

# Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois under the Ex Post Facto Clause

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Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>1</sup>

¶1 State laws restricting where convicted sex offenders can legally reside first came into common use in the mid-1990s.<sup>2</sup> Since then, a number of states and municipalities, including Illinois, have implemented restrictions prohibiting sex offenders<sup>3</sup> from living within certain distances from schools, parks, and other areas where children gather.<sup>4</sup> These prohibited distances range from 500 to 2000 feet,<sup>5</sup> and often encircle multiple entities within a community. As a result, sex offenders are often severely limited as to where they can legally reside. These laws have forced some offenders to remain in prison<sup>6</sup> or live in makeshift tent cities because there is nowhere else for them to live.<sup>7</sup> In Georgia, for example, state probation officials advised sex offenders to live in a muddy

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<sup>1</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

<sup>2</sup> See, e.g., ALA. CODE § 15-20-26(a) (1999); CAL. PENAL CODE § 3003(g) (1998); DEL. CODE tit. 11, § 1112 (1995); FLA. STAT. § 947.1405(7)(a)(2) (1995); GA. CODE § 42-1-13(b) (1996).

<sup>3</sup> Each state has its own list of crimes that subject an individual to the label of “sex offender” or “child sex offender.” In Illinois only child sex offenders are prohibited from living within 500 feet of schools, playgrounds, daycares and other areas where individuals under age 18 gather. 720 ILL. COMP. STAT. 5/11-9.3(b-5) (2010); 720 ILL. COMP. STAT. 5/11-9.4(b-5) (2010).

<sup>4</sup> See generally Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. 483 (2007); Justin H. Boyd, Comment, *How To Stop A Predator: The Rush To Enact Mandatory Sex Offender Residency Restrictions and Why States Should Abstain*, 86 OR. L. REV. 219 (2007) (collecting various sex offender laws).

<sup>5</sup> See HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 139–141 (Sept. 2007), available at <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers-0> (listing residency laws in different states).

<sup>6</sup> Megan Twohey, *St. Leonard Closes Doors to Sex Offenders*, CHI. TRIB., Dec. 6, 2009, [http://articles.chicagotribune.com/2009-12-06/news/0912050317\\_1\\_offenders-halfway-nursing-homes](http://articles.chicagotribune.com/2009-12-06/news/0912050317_1_offenders-halfway-nursing-homes).

<sup>7</sup> *Homeless Georgia Sex Offenders Ordered out of Woods Camp*, FOXNEWS.COM, Sept. 29, 2009, <http://www.foxnews.com/story/0,2933,556300,00.html>.

camp on the outskirts of the county until they could locate a legally permissible home.<sup>8</sup> In Florida, some sex offenders were forced to live under a remote bridge because they could not find housing that complied with the county's residency law.<sup>9</sup> In Illinois, 1000 sex offenders are currently eligible for parole but the state refuses to release them from prison because they cannot secure suitable housing.<sup>10</sup> These are but some consequences of the increasingly strict regulatory scheme confronting sex offenders in the United States today.

¶2 This Comment explores whether a viable challenge to residency restrictions on child sex offenders in Illinois exists under the ex post facto clauses of the federal and state constitutions. It also recounts the history of sex offender regulation in Illinois and explores the social and political environment that fostered the emergence of residency restrictions in the state. Part I provides a brief overview of the history and purpose of the ex post facto clause. It also highlights the recent resurgence of preventive lawmaking; that is, laws that work to prevent crime rather than detect and investigate it, and laws that impose direct restraints on the liberty of those considered particularly dangerous by the state. Part II briefly recounts the legislative history of sex offender regulation in Illinois, and provides an overview of the political and social realities that shaped the legislative debate. Part III uses recent state court decisions in Illinois, Indiana, and Kentucky to evaluate the constitutionality of residency restrictions on child sex offenders in Illinois, ultimately arguing that such restrictions violate the ex post facto clauses of the federal and state constitutions. Finally, this Comment concludes by considering the need for judicial intervention given the resurgence of the preventive state.

