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The Case for Kentucky Sex Offenders: Residency Restrictions and Their Constitutional Validity

Alicia A. Sterrett

INTRODUCTION

Over the past ten years, our country has seen the widely publicized and often gruesome stories of children and other members of our society victimized by “sexual predators.” This topic can hardly be escaped with television programming aimed directly at exposing the unfortunate realities and news programs that delight in broadcasting the controversy surrounding these crimes. While the necessity of addressing these crimes is apparent, there is another side to this story—one that is often neglected. It involves the difficulty of those convicted under the very statutes aimed at protecting society from “predators.” These men and women are neighbors, friends, and family members, and all of them have the misfortune of facing lifestyle restrictions that could infringe upon their constitutional liberties. Despite the fact that very few of these men and women are guilty of heinous crimes worthy of a news spot, they live in the shadow of more infamous offenders. This Note examines the plight of these offenders through the looking-glass of federal and state legislation passed to thwart these “predators” and the constitutional challenges many of them have raised with particular emphasis on the challenges of Kentucky offenders.

A. History and Development of Community Restriction Laws

Throughout history, certain categories of criminals have always attracted public scrutiny. The most recent group of offenders to come into the public eye are sex offenders. While it may seem a relatively new issue given the rush of legislation that has followed the gruesome and highly publicized attacks on several children, sexual offenders are not new phenomena. These crimes were sensationalized long before the modern media even emerged. However, the way we have chosen to address the issues that arise with these offenders is a new take on an old approach. The original

1 B.A. 2005, Transylvania University, J.D. expected 2008, University of Kentucky College of Law. The author wishes to thank her amazing family for their unconditional support, particularly her extremely patient husband, Chad. Without them, none of this would be possible.

approach to dealing with these “sex psychopaths” was to treat them for their illness, which, because their condition of release was based upon a recommendation made exclusively by psychiatrists, often resulted in their indefinite removal from society. These offenders could not re-enter society until they were no longer a “threat” under this very subjective standard.

The “treatment” was premised on the assumption that these persons had a mental defect that was somehow curable. These civil commitment statutes spread much like the modern day registration laws, with nearly half of the states having one by the 1960s.

The view that sex offenders could somehow benefit from treatment changed during the 1980s when legislatures turned away from rehabilitation. The onslaught of highly publicized crimes during the 1990s caused legislatures to retreat from their earlier abandonment of committing these offenders for treatment and turned toward combining these civil commitment statutes with a criminal penalty.

There was a slight change in their approach as civil commitment became a way to extend, sometimes indefinitely, an offenders’ commitment after having served a prison sentence as well. The most recent approach to dealing with sexual offenders is reflected in the Community Notification laws that have become more the rule than the exception.

B. The Federal Acts

The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was passed by Congress in 1994. The Act mandated that all states enact programs requiring those offenders convicted of a criminal offense against a minor or a sexually violent offense to register a current address with state or local authorities. It also defined the length of required registration as based upon previous number of convictions, the nature of the offense, and the characterization of the offender as a sexual predator.

As if states needed more motivation than the public outcry stemming from the media frenzy involving sexual offenders, the Office of the Attorney General issued guidelines stating that those states failing to comply within the requisite time period would be subject to a mandatory

3 Id.
4 Id.
5 Id. at 903 (citing the states who had such statutes during this time).
7 Id.
8 Id.
10 Id. at § 14071(a)(1)(A).
11 Id. at § 14071(b)(6)(A).
ten percent reduction in Federal Local Law Enforcement funding, with those funds reallocated to the states that had complied.\textsuperscript{12}

The Wetterling Act was amended in 1996, following the highly publicized crime against the young Megan Kanka of New Jersey. According to the media, Megan Kanka was a seven-year old girl who lived with her family in a quiet suburban town. Unbeknownst to her family, a convicted sex offender loomed just across the street from their home.\textsuperscript{13} One fateful afternoon, he enticed Megan into his home, offering to show her the puppy he assured her was inside. Her death occurred less than thirty yards from the front door of her own home.\textsuperscript{14} The amendment to the Wetterling Act provided for the exchange of information between state and federal enforcement agencies as well as the disclosure of information for any purpose permitted under state law.\textsuperscript{15} This, coupled with the publicity surrounding sex offenders and their crimes, has paved the way for the continued revision of sexual offender statutes around the nation. Laws that formerly took the form of simple registration requirements have become increasingly complex, restricting employment opportunities,\textsuperscript{16} broadening the definition of crimes within the statute, and placing restrictions on where offenders may live upon release.\textsuperscript{17} In 2006, Congress proposed changes to the Sexual Offender Registration Act and those changes were signed into law by President George W. Bush on July 27, 2006 as the Adam Walsh Child Protection and Safety Act of 2006.\textsuperscript{18}

The Walsh Act defines and requires a three-tier classification system for offenders, much like the New Jersey statute.\textsuperscript{19} In developing this system, the Walsh Act also increases the minimum registration requirements from ten years to fifteen years for Tier One offenders.\textsuperscript{20} Based on this new federal mandate, states will again have to revise their statutes in order to become compliant.

