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## Jessica's Law Residency Restrictions in California: The Current State of the Law

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## ARTICLE

JESSICA'S LAW RESIDENCY  
RESTRICTIONS IN CALIFORNIA:  
THE CURRENT STATE OF THE LAW*BRUCE ZUCKER\**

## INTRODUCTION

Sex offender residency restrictions in the United States became ubiquitous throughout state and county jurisdictions in 2006 following the passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("SORA").<sup>1</sup> Following passage of SORA, over 30 states and hundreds of local counties and municipalities adopted some form of restriction on where registered sex offenders could live.<sup>2</sup> Although California had already placed some such limits, California voters passed Proposition 83 in November 2006, known as the Sexual Predator Punishment and Control Act: Jessica's Law (SPPCA).<sup>3</sup> Among other provisions, Jessica's Law for the first time prohibited certain registered sex offenders from living within 2,000 feet

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<sup>1</sup> Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)).

<sup>2</sup> See, e.g., CAL. PENAL CODE § 3003.5(a) (Providing that, if a sex offender was subject to registration under Penal Code 290, meaning that he stood convicted of one or more certain enumerated sex offenses, he could not live in a single family residence with another unrelated sex offender).

<sup>3</sup> 2006 Cal. Legis. Serv. Prop. 83 (Westlaw 2014); *In re E.J.*, 47 Cal. 4th 1258, 1263 (2010).

of “schools and parks where children regularly gather,”<sup>4</sup> divesting parole authorities from making any exceptions or independent determinations on case-by case bases.

This article explores the state of the law and current litigation involving sex offender residency restrictions in California. It discusses California’s Jessica’s Law, the enactment of Proposition 83, and the Supreme Court’s ruling in *In re E.J.*,<sup>5</sup> which gave some initial guidance as to the validity and application of Jessica’s Law residency restrictions.<sup>6</sup> This article tracks litigation resulting from *E.J.* now pending in various California courts. Finally, this article discusses the effectiveness of the law on its intended purpose: whether children and communities are safer.

## I. PROPOSITION 83

In November 2006, approximately 70% of the California electorate voted in favor of Proposition 83 (Jessica’s Law).<sup>7</sup> Then State Senator George Runner (R-Antelope Valley) and his wife, State Assemblywoman Sharon Runner (R-Antelope Valley), authored the initiative.<sup>8</sup>

Proposition 83 contained numerous provisions aimed at strengthening California law on the prosecuting, sentencing, imprisonment, and release of sex offenders.<sup>9</sup> Proposition 83 increased the penalties for sex offenses; required GPS monitoring for sex offenders, whether or not on parole or probation; strengthened the Sexually Violent Predator (SVP) law, including more sex offenders into the provision; and restricted where sex offenders may live in the community.<sup>10</sup>

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<sup>4</sup> 2006 Cal. Legis. Serv. Prop. 83, § 21 (Westlaw 2014) (amending CAL . PEN. CODE § 3003.5 to read “[n]otwithstanding any other provision of law, it is unlawful for any person for whom [sex offender] registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.”).

<sup>5</sup> *In re E.J.*, 47 Cal. 4th 1258 (2010).

<sup>6</sup> *Id.*

<sup>7</sup> *Proposition 83: Sex Offender Reform*, CA SECRETARY OF STATE – GENERAL ELECTIONS (Dec. 14, 2006 at 12:41 PM), <http://vote2006.sos.ca.gov>Returns/prop/mapR083.htm>.

<sup>8</sup> Leon Worden, *SCV Newsmaker of the Week: George Runner, State Senator and Honorary Chairman, Proposition 83*, SVCTV (Oct. 29, 2006), [www.scvhistory.com/scvhistory/signal/newsmaker/sg102906-nm.htm](http://www.scvhistory.com/scvhistory/signal/newsmaker/sg102906-nm.htm)

<sup>9</sup> *Proposition 83*, CALIFORNIA LEGISLATIVE ANALYST’S OFFICE (Nov. 2006), [www.lao.ca.gov/ballot/2006/83\\_11\\_2006.htm](http://www.lao.ca.gov/ballot/2006/83_11_2006.htm).

<sup>10</sup> *Id.*

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With respect to residency restrictions, the relevant portion of Proposition 83 changed the Penal Code by enacting section 3003.5(b) as follows:

(b) Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290<sup>11</sup> to reside within 2000 feet of any public or private school, or park where children regularly gather.