## I. AN INTRODUCTION TO THE EX POST FACTO CLAUSE AND THE PREVENTIVE STATE

¶3 Both the U.S. Constitution and the Illinois Constitution contain ex post facto clauses that prohibit Congress and the various state legislatures from passing laws that impose or increase punishment for criminal acts after those acts are committed.<sup>11</sup> The U.S. Constitution contains not one, but two, explicit ex post facto prohibitions, “mak[ing] clear the Framers' near obsessive concern over the threat of retroactively-designed laws.”<sup>12</sup> Alexander Hamilton, for example, considered the ex post facto prohibitions contained in the Constitution among the “greate[st] securities to liberty and republicanism.”<sup>13</sup> James Madison claimed that “ex post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation.”<sup>14</sup> One leading delegate to the Constitutional Convention of 1787, Judge Oliver Ellsworth, went so far as to say that an explicit Constitutional prohibition against ex post facto legislation

<sup>8</sup> *Id.*

<sup>9</sup> John Pain, *Miami Sex Offenders Get OK To Live Under a Bridge—Law Makes Housing All But Unobtainable*, CHI. TRIB., Apr. 7, 2007, at 4.

<sup>10</sup> Twohey, *supra* note 6.

<sup>11</sup> U.S. CONST. art. I, § 9, cl. 3 (“No . . . ex post facto Law shall be passed.”); U.S. CONST. art. I, § 10, cl. 1 (“No state shall enter into any . . . ex post facto Law.”); IL CONST. art. I, § 16 (“No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed.”).

<sup>12</sup> Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275 (1998).

<sup>13</sup> THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>14</sup> THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

was unnecessary because “there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves.”<sup>15</sup>

¶4 The location of these clauses within the Constitution itself additionally demonstrates the importance of the prohibition. According to scholar Breck McAllister:

That it was considered necessary to include [two ex post facto clauses] in the original Constitution is a commentary upon the importance attributed to them by the Framers. Such matters as freedom of religion, freedom of speech, freedom of the press, etc., came later in the first ten amendments and then only as restraints upon the federal government.<sup>16</sup>

The ex post facto provision contained in Article I, Section 10, however, applied directly to the states.<sup>17</sup>

¶5 The language of Illinois’ ex post facto clause mirrors that of the Federal Constitution and Illinois courts interpret the state’s ex post facto prohibition in lock step with the United States Supreme Court’s interpretation of the Federal Ex Post Facto Clauses.<sup>18</sup> Thus, the same parameters that constrain Congress’s ability to act also constrain the Illinois legislature’s ability to do the same.

¶6 The Federal Constitution, however, fails to clearly define the scope of its ex post facto prohibitions, making their application difficult at times. The United States Supreme Court first considered what types of laws should be prohibited as ex post facto laws in the 1798 case of *Calder v. Bull*.<sup>19</sup> The Court concluded that the federal ex post facto prohibitions applied only to criminal, not civil, laws; and the Court defined four types of criminal laws that the Ex Post Facto Clauses were designed to prevent.<sup>20</sup> These categories, which still hold true today, include:

- 1st. Every law that makes an action, done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action.
- 2nd. Every law that *aggravates* a crime, or makes it greater than it was, when committed.
- 3rd. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.
- 4th. Every law that alters the *legal rules of evidence*, and

<sup>15</sup> Robert G. Natelson, *Statutory Retroactivity: The Founders’ View*, 39 IDAHO L. REV. 489, 515 (2003) (quoting RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., 1937)).

<sup>16</sup> Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CAL. L. REV. 269, 269 (1927).

<sup>17</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>18</sup> *Barger v. Peters*, 645 N.E.2d 175, 176 (Ill. 1994) (“[T]he drafters of our modern constitution intended the Illinois *ex post facto* clause to do no more than conform to the Federal Constitution’s general prohibition on the States. Thus, in construing this State’s constitutional provision, we are without a basis to depart from the Supreme Court’s construction of the Federal *ex post facto* clause. And, in fact, this court has long interpreted our own constitutional provision in step with Supreme Court pronouncements.”) (internal citation omitted).