With these increased restrictions come questions about their constitutionality. The vast majority of the constitutional challenges have failed completely, yet they continue to be filed. The public interest in
this type of legislation and preventing tragedies like that involving Megan Kanka is great. Therefore, the importance of analyzing the issues that arise when trying to balance the interest of the public with the interest of these offenders is obvious and the consequences on both sides of the issue can be tremendous.

With that in mind, the Introduction of this Note will undertake just such an analysis to look at striking that balance. Part I of this Note will examine the recently amended Kentucky Sexual Offender Registration Act and compare it to similar laws in other states, with particular emphasis on those states that also incorporate residency restrictions. Part II will look at the lawsuit filed in Federal District Court for the Western District of Kentucky, challenging the amended Kentucky statute. It will also address previously failed constitutional challenges to other sex offender registration statutes. Finally, the Conclusion will look very closely at the Kentucky challenge and suggest, based upon constitutional analyses, why this case and others like it should prevail. In so doing, it will also address some of the recent victories claimed in Kentucky trial courts.

I. Sexual Offender Registration Laws

A. The Kentucky Sexual Offender Registration Act

As mandated by the Federal Acts, Kentucky passed a law requiring certain sexual offenders to register with local law enforcement officers upon their release from imprisonment. As with most other states, the law required that offenders must include their name, local address, fingerprint, and photograph with the information to be updated at least every two years. It provided that the minimum registration period was ten years, as required by the Jacob Wetterling Act. In short, the law met the minimum standards required by the federal act. However, like other states, the legislature in Kentucky has continued to feel the pressure brought to bear by the public's concern about the legitimate dangers that these offenders pose. Certainly there are concerns about recidivism among these particular offenders. There is also the concern that without legislation like this, these offenders would go undetected and pose even more of a threat if they were completely unmonitored. This continued concern coupled with the media's coverage has resulted in exceedingly restrictive laws for convicted sex offenders.

Kentucky is no different in this respect and very large changes were made to the Sexual Offender Registration Act during the 2006 session of the
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General Assembly with the passage of House Bill 3. The minimum period of registration was increased from ten years to twenty years. Perhaps the greatest change to the law is the residency restriction that bars convicted sex offenders from living within 1,000 feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. The effects of this change are drastic, requiring registrants to become compliant with the new law within ninety days of it going into effect, whether they own or rent their property. In addition to the residency requirements, it expands the category of sex offenders now subject to the law from those on parole, probation or any type of judicial supervision, to include those no longer under any type of judicial supervision.

B. Similar Legislation in Other States

All fifty states now have some sexual offender registration law in place. The general provisions follow closely with the mandate from the federal acts, with certain registration information required, along with a photograph, fingerprint, and other identifying information. The statutes provide the term of years for registration (subject to the minimum federal standards) as well as varying penalties for failure to register or update registration information. The state law enforcement officials who will administer the program are also designated within the statutes.

While this is the bare minimum allowed under the federal guidelines, a number of other states have made changes similar to those made by Kentucky. In fact, the Kentucky statute was modeled after the Iowa law which prohibits sex offenders from residing within 2,000 feet of real property comprising a public or nonpublic elementary school, secondary school, or child care facility. Unlike the Kentucky statute, it does contain an exception for those registrants required to serve a sentence at a jail, prison, or other correctional facility located within the loci prohibition.

The Iowa law also provides an exception for those who established their residency prior to July 1, 2002 (the effective date of the statute) or where

29 Andrew Wolfson, Sex Offenders Fight Residence Rules, Louisville Courier-Journal Sept. 21, 2006, at 1B.
32 Id.
a school or childcare facility is newly located on or after July 1, 2002.\footnote{Id. at § 692A.2A(4)(a)–(c); Wolfson, supra note 29 (citing the complaint that challenges the Kentucky statute).}

Even with these exceptions, Iowa has faced great difficulty in maintaining their registry given that many offenders cannot find a place to live and still be compliant with this restrictive law.\footnote{Cassondra Kirby, Relocating Sex Criminals Can Backfire—In Iowa, Many Just Vanish Kentucky’s Law Begins in July, LEXINGTON HERALD-LEADER, June 18, 2006, at A1.} Law enforcement officers there suggest the law has done anything but make the state safer.\footnote{Id. (quoting Linn County, Iowa Sheriff, Don Zeller, who says only half of Iowa’s sex offenders are now accounted for, compared with 90% before the law went into effect).} The Chief Deputy in the sheriff’s office in Dubuque County, Iowa stated that thirty of their offenders were forced to move because of the law and because of the difficulty involved in compliance, those offenders are now giving false addresses.\footnote{Id. (quoting Dubuque County, Iowa Chief Deputy Don Vrotsos).} While the measure was passed in order to keep closer ties on the location of sex offenders, it has in fact had the completely opposite effect, leaving officers with many offenders classified as “whereabouts unconfirmed.”\footnote{Id. (quoting Don Zeller).}

