Local Government Regulation of Sex Offenders: Addressing a Threat*

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> Sex offenders are a serious threat in this Nation. ... Nearly 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger. When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.[i]

During 2005, acts of convicted sex offenders were often in the news.[ii] Unfortunate events across the Nation created public awareness of kidnappings and murders of children at the hands of sex offenders. Often, these offenders were not properly registered with government officials and lived near their victims. The media, the public, and the survivors of the victims called upon federal, state and local governments to address these problems. This article will look at measures taken by local governments across the United States to address the threat posed by sex offenders, and the court challenges to these efforts.

Historical Background – Legal Attempts to Address Sex Offenders

In the early 1990s, the murders of Megan Kanga and other children by released sex offenders spurred the enactment of Megan's Law.[iii] Under this law, states are required to enact sex offender registration laws as a condition of receiving a portion of their federal law enforcement funding.[iv] All fifty states have complied with Megan's Law, notwithstanding unsuccessful challenges to the constitutionality of such legislation.[v]

Like states, local governments have also been called upon to address the threats posed by sex offenders. To date, these efforts have come in two contexts: banning sex offenders from public areas (such as parks and schools); and creating residency restrictions for sex offenders.

Sex Offenders and Access to Public Parks

At least three communities have addressed the threat posed by convicted sex offenders visiting parks where children congregate. However, the approach used has been slightly different in each community.

In Laredo, Texas, the city adopted an ordinance creating a "child safety zone" that

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prohibits child sex offenders from knowingly being present in, or loitering within, 300 feet of a city park where children congregate.[vi] As of December, 2005, this ordinance had not been judicially challenged.

Other communities have taken the approach of adopting ordinances that focus on specific sex offenders. In Lafayette, Indiana, the city was faced with an individual having a history of sex offenses (some involving children), who was seen watching young children in city parks.[vii] Two local government officials in Lafayette sent a letter to this offender, "Doe," which banned him from entering the city's public parks and schools.[viii]

In *Doe v. City of Lafayette, Ind.*, the plaintiff challenged the ban concerning public parks in federal court.[ix] Doe argued that the ban prohibiting him from entering public parks infringed on his right to free speech and violated substantive due process.[x] The federal district court disagreed and granted the city's motion for summary judgment.[xi] Doe then appealed to the U.S. Court of Appeals for the Seventh Circuit.[xii] The appellate court rejected Doe's contention that the ban violated his free speech rights by punishing his private thoughts.[xiii] The court reasoned that the ban was directed at Doe's actual conduct of entering parks to watch young children and, therefore, the ban advanced the legitimate governmental interest of protecting the city's youth.[xiv] The court also determined that the ban was not a punishment, but a civil regulatory measure designed to protect the public.[xv] As to substantive due process, the Seventh Circuit rejected Doe's claim of a right to "wander and loiter in public parks," stating that nothing in his arguments established this as a fundamental right.[xvi] The court upheld the ban as rationally related to a legitimate governmental purpose, and further stated that the ban was narrowly tailored to serve the compelling governmental interest of protecting children.[xvii]

In Michigan City, Indiana, the local government was faced with a similar situation to that in Lafayette.[xviii] An individual, Brown, was observed visiting a park, driving slowly past the children's day camp area, and looking at park visitors with binoculars; city officials later learned that Brown was a convicted child molester.[xix] Ultimately, city staff took away Brown's parking pass for the park, and told him that he would be arrested if he entered again.[xx] The city's Parks and Recreation Board met and approved a resolution, entitled "A Resolution Prohibiting The Use Of Park Department Properties By An Individual Having A Child Molesting History," that banned any person convicted of child molesting (or any other sex crime in which the victim was a child), and Brown specifically, from city parks.[xxi] Brown challenged the city's actions, stating that the city violated his property and liberty interests, and procedural due process and substantive due process rights, by effectuating the ban.[xxii]

In *Brown v. Michigan City, In.*, the federal district court rejected all of Brown's arguments. First, the court disagreed with Brown's contention that his liberty and property interests were violated by the ban; therefore, there could be no violation of due process.[xxiii] Even if there had been a proper liberty or property interest

before the court, Brown was afforded adequate process.[xxiv] At the hearing, the Parks and Recreation Board heard discussions of the legal issues, a law enforcement presentation, and implementation considerations from city staff; accordingly, the court concluded the hearing was not a "sham," as alleged by Brown.[xxv] (The court's close review of events that took place during the hearing highlights the importance of creating a record that the city can produce if its actions are later challenged in court.)