<sup>19</sup> 3 U.S. 386 (1798).

<sup>20</sup> *Id.* at 390, 399.

receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.<sup>21</sup>

¶7 According to McAllister, “This oft-quoted dictum is a recognition that the phrase ex post facto is a technical one, to be filled by the court with an esoteric meaning.”<sup>22</sup> Today, however, there are three generally accepted reasons for prohibiting ex post facto laws.<sup>23</sup> The first is to provide fair warning of the law’s effect.<sup>24</sup> The second is to ensure proper reliance on the law.<sup>25</sup> And the third is to provide a check on legislative power.<sup>26</sup>

¶8 This third reason was of particular concern to the Framers because the Framers “commonly regarded ex post facto laws . . . as weapons of tyrants and despots used to achieve politically motivated results.”<sup>27</sup> By denying Congress and the state legislatures the ability to use these weapons, the Framers hoped to limit the abuse of government power directed at political enemies.<sup>28</sup> Additionally, “[b]y disallowing retroactive retributive measures completely, the Framers prevented legislatures from using [these measures] against any particular group.”<sup>29</sup>

The United States Supreme Court has also recognized the importance of the Ex Post Facto Clauses in keeping legislative power in check. Upon considering the types ex post facto laws feared by the Framers, the Court observed in *Calder* that:

The prohibition against . . . ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws. . . . The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender: as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice . . . the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law.<sup>30</sup>

Both the Framers and the United States Supreme Court, therefore, recognized early on the need to limit the legislature’s power to retroactively punish its citizens.

¶9 Throughout history, the Federal Ex Post Facto Clauses have served to cabin the punitive powers of the state. For example, the United States Supreme Court has used the Ex Post Facto Clause to strike down state legislation requiring teachers, lawyers,

<sup>21</sup> *Id.* at 390 (emphasis in original).

<sup>22</sup> McAllister, *supra* note 16, at 271.

<sup>23</sup> See Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1496–1498 (1975) (outlining the theoretical justifications for prohibiting ex post facto laws).

<sup>24</sup> *Id.* at 1496.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1498.

<sup>27</sup> *Id.* at 1500.

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

<sup>29</sup> *Id.*

<sup>30</sup> *Calder v. Bull*, 3 U.S. 386, 389 (1798) (emphasis in original omitted).

clergymen, and others to take an “Oath of Loyalty” denying allegiance to the Confederacy before continuing to work in their chosen profession;<sup>31</sup> to prohibit states from retroactively extending the statute of limitations for past sexual offenses;<sup>32</sup> and to prohibit states from applying revised sentencing guidelines to individuals who committed their crimes prior to the guidelines’ effective date.<sup>33</sup> Implicit in these decisions is the recognition that it is fundamentally unfair to retroactively punish individuals for their past actions, and to do so exceeds the bounds of the punitive state.

¶10 But today, to use a phrase coined by Carol Steiker, the preventive state, not the punitive state, is “all the rage.”<sup>34</sup> In the preventive state,<sup>35</sup> “the paradigm of governmental social control [shifts] from solving and punishing crimes that have been committed, to identifying ‘dangerous’ people and depriving them of their liberty *before* they can do harm.”<sup>36</sup> According to Steiker, the expansion of the preventive state is particularly evident in two areas of law.<sup>37</sup> The first area involves giving the police more authority to prevent, as opposed to detect and investigate, crime. For example, laws that allow police to search people without individualized suspicion,<sup>38</sup> to stop and frisk people without probable cause,<sup>39</sup> or to order suspected gang members to disperse from a loitering group.<sup>40</sup> Another area where the expansion of the preventive state is evident is in the emergence of laws that impose direct restraints on the liberty of those considered particularly dangerous by the state. For example, pre-trial detention laws, sex offender registration and community notification statutes, and civil commitment laws, which allow the indefinite commitment of certain sexual criminals.<sup>41</sup> In both of these areas of law, the traditional role of the state has expanded from that of punisher to that of preventer.