The Mississippi statute provides that “a person required to register [under the sex offender registration act] shall not reside within one thousand five hundred (1,500) feet of the real property comprising a public or nonpublic elementary school or secondary school or a child care facility.”\footnote{Miss. CODE ANN. § 45-33-25(4)(a) (2007).} But like Iowa, the Mississippi law provides an exception for those registrants “serving a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.”\footnote{Id. at § 45-33-25(4)(b)(i).} It also provides an exemption for those who “established the subject residence prior to July 1, 2006 [the date the law went into effect] or [where] the school or child care facility is located within one thousand five hundred (1,500) feet of the school or child care facility subsequent to the date the person established residency.”\footnote{Id. at § 45-33-25(4)(b)(iii).}

The Ohio law prohibits sexual offenders from living within 1,000 feet of any school premises.\footnote{Ohio REV. CODE ANN. § 2950.034(A) (2007).} It also provides a private cause of action against any offender who establishes residency within this prohibited area by other owners of property in the area as well as the local prosecutor.\footnote{Id. at § 2950.034 (B).} Georgia’s law, like that of Iowa, prohibits residency or loitering within 1,000 feet of a child-care facility or school, but adds churches “and or area[s] where minors congregate” to the list of prohibited areas.\footnote{Ga. CODE ANN. § 42-1-15 (2007).} It also prohibits

\begin{align*}
\text{\footnote{Id. at § 692A.2A(4)(a)–(c); Wolfson, supra note 29 (citing the complaint that challenges the Kentucky statute).}} \\
\text{\footnote{Cassondra Kirby, Relocating Sex Criminals Can Backfire—In Iowa, Many Just Vanish Kentucky’s Law Begins in July, LEXINGTON HERALD-LEADER, June 18, 2006, at A1.}} \\
\text{\footnote{Id. (quoting Linn County, Iowa Sheriff, Don Zeller, who says only half of Iowa’s sex offenders are now accounted for, compared with 90% before the law went into effect).}} \\
\text{\footnote{Id. (quoting Dubuque County, Iowa Chief Deputy Don Vrotsos).}} \\
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\text{\footnote{Miss. CODE ANN. § 45-33-25(4)(a) (2007).}} \\
\text{\footnote{Id. at § 45-33-25(4)(b)(i).}} \\
\text{\footnote{Id. at § 45-33-25(4)(b)(iii).}} \\
\text{\footnote{Ohio REV. CODE ANN. § 2950.034(A) (2007).}} \\
\text{\footnote{Id. at § 2950.034 (B).}} \\
\text{\footnote{Ga. CODE ANN. § 42-1-15 (2007).}}
\end{align*}
offenders from being employed by a facility that is within 1,000 feet of the prohibited areas. Like the Kentucky statute, the Georgia statute measures the distance of 1,000 feet from outer property line to outer property line, not from the walls of the structures. This is particularly problematic in Kentucky where offenders who were compliant under the former standard (with 1,000 feet being measured from the outside wall of their home to the outside wall of the school, daycare, etc.) are now being forced to move because their property lines are too near the prohibited structures. Unlike the Ohio law, the Georgia statute expressly prohibits a private right of action against offenders who establish residency in violation of the provision.

Alabama goes one step further limiting an offenders' residence not only as it relates to schools and child-care facilities, but also as it relates to the victim. Offenders are prohibited from living within 2,000 feet of a school or child care facility and within 1,000 feet of the property on which any of the former victims or the victims' immediate family members reside. While it does provide an exception for those situations where changes to property within 2,000 feet of the offenders established residency would mean non-compliance, the law continues to limit the employment opportunities for these offenders by prohibiting employment in facilities within 500 feet of a school, child-care facility, playground, park, athletic facility or field, or any other business or facility having a principal purpose of caring for, educating or entertaining minors.

The results have been much the same in all of these states, with offenders having considerable trouble locating any area that is acceptable under the new law. The practical challenges of living under the new law have provoked scrutiny from many groups that has led to a number of new challenges to these laws.

II. CONSTITUTIONAL CHALLENGES

A. Challenging the Kentucky Sex Offender Registration Act

After the adoption of the amendments to the Sex Offender Registration Act provided by House Bill 3, but prior to its enforcement, a lawsuit was filed in Federal District Court for the Western District of Kentucky challenging the new law, particularly the residency restrictions placed upon

44 Kirby, supra note 34.
48 Id. at § 15-20-26(a) & (b).
49 Id. at § 15-20-26(c) & (g).
50 Greg Bluestein, No Place for Sex Offenders to Go—Georgia Law Bars Them From Living Virtually Anywhere, LEXINGTON HERALD-LEADER, June 24, 2006, at A3.
sex offenders. This provides a new challenge to the laws, given that prior challenges had been based upon civil commitment statutes, registration requirements and the community notification provisions of those statutes. While the specific provision of the law being challenged is different, the constitutional basis for the challenges remains the same. The plaintiffs have asserted violations of the ex post facto clause, procedural due process, substantive due process, the right against self-incrimination, the takings clause, and the prohibition against cruel and unusual punishment.

