts*, 912 N.W.2d 858 (Mich. 2019) (No. 148981); Brief of Amicus Curiae Michigan Attorney General Dana Nessel, *People v. Snyder*, 911 N.W.2d 467 (Mich. 2019) (No. 153696).
202. *Report on Legislation*, *supra* note 79; see also *Impact and Legality of Sex Offender Residency Restrictions*, *supra* note 26 (discussing litigation involving sex offender registration requirements).
203. See *A Just Society Is Merciful*, CONGRESSWOMAN ALEXANDRIA OCASIO-CORTEZ, <https://ocasio-cortez.house.gov/ajs/mercy-in-reentry> [https://perma.cc/2AF6L6MZ]; Marty Johnson, *Ocasio-Cortez Targets Poverty with New Legislation*, HILL (Sept. 25, 2019, 10:55 AM EDT), <https://thehill.com/homenews/house/462956-aoc-introduces-new-bill-package-aimed-at-tackling-poverty> [https://perma.cc/HE2S-7EWX].



This Part builds on these reforms and scholars' suggestions to propose a way out of New York's prolonged detention regime. These proposals can be divided into two main categories. First, New York can make it easier for registrants to find housing. Such reforms include repealing laws that restrict where registrants may live and affirmatively helping prisoners find housing. Second, New York can untether a registrant's housing status from decisions regarding the registrant's confinement. For instance, DOCCS could release registrants into unapproved housing and monitor them to address any legitimate safety concerns. Simply put, there are ample alternatives to restricting where registrants can live and then detaining them due to their resultant homeless status.

### A. Lowering Barriers to Finding Housing

#### 1. Residency Restriction Repeals

First and foremost, New York should repeal SARA's residency restriction, and Congress should repeal the prohibition on admission to public housing for lifetime registrants.<sup>204</sup> Kansas, Colorado, and Nebraska's rejections of residency restrictions can serve as an impetus for this reform.<sup>205</sup>

At the very least, existing residency restrictions should be narrowed. The Fortune Society found that halving SARA's one-thousand-foot buffer zone would open up substantial housing options and, chiefly, make DHS's 30th Street intake shelter SARA-compliant. This would allow homeless prisoners to be immediately released into the shelter system, instead of lingering for years on a "waiting list" for placement.<sup>206</sup> Concomitantly, considering that individuals are less likely to reoffend the older they are and the longer they have been out of prison,<sup>207</sup> Congress should limit the public-housing ban to a specified number of years. Further, given evidence that people are less likely to recidivate when

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<sup>204</sup>. New York could also more narrowly apply lifetime registration obligations so that fewer registrants qualify as "lifetime registrants" under the public housing ban. For instance, while the Court of Appeals has yet to rule on this issue, courts could consider "designations" – which trigger lifetime registration for, *inter alia*, sexually "violent" offenses even if an individual is adjudicated a Level 1 registrant – discretionary, and thus decline to impose designations where an individual's offense was not actually violent. See *Sex Offender Registry FAQs*, *supra* note 31.

<sup>205</sup>. See sources cited *supra* note 199; *Residency Law for Sex Offenders Unlikely*, KEARNEY HUB (Dec. 29, 2005), [https://www.kearneyhub.com/news/local/residency-law-for-sex-offenders-unlikely/article\\_9041adcb-d6a2-5bc8-90do-c4b4c7d3ec76.html](https://www.kearneyhub.com/news/local/residency-law-for-sex-offenders-unlikely/article_9041adcb-d6a2-5bc8-90do-c4b4c7d3ec76.html) [https://perma.cc/5YJU-YPQJ]. However, Nebraska law allows political subdivisions to enact certain residency restrictions. See NEB. REV. STAT. § 29-4017 (2019).

<sup>206</sup>. *Nowhere to Go*, *supra* note 16, at 10.

<sup>207</sup>. See sources cited *supra* note 49.

they have family support,<sup>208</sup> SARA and the public-housing ban should be amended to allow people to live in otherwise noncompliant housing with family members.<sup>209</sup>

Alternatively, residency restrictions could be imposed on a case-by-case basis. In Minnesota and Texas, for instance, the parole board makes individualized assessments of which registrants must abide by residency restrictions.<sup>210</sup> And Oregon's Department of Corrections has created exceptions to residency restrictions based on, for instance, whether the restrictions will force the registrant into homelessness.<sup>211</sup> New York could incorporate such assessments into SORA hearings, when courts already make individualized risk assessments and the registrant is represented by counsel.<sup>212</sup> Any risk assessment tools used in such analyses should – unlike New York's current tool for SORA hearings<sup>213</sup> – be scientifically verified, as well as account for the inherent racial and socioeconomic biases generally built into algorithms.<sup>214</sup>

## 2. *Affirmative Assistance Finding Housing*

In the interim, New York should help its registrants – particularly those with disabilities and in need of medical care – find a place to live. As former DOCCS nurse Lynn Cortella describes, DOCCS is well positioned to undertake this task.<sup>215</sup>

DOCCS should also work with other government agencies, like the Department of Health (DOH), that have access to medically appropriate housing options. Responsible for administering New York State nursing homes and assisted-living centers, DOH can discern admissions criteria for these facilities and help place prisoners. As the Vera Institute recommends, DOCCS and DOH

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208. See Wagner, *supra* note 113, at 195.