¶11 The rise of the preventive state is a relatively recent phenomenon. According to Steiker, “The preventive state became possible only as the [twentieth] century progressed, with the invention of modern police forces and total institutions like the prison, the mental hospital and the home for juvenile delinquents.”<sup>42</sup> As a result, the limits of the preventive state are less defined than those of the punitive state, which the Framers actively debated and directly incorporated into the Constitution.<sup>43</sup> Again, according to Steiker:

<sup>31</sup> *Cummings v. Missouri*, 71 U.S. 277 (1866).

<sup>32</sup> *Stogner v. California*, 539 U.S. 607 (2003).

<sup>33</sup> *Miller v. Florida*, 482 U.S. 423 (1987).

<sup>34</sup> Carl S. Steiker, *Forward: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774 (1998).

<sup>35</sup> “State” in this context refers to sovereign governmental power, not one of the fifty states.

<sup>36</sup> Eric Janus, *The Preventative State: Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576, 576 (2004).

<sup>37</sup> Steiker, *supra* note 34, at 774–776.

<sup>38</sup> See *Maryland v. Buie*, 494 U.S. 325 (1990) (upholding a limited protective sweep of a house by police).

<sup>39</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding the search of a person without probable cause provided the police have reasonable suspicion that the person had committed, was committing, or was about to commit a crime).

<sup>40</sup> See *Chicago v. Morales*, 687 N.E.2d 53 (Ill. 1997) (striking down the City of Chicago’s gang loitering ordinance, which allowed the police to order individuals to disperse if the officer believed the group contained at least one gang member, as void for vagueness).

<sup>41</sup> Steiker, *supra* note 34, at 775–776.

<sup>42</sup> *Id.* at 778.

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

At the time of the drafting and ratifying of the Constitution, the dangers of the punitive state were well known. Thus, the Founders were careful to include in our foundational text . . . references . . . to particular criminal processes and protections in order to cabin appropriately the punitive power of the new federal government.<sup>44</sup>

Further:

The limits of the punitive state have been explored extensively (if not resolved successfully) both by courts and legal commentators. In contrast, courts and commentators have had much less to say about the related topic of the limits of the state not as punisher (and thus, necessarily as investigator and adjudicator of criminal acts) but rather as preventer of crime and disorder generally.<sup>45</sup>

¶12 There are, however, some limits that currently exist on powers of the preventive state. The United States Supreme Court has concluded, for example, that the law may not single out one group of people for disfavored treatment based solely on race.<sup>46</sup> The Court has also established a hierarchy of liberty interests, and afforded greater protection to those rights considered “fundamental.”<sup>47</sup> Finally, the Court has instituted a strict set of criminal procedures to limit the government’s ability to deprive suspected criminals of privacy and liberty.<sup>48</sup> As a result, according to Eric Janus, “[t]he government’s efforts at radical prevention have, in the last half century, [been] met with diminishing success, as the courts have erected some important constitutional bulwarks against excessive erosions of liberty in the name of prevention.”<sup>49</sup>

¶13 But, recent sex offender laws threaten to undercut this progress. According to Janus, “by re-introducing and re-legitimizing the concept of the degraded other,” recent sex offender laws “rationalize a degraded system of justice, in which the normal protections of the Constitution do not apply.”<sup>50</sup> The next section recounts the emergence of sex offender laws in Illinois, and considers the rise of the preventive state as it relates to sex offender regulation in the state.

## II. SEX OFFENDER REGULATIONS IN ILLINOIS AND THE RISE OF THE PREVENTIVE STATE

¶14 The statutory scheme regulating non-institutionalized<sup>51</sup> sex offenders in Illinois is comprised of three basic components: the Sex Offender Registration Act (SORA), which

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

<sup>45</sup> *Id.* at 773–774.