The assertions contained in this complaint are based upon a class of nine plaintiffs, all of whom are previously convicted sex offenders who will be forced to relocate because of the residency restrictions placed upon offenders by the amendments to the Sex Offender Registration Act in House Bill 3. Their stories, summarized in the complaint, include an elderly man, forced from his nursing home. Particularly troubling about his plight is the fact that his son lives near the Lexington nursing home in which he currently resides and is able to assist in his care. When he is forced to move, he will be hours away from his family as well as his current medical providers. His current doctors fear that such a dramatic change in his surroundings could negatively affect his physical and mental health.

Another plaintiff suffering under the restrictions of the revised law is a single mother who must either break her lease and remove her children from their schools or face criminal prosecution. She pleaded guilty to statutory rape more than ten years ago and has since completed treatment for her offense as well as the domestic violence she was enduring at that time. This woman specifically obtained permission from her probation officer to occupy her current residence and intended to purchase the home at the end of her lease. Because the Kentucky law makes no provision for “grandfathering” in offenders who currently live in compliance, her plans have changed. She and her two children will be looking for a new home, breaking their current lease and possibly moving away from their schools.

An elderly man who must sell the home he and his wife have occupied for thirty-nine years is also among those being forced to move because of

52 Infra notes 75–80 and accompanying text.
54 Suit Challenges Sex Offender Law, supra note 51.
55 First Amended Complaint, supra note 53, at 4–5.
56 Id. at 4–5.
57 Id. at 3–4.
58 Id. at 4.
the heightened restrictions. This move is particularly burdensome for him not only because he must abandon his home of nearly forty years, but because he is retired and lives on a fixed income after retiring from the job he held for thirty-four years. The judge who sentenced him entered an order that he could continue to live at his current address, but the new law imposes additional criminal liability on him if he chooses to do that.

As mentioned above, the Kentucky statute makes no allowances even for those with judicial permission to occupy their current residences. The complaint includes many others just like them and there are certainly many more citizens of the Commonwealth who face similar obstacles to comply with the new statute. One particular plaintiff must register for an additional ten years because of the amended law. All of these plaintiffs lived in compliance with the former law and now must make changes to their lives because of the recently enacted statute.

The stark reality for these plaintiffs is that if Kentucky had adopted a grandfather clause for those offenders already registered and in compliance with the law, they would not have to move. As mentioned previously, Iowa and Mississippi expressly exclude those offenders who had already established residency prior to the enactment of the law. Note also that the Kentucky statute is burdensome not only for offenders but for corrections officials who must move those offenders who are currently incarcerated in facilities that are within 1,000 feet of the prohibited areas.

A motion for preliminary injunction to prevent these and other people like them from being evicted from their homes was filed but denied on October 10, 2006. The motion asserted that the intent and effect of House Bill 3 was to punish the plaintiffs in violation of the Ex Post Facto Clause of the United States Constitution. In support of this assertion, the memorandum pointed to legislative intent, evidenced by the title of the bill and a survey of other cases in which an "affirmative disability or restraint" was placed upon offenders. Along those lines, the lack of a grandfather clause for offenders living in compliance prior to this law was cited as well as a comparison to other states that allow offenders to retain their residence if a new facility is opened after their moving there.

59 Id. at 7.
60 Id.
61 Id.
62 Id.
66 Id.
67 Id.
In denying the motion, Chief Judge Heyburn simply found that the factors to be considered when granting a preliminary injunction were not satisfied. The factors to be considered are: (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. He cited what he thought were gross inadequacies for the first two prongs that could not be overcome by the last two. The leniency of other courts in allowing the rights of sex offenders to be restricted was also offered as support for his failure to presume that this law might be unconstitutional. He also cited the discretion bestowed upon law enforcement officers not to evict offenders immediately upon the date of enforcement. The reality of this seemed questionable even then, given Fayette County Sheriff Kathy Witt's statements that at 12:01 am, deputies would be knocking on doors to begin arresting those in violation. Law enforcement authorities in other places, such as Louisville and Winchester were more forgiving, issuing citations to those in violation. Heyburn did offer suggestions where the case for the plaintiffs might be improved. He pointed out that their strongest argument, that the statute operates as an ex post facto punitive law against persons who had previously been living lawfully in an area but will be forced to move, might be strengthened by showing that plaintiffs will be unable to find other residency or unable to recuperate fair value for their properties. With the date of enforcement now passed, this proof could be very soon coming. While this order did not result in an immediate victory for these plaintiffs and others like them, the battle continues to wage on.

