IN THE SUPREME COURT OF OHIO

Francis Hyle,	)	Case Number 06-2187
Appellee,	)	
v.	)	
	)	Upon Certification of Conflict
Gerry R. Porter Jr.,	)	
Appellant.	)	

Brief of *Amici Curiae* in Support of Appellant Gerry R. Porter Jr.

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INTEREST OF *AMICI*

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic civil rights and civil liberties for all Americans. *Amicus Curiae*, The Ohio Association of Criminal Defense Lawyers is an organization dedicated to the interests of the criminally accused and convicted to ensure that they receive the full protections to which they are entitled under the laws and the Constitution. Both organizations address this court frequently with amicus briefs in matters of relevance to them.

This case raises constitutional issues of critical importance to *amici*, including the proper meaning of the Ex Post Facto Clause and the distinction between civil regulation and punishment. It is in defense of these basic liberties and for the reasons set out in the following brief that *amici* urge the Court to recognize the substantial constitutional questions at issue in this case, and to hold that retroactive application of R.C. 2950.031 violates both the United States Constitution and the Ohio Constitution.

ISSUE PRESENTED FOR REVIEW

Whether R.C. 2950.031-Ohio's residency-restriction statute prohibiting certain sexually oriented offenders from living within 1,000 feet of a school-can be applied to an offender who had bought his home and committed his offense before July 31, 2003 (the effective date of the statute).

STATEMENT OF FACTS

Amici accept the statement of facts as set forth in appellant's brief.

ARGUMENT

INTRODUCTION

Preventing the victimization of helpless children is a laudable goal. Moreover, the types of crimes R.C. 2950.031 seeks to prevent understandably evoke a strong desire for retribution and revenge. But RC. 2950.031 does nothing to protect children. Legislation which is designed to convince the public that the legislature is doing something, anything, legislation for the sake of legislating, legislation which is little more than a political placebo not only does nothing to protect children, it may actually put them in greater danger. *See, e.g.*, Jessica Brown, *Law Pushes Sex Offenders To Suburbs*, Cincinnati Enquirer (Ohio) May 1, 2007, at 1A (noting that county employees believe sex offenders will simply stop reporting because the residency restriction laws leave them nowhere to live legally).

It is obvious that sex offenders are the political pariahs of our day. This animus has led to the enactment of increasingly harsh laws directed at them. And, as a Kentucky District Court Judge notes, "Our courts, the public's last line of defense for civil liberties, have been quick to join the mob, twisting and contorting prevailing case law with an eye on the ultimate goal of approving harsher and harsher laws, while simultaneously glossing over significant concerns and constitutional challenges." *Kentucky v. Baker* (Apr. 20, 2007), Kenton District Court, 4th Division, Nos. 07-M-00604, 06-M-5879, 06-M-5885, 06-M-5932, 06-M-5915, 06-M-5920, 06-M-6814, 06-M-6031, 06-M-5834, 06-M-5930, 06-M-5866, unpublished, slip op. at 9.

The Kentucky Court goes on to note that the residency restriction laws are based on two flawed premises: (1) that sex offenders target children they do not know at an extremely high

rate and (2) that sex offenders re-offend at a much higher rate than other criminals. *Id.* Numerous scientific studies show that both premises are flawed. *See id.* at 9-10. For example, a recent study by the Minnesota Department of Corrections examining whether residency restriction laws affect recidivism found that *not one of the sex recidivists* in the study would have been deterred by a residency restriction law. Minnesota Dept. of Corrections, *Residential Proximity & Sex Offense Recidivism in Minnesota* (2007), available at http://www.doc.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf.

Indeed, a Department of Justice study found that only 7% of the victims of child sex offenders were strangers to the attacker. Patrick A. Langan et al., Dept. of Justice, *Recidivism of Sex Offenders Released From Prison in 1994*, 36 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf. A 1997 Department of Justice report found that only 3% of sexual assaults against children under 12 years old were perpetrated by strangers, while only 11% were committed by strangers against children 13 to 17 years old. David Finkelhor & Richard Ormrod, Dept. of Justice, Office of Juvenile Justice and Delinquency Programs, *Offenders Incarcerated for Crimes Against Juveniles* (2001), available at http://www.ncjrs.gov/pdffiles1/ojjdp/191028.pdf.

The premise that sex offenders re-offend at higher rates is equally flawed. *See Baker*, slip op. at 11. For example, a study of 29,000 sex offenders found a recidivism rate of 12.7% for child molesters over five years. LeRoy Kondo, *The Tangles Web: Complexities, Fallacies and Misconceptions Regarding the Decision to Release Treated Sex Offenders from Civil Commitment to Society*, 23 N. Ill. U.L. Rev. 195, 199 (2002). A Department of Justice study found that only 5.3% of sex offenders were rearrested for sex crimes within three years of being released. Langan et al., *supra*, at 1. The same study found that only 3% child molesters were

rearrested for child sexual assault within three years. *Id.* Moreover, the study found that only 39% of child molesters released in 1994 were rearrested for any offense, while 68% of all prisoners released in 1994 were rearrested for any offense within the same time frame. *Id.*

Although the flaws of R.C. 2950.031 provide a compelling argument against enactment of such laws, they do not provide sufficient legal basis on which to invalidate the laws. However, when taken together with the prevailing case law and the constitutional infirmities of the law itself, it is clear that R.C. 2950.031 should be invalidated.

Proposition of Law No. 1:

R.C. 2950.031 was not intended to apply retroactively.

"Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments." *Smith v. Smith* (2006), 109 Ohio St.3d 285, 286, 847 N.E.2d 414. The constitutional prohibition "nullifies" any law that reaches back and creates "new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective." *Id.*

To determine whether a law is unconstitutionally retroactive, Ohio courts use a two-step process. *Id.* First, the court must determine "whether the General Assembly expressly intended the statute to apply retroactively." *Id.* Second, if the court finds that statute was intended to apply retroactively, the court must then determine whether the statute is "substantive" or "remedial" in nature. *Id.* If the statute is "substantive" and applies retroactively, it is unconstitutional. *Id.*

Pursuant to R.C. 1.48, a "statute is presumed to be prospective in its operation unless expressly made retrospective." The Ohio Supreme Court has stressed that "absent a clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute

may be applied prospectively only." *State v. LaSalle* (2002), 96 Ohio St.3d 178, 181, 772 N.E.2d 1172.

R.C. 2950.031 provides that: "No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to 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."

Ohio courts have held that a statute should only be applied prospectively if it does not include the terms "retroactive" or "retrospective" and does not clearly state that it applies "to offenders that have already been convicted or had been convicted on, before and/or prior to a *certain date*." *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶11 (emphasis added). Moreover, the "inclusion of such language as '[i]f a person is convicted of or pleads guilty to a felony offense *** and the person is on *** on community control' does not demonstrate a clear manifestation of the General Assembly's intent that the statute apply retroactively." *Id.* (ellipsis in original).

Here, the statute fails to include any language expressly requiring retroactive application. Nor does it state that it applies offenses committed prior to a certain date. Resorting "to other methods of interpretation is *not permitted* by R.C. 1.48 to determine retroactivity since only clear (not ambiguous) indications will be permitted to pass the statutory hurdle of R.C. 1.48." *Hobler v. Motorists Mut. Ins. Co.* (1995), 105 Ohio App.3d 629, 632, 664 N.E.2d 999 (emphasis added). Accordingly, R.C. 2950.031 should not be applied retroactively.

Proposition of Law No. II:

Applying R.C. 2950.031 Violates Section 28, Article II of the Ohio Constitution, which prohibits the retroactive application of substantive laws.

Even if R.C. 2950.031 were intended to apply retroactively, retroactive application would violate Section 28, Article II of the Ohio Constitution pursuant to the second analytical step, as the statute is substantive rather than remedial in nature. This Court has held that a "substantive statute is one that impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Smith v. Smith* (2006), 109 Ohio St.3d 285, 286, 847 N.E.2d 414.

On the other hand, a remedial law is one that provides "rules of practice, courses of procedure, or methods of review." *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70, 72, 242 N.E.2d 658. In other words, remedial laws "are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570. The dictionary defines a remedial law as one that provides "a means to enforce rights or redress injuries" or a "law passed to correct or modify an existing law; esp., a law that gives a party a new or different remedy when the existing remedy, if any, is inadequate." Black's Law Dictionary (8th ed. 2004) 1319-20.