(c) Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290.<sup>12</sup>

The statute is not a model of clarity, primarily because any statute that is enacted or amended by voter initiative and bypasses the legislative vetting process is bound to encounter drafting, implementation, and constitutional problems.<sup>13</sup> As a result, the law led to certain unintended consequences, such as making sex offenders homeless and causing authorities to lose track of them:

The restriction has resulted in more than 2,100 rapists, child molesters and other sex offenders becoming transient in California since the law was implemented three years ago - about one-third of the state's total paroled sex offenders, and a 24-fold increase since the law passed. In dense cities such as San Francisco, where there is virtually no housing that meets the restriction, more than 80 percent of paroled sex offenders are homeless.<sup>14</sup>

For these reasons, the court system has now been called upon to clarify the mess created by this initiative.

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<sup>11</sup> CAL. PEN. CODE § 290(b) (requiring those convicted of certain enumerated sex related criminal offenses to register for the rest of his or her life with the local police department both annually and each time he or she changes residences). In some cases, courts may order offenders to register pursuant to Cal. Pen. Code § 290 even if he or she did not commit one of the enumerated offenses, if the court finds the offense to have been "sexually motivated." *Id.* Willfully failing to comply with the sex registration requirements can be criminally charged as a misdemeanor or felony in California. CAL. PEN. CODE § 290.018.

<sup>12</sup> CAL. PENAL CODE § 3003.5.

<sup>13</sup> See Michael Vitello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 685-86 (Summer 2008); see also John Laird and Clyde Macdonald, *More Deliberation? Perspectives on the California Initiative Process and the Problems and Promise of its Reform: A.B. 1245 of 2003 - An Attempt at Modest Reform of California's Initiative Process*, 47 CAL. W. L. REV. 301, 304 (Spring 2011).

<sup>14</sup> Marisa Lagos, *Residency Ban on Sex Offenders Targeted*, SAN FRANCISCO CHRONICLE, December 27, 2010, at A1.

## II. AMBIGUITIES IN THE LAW

As a result of the implementation of section 3003.5(b), numerous ambiguities in the language of the statute, as well as potential federal and state constitutional violations, arose. For example, nothing in section 3003.5(b) states whether the law applies to all sex offenders required to register under Penal Code section 290, or whether its reach is limited to those convicted or paroled after the law became effective on November 6, 2006.<sup>15</sup> The law fails to specify whether people on probation supervision for misdemeanors (or felonies) must comply, whether violating the statute is a separate criminal offense, or whether the government is limited to bringing a civil abatement action against the sex offender violator.<sup>16</sup> If violation of section 3003.5(b) is a separate criminal offense, the statute fails to state whether such an offense is an infraction or a misdemeanor, and fails to state the potential penalties for a violation one or more provisions of the statute.<sup>17</sup> It essentially renders the statute meaningless for purposes of criminal sanctions.

In addition to these issues, other questions have arisen as to the meaning of various terms in the statute. These issues and questions are explored below.

## A. MEANING OF THE TERM “RESIDE”

The first ambiguity that arose stemming from the application of Section 3003.5(b) was the meaning and application of the word “reside.” The statute prohibits those subject to the residency limitations from residing within the 2,000 foot restricted area. “Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.”<sup>18</sup> However, the statute has failed to define what it means to “reside.”

The first law enforcement authority to interpret and enforce this restriction, and to define the term “reside”, was the California Department of Corrections and Rehabilitation, Division of Adult Parole Operations (“CDCR”). On August 17, 2007, the CDCR issued and implemented Policy No. 07-36, pertaining to the enforcement of Jessica’s Law residency restrictions as to parolees under its

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<sup>15</sup> PENAL § 3003.5.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> PENAL § 3003.5(b)

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jurisdiction.<sup>19</sup> Under this policy, any parolee released onto parole supervision on or after November 8, 2006, who was required to register as a sex offender under California Penal Code section 290 must either have compliant housing or, otherwise, “declare themselves transient.”<sup>20</sup> Non-compliant parolees were arrested and charged with parole violations.<sup>21</sup>

The most interesting aspect of CDCR's Policy Number 07-36 was its definition of “reside” under the statute. Under the policy, a “residence” is “one or more addresses at which a person *regularly resides*, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, homeless shelters, and recreational and other vehicles.”<sup>22</sup> In fact, CDCR previously interpreted the residency term to include any parolee being physically present in any building within the 2,000 foot restriction for more than a *two-hour period*, unless the parolee was there for medical, work-related, or business-related activities.<sup>23</sup> Even with this definition, CDCR's Policy fell short of defining the meaning of “regularly reside” in a reasonable and constitutionally acceptable fashion.