B. Challenges in Other States

1. Kansas v. Hendricks.—The Supreme Court of the United States has not taken many opportunities to address the issues raised with the passage

68 Memorandum Opinion and Order, supra note 64 (citing Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000)).
69 Id. at 2.
70 Id. at 1–2.
71 Id. at 2.
72 Cassondra Kirby, Fayette Sex Offenders Told They Have to Move—Buffers Set Around Schools, Playgrounds, Day Cares—Downtown Lexington Virtually off Limits, with a Few Exceptions, LEXINGTON HERALD-LEADER, June 10, 2006, at A1.
74 Memorandum Opinion and Order, supra note 64.
of these statutes and the subsequent constitutional challenges. It did, however, take the opportunity to implicitly confirm a constitutional basis for them in "Kansas v. Hendricks." The Court found that the liberty interest asserted by those subject to the civil commitment statute employed in Kansas was not absolute. The Court stated "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint." This was reiterated when the Court examined other cases in which involuntary civil commitment statutes were consistently upheld as long as the confinement was not carried out without proper procedures and evidentiary standards. Kansas' statute was not deficient in providing these proper procedures and evidentiary standards because a finding of future dangerousness and an inability to control that dangerousness was a prerequisite to confinement under the law. The majority found this to be in line with their previous decisions.

In addition to asserting that his due process rights were violated by this restriction on his liberty, Hendricks asserted an ex post facto violation. The Court was just as unwilling to accept this argument, finding that Kansas had not established criminal proceedings that would punish him beyond the prison sentence he had already served. In particular, the Court looked to statutory construction as a guide for determining whether civil or criminal proceedings had been instituted against a defendant. Kansas placed this law within its probate code, instead of its criminal code; this evidence supported the Court's finding that the intent of the legislature was not to institute criminal proceedings against these defendants. In these cases, the Court will defer to the legislature's intent except in those cases where the party challenging the law provides "the clearest proof" that the scheme is so punitive in purpose or effect that it is obviously not civil in nature. While that case dealt exclusively with the civil commitment statute in Kansas, the Court has declined to hear two other cases involving challenges

78 Id. at 356–357 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)).
79 Id. at 357.
80 Id. at 357–358.
81 Id. at 358.
82 Id. at 361.
83 Id.
84 Id.
85 Id.
86 Id. (quoting United States v. Ward, 448 U.S. 242 (1980)).
to sex offender registration laws, suggesting that the result would be the same when dealing with similar issues that arise in these cases.\textsuperscript{87}

2. \textit{Doe v. Poritz}.\textsuperscript{88}—While New Jersey was not the first state to pass a Sexual Offender Registration law, it was certainly the most publicized given that it was a direct response to the gruesome incident involving young Megan Kanka.\textsuperscript{89} It was not long after the passage of the law that the first constitutional challenges were mounted. The New Jersey statute met the minimum federal guidelines, requiring registration of fingerprints, a photograph as well as name, address and nature of the offense.\textsuperscript{90} With regard to the publication of information, New Jersey developed a tier system.\textsuperscript{91} If risk of re–offense is low, only those law enforcement agencies likely to encounter the person registered are notified.\textsuperscript{92} If the risk is moderate, organizations in the community are notified subject to the Attorney General's guidelines.\textsuperscript{93} Finally, if risk of re–offense is high, the public is notified subject to the Attorney General's guidelines that aim to alert those members of the public likely to encounter the person.\textsuperscript{94} This system required the Attorney General to develop factors which would correspond to the likelihood of re–offending and base public notification upon the level the offender is placed in.\textsuperscript{95} In \textit{Doe v. Poritz}, the plaintiff not only challenged the law on substantive due process grounds but strove to challenge the law as applied to him.\textsuperscript{96} The New Jersey Supreme Court upheld the constitutionality of the laws, denying all the substantive claims, but did find that the tier system required something more to satisfy the constitutional requirements.\textsuperscript{97}

Upholding the laws, the Court found that registration and community notification requirements were "rationally related to [the] legitimate state interest," of protecting the public from a group of offenders particularly likely to re–offend.\textsuperscript{98} The Court further held that the Constitution does not prevent society from attempting to protect itself from these offenders

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{87} Durant, supra note 76, at 293–94.
\item \textsuperscript{88} Doe v. Poritz, 662 A.2d 367 (1995).
\item \textsuperscript{91} Id. at § 2C:7–8.
\item \textsuperscript{92} Id. at § 2C:7–8(c)(1).
\item \textsuperscript{93} Id. at § 2C:7–8(c)(2).
\item \textsuperscript{94} Id. at § 2C:7–8 (c) (3).
\item \textsuperscript{95} Id. at § 2C:7–8.
\item \textsuperscript{96} Prettyman, supra note 6 at 1092.
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Doe v. Poritz, 662 A.2d 367, 414 (1995).
\end{itemize}
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Despite the inevitable punitive impact on these people. This finding is in line with the majority of Courts who have dealt with this issue. The New Jersey Supreme Court examined fully the legislature’s challenge in addressing these issues of safety while attempting to balance the interests of those convicted and like the Supreme Court in Hendricks, found that the legislative intent was not punitive but rationally related to that legitimate state interest.