The residency restrictions of R.C. 2950.031 are substantive in nature. The statute is substantive because it forbids sex offenders who are not registration exempt from establishing a residence "within one thousand feet of any school premises." R.C. 2950.31. In Ohio, the property rights of the individual have always been considered "fundamental." *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 38. As the Ohio Supreme Court stressed in *Norwood*, "the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, *no matter how great the weight of other*

forces." *Id.* (emphasis added). Among the rights associated with property are the rights of "free use" and "enjoyment." *Buchanan v. Warley* (1917), 245 U.S. 60, 74.

Applied retroactively, R.C. 2950.31 would force a person from his or her home for a crime committed before the law was enacted. Such a law cannot be called "remedial" under any understanding of the term remedial. It does not provide a new course of procedure or method of review. Rather, the law creates a new wrong—a wrong related solely to a past transaction. Not only would it impose an additional burden as to a past transaction, it would affect a fundamental right, putting it squarely within the category of laws that Section 28, Article II of the Ohio Constitution expressly forbids. Thus, this Court should strike down R.C. 2950.031.

Proposition of Law No. III :

Retroactive application of R.C. 2950.031 is prohibited by Ex Post Facto clause of the U.S. Constitution.

Article One, Section Nine, of the U.S. Constitution forbids States from enacting an ex post facto law: "No State shall ... pass any ... ex post facto law." An ex post facto law is one that "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Cummings v. Missouri* (1867), 4 U.S. 277, 325-326. The ex post facto clause secures the rights of citizens "against deprivation for past conduct by legislative enactment. *under any form, however disguised.*" *Weaver v. Graham* (1981), 450 U.S. 24, 31 (emphasis added).

As Justice Marshall explained in *Calder v. Bull*, advocates of such laws are often "stimulated by ambition, or personal resentment, and vindictive malice." 3 U.S. 386, 389 (1798). The Ex Post Facto clause was expressly intended to protect against such "arbitrary and potentially vindictive legislation." *Weaver*, 450 U.S. at 29.

Consistent with intent of the Framers, courts have historically approached legislation challenged under the ex post facto clause with skepticism rather than deference. As the second Justice Harlan noted, "the policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature in imposing penalties on past conduct ... may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James v. United States* (1961), 366 U.S. 213, 247 n.3 (Harlan, J., concurring in part and dissenting in part).

As noted above, the Ex Post Facto clause of the U.S. Constitution forbids States from enacting a law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed ...." *Calder*, 3 U.S. at 390. Although the ex post facto prohibition applies only to punitive laws (as opposed to civil regulations), "it is the effect, not the form, of the law that determines whether it is ex post facto." *Weaver*, 450 U.S. at 31. Thus, even where a legislature purportedly intends to establish a civil penalty, courts must inquire further to determine whether the law is "so punitive either in purpose or effect as to negate that intention." *U.S. v. Ward* (1980), 448 U.S. 242, 248-249.

Historically, to determine whether a law is in fact punitive despite being labeled "civil," courts have used the framework established in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169. *See, e.g., Smith v. Doe* (2003), 538 U.S. 84. The relevant *Mendoza-Martinez* factors require determining whether the sanction: (1) has historically been regarded as a punishment; (2) will promote the traditional aims of punishment; (3) involves an affirmative disability or restraint; (4) has a rational connection to a nonpunitive purpose; and (5) appears excessive for its purpose. *Kennedy*, 372 U.S. at 168-69. The factors, however, are "neither exhaustive nor dispositive," rather they are "useful guideposts." *Smith v. Doe*, 538 U.S. at 97

(internal citations omitted). Here, all five factors point to the statute in question, R.C. 2950.031, being punitive in nature and, as a result, in violation of the Ex Post Facto clause.

Has the sanction has been historically regarded as a punishment? Forcing someone from his home and forbidding him to live in specified areas where others are perfectly free to reside, as R.C. 2950.031 does, is a form of banishment. Banishment has historically been regarded as a punishment. *Smith*, 538 U.S. at 98. Indeed, the Supreme Court has expressly recognized banishment as a form of punishment: "banishment is defined as a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life." *U.S. v. Ju Toy* (1905), 198 U.S. 253, 269. Given that banishment has been historically recognized as a punishment and the foregoing Supreme Court definition of banishment, it is clear that R.C. 2950.031 does impose a penalty historically regarded as a punishment.

The second factor to consider is whether the law promotes the traditional aims of punishment—deterrence and retribution. *Smith*, 538 U.S. at 101. The First District Court of Appeals notes that R.C. 2950.031 is "designed to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime." *Hyle v. Porter*, 2006-Ohio-5454, at ¶17. According to Black's Law Dictionary, deterrence is the "act or process of discouraging certain behavior." Black's Law Dictionary (8th ed. 2004) 481. A law that is designed to reduce the likelihood of offense is by definition a law designed to deter.[1]

The third factor requires considering whether the law involves an affirmative disability or restraint. Prohibiting a person from living in a specified area, an area where others are free to reside, is clearly an affirmative disability or restraint. As noted previously, this is a form of banishment, which the Supreme Court has defined as "a punishment inflicted upon criminals

[1] Because the question is the intent of the law, the fact that it is unlikely to achieve that intent is irrelevant.

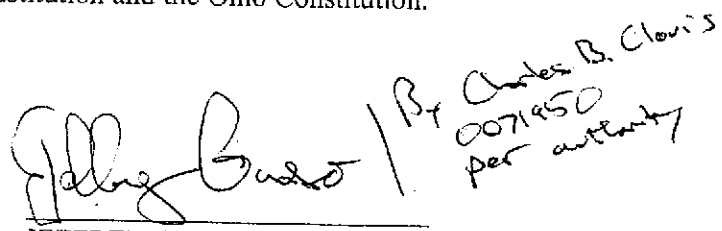
***." *U.S. v. Ju Toy* (1905), 198 U.S. 253, 269. Moreover, the banishment is not prospective in nature and tied to only one thing: the past crimes of the defendants.

The final two factors that the court must consider are linked: whether the law has a rational connection to a nonpunitive purpose and whether it appears excessive for its purpose. The law's ostensible nonpunitive purpose is to protect children. *Hyle v. Porter*, 2006-Ohio-5454, at ¶18. But R.C. 2950.031 protects no one. Under R.C. 2950.031 the offender would still be allowed to *own* a home near a school. The offender is only forbidden from "residing" in the home. Thus, he or she could theoretically spend every day near a school, *while school is in session* (i.e. when the offender poses the greatest risk to children), and do the any of the things the legislators who enacted this law are purportedly trying to prevent. Moreover, as the First District notes, the offender would still be allowed to travel through school zones, enter those areas for employment, and conduct commercial transactions in those areas. *Hyle*, at ¶18. Thus, the offender could visit and linger in school zones for as long as he or she wants. The only thing offender would not be allowed to do that he or she could do previously is sleep within the restricted zone. Accordingly, it is difficult to understand how the law protects children and what nonpunitive purpose it could possible serve. And since it fails in this regard, the only possible remaining rationale for the law is punishment. The law's failure to provide individualized risk assessment or to consider possible rehabilitation are further indication of the law's intent to punish the offender, not protect to the community.

Therefore, this court should find that R.C. 2950.031 is punitive in nature. Accordingly, applying the law retroactively constitutes an ex post facto punishment, which is expressly forbidden by the United States Constitution.

CONCLUSION

For the foregoing reasons, amicus urges this Court to hold that retroactive application of R.C. 2950.031 violates both the United States Constitution and the Ohio Constitution.



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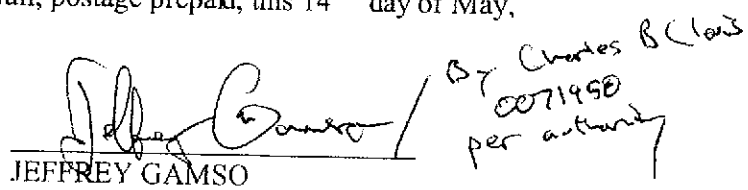
PROOF OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served upon NAME ADDRESS; by regular U.S. Mail, postage prepaid, this 14TH day of May, 2007.



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IN THE SUPREME COURT OF OHIO

Francis Hyle,	)	Case Number 06-2187
Appellee,	)	
v.	)	
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Appendix to
Brief of Amici Curiae in Support of Appellant Gerry R. Porter Jr.

COMMONWEALTH OF KENTUCKY
KENTON DISTRICT COURT
FOURTH DIVISION
CASE Numbers, 07-M-00604, 06-M-5879
06-M-5885, 06-M-5932, 06-M-5915, 06-M-5920,
06-M-6814, 06-M-6031, 06-M-5834,
06-M-5930, and 06-M-5866

ENTERED
KENTON CIRCUIT/DISTRICT COURT
APR 20 2007
JOHN C. MIDDLETON
BY_____D.C.