#### B. HOW THE 2,000 FOOT RESTRICTION IS MEASURED

The second ambiguity in the law arises with respect to the meaning of “2,000 feet.” Nothing in the statute gives any indication as to how the 2,000 foot distance is measured.<sup>24</sup> For example, a parolee may live in an urban area near a freeway and near a school or park. The school or park may be located within a 2,000-foot radius of the parolee's home by drawing a straight line between the two locations, sometimes referred to

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<sup>19</sup> See *In re E.J.*, 47 Cal. 4th at 1266.

<sup>20</sup> *Id.* at 1267 fn. 3 (citing CDCR, Policy No. 07-48: Revised Procedures for Jessica's Law Notice to Comply (Oct. 11, 2007) (amending Policy No. 07-36)).

<sup>21</sup> *Parole Agents Begin Active Enforcement of 2,000 Foot Jessica's Law Residency Restrictions for Sex Offenders*, CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION (Oct. 11, 2007), [www.cdcr.ca.gov/News/Press\\_Release\\_Archive/2007\\_Press\\_Releases/Press\\_Release\\_10-11-2007.html](http://www.cdcr.ca.gov/News/Press_Release_Archive/2007_Press_Releases/Press_Release_10-11-2007.html)

<sup>22</sup> CDCR, Policy No. 07-48: Revised Procedures for Jessica's Law Notice to Comply (Oct. 11, 2007) (amending Policy No. 07-36)).

<sup>23</sup> *In re Taylor*, 147 Cal. Rptr. 3d 64, 74 fn. 17 (Cal. Ct. App. 2012), *review granted*, *In re Taylor*, 150 Cal. Rptr. 3d 566 (2013).

<sup>24</sup> See CAL. PENAL CODE § 3003.5(b).

by the idiom “as the crow flies.”<sup>25</sup> However, in order to get to the school or park, the parolee would have to walk or drive around the freeway to get there, which may equate to a distance of well-over 2,000 feet.

Instead of taking into account this reality, some authorities use the “as the crow flies” method for determining the 2,000-foot distance.<sup>26</sup> This results in disqualifying numerous residences that, as a practical matter, would be well over the 2,000 foot distance because a freeway or other large obstruction stands between the two locations.

### C. MEANING OF THE TERM “SCHOOL”

Jessica’s Law prohibits registered sex offenders from residing within 2,000 feet of a school.<sup>27</sup> However, it fails to define what is meant by the term “school.”<sup>28</sup> As such, the law risks violating the First Amendment as overbroad because it purports to cover any location that includes the term “school” in the title.<sup>29</sup> Not only would a sex offender be in violation if he/ she resided within 2,000 feet of a public elementary school, but he/ she would also potentially be in violation if he/ she resided within 2,000 feet of a university (primarily attended by adults) or a trade school such as an H&R Block Tax Preparation school, a dental assisting school, or a cooking school<sup>30</sup>. Moreover, an after-school private tutoring businesses, such as Kumon, Kaplan, or Sylvan Learning

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<sup>25</sup> CAMBRIDGE ADVANCED LEARNERS DICTIONARY AND THESAURUS 172 (3d ed. 2008) (defining “as the crow flies” to be measured “as a straight line between the two places”).

<sup>26</sup> See, e.g. John Sakata, *Sex Offender Ordinance Tougher than State Law*, LOMP OC RECORD (Jul, 15, 2012 at 12:05 am), [www.lompocrecord.com/news/local/govt-and-politics/sex-offender-ordinance-tougher-than-state-law/article\\_8ca1d7f0-ce3e-11e1-a052-001a4bcf887a.html](http://www.lompocrecord.com/news/local/govt-and-politics/sex-offender-ordinance-tougher-than-state-law/article_8ca1d7f0-ce3e-11e1-a052-001a4bcf887a.html).

<sup>27</sup> CAL. PENAL CODE § 3003.5(b).

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g. *In re Sheena K.*, 40 Cal. 4th 875, 890 (2007) (holding a probation condition “‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (citations omitted)).