The New Jersey law challenged in Hendricks had not only a registration component but also a community notification component. The plaintiff challenged the notification portion as violating his due process rights despite the legislature’s attempt to adequately provide protections by developing a “tier system” that dictated the level of community notification. In requiring more of the Attorney General with regard to the tier system, the Court found that a certain liberty interest was implicated by the disclosure of personal information and the potential harm to reputation, enough to trigger both the due process and fairness doctrines in the state of New Jersey. Under the law, all offenders were subject to some level of community notification, but those offenders with a moderate to high risk of re-offense faced more widespread community notification and consequently, greater implication of their due process rights. In finding that the procedures in place failed to ensure the preservation of the defendant’s due process rights, the Court required that those offenders who were found to be within the second or third tier (those subject to wider public notification) were entitled to a hearing before such categorization could be placed upon them. Further, the Court held that judicial review through a summary proceeding must be allowed prior to notification if sought by any person under the law.

a. Other Substantive Challenges to Sex Offender Registration Laws—To hypothesize about the future probability of successful constitutional challenges, it is necessary to look at why the Hendricks challenge failed on substantive grounds. Doe, in Poritz, challenged the law as a violation of the prohibition of ex post facto laws, bills of attainder, double jeopardy, cruel and unusual punishment, invasion of privacy, as well as a deprivation of due process and equal protection rights under the United States and New Jersey Constitutions. His ex post facto claim was based upon the retroactive effect that these laws have, imposing additional requirements.

99 Id. at 372.
100 See infra notes 100–116 and accompanying text.
101 Poritz, 662 A.2d at 373, 377.
102 Poritz, 662 A.2d at 382.
103 N.J. STAT. ANN. § 2C:7-8(c) (2007).
104 Poritz, 662 A.2d at 382.
105 Id. at 382.
106 Prettyman, supra note 6, at 1092.
upon defendants who have already committed their crimes.\textsuperscript{107} The claim of invasion of privacy was based upon the requirement that offenders be fingerprinted, photographed and have other documents maintained as part of the public record.\textsuperscript{108} Further, he brought claims under the Due Process Clause based on the lack of procedure in place for offenders to challenge their classification under the law.\textsuperscript{109} The majority of other constitutional challenges have followed from this framework. However, the result has generally been the same. Courts have repeatedly upheld the constitutionality of these laws.

One issue that is crucial to this determination is whether these laws are regulatory in nature or are in fact some attempt at further punitive effects on offenders. One glaring finding in this case was that the legislature had taken great pains to establish the purpose of the law as remedial and regulatory.\textsuperscript{110} To determine what would constitute punitive intent, the Court undertook an analysis, looking at the test provided in \textit{Kennedy v. Mendoza-Martinez}\textsuperscript{111} and how that test was subsequently interpreted in a number of cases. According to the Court in \textit{Kennedy}, the factors relevant for determining whether an act is penal or regulatory in character include:

\begin{quote}
whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.\textsuperscript{112}
\end{quote}

Following this survey of the law, the Court found that a statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though it may have some inevitable deterrent impact and adversely affect those subject to its provisions.\textsuperscript{113} The New Jersey law was found to meet the requisite definition of remedial, with the deterrent effects not so great as to overcome the legislative intent of protecting the public.\textsuperscript{114}

\begin{enumerate}
\item\textsuperscript{107} \textit{Poritz}, 662 A.2d at 387–405.
\item\textsuperscript{108} \textit{Id.} at 406–13.
\item\textsuperscript{109} \textit{Id.} at 381–82.
\item\textsuperscript{110} N.J. STAT. ANN. § 2C:7–1 (2007).
\item\textsuperscript{112} \textit{Id.} at 168–169.
\item\textsuperscript{113} \textit{Doe v. Poritz}, 662 A.2d 367, 388 (1995).
\item\textsuperscript{114} \textit{Id.} at 404.
\end{enumerate}
More recent challenges include the challenge by another anonymous plaintiff to the Alaska sex offender registration statute. In this suit, the challenge was again based upon the ex post facto prohibition in the United States and Alaskan Constitution. Smith v. Doe was the first time the United States Supreme Court granted certiorari to a plaintiff challenging a registration law as a violation of the ex post facto clause. Like the Kansas and New Jersey cases, the Court's determination turned upon whether the state had instituted a criminal or civil proceeding. The Court revisited the analysis from Kansas v. Hendricks, looking first to the statutory construction and affording the legislature considerable deference. The Court also cited the legitimate non-punitive governmental objective of protecting the public by imposing restrictive measures on sex offenders that the Alaska legislature expressed in the statutory text; the legislature cited the high risk of re-offending that sex offenders pose and the "primary governmental" interest of the law in protecting the public from sex offenders. In upholding the law, the Court found that the "registration requirements make a valid regulatory program effective do not impose punitive restraints in violation of the Ex Post Facto Clause."