Brown also asserted that the ban violated a fundamental right to be in the park.[xxvi] The court rejected this argument, failing to find that such a fundamental right existed.[xxvii] The court concluded that the ban was rationally related to the city's compelling interest in safeguarding children in its parks.[xxviii]

In a recent case, a park ban was challenged by a sex offender in North Carolina. The Town of Woodfin, a suburb of Ashville, enacted an ordinance in 2004 prohibiting the presence of sex offenders in the public park of that town. [xxix] The ordinance was upheld by the trial court in July, 2006. [xxx]

In June, 2006, the City of Indianapolis' ordinance[xxxi] restricting certain sex offenders from being within 1,000 feet of specified public park areas was challenged by the ACLU in Federal Court in Indiana. That case is pending as of August 11, 2006.

These cases illustrate that, to date, local government efforts to protect children by banning convicted sex offenders from public parks have been upheld by the courts, despite challenges concerning liberty and property interests, and First Amendment protections.

Sex Offender Residency Requirements

Fourteen states[xxxii] and several localities[xxxiii] have enacted residency restrictions for sex offenders.

In an effort to protect children in Iowa from the risk that a sex offender might re-offend in locations close to the offender's residence, a statute was enacted that prohibited a person convicted of specified sex offenses involving minors from residing within 2,000 feet of a school or registered child care facility.[xxxiv] Several exceptions were permitted, including residences established prior to July 1, 2002; schools or child care facilities built after that date; or for offenders who served a sentence at a correctional institution.[xxxv] This law was challenged in a class action, *Doe v. Miller*, brought by convicted sex offenders against a class of defendants, including local government attorneys who were charged with the law's enforcement.[xxxvi] The offenders claimed that the law violated due process as provided for in the Fourteenth Amendment.[xxxvii] The district court found the statute was unconstitutional.[xxxviii]

On appeal, the offenders argued that there was a violation of procedural due

process because the law failed to provide notice of what conduct was prohibited, and did not require an individualized determination as to whether each person covered by the statute was dangerous.[xxxix] They further claimed that there was no notice, because some cities could not give information about where schools and child care facilities were located, and it was difficult to measure the restricted areas.[xl] The U.S. Court of Appeals for the Eighth Circuit rejected these arguments, saying instead that a law was not vague on its face unless it was impermissibly vague in all of its applications.[xli]

The offenders also argued that the law violated their fundamental rights, including privacy and choice in family matters, the right to travel, and the right to live where one chose.[xlii] The court rejected the argument that the rights to privacy and choice in family matters were implicated, as the statute did not restrict who could live with the offenders and their families.[xliii] With respect to travel, the offenders argued that they were limited in their ability to establish residences all over Iowa, and the law deterred previously-convicted sex offenders from migrating from other states to Iowa.[xliv] However, the court found that there was no actual barrier to movement and no obstacle to sex offenders entering Iowa.[xlv] There was no different treatment for non-resident visitors, and no discrimination against those who wanted to be residents.[xlvi] Finally, the court refused to recognize a so-called fundamental right to live where one wanted.[xlvii]

The offenders also raised an argument regarding the lack of scientific proof that showed excluding sex offenders from residing within 2,000 feet of schools or child-care facilities was likely to enhance the safety of children.[xlviii] However, the court found this argument understated the authority of the state legislature to make judgments about the best means to protect the health and welfare of its citizens.[xlix]