<sup>30</sup> The term “school” has a very real meaning. For example, Penal Code section 626, subdivision (a)(4), defines “school” as “any public or private elementary school, junior high school, four-year high school, senior high school, adult school or any branch thereof, opportunity school, continuation high school, regional occupational center, evening high school, or technical school or any public right-of-way situated immediately adjacent to school property or any other place if a teacher and one or more pupils are required to be at that place in connection with assigned school activities.” If this definition would be applied to define the term “school”, it would clearly be constitutionally overbroad.

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Centers would appear to qualify as well.<sup>31</sup> The definition requires more specificity to avoid such unintended interpretations and from overreaching into constitutionally protected conduct.

D. MEANING OF THE TERM "PARK WHERE CHILDREN REGULARLY GATHER"

Another problem with Jessica's Law residency restrictions is the meaning of the term "park."<sup>32</sup> Seemingly, Jessica's Law targets parks with playground equipment for children, such as slides, swings, and jungle gyms. However, parks that lack such child play apparatuses would not seem to be applicable, given their lack of appeal to children. Moreover, locations that have the term "park" in the title but are primarily intended for adults, such as baseball stadiums (i.e., Candlestick Park) or hiking areas (i.e., Santa Monica Mountains National Park) would likewise seem not to be intended for inclusion. It is therefore unclear as to whether Jessica's Law is intended to ban sex offenders from living near recreational play areas where their primary activities do not involve children.

Jessica's Law prohibits those subject to it from living within 2,000 feet of a park "where children regularly gather."<sup>33</sup> Again, the law fails to define what was intended by this proscription. The term "children" would presumably include more than one person who is under the age of eighteen. This part seems clear enough. However, it is unclear what is exactly meant by "regularly gather." Would this apply if more than one child "gathers" on a daily basis? What if a particular park is devoid of children, except on weekends? Is that regular enough to satisfy the parameters of the statute? Who measures and determines the minimum requirements for qualifying as a park where "children regularly gather." How does a sex offender receive notice?

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<sup>31</sup> Of particular concern is the ease with which these businesses can establish themselves and their relative transiency. For example, Kumon, the country's largest after-school tutoring franchise, licenses over 2,000 locations in the United States. Each are run as small businesses and are located in all different neighborhoods and communities. Because Kumon is growing, there is no telling when or where the next Kumon location will appear. This would potentially displace all existing sex-offender registrants within a 2,000 foot radius. See *Own a Franchise – Kumon North America*, KUMON, [www.kumonfranchise.com/](http://www.kumonfranchise.com/) (last visited Mar. 7, 2014).

<sup>32</sup> See CAL. PENAL CODE § 3003.5(b) ("Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or *park where children regularly gather.*" ) (emphasis added).

<sup>33</sup> *Id.*



Some communities have actually gone as far as creating areas called “pocket parks” in order to force sex offenders out of their neighborhoods.<sup>34</sup> They are being built across the country.<sup>35</sup> For example, the City of Los Angeles has plans underway to construct at least three “pocket parks.” These locations will consist of small swaths of land less than one-fifth of an acre in size (about the size of a small backyard to a single family residence) intended to uproot and displace sex offenders currently residing nearby.<sup>36</sup> Although very clever and effective, if every community is allowed to build these relatively inexpensive play areas solely for the purpose of banning sex offenders from their neighborhoods, there will be nowhere left for sex offenders to live. Although many people may be happy with such an outcome, the effect will be to drive sex offenders into homelessness, living out of cars vans in the very same neighborhoods trying to ban them.<sup>37</sup> They would still be physically present in these communities. However, they would not have official addresses and, therefore, would not have to register the locations of their living quarters with local police. This would, ironically, lead to even worse outcomes.<sup>38</sup>

#### E. LACK OF CLARIFYING AUTHORITY

To date, Jessica’s Law is over seven years old.<sup>39</sup> Nevertheless, these ambiguities continue to puzzle and perplex law enforcement, the courts, sex offenders, and the community. In particular, the lack of guidance, the lack of consistency in enforcement methodology across the

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<sup>34</sup> Ian Lovett, *Neighborhoods Seek to Banish Sex Offenders by Building Parks*, N.Y. TIMES, March 9, 2013, at A22 (“From the metropolis of Miami to the small town of Sapulpa, Okla., communities are building pocket parks, sometimes so small that they have barely enough room for a swing set, to drive out sex offenders. One playground installation company in Houston has even advertised its services to homeowners associations as an option for keeping sex offenders away.”).