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS

MICHAEL BAKER, DALE BECKER,
JAMES DEAVER, RICHARD FOSTER,
JAMES GOSNEY, JEFFREY JOHNSON,
LAWRENCE JONES, KENNETH MCDANIEL,
ROBERT OBERER, CHARLES TOLBERT
AND ROBERT WAGONER DEFENDANTS

OPINION OF THE COURT
AND ORDER

INTRODUCTION

Each of the defendants herein challenges the constitutionality of Kentucky law which places residency restrictions on sex offenders. Such restrictions were first enacted during the 2000 Regular Session of the General Assembly as a portion of Senate Bill 263. Codified as KRS 17.495, and effective April 11, 2000, these original restrictions provided:

> "No registrant, as defined in KRS 17.500, who is placed on probation, parole, or other 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. The measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence. (KRS 17.495, since repealed and reenacted in amended form, now compiled as KRS 17.545)

It is important to note for our analysis, that these original restrictions carried no separate penalty provision. That is to say, they were legislatively mandated as conditions of probation and parole only. Violations thereof did not constitute a separate crime. Additionally, the loci prohibitum did not include areas surrounding public playgrounds.

In 2004 the General Assembly amended the statute exempting youthful offenders from the residency restrictions. That statutory modification is not germane to our current analysis.

The current form of the statute was enacted during the 2006 Regular Session of the General Assembly as a portion of House Bill 3. Codified as KRS 17.545, and effective July 12, 2006, the current statute reads:

> (1) No registrant, as defined in KRS 17.500, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. The measurement shall be taken in a straight line from the nearest property line of the school to the nearest property line of the registrant's place of residence.
>
> (2) For purposes of this section:
>
> (a) The registrant shall have the duty to ascertain whether any property listed in subsection (1) of this section is within one thousand feet of the registrant's residence.
>
> (b) If a new facility opens, the registrant shall be presumed to know and, within ninety (90) days, shall comply with this section.
>
> (3) Any person who violates subsection (1) of this section shall be guilty of:
>
> (a) A Class A misdemeanor for a first offense; and
> (b) A Class D felony for the second and each subsequent offense.
>
> (4) Any registrant residing within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility on July 12, 2006, shall move and comply with this section within ninety (90) days of July 12, 2006, and thereafter, shall be subject to the penalties set forth under subsection (3) of this section.
>
> (5) This section shall not apply to a youthful offender probated or paroled during his or her minority or while enrolled in an elementary or secondary education program. (KRS 17.545)

Thus the current law expands the original restrictions to include areas surrounding publicly owned playgrounds. The current statute also modifies the method of measuring

the one thousand (1,000) foot restriction and it establishes separate crimes and criminal penalties for violating the restrictions.

Each of the defendants herein is charged with a Class A misdemeanor for alleged violation of the residency restrictions imposed on sex offenders by KRS 17.545. It is important to note that the triggering sex offense convictions of each of the herein defendants pre-date the effective date of the current statute. In fact, the triggering sex offense conviction of all defendants except Robert Wagoner pre-date Kentucky's original residency restrictions previously codified as KRS 17.495, and effective April 11, 2000. Attached hereto as Appendix A is a summary of the triggering sex offender convictions of each of the herein defendants.

The defendants challenge the constitutionality of the residency restrictions on several grounds and demand dismissal of the criminal charges lodged against them for violating KRS 17.545. They argue that the provisions violate the following constitutional protections: 1) The Equal Protection Clause contained in the 14th Amendment to the United States Constitution; 2) Substantive Due Process as set forth in the 5th Amendment to the United States Constitution; 3) The Ex Post Facto Clause contained in Article 1, Section 10 of the United States Constitution and Section 19(1) of the Kentucky Constitution; and 4) The Inalienable Property Rights Provision as set forth in Section 1(5) of the Kentucky Constitution.

This Court's opinion on these significant constitutional challenges follows:

HISTORICAL BACKGROUND

Deciding the legal issues presented herein rests, in part, on ascertaining the legislative intent underlying the enactment of House Bill 3 during the 2006 Regular Session of the Kentucky General Assembly. To that end, this Court believes a basic understanding of the circumstances, culture and political outcry surrounding the adoption of sexual offender registration acts (SORA) and sexual offender residency restrictions (SORR) is beneficial to our analysis. Of equal importance are the limited, but insightful, recent scholarly critiques of such legislation. To that end we begin our legal analysis with this historical background.

It was July 29, 1994, a perfect summer evening in Hamilton Township, New Jersey, a small suburban neighborhood that was not affluent, but comfortable. Above all it was safe, or so the residents thought. Pets were being walked, lawns were being mowed, cars were being washed, and backyard barbeques were in full blaze. But the atmosphere in the Kanka household was far from normal. Little Megan Kanka, age seven, had not been seen for nearly three hours. The quiet panic of the Kanka family would soon escalate into a neighborhood nightmare.

The small suburban community would soon be transformed into the lead story on the local news. Countless law enforcement officers with sirens blaring and lights flashing filled the quiet suburban streets. They were quickly followed by hundreds of volunteers offering their time to search for the missing child. The hoards were complimented by

dozens of reporters anxious to squeeze every last drop of pathos and panic out of the scene.

All of the Kanka's neighbors, even the odd little man across the street, Jesse Timmendequas, offered to help in the search. There had been rumors about Timmendequas and the two other men that recently moved into the rented house; they had been in trouble with the law in the past some said, but no one seemed to know, or even care too much, about the details. How could anyone have known at the time that within twenty-four hours, the odd little man would lead investigators to the raped, strangled body of the missing seven year old child?

Timmendequas' sordid history made headlines in the morning papers. In 1979 he had confessed to an attempted sexual assault of a five year old girl and had been given a suspended sentence. He later served nine months in jail for failing to undergo therapy that was ordered as part of that sentence. Soon after his release he sexually assaulted a seven year old girl and upon conviction served seven years in prison. It was in prison that he met the two men with whom he lived in the quiet suburban home.

Timmendequas twice convicted of victimizing helpless children, quickly confessed to the crime. The confession was graphic, and the details now fueled not just local newspaper headlines but lead stories on the national news. Young Megan had walked by while Timmendequas was outside. He lured her into his home with stories of a new puppy which did not exist. He raped her and then smashed her head against a dresser. As she lay bloodied on the floor he wrapped her head in a plastic bag and then removed her belt and used it to strangle her. He stuffed her limp body into a toy chest and

drove to a remote location to dump her like unwanted garbage. Before returning home he sexually assaulted her one last time.

For all but the most callous and insensitive among us, it was the type of crime that makes blood boil and evokes strong desire to seek retribution and revenge. Such emotions are indicative of the pervasive public attitude toward sex offenders generally. Such emotions, however, are potentially problematic when they serve as the underlying basis for enacting SORR's and applying such statutes retroactively to prior crimes.

Ultimately it took a jury less than ten hours deliberation to convict Timmendequas and sentence him to death for his heinous crime. While few questioned the verdict, it seemed the entire nation questioned the circumstances surrounding the young child's murder. How could such a thing have happened? How could an individual with Timmendequas' criminal history have been permitted to blend into a quiet suburban neighborhood and quietly lure a young child to such a brutal death?

This single, isolated and heinous crime fostered a public outcry. The public demanded action. There had to be some mechanism to warn people when a sexual predator was living in their neighborhood. Dick Zimmer, a New Jersey State Senator, agreed. In the context of this emotionally charged atmosphere, Zimmer and his collogues in the New Jersey legislature quickly drafted a series of "get-tough-on crime" measures which required sexual offender risk assessment, registration and community notification. Within eighty days of Megan's death the measures became law in New Jersey. It came to be called "Megan's Law." Two years later, after Zimmer was elected to Congress, similar

versions of New Jersey's "Megan's law" were enacted as federal law. Congress now pre-conditions a significant portion of federal law enforcement funding on states having acceptable sex offender registration laws.

On the surface the laws seemed to address the prevailing public question: how could this have happened? They presented a quick solution to the problem of unknown sexual predators residing in one's community. But from the outset some questioned perceived flaws in such laws. Studies indicated that published information regarding sexual offenders was often inaccurate. Legal scholars warned that the reputations of innocent people would be sullied, that hard-core pedophiles would provide false addresses rendering registration for them meaningless, that vigilante justice would spike and that criminal confessions, an important tool in the prosecution of child sex offenses, would plummet as offenders faced the possibility of lifelong registration.