<sup>46</sup> Janus, *supra* note 36, at 582.

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.* at 576.

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

<sup>51</sup> This Comment discusses only those laws that affect sex offenders once they are released from prison. Illinois also has a civil commitment program for sex offenders. The Sexually Violent Persons Commitment Act allows the indefinite civil commitment of those sex offenders considered most likely to re-offend. 725 ILL. COMP. STAT. 207/1 (2010).

requires convicted sex offenders to register certain personal information with the state;<sup>52</sup> the Sex Offender Community Notification Law (SOCNL), which requires the State Police to make sex offender information available to the public via the Internet;<sup>53</sup> and Sections 5/11-9.3(b-5) and 5/11-9.4(b-5) of the Illinois Criminal Code (“Illinois’ residency statute” or “Illinois’ residency law”), which prohibits child sex offenders from residing within 500 feet of schools, playgrounds, child care institutions, daycares and facilities providing programs or services directed towards persons under eighteen years of age.<sup>54</sup> SORA and SOCNL apply to all sex offenders,<sup>55</sup> whereas the Illinois’ residency statute applies only to child sex offenders.<sup>56</sup>

¶15 A sex offender is an individual who has been convicted<sup>57</sup> of at least one of over thirty different sex crimes.<sup>58</sup> Generally, a child sex offender is a sex offender who committed his or her sex crime against a person under age eighteen.<sup>59</sup> Both types of

<sup>52</sup> Sex Offender Registration Act, 730 ILL. COMP. STAT. 150/1 (2010).

<sup>53</sup> Sex Offender Community Notification Law, 730 ILL. COMP. STAT. 152/101 (2010).

<sup>54</sup> 720 ILL. COMP. STAT. 5/11-9.3(b-5) (2010); *id.* at 5/11-9.4(b-5).

<sup>55</sup> 730 ILL. COMP. STAT. 150/2(A)–(C); *id.* at 152/105.

<sup>56</sup> 720 ILL. COMP. STAT. 5/11-9.3(c)(2.5); *id.* at 5/11-9.4(d)(2.5).

<sup>57</sup> 730 ILL. COMP. STAT. 150/2(B). An individual is required to register as a sex offender if he or she is found not guilty by reason of insanity of a registerable offense; is the subject of a finding not resulting in an acquittal of a registerable offense; is convicted or adjudicated for a violation of federal law, the law of another state, the Uniform Code of Military Justice, or a foreign country law that is substantially equivalent to a registerable offense; is a juvenile adjudicated delinquent for any registerable offense; or is an individual adjudicated as being sexually dangerous or sexually violent. *Id.*

<sup>58</sup> *Id.* at 150/2(B)–(C). A felony or misdemeanor conviction of any of the following offenses requires registration as a sex offender: child pornography, aggravated child pornography, indecent solicitation of a child, sexual exploitation of a child, custodial sexual misconduct, sexual misconduct with a person with a disability, soliciting for a juvenile prostitute, patronizing a juvenile prostitute, keeping a place of juvenile prostitution, juvenile pimping, exploitation of a child, grooming, traveling to meet a minor, criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual abuse, aggravated criminal sexual abuse, or ritualized abuse of a child; or kidnapping, aggravated kidnapping, unlawful restraint, or aggravated unlawful restraint when the victim is a person under eighteen years of age and the defendant is not a parent of the victim and the offense was sexually motivated as defined in Section 10 of the Sex Offender Management Board Act and the offense was committed on or after January 1, 1996; or first degree murder when the victim was under eighteen years of age and the defendant was at least seventeen years of age at the time of the offense, and the offense was sexually motivated as defined in Section 10 of the Sex Offender Management Board Act; or sexual relations within families committed on or after June 1, 1997; or child abduction committed by luring or attempting to lure a child under sixteen years of age into a motor vehicle, building, house trailer, or dwelling place without the consent of the parent or lawful custodian of the child for other than a lawful purpose, and the offense was sexually motivated as defined in Section 10 of the Sex Offender Management Board Act, and the offense was committed on or after January 1, 1998; or any of the following offenses if committed on or after July 1, 1999 and when the victim was under eighteen years of age: forcible detention if the offense was sexually motivated as defined in Section 10 of the Sex Offender Management Board Act, solicitation for a prostitute, pandering, patronizing a prostitute, or pimping; or the following offenses if committed on or after July 1, 1999: indecent solicitation of an adult, or public indecency for a third or subsequent conviction; or permitting sexual abuse when the offense was committed on or after August 22, 2002. *Id.*