In addition, the court rejected the offenders' claim that the law violated the Fifth and Fourteenth Amendments because the residency restriction and registration requirement allegedly resulted in self-incrimination.[l] Because the statute regulated where a sex offender could reside and did not require information that could speculatively be used in a criminal case, the statute did not violate these constitutional provisions.[li] Finally, the offenders claimed that the statute was an unconstitutional ex post facto law because it imposed retroactive punishment on those who committed sex offenses prior to July 2002.[lii] To establish that the statute was punishment, the offenders first argued that the law was the effective equivalent of banishment.[liii] The court did not agree, finding the statute merely regulated where offenders could reside, but not where they could go (even within the restricted areas).[liv] The court also looked into whether deterrence and retribution were indicators of punishment in this case.[lv] While it acknowledged that there may have been a deterrent effect, the court held that there was no indication of punishment, as the law was designed to reduce the likelihood of future offenses by limiting temptation and reducing the opportunity to commit a new crime.[lvi] Also, the law was consistent with the legislature's goal of protecting the health and safety of children and the regulatory scheme had a rational connection to a non-punitive purpose.[lvii] In light of the "high risk of recidivism

posed by sex offenders," the legislature could reasonably conclude that the law would protect society by minimizing the risk of repeated sex offenses against minors.[lviii] As such, the offenders failed in their argument that the law was ex post facto punishment; likewise, they failed to show that the ban constituted cruel and unusual punishment.[lix]

In 2006, the Georgia legislature expanded their residency requirement to include that a sex offender could not reside within 1,000 feet of school bus stops. [lx] This provision is temporarily restrained by the court as to Georgia registered sex offenders. [lxi] The case on the merits is still pending as of August 11, 2006.

Notes

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i. McKune v. Lile, 536 U.S. 24, 32-33 (2002) (Kennedy, J. plurality opinion) (citations omitted).

ii. *See, e.g.*, News Archive, Sexoffenders.com, http://www.sexcriminals.com/news-archive.

iii. 42 U.S.C. § 14071, *et. seq*. (Westlaw 2005).

iv. *Id*.

v. *See, e.g.*, Connecticut Dept. of Pub. Safety v. Doe, 538 U.S. 1 (2003) (upholding Connecticut's "Megan's Law," stating that due process did not require a hearing to prove that a sex offender registrant was currently dangerous); Smith v. Doe, 538 U.S. 84 (2003) (Alaska's Sex Offender Registration Act was nonpunitive and its retroactive application did not violate the Ex Post Facto Clause).

vi. Laredo, Tex., Ordinance 2005-O-124 (June 6, 2005), *available at* http://www.nationallawcenter.org/files/Laredo,%20TX%20ordinance.pdf (last visited Jan. 23, 2006).

vii. Doe v. City of Lafayette, Ind., 377 F.3d 757, 758-59 (7th Cir. 2004).

viii. *Id*. at 760.

ix. *Id*. at 758.

x. *Id*. at 761-62.

xi. *Id*. at 761.

xii. *Id*. at 758.

xiii. *Id*. at 765.

xiv. *Id*.

xv. *Id*. at 766.

xvi. *Id*. at 769-70.

xvii. *Id*. at 773.

xviii. Brown v. Michigan City, In., No. 3:02 CV 572 RM, 2005 WL 2281502 (N. D. Ind. Sept. 15, 2005).

xix. *Id*.

xx. *Id*. at * 2.

xxi. *Id*. at * 3.

xxii. *Id*. at * 5.

xxiii. *Id*. at * 7.

xxiv. *Id*. at * 10.

xxv. *Id*. at * 7, 9.

xxvi. *Id*. at * 11.

xxvii. *Id*.

xxviii. *Id*. at * 12.

xxix. Woodfin, NC Ordinance Adopted April 19, 2004.

xxx. Standley v. Town of Woodfin, 05 CvS 3811 (Superior Court, Buncomb County NC).

xxxi. Indianapolis, IN General Ordinance 51,2006 (May 15, 2006).