With the "get-tough-on-crime" political trade winds blowing, however, all such warnings have been summarily dismissed. In fact, state legislators and local officials have since sought even harsher measures. A local official in New Mexico proposed posting sex offenders' photos at the zoo and other areas where children congregate.[1] Several states have enacted restrictions on sex offenders participating in Halloween festivities.[2] Other states, including Kentucky, have enacted measures prohibiting sex offenders from residing within a set distance of schools, playgrounds, day care centers and other areas frequented by children. The growing rush to enact increasingly onerous restrictions has

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[1] Michael Duster, Note, Out of Sight, Out of Mind: State Attempts to Ban Sex Offenders, 53 Drake L. Rev. 711, 719-20 (2005)

[2] Clif LeBlanc, Child Sex Offenders Restricted Monday; Some Say Effort Won't Help Children, THE STATE, (Columbia, S.C.) Oct.28, 2005; and Halloween Banned for Sex Offenders, RNews, Oct. 29, 2005, http://rnews.com/print.cfm?id=31579

led one commentator to conclude: "Politicians, even in honest attempts to protect the public good, sometimes go too far without considering unintended consequences."[3]

The public both fears and hates sexual offenders, the political pariahs of our day. This prevailing public animus has resulted in the enactment of increasingly harsh measures. Our courts, the public's last line of defense for civil liberties, have been quick to join the mob, twisting and contorting prevailing case law with an eye on the ultimate goal of approving harsher and harsher laws, while simultaneously glossing over significant concerns and constitutional challenges.

The defendants herein have voiced many of these same concerns. They argue that SORR's are premised on two flawed theories; first, that sexual offenders target unknown children at an extremely high rate to commit many of their crimes, and second that sex offenders re-offend at a much higher rate than other criminals. Scientific studies call both theories into question.

Many studies have shown that relatives, friends, baby-sitters, teachers and others in positions of authority over a child are far more likely than strangers to commit sexual assaults.[4] One study found that 80% of abused girls and 60% of abused boys are victimized by people that they know.[5] Another study found that no more than 10% of child molestations are committed by strangers to the victims.[6] A 2003 Department of Justice study found that only 7% of incarcerated child sex offenders in prison in 1997

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[3] Dwight Merriam, The 2005 ZiPLeRs: The Eleventh Annual Zoning and Planning Law Report Land Use Decision Awards, ZONING & PLAN. L. REPT., Feb 2006, at 5.
[4] Duster, supra note 1 at 717
[5] *Id*
[6] Luis Rosell, Sex Offenders: Pariahs of the 21st Century?, 32 Wm Mitchell L. Rev at 420 (2005).

were there for crimes where the victim and assailant were strangers.[7] Additionally as defendants point out, a 1997 report from the Department of Justice indicated that only 3% of sexual assaults against children under 12 years old were perpetrated by strangers as were only 11% of sexual assaults against children 13 to 17 years old.[8] Likewise a 2000 report from the same agency indicated that as to victims 5 years old or younger, only 3.1% of the crimes were committed by strangers and as to children age 6-11, only 4.7%.[9] The implication of these and countless other studies is that laws designed to protect our children, to be effective, should focus on preventing sex offenders from harming children whom they know, not fixated on preventing the rare attacks by strangers. Legislators however, continue to focus on the high profile, emotionally charged cases like that of Megan Kanka, and craft measures designed to combat the predator lurking in the bushes.

Additionally, studies have not established a causal connection between the proximity of a sex offender's residence to schools, playgrounds and child care facilities with an increased likelihood of recidivism. A study by a California newspaper of nearly five hundred released sex offenders who legally resided near schools and day care facilities found that only one was rearrested during the one year period of the study, and that was on a charge of parole violation and not for another sexual assault.[10] A Minnesota Department of Corrections study found that only two recidivist acts of child sexual assault were committed in parks on unknown victims and in those two instances the

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[7] Patrick A. Langan, Erica L. Schmitt and Matthew R. Duros, Dep't of Justice, Recidivism of Sex Offenders Released From Prison in 1994, 36 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

[8] United States Dept. of Justice, Office of Juvenile Justice and Delinquency Programs, Offenders Incarcerated for Crimes Against Juveniles, Finkelhor, David and Richard Ormrod. December 2001.

[9] Id

[10] Leslie Henderson, Comment, Sex Offenders: You Are Now Free To Move About The Country. An Analysis of Doe v. Miller's Effects on Sex Offender Residency Restrictions, 73 UMKC L. REV. 797 at 804 (2004)

assaults occurred several miles away from the offenders' homes. This fact resulted in the Department concluding that residency restrictions would not be effective in deterring the offender who wanted to harm again.[11]

SORR's are also premised on the claim that sex offenders re-offend at a much higher rate than other criminals. Countless studies refute this claim as well. One study of 29,000 sex offenders found a recidivism rate of 12.7% for child molesters over five years.[12] A study by the Department of Justice published in 2003 found that only 14% of sex offenders and rapists released from prison in 1994 were recidivists. Of those child molesters released in 1994 only 3% were rearrested within three years for a child sexual assault, only 14% were rearrested within three years for any violent offense and a total of 39% were rearrested for any offense including parole violations and traffic offenses.[13] At the same time a Department of Justice study concluded that 68% of all prisoners released in 1994 were rearrested for any offense within three years.[14] Thus, claims that sex offenders have a higher recidivism rate than other offenders, the driving force behind SORR's, appear unfounded.

Thus, as one pundit has concluded;

> "(R)esidency restrictions suffer from several practical problems that call into question their basis, efficacy, and fairness. Their scientific premise is spurious and only leads to over-inclusive and ineffective restrictions that will do

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[11] Duster, supra note 1, at 753

[12] LeRoy Kondo, The Tangled Web –Complexities, Fallacies and Misconceptions Regarding the Decision to Release Treated Sex Offenders from Civil Commitment to Society, 23 N. ILL. U.L. REV. 195,199 (2002)

[13] LANGAN, SCHMITT AND DUROSE, supra note 7.

[14] U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE U.S.:RECIDIVISM(2002), available at http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm

nothing to stop the small fraction of sex offenders who will harm unknown children again..."[15]

While these pitfalls of SORR's may provide a compelling policy argument against the enactment of such laws, they do not, in and of themselves, furnish an appropriate legal basis upon which a court can invalidate such measures. Courts are not free to strike down legislative enactments simply because the wisdom or efficacy of same is in question. On the contrary, courts are required to exercise great deference in reviewing legislative enactments and should invalidate same only upon a clear showing of constitutional infirmity. At the same time, while the concerns expressed above provide an insufficient basis, standing alone, to invalidate the statutes in question, they are extremely beneficial to the Court in its analysis of the alleged constitutional defects of these statutes. That analysis follows.

EX POST FACTO ANALYSIS

Defendants argue that the statutes in question, if applied to them, would violate the Ex Post Facto Clause of the U.S. Constitution. Article 1, Section 10 of the U.S. Constitution states in relevant part: "No state shall....pass any.....ex post facto law." This provision prohibits states from enacting laws which increase punishment for criminal acts after they have been committed. [See Calder v Bull, 3 U.S. 386, 390, 3 Dall. 386, 1 L. Ed. 648 (1798)]. Defendants further contend that the statutes violate Section 19(1) of the

[15] Caleb Durling, Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders Restrictions, and Reforming Risk Management Law, Northwestern School of Law, Journal of Criminal Law and Criminology (Fall 2006).

Kentucky Constitution which states in relevant part, "No ex post facto law.....shall be enacted."

It must be noted at the outset of this section that the United States Supreme Court has addressed a similar challenge to the Sex Offender Registration Act of Alaska in its landmark decision of Smith v Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). While this decision is not squarely on point with the issue sub judice because it addresses, and ultimately upholds, the constitutionality of sex offender registration (SORA's) and not sex offender residency restrictions (SORR's), its analysis does provide a helpful guide to the current issue. In this case the Supreme Court held that Alaska's Sexual Offender Registration Act "is nonpunitive and its retroactive application does not violate the Ex Post Facto Clause." Smith, 538 U.S. at 105-106.

Several courts nationwide have applied the rationale of Smith to overrule similar challenges to statutes retroactively imposing residency restrictions on sex offenders. In Doe v Miller, 405 F. 3rd 700 (8th Cir. 2005) the court relied heavily on the language of Smith in upholding Iowa's SORR against an Ex Post Facto challenge. Likewise, the courts in Lee v State, 895 So 2d 1038 (Ala 2004); Mann v State, 603 S.E. 2d 283 (Ga 2004); and People v Leroy, 828 N.E. 2d 769 (Ill. App. Ct. 2005) all adopted the analytical approach set forth in Smith, and all reached similar conclusions upholding their respective state's SORR against claims that it violated the Ex Post Facto Clause.