<sup>35</sup> *Id.*

<sup>36</sup> Angel Jennings, *L.A. Sees Parks as a Weapon Against Sex Offenders*, L.A. TIMES, March 1, 2013, at A1. (quoting Los Angeles City Councilman Joe Buscaino as stating, “I want to do everything in my power to keep child sex offenders away from children. We have to look at some solutions and in comes the pocket park idea.”) It remains to be seen as to whether this truly comports with the intent of Jessica’s Law.

<sup>37</sup> See Ian Lovett, *Neighborhoods Seek to Banish Sex Offenders by Building Parks*, N.Y. TIMES, March 9, 2013, at A22 (quoting a landlord as saying “[p]eople come out of jail, and they just become homeless . . . [t]hey have no food, no money, no anything. What’s the possibility then that they’re going to reoffend? They can add all the parks they want, but they still have to go somewhere.”).

<sup>38</sup> *Id.*

<sup>39</sup> Jessica’s Law was passed by California voters on November 7, 2006. *Proposition 83: Sex Offender Reform*, CA SECRETARY OF STATE – GENERAL ELECTIONS (Dec. 14, 2006 at 12:41 PM), <http://vote2006.sos.ca.gov>Returns/prop/mapR083.htm>.

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state, and the sweeping nature of the residency restrictions leave a tremendous void for those trying to understand how it must be implemented.<sup>40</sup>

### III. LACK OF AVAILABLE HOUSING IN URBAN AREAS

One of the primary contentions that sex offenders have advanced in opposition to Jessica's Law concerns the utter lack of availability of compliant housing in urban locations in California; particularly, San Francisco, the greater Los Angeles area, San Jose, and San Diego.

In November 2010, Los Angeles County Superior Court Judge Peter Espinoza issued a ruling which stated that Jessica's Law left sex offenders with the Hobson's choice of either violating parole and returning to prison on the one hand, or choosing to be homeless on the other hand<sup>41</sup>. This is the practical result because so much of the greater Los Angeles area lacks affordable residential housing compliant with the law. In his ruling, Judge Espinoza stated that the Los Angeles County Superior Court received over 650 petitions from sex offenders made homeless by Jessica's Law, and that the numbers were ever increasing.<sup>42</sup> The ruling cited a statement made by Los Angeles Chief of Police Charlie Beck that the Law caused "a marked increase of homeless/transient [sex offender] registrants."<sup>43</sup> Judge Espinoza further opined:

Rather than protecting public safety, it appears that the sharp rise in homelessness rates in sex offenders on active parole in Los Angeles County actually undermines public safety . . . The evidence presented suggests that despite lay belief, a sex offender parolee's residential proximity to a school or park where children regularly gather does not bear on the parolee's likelihood to commit a sexual offense against a child.<sup>44</sup>

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<sup>40</sup> John Simerman, *Report: State Board Says Sex-Offender Law Needs To Be Refined*, SAN JOSE MERCURY NEWS (Feb. 21, 2008), [www.mercurynews.com/nationworld/ci\\_8325634](http://www.mercurynews.com/nationworld/ci_8325634) ("[A] wide-ranging report, the first from the newly formed California Sex Offender Management Board, paints a picture of a state trying to catch up to some of the nation's toughest anti-predator laws, while legal questions remain and funding for research, local enforcement and treatment goes lacking.").

<sup>41</sup> *See, supra*, footnotes 44 and 45.

<sup>42</sup> Andrew Blankstein, *Law Restricting Where Sex Offenders Can Live is Unconstitutional*, L.A. TIMES, November 4, 2010, at A1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

The problem is not just limited to Los Angeles. Other cities, such as San Francisco and San Diego, are so densely populated that the availability of compliant housing is virtually non-existent. Sex offenders in the San Francisco area have found difficulty finding affordable, compliant housing as well. “Nearly all of San Francisco. . . is off-limits to sex offenders because of the number of parks and schools close to housing.”<sup>45</sup>