A companion case to Smith v. Doe was Connecticut Department of Public Safety v. Doe, which challenged provisions of Connecticut's sex offender registry law. At issue in that case were the public notification provisions of the Connecticut statute that permitted the name, address, photograph and descriptions of offenders to be made available on the internet. The plaintiff in this case made a due process argument that being subjected to these registration requirements modified his legal status and damaged his reputation without providing notice or the opportunity to contest. The plaintiff was successful in the lower courts, with the Second Circuit finding that the law did violate the Due Process Clause of the Fourteenth Amendment. His argument was based in large part on the failure to distinguish between violent and non-violent offenders in their classification scheme and the subsequent stigma thrust upon him by his mere inclusion

116 Id. at 92 (citing Kansas v. Hendricks, 521 U.S. 346 (1997)).
117 Id.
118 Id. at 93.
119 Id. at 102.
121 Id. at 4.
123 Id. at 723.
However, the United States Supreme Court was not so inclined. The Court did not find that the issue of currently dangerous offenders was relevant, given that Connecticut had chosen to include offenders based on their previous conviction and not on the threat of their re-offending. Due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme. Thus, in this case, the defendants were not entitled to a pre-deprivation hearing on whether they are likely to re-offend because their conviction alone placed them under the auspices of the statute, not their future dangerousness.

**CONCLUSIONS**

**A. Constitutional Analysis**

Based upon the predominant failure of constitutional challenges to sex offender registration laws, success does not appear to be in the near future. However, by applying thorough constitutional analysis to the challenge to the Kentucky statute, the invalidation of these residency restrictions looks more promising.

The first step in analyzing the plaintiffs' claims is to look at the requirements of asserting a procedural due process claim. The Due Process Clause of the Fourteenth Amendment provides that "[no state shall] deprive any person of life, liberty or property without due process of law." In the past, challenges to these statutes have been based upon a liberty interest, a claim that is always harder to mount because of the stringent standard imposed by the Court on plaintiffs asserting such a claim. The claim challenging residency restrictions is clearly based on a property interest. Of course, the Supreme Court has held that property interests are not created by the Constitution, but are defined "by existing rules or understandings that stem from an independent source." In most cases, this independent source is state law. The Kentucky Constitution proclaims that the right of acquiring and protecting property is within those rights inherent in all men.

Having established the source of this property interest, the next step in the analysis is determining whether the government provides adequate process before it deprives the citizen of that interest. In the case of the Kentucky statute, there is absolutely no process in place that would allow offenders who are being deprived of their property to appeal or

125 Daugherty, supra note 122, at 719.
126 Connecticut Department of Public Safety, 538 U.S. 1 at 4.
127 U.S. CONST. amend. XIV.
128 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
129 Ky. CONST. § 1.
130 Roth, 408 U.S. 569–70.
be heard on the matter. This is at odds with other states who allow the grandfathering of those offenders who had already established residency prior to the passage of these laws. This is also at odds with the laws of a Commonwealth that values so much the ability to acquire and protect property that it constitutionally requires it.

In determining what process is due a citizen in this situation, the Court has provided a flexible balancing test that allows the weighing of the private interest in preserving the status quo against the government interest in summary adjudication.\textsuperscript{131} The ultimate due process question in these cases is whether it is appropriate to sacrifice the very real interests of citizens in continuing to live in their own homes on the altar of public safety. The factors to be considered when addressing this question are:

the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.\textsuperscript{132}

The private interest at issue here is obvious. Each of these citizens has a very real interest in continuing to live in their established homes. Some of them have actual ownership interests in these homes.

The risk of erroneous deprivation here is unlike that considered in other cases. Generally, this factor concerns whether welfare recipients would be unfairly deprived of benefits to which they are actually entitled. Certainly these citizens are entitled to occupy their own homes. To deprive them of this without some hearing would be erroneous on its face. Finally, the government interest in these cases has been repeatedly recognized. These statutes are cited as a protective measure, aimed at keeping our children and families safe. This Note proposes that this Commonwealth should not force such deprivation upon citizens having already served time for their offenses and who wish to move on with their lives. Instead of having consistency and stability, these citizens will be uprooted every time a prohibited facility goes up near their residence. Herein lies the problem.