This Court believes that the language of the Smith decision affirming Alaska's SORA should not be so easily extended to upholding SORR's. To do so glosses over the

fact that the court in Smith approved Alaska's SORA, in part, because the measure placed no limit on where a sex offender could live.

> "By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Smith, 538 U.S. at 101.

As Judge Melloy noted in his dissent in Miller:

> "...The Supreme Court could not use the same reasoning to uphold residency restrictions, for restrictions do involve expulsion and place limits on where an offender can live. Miller, 405 F. 3rd at 724

Simply because the United States Supreme Court has ruled that SORA's are non-punitive and thus do not violate the Ex Post Facto Clause does not mean the court has implicitly upheld SORR's. On the contrary, Justice Souter, in a concurring opinion in Smith, signaled his unease with the majority's conclusion that Alaska's SORA was "non-punitive" and thus did not violate the Ex Post Facto Clause.

> "Ensuring public safety is, of course, a fundamental regulatory goal (citation omitted) and this objective should be given serious weight in the analyses. But, at the same time, it would be naïve to look no further, given pervasive attitudes toward sex offenders. (Citations omitted) The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones. Smith, 538 U.S. at 108-109.

While this Court is of the opinion that the Supreme Court's decision in Smith, upholding Alaska's SORA, does not mandate a similar ruling with respect to Kentucky's SORR challenged in the case sub judice, Smith nonetheless reiterates the analytical model required to address the current Ex Post Facto claims.

In determining whether the statutes in question violate the Ex Post Facto Clause this Court applies the analytical framework outlined by the Supreme Court in Smith. This analysis is a two-step process. Step one requires the court to ascertain whether the legislature intended the statute to establish civil proceedings or to impose punishment. Smith, 538 U.S. at 92 [See also Kansas v Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2071, 138 L. Ed. 2d 501 (1997)] If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive then we must move to the second step in the process and further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intent to deem it civil. Smith, 538 U.S. at 92. In examining the statute under the second phase of analysis the court must look to five factors as "useful guideposts", Hudson v United States, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), recognizing however that such guideposts are "neither exhaustive nor dispositive." United States v Ward, 448 U.S. at 249, 100 S. Ct. 2636. These five factors are whether the regulatory scheme: 1) has been regarded in our history and traditions as a punishment, 2) imposes an affirmative disability or restraint, 3) promotes the traditional aims of punishment, 4) has a rational connection to a non-punitive purpose, and 5) is excessive with respect to that purpose. Smith, 538 U.S. at 97

Let us turn our focus then toward applying this two-step analysis to the legislation sub judice. The Court must first ask whether the legislature indicated, either expressly or impliedly, a preference for one label or the other. "Considerable deference must be accorded to the intent as the legislature has stated it." Smith, 538 U.S. at 93. With regard

to Kentucky's SORR, enacted as House Bill 3 of the 2006 Regular Session, the Kentucky General Assembly enacted the following title; "An Act related to sex offenses and the punishment therefore." (Emphasis added) It is important at this stage to take note of a separate legislative proposal introduced, but not enacted, during the same 2006 Regular Session (House Bill 41). This bill, which covered such matters as the use of global position monitoring for sex offender parolees and expanded community notification, carried the title, "An Act related to sex offenses and sex offender management. (Emphasis added) It appears fairly clear from use of language such as "offenses" and particularly "punishment" in the title of House Bill 3 that the legislature was expressly placing a punitive label on the legislation. Unlike the facts of Smith, where the Supreme Court found;

> "Noting on the face of the statute suggests that the legislature sought to create anything other than a civil scheme designed to protect the public from harm, Smith, 538 U.S. at 93

in the case sub judice the legislature, on the face of the legislation, has labeled the Act as one related to sex "offenses" and "punishment." It would be a monumental feat of judicial gymnastics to conclude from such labels that the legislature intended anything other than a punitive scheme.

Further evidence that the legislature intended to create a punitive as opposed to a civil-regulatory scheme can be garnered from the fact that both the House of Representatives and the State Senate required that "Corrections Impact Statements" and "Local Mandate Fiscal Impact Estimates" be prepared for House Bill 3 prior to its enactment to assess the potential costs of the proposed legislation. All of these cost

projections focused squarely on such items as increased costs to our corrections system in terms of incarceration and additional probation and parole officers. The costs that were analyzed focused on expenses that are clearly punitive in nature.

Additionally, examining the enforcement procedures established by the act leads to the inescapable conclusion that the legislature intended a punitive rather than a remedial statutory scheme. As the court in Smith opined, "other formal attributes of a legislative enactment, such as...the enforcement procedures it establishes, are probative of the legislature's intent." Smith, 538 U.S. at 94. With regard to the statutes in question, the legislature chose criminal sanctions as the sole enforcement procedure. Sex offenders found to be residing within the prohibited zones are guilty of a Class A misdemeanor for a first offense and a Class D felony for each subsequent offense.

This Court is cognizant of non-binding but persuasive case law across this nation universally rejecting the notion that SORR's are punitive in nature and thus upholding such measures in the face of Ex Post Facto challenges. [See Doe v Miller, 405 F 3d 700 (8th Cir 2005), Lee v State, 895 So 2d 1038 (Ala 2004), Mann v State, 603 SE 2d 283 (Ga 2004), People v Leroy, 828 N.E. 2d 769 (Ill. App. Ct. 2005) and State v Seering, 701 N.W. 2d 655 (Iowa 2005)]. In each of these cases, however, the reviewing court was unable to reach a definitive conclusion under the first prong of the Smith analytical model, that the legislature expressly intended a punitive scheme. Thus, in each of the above cases, the courts' holdings that the statutes in question were "non-punitive" in nature were based on application of the five "useful guideposts" suggested by the Smith court for the second prong of analysis.

In the cases sub judice we need not proceed to the second prong of analysis as the statutes in question are clearly distinguishable from those reviewed in the above cases. Unlike the statutes under review in Miller, Lee, Mann, Leroy, or Seering, the Kentucky General Assembly has clearly expressed its intent to create a punitive scheme. Use of such terms as "offenses" and "punishment" in the title of the act serve to express such intent. Legislative analysis of the financial costs to our corrections and parole systems underscores a punitive intent. Adopting criminal sanctions as the sole means to enforce the statutory provisions further underscores the legislature's punitive intent.

Even if we assume for the sake of argument that this legislative expression of punitive intent is not perfectly clear, application of the five factor analysis amounts to little more than an alternate path to the same destination.

Let us turn our attention to applying the five factors enumerated by the court in Smith to Kentucky's residency restrictions. It is important to note at the outset of this phase of our analysis that the Supreme Court has not stated how to weigh these factors. Smith, 538 U.S. at 97. Nor has the Supreme Court indicated whether failing a certain number of factors renders a statute categorically unconstitutional, leaving lower courts to weigh, or more often discount, factors as they see fit. Miller, 405 F. 3rd at 721. It should come as little surprise then, in the politically charged and passionate atmosphere surrounding SORR's, that negative findings on these factors are afforded great weight by reviewing courts while affirmative findings are often glossed over and discounted as

insignificant in route to upholding the measure's constitutionality. It is often a process that can fairly be criticized as little more than judicial sleight of hand.

Turning first to any historical tradition regarding residency restrictions, the defendants argue that restrictions imposed under the Kentucky act are the effective equivalent of banishment, which has been regarded historically as a punishment. Smith, 538 U.S. at 98, and which has been defined as "punishment inflicted on criminals by compelling them to quit a city, place, or county for a specified period of time, or for life." United States v Ju Toy, 198 U.S. 253, 269-270, 25 S. Ct. 644, 49 L. Ed. 1040 (1905). Given that definition of banishment, and the Supreme Court's recognition that banishment has in fact been historically regarded as punishment, this Court finds it nearly impossible to understand how any court reviewing SORR's would not make a finding that the penalty has been historically considered a punishment. Yet that is precisely what has happened to date.