A study prepared for the *In re Taylor*<sup>46</sup> litigation, concluded that virtually no compliant affordable housing exists in the San Diego area for sex offenders. Julie Wartell, a crime analyst who worked for the San Diego County District Attorney’s Office in 2010, conducted a study of the impact Jessica’s Law would have on San Diego County’s available housing for sex offenders.<sup>47</sup> Although Wartell’s study showed approximately one-fourth of San Diego County residences compliant Jessica’s Law, less than three percent of San Diego County’s multifamily parcels were compliant.<sup>48</sup> When considering the fact that only five to eight percent of those residential units were available for rent at any particular time, this left sex offenders with almost no available housing compliant with Jessica’s Law.<sup>49</sup>

Thomas Green, a National University professor who also participated in the study, noted how hard it was, as a practical matter, finding compliant housing: “Besides making phone calls, besides driving all over the county to only find two, made—it seems to me like it would be a very difficult proposition to try to find affordable housing that was compliant.”<sup>50</sup>

#### IV. THE CALIFORNIA SUPREME COURT’S INVOLVEMENT

##### A. *IN RE E.J. ON HABEAS CORPUS*: THE INITIAL SUPREME COURT RULING

Almost as soon as Jessica’s Law became operative, the California Supreme Court heard a challenge to Jessica’s Law in the case of *In re E.J. on Habeas Corpus*,<sup>51</sup> a consolidated habeas corpus lawsuit where

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<sup>45</sup> *Id.*

<sup>46</sup> 209 Cal. App. 4th 210 (2012).

<sup>47</sup> *Id.* at 219-220.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 221.

<sup>51</sup> *In re E.J. on Habeas Corpus*, 47 Cal. 4th 1258 (2010).

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four California parolees contested its constitutionality.<sup>52</sup> They sought to stop state parole authorities from enforcing the residency restrictions of Jessica's Law against them because (1) doing so violated the ex post facto clauses of the United States and California Constitutions;<sup>53</sup> (2) it violated their state and federal constitutional rights to privacy, substantive due process, and intrastate travel; and (3) it infringed on their right to be free of being subject to a vague and overbroad statutory scheme which could result in loss of liberty.<sup>54</sup>

On February 1, 2010, the Court rejected the petitioners' challenge as to the retroactivity and ex post facto application of the statute to them. "[Jessica's Law] is not an ex post facto law if applied to such conduct occurring after its effective date because it does not additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee's status as a lifetime registrant under section 290."<sup>55</sup>

However, the Court found that their "as applied" challenge, i.e., that the Jessica's Law residency restrictions infringes on their right to substantive due process rights, right to privacy, property rights and right to intrastate travel, could not be resolved based on the record presented<sup>56</sup>. Rather, the Court held that "[t]he trial courts of the counties to which petitioners have been paroled are manifestly in the best position to conduct such hearings and find the relevant facts necessary to decide the claims with regard to each such jurisdiction."<sup>57</sup> As such, sex offenders in various counties began litigating some of these issues. Currently, the *Taylor*<sup>58</sup> case is making its way through the court system on the residency restriction issue.<sup>59</sup>

#### B. *PEOPLE V. MOSLEY*: APPLICABILITY LIMITED TO CALIFORNIA PAROLEES

Another issue raised by both government and defense lawyers is whether Jessica's Law residency restrictions is limited to people on active parole supervision, or whether it applies on a broader scale to all convicted sex offenders subject to Penal Code 290 registration

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<sup>52</sup> *Id.* at 1263.

<sup>53</sup> See U.S. CONST. ART. I, § 10; see also CAL. CONST. ART. I, § 9.

<sup>54</sup> *In re E.J.*, 47 Cal. 4th at 1263.

<sup>55</sup> *Id.* at 1280.

<sup>56</sup> *Id.* at 1283-1284.

<sup>57</sup> *Id.* at 1283.

<sup>58</sup> *In re Taylor*, 209 Cal. App. 4th 210 (Cal. Ct. App. 2010), review granted and opinion superseded (Jan. 3, 2013).

<sup>59</sup> See Section II.C, *infra*.