209. See Puls, *supra* note 92, at 349-51.

210. *Id.* at 345-46; see TEX. GOV'T CODE ANN. § 508.187 (West 2017); *Zoned Out*, *supra* note 199, at 5-7. However, since Texas allows municipalities to enact their own residency restrictions, the impact of the individualized approach is not necessarily far-reaching. Puls, *supra* note 92, at 345.

211. Puls, *supra* note 92, at 346-47.

212. See N.Y. CORRECT. LAW § 168-N(3) (McKinney 2019).

213. See *Nowhere to Go*, *supra* note 16, at 11.

214. See Angwin et al., *supra* note 172; Hayley Tsukayama & Jamie Williams, *If a Pre-Trial Risk Assessment Tool Does Not Satisfy these Criteria, It Needs to Stay Out of the Courtroom*, ELECTRONIC FRONTIER FOUND. (Nov. 6, 2018), [https://www.eff.org/deeplinks/2018/11/if-pre-trial-risk-assessment-tool-does-not-satisfy-these-criteria-it-needs-stay](https://www EFF.ORG/deeplinks/2018/11/if-pre-trial-risk-assessment-tool-does-not-satisfy-these-criteria-it-needs-stay) [https://perma.cc/XB8W-R3SC].

215. See *supra* Section II.A.

officials should “help[] providers understand that the individual in need of placement is a person with a need of and right to care” and “avoid stigmatizing labels such as ‘ex-offender’ or ‘prisoner’” that may discourage facilities from accepting the individual.<sup>216</sup> DOH should also provide incentives, such as increased funding and resources, to encourage nursing homes and assisted living facilities to accept people with sex-offense convictions unless they pose an individualized, demonstrable safety threat beyond the mere fact of their conviction.

Further, DOCCS should begin its current (limited) efforts to find housing for registrants earlier. As the Vera Institute describes, “it is vital that discharge planners have as much time as possible before a person’s release to identify and coordinate services”<sup>217</sup> to ensure, for instance, that a facility is parole-compliant, medically appropriate, and has a bed available. Thus, instead of waiting until people *pass* their release dates to put them on a shelter waitlist, DOCCS should do so when an individual is first approved for early release. Likewise, DOCCS should investigate housing options expeditiously to leave time for alternative plans to be made before an individual’s release date.<sup>218</sup>

At the very least, DOCCS should provide prisoners with the tools necessary to search for housing, such as internet access (with individualized limits as necessary), free phone calls, access to lists of, and application information for, SARA-compliant facilities, and DOCCS’ proprietary SARA-compliance map. Following Wisconsin’s lead, DOCCS should also allow prisoners who have reached their release dates to leave prison during the day to search for residences, under monitoring as necessary via the Global Positioning System (GPS) or under the supervision of a parole officer.<sup>219</sup>

### 3. *Providing Temporary Housing*

State and local governments could, alternatively, provide temporary housing and health care for homeless registrants.<sup>220</sup> DOCCS Directive 9222 already authorizes temporary “emergency housing assistance” funding to “assist in [a]

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<sup>216</sup>. Silber et al., *supra* note 44, at 29.

<sup>217</sup>. *Id.* at 31.

<sup>218</sup>. To the extent this requires more re-entry planners, DOCCS should increase its number of discharge planning and parole staff. *See id.* at 32.

<sup>219</sup>. *See Werner v. Wall*, 836 F.3d 751, 755 (7th Cir. 2016) (describing Wisconsin policy allowing prisoners to leave prison to “search for housing”).