Court's reviewing SORR's have devised several arguments to avoid fully addressing the issue of whether residency restrictions constitute banishment. In Lee, for example, the court avoided the banishment issue procedurally, ruling that the defendant had not presented sufficient facts at trial to permit full consideration of the issue by the reviewing court. Lee, 895 So at 1043. The Leroy court sidestepped the issue with the terse finding that the defendant could always find another place to live. Leroy, 828 N.E. 2d at 780. Other courts have concluded that the residency restrictions do not constitute banishment as traditionally understood because the offender could enter into the

restricted zones for other purposes; he simply could not reside there. Doe v Baker, N0. Civ. A. 1:05-CV-2265, 2006 WL 905368 at 4 (Apr 5, 2006).

In this Court's opinion, dissenting judges have been far more intellectually honest concluding that residency restrictions constitute banishment. The dissent in Miller concluded, "The difficulty in finding proper housing prevents sex offenders from living in many Iowa communities. This effectively results in banishment from virtually all of Iowa's cities and towns." Miller, 405 F. 3rd at 724. The dissent in Leroy found Illinois' residency restriction a "substantial limitation on where Leroy could live in his hometown..." and concluded that "to indefinitely expel a man from his family home, and separate him from family members with whom he has lived his entire life, seems decidedly similar to a method of punishment employed in colonial times." Leroy, 828 N.E. 2d at 787. The dissent in Seering concluded residency restrictions constituted banishment because they, "impose an onerous and intrusive obligation on a convicted sex offender, result in community ostracism, and mark the offender as a person who should be shunned by society." Seering, 701 N.W. 2d at 671-672.

This Court concludes that Kentucky's sex offender residency restrictions constitute a form of banishment, a punishment that is historically and traditionally punitive.

The second factor to consider is whether the law promotes the traditional aims of punishment – deterrence and retribution. Smith, 538 U.S. at 102. In finding that Alaska's SORA was not retributive, the Smith court reasoned, without citing any actual data, that the law was reasonably related to sex offenders having unusually high rates of recidivism.

Smith. 538 U.S. at 102. A review of the scientific studies in this area, including those referenced in the "Historical Background" section of this opinion, show that sex offenders are actually less likely to re-offend than other criminals and cast doubt on Smith's assertions to the contrary. Other courts, much like the approach they have taken with the preceding factor, have basically danced around the issue. In Leroy for instance, the court agreed that the Illinois residency restrictions may be deterrent but reasoned that countless laws deter without being considered punishment. Leroy, 828 N.E. 2d at 781. Again, the dissenting opinions in these cases offer a much more straightforward, intellectually honest approach to the issue.

In Leroy for instance, the majority supported its position with the twisted reasoning that the defendant could still visit his mother at her home every day so long as he did not sleep there at night. Leroy, 828 N.E. 2d at 781. The dissent, in its more thoughtful analysis, found such reasoning ironic and actually supportive of the contrary view. The dissent pointed out that as a result of these permissible visits Leroy could be at his mother's home near an elementary school all day long, each and every day, while school was in session and he allegedly posed the greatest risk to children – but he could not spend the night there after school was dismissed and the children returned to their various homes.

> "As previously noted, Patrick Leroy can return "on a daily basis" to the home from which he has been removed. I would assume that on any given visit, he could do the kind of things our legislators feared that he might otherwise do, if he lived there. As my colleagues observe, Leroy has the right to be precisely where the legislators did not want him to be, every morning when the children of Miles Davis Elementary School arrive, and every afternoon when the same children leave. Since school is a daytime event, Leroy has essentially all the access that he had before the State of

> Illinois, for no rational reason, banned him from the place where he wanted to live." Leroy, 828 N.E. 2d at 793.

The dissent thus concluded this result could only be retributive.

> "Absent a tendency to promote retribution, what legitimate purpose would legislators have in removing Patrick Leroy from his home given the fact that he has lived there for 10 years without re-offending, despite his close proximity to hundreds and hundreds of children who have matriculated to Miles Davis Elementary School during that same time span. Id. at 791.

The dissent in Leroy further reasoned that the law's failure to consider sex offenders' prior offenses, case histories, or possible rehabilitation could only be seen as an indicator of legislative intent to punish the offender, not protect the community.

> "Since this Act treats all offenders alike, without consideration of whether a particular offender is likely to re-offend, its retroactive residency restriction promotes and furthers retribution, a traditional aim of punishment. Leroy, 828 N.E. 2d at 791.

The absence of individualized risk assessment of sex offenders even caused concern to Justice Souter, a concurring member of the majority in Smith.

> "Ensuring public safety is, of course, a fundamental regulatory goal (citation omitted) and this objective should be given serious weight in the analyses. But, at the same time, it would be naïve to look no further, given pervasive attitudes toward sex offenders. (Citations omitted) The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." Smith, 538 U.S. at 108-109.

Justice Ginsburg, in her dissent in Smith, voiced similar concerns.

> "The Act applies to all convicted sex offenders, without regard to their future dangerousness....and meriting heaviest weight in my judgment, the

> Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation." Smith, 538 U.S. at 116 – 117.

This Court concludes that Kentucky's sex offender residency restrictions promote retribution, a traditional aim of punishment.

The next factor to consider is whether the law imposes an affirmative disability or restraint. Even the courts that have upheld residency restrictions concede that the statutes under review violate this guidepost by imposing an affirmative restraint. [See Leroy, 828 N.E. 2d at 781, Miller, 405 F. 3rd at 720 – 721, and Seering, 701 N. W. 2d at 668]. Clearly, imposition of an affirmative restraint is intrinsic with SORR's, i.e. the offender cannot reside in the prohibited zone. These same courts, however, then quickly dismiss the importance of this guidepost, terming it insufficient to render residency restrictions punitive.

> "...although we would not characterize the disability or restraint imposed....as minor or indirect, we are not convinced that the presence of this factor alone is sufficient to create a punitive effect from...nonpunitive purpose." Leroy, 828 N. E. 2d at 781.

In the words of countless magicians, "Now you see it, now you don't." The dissent in Leroy did not mince words in its criticism of such judicial prestidigitation.

> "....my colleagues skirt the issue, discounting the residency restriction's ability to promote deterrence, a traditional aim of punishment, just like they dismissed the question of whether this Act's restriction imposes the kind of disability and restraint that carries a punitive effect. In truth, this restriction provides deterrence every bit as effectively as other forms of punishment, a circumstance that no one even questions." Id. At 790.

Dissenting judges have not been so quick to downplay the importance of this factor. They have found this factor significant, in part, because it serves to distinguish

residency restrictions from SORA's. Sex offender registration laws do not place limits on where registrants can live while such limitations are the precise aim of residency restriction laws. This is an important distinction because it indicates that the Supreme Court's reasoning in Smith upholding Alaska's SORA does not provide a similar compelling basis for upholding residency restrictions. In fact, the federal district judge in Miller who found Iowa's residency restrictions unconstitutional cited this very point, finding that the residency restriction "imposed exactly the affirmative restraint that the Supreme Court found lacking in Alaska's sex offender registration schemes." Doe v Miller, 298 F. Supp 2d 844, 870, (S.D. Iowa 2004), rev'd 405 F. 3rd 700 (8th Cir, 2005) cert denied, 126 S. Ct. 757 (2005). On appeal, the dissent in Miller agreed:

> "It (Iowa's SORR) restricts offenders from living in certain areas. Offenders that live within the restricted areas face criminal penalties. In this way, the restraint differs greatly from the sex offender registry in Smith. The Court in that case pointed out that offenders were "free to change...residences." (Citation omitted) The Court also noted that there was no evidence that the measure disadvantaged the offenders in finding housing. (Citation omitted) I would find that the affirmative disability or restraint intrinsic in the residency requirement distinguishes it from the sex offender registry in Smith and weighs in favor of finding the law punitive. Miller, 405 F. 3rd at 725.

The Kentucky Supreme Court upheld our state's SORA using reasoning similar to that of the U.S. Supreme Court in Smith, noting that Kentucky's sex offender "registration requirements did not constitute a disability or restraint; the registration did not place limitations on the activities of the offender..." Hyatt v Commonwealth, 72 S.W. 3rd 566, 572, (Ky. 2002). Unlike registration requirements, residency restrictions do in fact impose an affirmative disability and do place limitations on the activities of the

offender. Arguing that the holdings of Smith and Hyatt should be extended to residency restrictions glosses over this extremely important distinction. Additionally, the court in Hyatt found that "Any potential punishment arising from the violation of the Sex Offender's Registration Act is totally prospective and is not punishment for past criminal behavior." Id at 572. Obviously that same rationale cannot be applied to the residency restrictions challenged herein. The punishment imposed by these statutes, banishment, is not prospective in nature. It is tied to one thing and one thing only; the past crimes of the herein defendants, some of which occurred as long ago as seventeen years. Applying the rationale of Hyatt to Kentucky's residency restrictions would ignore that crucial distinction as well.