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requirements. *People v. Mosley*, a case currently pending in the California Supreme Court, is grappling with that very issue.<sup>60</sup>

California Attorney General Kamala D. Harris has taken the position in the *Mosley* case that Jessica's Law residency restrictions applies only to parolees. In her opening brief on the merits, the Attorney General made the following argument:

Jessica's Law imposes its residency restriction only on parolees and only as a statutory condition of their parole from prison. As merely a misdemeanor probationer, rather than a felony parolee, Mosley is not subject to the Jessica's Law residency restriction at all. . . . Although one could make a plausible argument that the Jessica's Law residency restriction applies to all sex offender registrants and that violation of the restriction is a crime, which might have been the intent of the voters in passing Proposition 83, the better view. . . . is that the residency restriction operates only as a condition of parole. Accordingly. . . . Mosley's misdemeanor conviction and resultant obligation to register as a sex offender do not subject him to the Jessica's Law residency restriction [because he is not a parolee.]<sup>61</sup>

Furthermore, according to the California Attorney General, Jessica's Law is not a crime: it only applies if it is imposed as a condition of parole.<sup>62</sup> In the same brief discussed above, the Attorney General made that argument:

In the previous *E.J.* cases, this Court did not decide whether section 3003.5(b) governed only parolees or created a separate new misdemeanor offense applicable to all sex offenders subject to registration regardless of their parole status because the Department of Corrections and Rehabilitation in that case was seeking only to enforce section 3003.5(b) as a statutory parole condition; and, as this Court further noted, there was no indication that any other registered

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<sup>60</sup> The *Mosley* case actually focuses on the primary issue of whether the discretionary imposition of lifetime sex offender registration, which includes residency restrictions that prohibit registered sex offenders from living "within 2000 feet of any public or private school, or park where children regularly gather" PENAL CODE § 3003.5, subd. (b)), increase the "penalty" for the offense within the meaning of *Apprendi v. New Jersey* 530 U.S. 466 (2000), and require that the facts supporting the trial court's imposition of the registration requirement be found true by a jury beyond a reasonable doubt. *People v. Mosley*, 121 Cal. Rptr. 3d . 321, 322 -323, *review granted*, 121 Cal. Rptr. 280 (2011). However, collateral to that is whether Jessica's Law even applies to non-parolees in the first instance. *Id.*

<sup>61</sup> See *Mosley*, 121 Cal. Rptr. 3d at 280, Respondent Attorney General's Opening Brief on the Merits, at pages 11-12. Attorney General Kamala Harris is the chief law enforcement officer in California, and is principally charged with enforcing Jessica's Law.

<sup>62</sup> *Id.*

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sex offenders, on parole or otherwise, had ever been charged with a criminal offense based on this provision. [citations] Now, however, this Court has requested briefing on the question left unanswered in *E.J.*

As explained below, it may reasonably be argued that the electorate, in voting for Proposition 83, intended that the residency restriction would govern all sex offenders subjected to a lifetime registration obligation and that violation of its terms would constitute a misdemeanor. Nevertheless, the Attorney General, on behalf of the People, has consistently taken the position, in state and federal courts, that section 3003.5(b) did not successfully carry out any such alleged intent. Instead, the better reading of section 3003.5(b) is that it applies only to parolees as a statutory condition of parole and that its sanction extends only to holding the parolee in violation of parole rather than to holding him culpable for a new crime. Although the matter is not free from doubt, respondent adheres to that position here.

The drafters of Proposition 83, and the voters who approved it, may have intended that the section 3003.5(b) residency restriction would govern all sex offender registrants. But the more reasonable view is that section 3003.5(b) as adopted applies only to parolees.<sup>63</sup>

The *Mosley* case remains on the Supreme Court docket. It is fully briefed and is currently awaiting calendaring for oral argument.<sup>64</sup>

C. *IN RE TAYLOR*: THE CASE THAT WILL LIKELY RESOLVE THE RESIDENCY RESTRICTION ISSUE

The case of *In re Taylor*<sup>65</sup> will probably settle once and for all the issue of whether residency restrictions violate state and federal constitutional protections of sex offenders. After the passage of Proposition 83, numerous sex offenders filed petitions for writs of habeas corpus in the San Diego County Superior Court directly challenging the constitutionality of the residency restrictions.<sup>66</sup> Specifically, the petitioners challenged the “as applied” aspect of the restriction pursuant to the directive that the California Supreme Court gave in the *E.J.* cases discussed *supra*.<sup>67</sup>

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<sup>63</sup> *Id.* at pages 15 through 16.

<sup>64</sup> *People v. Mosley*, Cal. Supreme Court Case No. S187965.

<sup>65</sup> 147 Cal. Rptr. 3d 64 (Cal. Ct. App. 2010).

<sup>66</sup> *Id.* at 68-71.

<sup>67</sup> *Id.* at 66-67.

