

Statement of Professor David Jung
Joint Hearing
Senate and Assembly Public Safety Committees
PROPOSITION 83: Jessica's Law
Tuesday, October 10, 2006

Senator Migden, Assemblymember Leno and Members of the Senate and Assembly
Public Safety Committees:

Thank you for inviting me to participate in this important hearing. My name is David Jung, and I am a professor at Hastings College of the Law, and the director of Hastings' Public Law Research Institute. At the California Research Bureau's request, the Institute prepared an objective analysis of the legal and constitutional issues surrounding Proposition 83's residency restrictions. I am here to summarize our analysis. Before I say more, however, I want to give full credit to Ms. Jodi Schwarzberg, a third year student at Hastings whose research forms the basis for much of my analysis. Her report, "The Law and Policy of Sex Offender Residency Restrictions in California," (Public Law Research Institute Working Papers, Spring, 2006) will be available shortly on our website at www.uchastings.edu/plri.

As Mr. Nieto's summary makes clear, there is scant evidence to suggest that residency restrictions are an effective way of reducing the risk to our children, and some research to suggest that their destabilizing effects are counterproductive. While the evidence raises questions about the wisdom of these laws, however, an unwise law is not always an unconstitutional law.

So far, challenges to the constitutionality of residency restrictions in seven states have resulted in published opinions. In each case, the residency restriction was found to be constitutional.

Despite this apparent unanimity, there are three reasons to believe that Proposition 83 raises serious constitutional issues.

- First, decisions by several California appellate courts suggest that the California constitution may protect the right to choose where to reside as part of the right to travel within the state. Proposition 83 burdens this right without being narrowly tailored to achieve any compelling state goal.
- Second, for the most part, the statutes that have been challenged have been more narrowly drawn than Proposition 83. If the proposition is overbroad, its punitive effect may violate the Ex Post Facto clause when it is applied to offenders whose violations predate the statute, and it may violate the substantive due process clause or the prohibition against cruel and unusual punishment to apply it to offenders who pose no risk to children.
- Finally, evidence about the impact of these laws and their efficacy is only now beginning to accumulate. The cases decided so far have been decided on limited factual records. Only one federal circuit – the Eighth circuit – and one state supreme court – Iowa – have weighed in on the issue, and strong dissenting opinions were written in each of those cases. On this record, it is very possible that another circuit or the Supreme Court would simply disagree.

Before returning to these points, let me walk through the constitutional analysis.

Challenges to residency have focused on three main areas of argument:

1. that they are a form of punishment that the ex post facto clause prohibits as to offenders whose convictions are already final, or that violate the cruel and unusual punishment clause as applied to new offenses;

2. that that they violate a fundamental right, like the right to travel, or the right to associate with family;
3. that they deny the offenders liberty without due process of law, because they are not rationally designed to protect children from potential offenders.

The first step in the constitutional analysis is to determine whether residency restrictions are a form of punishment, or, alternatively, a regulation that protects the public. Here, courts so far have concluded that residence restrictions are not intended to – and do not have the effect of – punishing the offender for a past offense. Rather, the argument goes, they protect the public by regulating the offender’s post-conviction behavior. Because the statutes are not punitive, they do not violate the prohibitions on ex post facto laws, cruel and unusual punishments or double jeopardy.

If residency restrictions are regulatory, and not punitive, the next question is whether they violate any rights secured by the federal or state constitution. So far as the federal constitution is concerned, courts have concluded that while residence restrictions make life inconvenient for offenders, they do not directly prohibit anyone from traveling from state to state or associating with others. Because their effect on the right of association and the right to travel is indirect at best, and because the right to choose where to live is not one of the fundamental rights the United States constitution protects, residency restrictions a statute that burdens this right must only be rationally related to a legitimate state interest.

The final question, then, is whether residency restrictions are a rational way to protect children from sex offenders. Rational basis review, as the courts call it, is

extremely deferential to the legislature's or, in the case of an initiative, the people's judgment. Because of this extreme deference, courts have largely simply taken at face value the claim that residency restrictions will reduce the likelihood of recidivism among sex offenders and thus protect children.

In the time I have remaining, let me return to the three reasons I believe Proposition 83 may be unconstitutional.

Both under the ex post facto clause analysis and under the due process analysis, the critical step in justifying these statutes is to argue that they reduce the risk to children by limiting where offenders live. As a growing body of experience with these statutes fuels doubts about their effectiveness, arguments that they are an effective method of reducing the risk to the public are undercut, and they appear to be simply a form of punishment.

Second, Proposition 83 is broader than most of the statutes that have been held constitutional by appellate courts. It covers more offenders – all registered offenders, as opposed to those who have harmed children in the past, and it covers a broader geographic area. To the extent that Proposition 83 effectively banishes offenders who pose no actual risk to children from particular communities, it may be found to be punitive in effect, and thus a violation on the prohibition against ex post facto laws and perhaps substantive due process as well.

Finally, while residency bans, at least those tailored to offenders who have harmed children in the past, have generally been upheld as rationally related to the important goal of protecting children, no ban has been evaluated under what courts call “strict scrutiny” because the federal constitution does not protect the right to choose

where one lives. A series of California appellate court cases, however, suggests that the California constitution may protect the right to choose one's residence as an element of the right to travel within the state. To the extent that this is the case, Proposition 83's residence restrictions would need to be more even more narrowly tailored. In that case, applying the ban to offenders who pose no evident risk to children would violate those offenders' rights under the California constitution.

My remarks have focused on Proposition 83's residence restriction. Before I close, it is important to note that Proposition 83 also would give local governments clear power to enact ordinances that are even more restrictive. Under current law, it is not clear whether such local ordinances would be valid. Both charter and general law cities have the same police power as the legislature, but only if it does not conflict with state law. State law currently imposes residence restrictions only on high risk offenders. Whether current state law preempts local residence restrictions has not yet been litigated. Under proposition 83, only the federal and state constitutions would limit the authority of local governments to enact more restrictive residency restrictions.