This Court agrees with the dissent in Miller and concludes that the affirmative restraint intrinsic in Kentucky's sex offender residency restrictions support a finding that the measure is punitive.

The final two factors which the Court must consider are linked; whether the restriction has a rational connection to a non-punitive purpose and whether the restriction is excessive with respect to that purpose. Residency restrictions, at least in part, are intended to further a non-punitive purpose. They are intended to protect children from sexual assault by known offenders, Leroy, 828 N.E. 2d at 781 – 782. The issue here is not whether the restriction was intended to further, either in whole or in part, a non-punitive purpose. The issue here is whether a rational connection exists between the restriction and that purpose.

Perhaps residency restrictions do bear some relationship to the interest they are intended to serve. Residency restrictions are designed to protect children from known sex offenders. To that end, one could argue, as has the Commonwealth, that those restrictions place children out of sight and beyond senses that could stir perversions of some sex offenders. It would follow then, that the restrictions reduce opportunity and diminish temptation of sex offenders and as such the restrictions bear some degree of reasonableness in relation to their purpose of protecting children.

Such protection, however, is minimal at best and completely illusory at worst. Residency restrictions do not restrict the sex offender from sitting on a bench in or near the very playground which serves to restrict his residency. That same offender can operate his car and "cruise" the area around the very daycare which serves to restrict his residency. He can return to the family home from which he was forced to move, on a daily basis if he so chooses, provided he does not sleep there, and peer out the window in deviant lust at the toddlers frolicking on the playground. While doing so, provided he can conceal his act of self gratification from public view, he can even masturbate. He can do all these things legally, without offending the residency restrictions. Unbelievably, residency restrictions do not even prevent a sex offender from taking up or resuming residency with the victim of his prior lascivious conduct, such as a teenage stepdaughter, so long as the home is located outside of the prohibited zone. If what we seek is to protect children from sex offenders, how do we accomplish that aim by imposing a 1000-foot residency restriction around schools, playgrounds, daycare facilities and the like? If the

offender is still permitted to visit and linger in such areas for protracted periods, so long as he does not sleep there, what actual protection have we provided our children? In truth, residency restrictions appear to be little more than a political placebo, offering false comfort to pacify the public's fear of sex offenders.

Perhaps there is some small class of sex offenders for whom such restrictions do inhibit future offenses. This Court remains unconvinced. Research by the Court found no reliable data establishing a causal connection between the proximity of an offender's home to areas frequented by children with an increased risk of recidivism. The few sparse studies referenced in the "Historical Background" section of this opinion concluded no such connection existed. That fact, when coupled with an offender's ability to lawfully enter and linger in the prohibited areas so long as he does not sleep there, makes the value of such restrictions appear dubious at best. Despite the Miller court's suggestion that "the requirement of a rational connection is not demanding..." Miller, 405 F. 3rd at 721., this Court is of the opinion that the connection between the restrictions and the non-punitive purpose of protecting children is far too tenuous to be deemed rational.

The more salient issue in this area however, is whether the restriction is excessive with respect to that purpose. Several judges have expressed concern over residency restrictions like Kentucky's which, being based on the specious premise that all sex offenders have an extremely high recidivism rate, subject all offenders to the same restrictions with no regard to their actual risk of re-offending. This complete lack of individualized risk assessment gives pause for concern.

Justice Souter, concurring in the Smith opinion, questioned whether "the fact that the [SORA] uses past crimes as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on." Smith, 538 U.S. at 109. Justice Ginsburg, dissenting in Smith criticized the over inclusiveness of Alaska's SORA as "[excessive] in relation to its non-punitive purpose." She noted the inconsistency presented by the situation of one of the Smith respondents; an individual to whom Alaska's registration provisions were being applied yet at the same time an individual whom Alaska courts had twice noted for his successful rehabilitation and an individual to whom the courts had even granted custody of a child of the same age and gender as his previous victim. Id. At 117-118. Judge Kuehn, dissenting in Leroy, criticized the disconnect between actual risk of recidivism and uniformly applied residency restrictions:

> "A restriction imposed without consideration for the likelihood of a particular offender to re-offend has to be grounded, at least in part, in furtherance of retribution. Here, the restriction is imposed without regard to the particulars of the offense, including the offender's choice of victim. The nature of the crime and the choice of the victim constitute important considerations in predicting what a prior offender's proximity to a given child-laden facility could mean in terms of re-offending. For example, a man branded a child sex offender for having consensual sex with a 17-year-old girl could safely reside in close proximity to toddlers gathered at a day care center but present a problem living across the street from a high school. On the other hand, a pedophile grandfather, branded a child sex offender for fondling his young grandchildren and their friends, presents a potential problem living across the street from a daycare center but could safely reside in close proximity to a high school." Leroy, 828 N.E. 2d at 791.

Judge Melloy, dissenting in Miller, was also critical of the complete lack of individualized risk assessment.

> "Though I believe a rational connection exists between the residency restriction and a non-punitive purpose, I would find that the restriction is excessive in relation to that purpose. The statute limits the housing choices of all offenders identically, regardless of their type of crime, type of victim, or risk of re-offending. The effect of the requirement is quite dramatic: many offenders cannot live with their families and/or cannot live in their home communities because the whole community is a restricted area. This leaves offenders to live in the country or in small, prescribed areas of towns and cities that might offer no appropriate, available housing. In addition, there is no time limit to the restrictions.....the severity of residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders' lives, makes the residency restriction excessive. Miller, 405 F. 3rd at 725-726.

Cogent models of individualized criteria exist with which to assess an offender's actual risk to re-offend. Nebraska, for example, has developed an assessment instrument which is used to determine both registration and level of custody requirements placed upon sex offenders. The instrument evaluates the following factors: 1) Whether the offender's conduct was characterized by repetitive or compulsive behavior; 2) Whether the offender's conduct was against a child; 3) Whether the offenses involved the use of a weapon, violence, or inflicted serious bodily harm; 4) The number, date and nature of prior offenses; 5) Whether psychological profiles of the offender indicate a risk of recidivism; 6) The offender's response to treatment; 7) Recent threats by the offender or expressions of intent to commit additional crimes; 8) Behavior of the offender while confined; 9) Proof of advanced age or debilitating illness of the offender; 10) Torture or mutilation of the victim or the infliction of death; 11) Abduction and transportation of the victim to another location; 12) Threats to re-offend sexually or violently; and 13) Recent clinical assessment of dangerousness. [See NEB. REV. STAT. Section 29-4013. See also

Slansky v Neb. State Patrol. 685 N.W. 2d 335 (Neb. 2004)] Nebraska state officials developed these individualized criteria in consultation with a University of Nebraska professor of law and psychology who studied sex offenders to determine which factors most closely related to the actual risk of recidivism. There is no reason why a similar approach could not be adopted by Kentucky and other states in connection with residency restrictions.

Kentucky and other states could easily tie residency restrictions to some form of individualized risk assessment as Nebraska has done. Residency restrictions are no small matter. Not only do they dictate where an offender may or may not reside, but collaterally, they could impact where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to residential alcohol and drug abuse rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender. Make no mistake; residency restrictions carry major consequences above and beyond the location of one's home. Kentucky's statutes paint with a very broad brush and subject all offenders to restriction without the slightest effort to assess the actual risk to re-offend. It is this aspect of Kentucky law which causes greatest concern to this Court.

Not only does Kentucky's statute suffer from a failure to assess the actual risk to re-offend, it also potentially subjects non-sex offenders to its onerous reach. For example, an individual that car jacks an automobile and its driver could quite easily be convicted of kidnapping (KRS 509.040) or unlawful imprisonment (KRS 509.020) under Kentucky

law. If we assume for the sake of this example that there was a 17-year-old passenger in the back seat of that automobile, the offender would be subjected to lifetime registration and residency restriction as if he were a sex offender. [See KRS 17.500(3)(a)(1), KRS 17.520(2)(a) and KRS 17.545(1).]. Likewise, the owner of the local Blockbuster Video store who hires high school students as part time clerks and who rents a single movie which is found to be obscene by local community standards could quite easily be convicted of using minors to distribute obscene material under KRS 531.040. Such conviction would subject the video store owner to twenty-year sex offender registration and residency restrictions. [See KRS 17.500(3)(a)(9), KRS 17.520(3) and KRS 17.545(1)]. Absent pure retribution, what legitimate purpose could legislators have in subjecting car thieves and video store owners to sex offender residency restrictions?