<sup>220</sup>. Though a discussion of this proposal is beyond the scope of this Essay, officials should also work to increase the amount of affordable housing stock in New York City. *See Tanay Warerkar, NYC’s Affordable Housing Agenda Isn’t Doing Enough for the City’s Neediest: Report*, CURBED N.Y. (Nov. 29, 2018, 1:29 PM), <https://ny.curbed.com/2018/11/29/18118131/nyc-affordable-housing-agenda-stringer-report-2018> [<https://perma.cc/B9J5-VYBL>].

parolee's reintegration and transition to the community."<sup>221</sup> DOCCS should utilize this funding—or any other funding—to temporarily pay for prisoners' housing and health care.<sup>222</sup> Such funding would not pose a significant burden as DOCCS *already* pays for detainees' housing and health care in prison, at a higher cost and without Medicaid assistance.<sup>223</sup> Yet upon release, Medicaid and SSI benefits would help cover costs.<sup>224</sup>

Finally, for its part, the City of New York could reasonably accommodate people with disabilities in the homeless-shelter system. The 2017 federal *Butler* settlement already requires New York City to reform its shelter system to accommodate the disabled.<sup>225</sup> But the City still rejects any obligation to accommodate people who are formally considered medically inappropriate.<sup>226</sup> DHS, along with other relevant agencies, must develop methods to accommodate the disabled. This could include developing medically appropriate shelters; more handicap-shelter beds; or paying for handicap-accessible rooms outside the shelter system and for necessary health care.

### B. Alternatives to the Approved Housing Requirement

So long as housing remains out of reach for New York's incarcerated registrants, DOCCS should eliminate its requirement that individuals obtain approved housing as a condition of release.

Importantly, DOCCS should not simply release into homelessness individuals who are medically incapable of caring for themselves. While release onto the streets might be an appropriate, and preferable, alternative to perpetual confinement for nondisabled individuals, for people with serious medical needs, it could

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221. Directive No. 9222, *supra* note 147, at 1.

222. See Thomas P. DiNapoli, *New York State's Aging Prison Population*, OFF. N.Y. ST. COMPTROLLER 2-3 (Apr. 2017), <https://osc.state.ny.us/reports/aging-inmates.pdf> [<https://perma.cc/Y432-X8A4>].

In conversations with my office and in litigation, DOCCS has maintained that, due to the "emergency" and "temporary" nature of the funding, it is inappropriate to use the funding in this way unless the prisoner already has permanent housing lined up. See State Defendants' Motion to Dismiss, *supra* note 191, at 19. But the crisis of registrants detained long after their release, solely because they are homeless, arguably constitutes an "emergency" justifying such funding.

223. See Thomas P. DiNapoli, *supra* note 222, at 2-3 (describing the significant cost of incarcerating elderly, disabled prisoners without Medicaid or other public benefit assistance).

224. See *id.*

225. *Butler* settlement, *supra* note 64, ¶ 21.

226. See City Defendants' Motion to Dismiss, *supra* note 64, at 21-23.

be life-threatening. As a solution, DOCCS should allow homeless disabled individuals to be released into non-parole-compliant housing.<sup>227</sup>

DOCCS can still account for any legitimate safety concerns under such a regime. For instance, apart from the legislative changes discussed above in Section V.A.1, parole officers could issue individualized, narrower restrictions tailored to a registrant's needs and safety concerns.<sup>228</sup> This could include creating narrower buffer zones, prohibiting registrants from entering certain spaces absent supervision, or exempting an individual from SARA or the public-housing ban for one specific, verified address.

Further, DOCCS could monitor individuals in non-parole-compliant housing via GPS or a similar device. To be sure, GPS devices pose serious privacy and cost concerns and can amount to simply "another kind of jail."<sup>229</sup> Still, many of my clients would prefer to have the *option* of surveilled freedom to indefinite imprisonment.

## CONCLUSION

As this Essay explains, New York's regime of rendering sex-offender registrants homeless, and then detaining them due to their homeless status, is fundamentally flawed. This scheme causes irreparable harm to prisoners and their families, is legally infirm, and fails to protect against actual causes of sexual abuse. New York should immediately stop detaining people solely because they are homeless, and divert its attention from sex-offender regulations that have no demonstrable impact on public safety toward improving access to housing, employment, and social integration—factors actually proven to reduce recidivism and strengthen communities.

*Allison Frankel wrote this Essay as a Yale Law Journal Public Interest Fellow with the Center for Appellate Litigation (CAL). I would like to thank my colleagues at CAL, particularly Abigail Everett, Nicole Geoglis, Susannah Karlin, Erika Parry, and Molly Schindler for their thoughtful comments and feedback. I so appreciate Lynn Cortella of Centers Health Care for her time and insights. Thank you to the Yale Law Journal editors, in particular Abigail Pershing, Sasha Dudding, Peter Kallis, and Ela Leshem*

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227. Of course, DOCCS could retain authority to reject a residence to safeguard against genuine safety threats or other case-specific factors, such as the presence of firearms in the home.

228. To the extent that these policies require exempting individuals from the mandatory SARA requirement or public-housing ban, DOCCS arguably has authority to do so as a reasonable accommodation under the ADA, or to protect detainees' constitutional rights, as discussed in Part IV, *supra*.

229. Kilgore & Sanders, *supra* note 173.

*for their excellent edits. Thank you, finally, to my former clients, for sharing your hardships with me and for your unyielding resilience. All views expressed are my own.*