After an eight-day evidentiary hearing, the superior court ruled the residency restriction “unconstitutionally unreasonable as applied to the lead petitioners because it violated [their] right to intrastate travel, their right to establish a home and their right to privacy and was not narrowly drawn and specifically tailored to the individual circumstances of each sex offender parolee.”<sup>68</sup> The court further opined “the fundamental vice of section 3003.5(b) as a parole condition . . . [is i]t is not narrowly drawn, much less specifically tailored to the individual. It applies as a blanket proscription, blindly applied to all registered sex offenders on parole without consideration of the circumstances or history of the individual case.”<sup>69</sup> As applied, nothing in the residency restriction furthers the intent of the law by creating “predator free zones around schools and parks where children gather,” when balanced against the broad effect of the statute curtailing or eliminating the availability of housing for most sex offenders.<sup>70</sup> The law essentially resulted in a complete banishment of sex offenders from residing in the county, “in essence, banishing them from living within most if not all of the county.”<sup>71</sup> Finally, the trial court ruled that treating all sex offenders identically “regardless of whether his or her crime involved the victimization of children or adults” undermines the very underpinning of the residency restriction in the first instance.<sup>72</sup> The State appealed the decision and the Fourth District Court of Appeal affirmed the trial court’s ruling.<sup>73</sup>

The State of California filed a petition for review in the California Supreme Court<sup>74</sup>. On January 3, 2013, the Supreme Court granted review on the following issue: Does the residency restriction of Penal Code section 3003.5, subdivision (b), when enforced as a mandatory parole condition against registered sex offenders paroled to San Diego County, constitute an unreasonable statutory parole condition that infringes on their constitutional rights?<sup>75</sup> The case is currently under review and a decision is expected sometime within the next two years.

It is hard to predict how the Supreme Court will rule in the *Taylor* case.<sup>76</sup> On the one hand, the Court could have already taken the position

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<sup>68</sup> *Id.* at 67.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 83

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> 209 Cal. App. 4th 210 (Cal. Ct. App. 2010)

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

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that sex offenders have no constitutional right to reasonable limitations on residency restrictions in *In re E.J.*<sup>77</sup> In fact, the Court of Appeal laid out a carefully considered and methodically reasoned decision in the *Taylor* case, laying the foundation for the Supreme Court to follow it.

On the other hand, if the Supreme Court were inclined to merely adopt the *Taylor* court's position, it could have denied review at the outset. The Supreme Court is currently composed of fairly conservative justices,<sup>78</sup> who, as a group, are unlikely to go to any great lengths to provide relief to sex offenders, and otherwise politically unpopular and disenfranchised group of people.

#### CONCLUSION

California voters passed Jessica's Law, along with its residency restrictions, over six years ago, presumably with the intention to make their neighborhoods safer for children by restricting where sex offenders may live. However, the poor and sloppy drafting of this initiative has left law enforcement, the courts, and the community in disarray over its proper application and enforcement.

Sentencing courts and state parole authorities already have the legal authority to impose reasonable residency restrictions on sex offenders.<sup>79</sup> However, this authority has been displaced by the enactment of these residency restrictions. A better solution would be to eliminate Jessica's Law residency restrictions and to reinvest the courts and parole authorities with the power to customize such restrictions on a case-by-case basis.

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<sup>77</sup> *In re E.J.*, (2010) 47 Cal. 4th at 1258

<sup>78</sup> Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOKLYN L. REV. 1, 53 (Fall 2002) (explaining that beginning in 1983, with the election of Republican governor George Deukmejian, the California Supreme Court's judicial philosophy has evolved to be more conservative nature). As of Fall 2013, all but one of the seven sitting California Supreme Court justices were appointed by Republican governors. *Justices – Supreme Court*, CALIFORNIA COURTS – THE JUDICIAL BRANCH OF CALIFORNIA, [www.courts.ca.gov/3014.htm](http://www.courts.ca.gov/3014.htm) (last visited Mar. 7, 2014).

<sup>79</sup> See *People v. Lent*, 15 Cal. 3d 481, 486 (1975). (empowering trial courts with the ability to set probation conditions for individuals sentenced to a term of probation. The conditions are presumptively valid unless they (1) have no relationship to the crime of which the offender was convicted, (2) relate to conduct which is not in itself criminal, and (3) require or forbid conduct which is not reasonably related to future criminality.); see also: Cal. PEN. CODE § 3000(b)(7). (empowering the Department of Corrections with the ability to set conditions of parole for those individuals sentenced to state prison.).