The excessiveness of Kentucky's residency restrictions is further heightened by their fluidity. An area within which sex offender residency is permitted today could be converted to an off-limits area tomorrow simply by the opening of a playground, school, or daycare facility. A small city, of which there are dozens in Northern Kentucky, need only strategically position a few swing sets throughout their borders, deeming such areas public playgrounds, to completely ban sex offenders from residing within the city's boundaries. Of course, once City A has succeeded in effecting a total ban on sex offenders it will quickly be followed by City B and City C until ultimately there is no place where sex offenders can legally reside. While this may be viewed as an abstract, extreme hypothetical situation in rural areas of Kentucky containing few cities, a quick

glance at the map of Northern Kentucky and its plethora of local units of government leads to the conclusion that this hypothetical is not the least bit unrealistic.

In fact, the harsh reality of a lack of legal housing available to sex offenders subject to residency restrictions is already striking home in at least one jurisdiction. Less than two years after the 2005 enactment of a 2,500 foot residency restriction for sex offenders, Miami-Dade County Florida finds itself housing sex offenders under expressway overpasses because there simply is no other legal housing available. State officials cite the housing crisis as one cause of a recent increase in the number of sex offenders absconding supervision altogether, thereby resulting in an overall decrease in public safety; certainly not the situation envisioned by lawmakers when such measures are enacted.[16]

This problem is potentially further exacerbated by the absence of a statutory definition of terms such as "playground." What constitutes a publicly owned playground for purposes of the statute? For example, should Covington's entire Devou Park, a 700 acre tract of land, several hundred acres of which are completely undeveloped and inaccessible woodland, be considered a "public playground" within the meaning of the statute simply because a few isolated areas therein contain swing sets and swimming pools? What purpose is served by prohibiting sex offenders from living within 1000 feet of undeveloped, unoccupied and unused woodland? And given the weight of judicial opinions in this area to date, is there any doubt that terms such as "playground" will be

[16] John Zarrella and Patrick Oppmann, Florida Housing Sex Offenders Under Bridge, CNN.com, April 6, 2007; available at http://www.cnn.com./2007/law/04/05/bridge.sex.offenders/index.html

afforded increasingly liberal interpretation with an eye toward further expansion of the "loci prohibitum?"

As to these two final factors, this Court finds that the residency restrictions imposed by Kentucky law do not bear a rational connection to the interests they are intended to serve and are excessive in relation to any non-punitive purpose which can be inferred.

It is therefore the holding of this Court that the statutes in question constitute a punitive, not a remedial scheme. Not only has the Kentucky General Assembly clearly expressed its intent to create a punitive scheme, but the statutes in question are so punitive in effect as to negate any inferred contrary intent to create a civil regulatory scheme. As such, application of these statutes to the defendant's herein, each of whom have triggering sex offender convictions which pre-date the effective date of the statute, constitutes an ex post facto punishment which is barred by both the United States Constitution and the Kentucky Constitution.

REMAINING CHALLENGES WILL NOT BE ADDRESSED

In addition to their Ex Post Facto claim, the defendants have also asserted that Kentucky's residency restrictions violate constitutional provisions in the areas of equal protection, substantive due process, and inalienable property rights. The Court chooses, at

this time, not to address those remaining, unresolved issues. Lest anyone accuse this Court of shirking its duty in this regard, allow the Court to set forth its rationale.

First and foremost is the fact that the Court's ruling on the defendants' Ex Post Facto claim is, in itself, dispositive of the action. The Court's ruling that Kentucky's residency restrictions violate ex post facto protections results in dismissal of the charges, at least for now. The Court is cognizant that the Commonwealth and the defendants all view the herein matters as "test cases." Appeal of this Court's opinion was a near certainty from the outset, regardless of whose side prevailed. If this Court's decision is ultimately reversed and remanded by the appellate courts, a distinct possibility, time remains to address the unresolved matters. This Court is also cognizant of the fact that multiple similar challenges have been filed in courts across this nation.[17] There is no doubt that the issues not addressed in this opinion will be addressed, in full or in part, by many if not all of these similar actions. These cases will hopefully provide a trove of persuasive authority upon which to draw guidance. Some may even provide binding, precedent setting authority. Thus this Court believes, as a mere entry level trial court, that the exercise of judicial restraint is appropriate at this juncture. Waiting to rule on issues which are not necessary for the disposition of the cases at this time, thereby allowing development of a more comprehensive body of case law appears to this Court to be the prudent approach to the remaining issues.

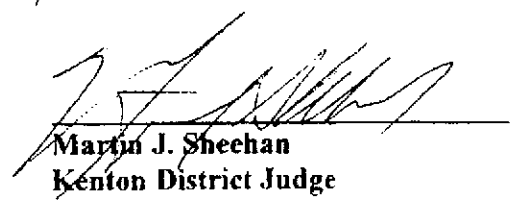
[17] See Doe v Fletcher, 3:06CV-474-S, U.S. Dist Ct., Western Dist of Ky., and Doe v Indianapolis, 1:06-CV-865-RLY-WTL, U.S. Dist. Ct., Southern Dist of Ind.

Additionally, the exorbitant case load of the Kenton District Court makes fully addressing the remaining issues an arduous task that could negatively impact the administration of justice in our county. It should be obvious, even to the most casual reader of this decision, that significant time has been devoted to researching and rendering an opinion on the Ex Post Facto issue alone. Full consideration of the remaining three issues would no doubt require substantially more time. Time is a precious and limited commodity in Kenton District Court. This Court believes that dedicating substantial additional hours to the resolution of issues not necessary at this time to final disposition of these matters constitutes an unwise allocation of limited judicial resources. The possibility that other currently pending cases may provide persuasive or precedent setting authority on these same issues further supports the exercise of judicial restraint at this time.

On a final note, this Court would be remiss if it did not compliment respective counsel on the legal briefs submitted herein. Too often in District Court, important legal matters are glossed over with little more than a wink and a nod, a criticism that can fairly be lodged not only against some attorneys practicing in such courts but also some of the judges presiding therein. It was clear from the briefs submitted herein that counsel on both sides of the aisle appreciated the legal import of the issues presented. The briefs submitted were well researched and extremely beneficial to the Court. This Court's compliments and gratitude are extended to counsel herein for their efforts.

IT IS THEREFORE ORDERED AND ADJUDGED that the current charges against the herein defendants be, and hereby are, dismissed.

Dated this 20 day of April, 2007.



Martin J. Sheehan
Kenton District Judge

cc: **case files**
Hon. Amy Burke, Asst. Kenton Co. Atty.
Hon. George Thompson, Asst. Kenton Co. Atty.
Hon. Brad Fox, Atty. For Defendant Baker
Hon. Lisa Wenzel, Atty. For Defendant Gosney
Hon. Don Nageleisen, Atty. For Defendant Johnson
Hon. Elizabeth Dunn, Public Defender for remaining Defendants
Hon. Michael Hummel, Public Defender for remaining Defendants

DEFENDANT	TRIGGERING SEX OFFENSE CONVICTION	DATE & COURT OF TRIGGERING CONVICTION
Michael Baker	Rape 3rd Degree	3/31/95 Kenton Circuit 94-CR-427
Dale Becker	Corruption of a Minor Gross Sex Imposition	2/11/92 Court Unclear (Possible Clermont Co. OH) Common Pleas
James Deaver	1) Sex Abuse 2nd Degree (2cts) 2) Incest	1) 8/6/98 Campbell Circuit 98-CR-061 and 2) 8/20/98 Campbell Circuit 98-CR-060
Richard Foster	Sodomy 1st Degree	10/24/90 Kenton Circuit 90-CR-048
James Gosney	Sex Abuse 1st Degree	10/3/97 Boone Circuit 97-CR-062
Jeffrey Johnson	Rape 3rd Degree	5/5/98 Boone Circuit 97-CR-196
Lawrence Jones	Sex Abuse 1st Degree	1/30/98 Kenton Circuit 97-CR-497
Kenneth McDaniel	Gross Sexual Imposition (3cts) and Compelling Prostitution (5cts)	7/31/95 Hamilton (OH) Common Pleas 95-CRA-005948E
Robert Oberer	Sex Abuse 1st Degree	5/23/95 Kenton Circuit 9-CR-019
Charles Tolbert	Sex Abuse 1st Degree (2cts) and Sodomy 2nd Degree	3/19/90 McCracken Circuit 90-CR-018
Robert Wagoner	Use of a Minor in a Sexual Performance	4/10/01 Kenton Circuit 00-CR-673 (Discharged from Probation 4/1/06)

APPENDIX A