Not only is this particular statute a violation of the procedural due process guaranteed by the Constitution, this law may be one of the first to fail the ex post facto challenge. Chief Judge Heyburn actually referenced this as the strongest argument this group of plaintiffs asserted in their complaint.\textsuperscript{133} As discussed previously, this challenge always turns

\textsuperscript{132} Id. at 335.
\textsuperscript{133} Memorandum Opinion and Order, supra note 64.
on whether the regulation is civil or criminal in nature, whether it has additional punitive effect for those offenders who have been previously convicted of their crimes and have served any sentence in connection with that conviction. The Constitution expressly prohibits the passage of ex post facto laws. These were first defined by the Court as a law which inflicts punishment for any act which was not a crime at the time of commission or one which increases the "degree of punishment previously denounced for any specific offense." The pertinent part of that definition for these cases is increasing the degree of punishment previously denounced for any specific offense. The most obvious illustration of an increased punishment would be if a defendant committed a crime that had a punishment of five years when it was committed, but was subsequently given a ten year sentence. However, that is not the only way that the degree of punishment could be increased. The way in which these citizens have been subjected to an increased punishment is more subtle but no less deplorable. What formerly resulted in a fixed registration period and certain additional restrictions has now brought upon them increased registration periods and residency requirements that force many from their homes. As alleged in the complaint, some of these offenders were not subject to any residency restrictions prior to the passage of House Bill 3. For others, the law extended the period of registration. As obvious as it may seem that these people are now faced with a greater punishment than was in effect when they were convicted of their crimes, the issue is still up for debate.

B. The Legislative Reality

The debate generally leads to the validation of these laws because the legislatures have made clear their intention to steer clear of punishment and instead implement these laws as a regulatory and public safety measure. Using traditional punishment analysis as the Supreme Court has handed it down brings about the same result. The analysis traditionally used is illustrated in the earlier cited, Kansas v. Hendricks case which finds that these acts do not establish further criminal proceedings against the offenders. The result in Smith v. Doe was the same as the Court held that failing to require individual determinations of dangerousness did not result in an ex post facto violation. However, applying the tests used in any of these

134 U.S. Const. art. I, § 9, cl. 3.
136 First Amended Complaint, supra note 53, at 6.
137 Id. at 7.
cases could produce a different outcome. The initial inquiry is whether the legislative intent was to enact a regulatory or punitive scheme.\textsuperscript{140}

For the Kentucky statute, legislative intent is evidenced in the first line of House Bill 3, where it states, "[a]n ACT relating to sex offenses and the punishment thereof."\textsuperscript{141} There may not be any stronger evidence than this that the intent of the legislature was to punish sex offenders for their crimes through the provisions of this bill. The case law suggests that if the intent is determined to be punitive, that is the end of the inquiry.\textsuperscript{142} Yet even faced with this obvious intention by the Kentucky General Assembly to punish those who have already served for their crime, the Courts have been slow to act as hundreds of Kentuckians are forced from their homes.

While the outcome of the federal suit remains to be played out in the courtrooms of the Commonwealth and perhaps, beyond, careful analysis suggests that the residency restrictions being imposed upon previously convicted offenders may be beyond the reach of the legislature. The case for these offenders having been made repeatedly, they have finally met some success in the trial courts of several Kentucky counties. Previously convicted sex offenders in Clark, Kenton and Jefferson counties have mounted successful constitutional challenges to the residency restrictions as applied to them.\textsuperscript{143} Each of the defendants were convicted of their crimes before the passage of House Bill 3 and were subsequently charged with violating its residency restrictions. In addition to asserting many of the due process claims mentioned previously, these defendants asserted additional violations based on alternate theories of banishment,\textsuperscript{144} the right of interstate and intrastate travel,\textsuperscript{145} as well as protections against unfair classifications by the legislature.\textsuperscript{146}

While the rationale among the judges varied somewhat, the result is the same.\textsuperscript{147} Each of these defendants will escape the restrictions issued by the

\textsuperscript{141} H.B. 3, 2006 Gen. Ass., Reg. Session (Ky. 2006).
\textsuperscript{142} Poritz, 662 A.2d at 390.
\textsuperscript{144} Opinion of the Court and Order at 20, Commonwealth v. Baker, et al., 07-M-00604, (Kenton Dist. Ct. Ky. Apr. 20, 2007). Judge Martin J. Sheehan concludes that the residency restrictions in place in Kentucky do, in fact, constitute a form of banishment, a punishment that is "historically and traditionally punitive." Id.
\textsuperscript{147} Judge Sheehan in Kenton County issued an in-depth, thirty-six page opinion that
Kentucky legislature. Whether their individualized success will translate into more widespread success for other Kentuckians is to be seen, given the reluctance on the part of prosecutors to appeal such decisions. \(^{48}\) Certainly the hope is that their success will provide incentive for future defendants (and undoubtedly there will be more) to challenge their new charges under the law and eventually lead to movement with the federal case.

addressed the history, past analysis and statistical reasoning associated with sexual offenders generally as well as residency restrictions applied to them. Hopefully, his treatment of the issue will provide resources for other judges and attorneys to successfully mount future challenges.

\(^{148}\) It is the opinion of this author that this reluctance to appeal reflects acknowledgement of the merits of the defendants, given that further loss on appeal would possibly widen the scope of defendants to which the ruling applies. Riley, supra note 143, at 1A (where the Jefferson County Attorney expressed that they “might appeal”).