xxxii. ALA. CODE §15-20-26(a) (2005) ("Unless otherwise exempted by law, no adult criminal sex offender shall establish a residence or any other living accommodation or accept employment within 2,000 feet of the property on which any school or child care facility is located"); ARK. CODE ANN. §5-14-128 (a) (2003) ("It shall be unlawful for a sex offender who is required to register…and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located") See, Weems v. Little Rock Police Department, 2006 U.S. App. LEXIS 17478 (8th Cir July 13, 2006) (Upholding ARK. CODE ANN. §5-14-128); CAL. PENAL CODE § 3003(g) (2005) ("[A]n inmate who is released on parole for any violation of [sections prohibiting lewd or lascivious acts, or continued sexual abuse

of a child] shall not be placed or reside, for the duration of his or her parole, within one-quarter mile of any public or private school…."); FLA. STAT. ANN. §947.1405(7)(a)(2) (2005) ("Any inmate who is convicted of [certain sexual crimes against minors] and . . . subject to conditional release supervision . . . [is prohibited from] living within 1,000 feet of a school, day care center, park, playground, designated public school bus stop, or other place where children regularly congregate"); GA. CODE ANN. § 42-1-13(b) (2003) ("No individual required to register . . . shall reside within 1,000 feet of any child care facility, school, or area where minors congregate"); 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (2005) ("It is unlawful for a child sex offender to knowingly reside within 500 feet of a school building…."); IND. CODE ANN. §11-13-3-4(g)(2) (2002) ("As a condition of parole, the parole board…shall prohibit the offender from residing within one thousand (1,000) feet of school property …for the period of parole, unless the offender obtains written approval from the parole board"); IOWA CODE § 692A.2A (2002) ("A person [who has committed a sexually violent offense] shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility"); KY. REV. STAT. ANN. §17.495 (2004) ("No registrant…who is placed on probation, parole, or any form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility"); LA. REV. STAT. ANN. §14:91.1(A)(2) (2004) ("Unlawful presence of a sexually violent predator is…the physical residing of a sexually violent predator within one thousand feet of any public or private, elementary or secondary school, a day care facility, playground, public or private youth center, public swimming pool, or free standing video arcade facility"); OHIO REV. CODE ANN. § 2950.031(A) (2004) ("No person who has been convicted of . . . either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises"); OKLA. STAT. TIT. 57, § 590 (2004) ("It is unlawful for any person registered pursuant to the Oklahoma Sex Offenders Registration Act to reside within a two thousand-foot radius of any public or private school site or educational institution"); OR. REV. STAT. § 144.642(1)(a) (2003) (Rules for post-prison supervision or parole "shall include . . .a general prohibition against allowing a sex offender to reside near locations where children are the primary occupants or users"); TENN. CODE ANN. § 40-39-211(a) (2005) ("[N]o sexual offender . . . or violent sexual offender, whose victim was a minor, shall knowingly establish a primary or secondary residence or any other living accommodation…within one thousand feet (1,000') of the property line on which any public school, private or parochial school, licensed day care center, or any other child care facility is located").

xxxiii. *See, e.g.*, Miami Beach, Fla., Ordinance 2005-3485 (June 8, 2005), *available* *http*://www.nationallawcenter.org/files/Miami%20Beach,%20FL%20ordinance.pdf (last visited Jan. 23, 2006). This ordinance has not been challenged as of December 2005.

xxxiv. IOWA CODE § 692A.2A (2002).

xxxv. *Id*.

xxxvi. Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004).

xxxvii. *Id*.

xxxviii. *Id*.

xxxix. Doe v. Miller, 405 F.3d 700 (8th Cir. 2005).

xl. *Id*. at 708.

xli. *Id*. (quoting Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982)).

xlii. *Id*. at 709.

xliii. *Id*. at 709-10.

xliv. *Id*. at 711.

xlv. *Id*. at 712.

xlvi. *Id*.

xlvii. *Id*. at 713-14.

xlviii. *Id*. at 714.

xlix. *Id*.

l. *Id*. at 716.

li. *Id*.

lii. *Id*. at 718.

liii. *Id*. at 720.

liv. *Id*.

lv. *Id*.

lvi. *Id*.

lvii. *Id*.

lviii. *Id*. at 721.

lix. *Id*. at 723.

lx. Act No. 571, Ga. Laws 2006 (HB 1059), codified at Ga. Code Ann. § 42-1-15.

lxi. Whitaker v. Purdue, No. 4:06-CV-0140-CC (N. D. Ga.)