<sup>59</sup> 720 ILL. COMP. STAT. 5/11-9.3(c)(2.5); *id.* at 5/11-9.4(d)(2.5). Under Illinois’ residency statute, a child sex offender is an individual convicted of any of the following: child luring, aiding or abetting child abduction, indecent solicitation of a child, indecent solicitation of an adult, soliciting for a juvenile prostitute, keeping a place of juvenile prostitution, patronizing a juvenile prostitute, juvenile pimping, exploitation of a child, child pornography, aggravated child pornography, predatory criminal sexual assault of a child, ritualized abuse of a child; or a violation of any one of the following when the victim is under eighteen years of age: criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse; or a violation of any one of the following when the victim is under age eighteen years of age and the defendant is not a parent of the victim: kidnapping, aggravated kidnapping,

offenders must register with local police, but, as discussed below, only child sex offenders are restricted as to where they may legally reside.

### A. Sex Offender Registration

¶16 The first component of Illinois' regulatory scheme was introduced and adopted in 1986. The Habitual Child Sex Offender Registration Act (HCSORA) required "habitual" child sex offenders to register with police within thirty days of their release from prison and remain registered for ten years.<sup>60</sup> Only four sexual offenses warranted registration under HCSORA,<sup>61</sup> and registration was required only after the conviction of a second or subsequent offense.<sup>62</sup> Failure to register with police was a Class A misdemeanor,<sup>63</sup> punishable by less than one year in prison and up to \$1000 in fines.<sup>64</sup>

¶17 As indicated by the HCSORA floor debate, lawmakers believed sex offenders posed a serious threat to the community. According to the bill's chief sponsor, State Representative Terry Parke, HCSORA was one of the most important laws the legislature would consider that year.<sup>65</sup> "[W]e are having an epidemic in Illinois . . . [of] sex crimes against our children," claimed Representative Parke.<sup>66</sup> "We must remember that pedophiles are compulsive and repetitive," echoed State Representative Robert Regan, "[t]hey have never been cured."<sup>67</sup>

¶18 Although HCSORA received strong support in both Houses, some lawmakers were concerned about the liberty interests at stake. State Representative Larry Hicks claimed it was "wrong" to "tell criminals once they've been rehabilitated and have served their time, that we're going to then register them and try to brand them for years to come."<sup>68</sup> State Representative Anthony Young similarly cautioned:

I understand what a sensitive area this is, but at the same time I think this House would be establishing a precedent that would be extremely dangerous—the precedent being making someone who has served their

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unlawful restraint, or aggravated unlawful restraint. *Id.* at 5/11-9.3(c)(2.5); *id.* at 5/11-9.4(d)(2.5).

<sup>60</sup> ILL. REV. STAT. ch. 38, para. 221, 223, 227 (1987).

<sup>61</sup> *Id.* at para. 222 § 2(B). Registerable offenses included: criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, and aggravated criminal sexual abuse when the offense was a felony.

<sup>62</sup> *Id.* at para. 222 § 2(A). Specifically, a "habitual child sex offender" was any person who, after July 1, 1986, was convicted a second or subsequent time of any of the sex offenses or attempts to commit any of the offenses set forth in the Act. Multiple convictions resulting from the same act or from offenses committed at the same time counted as one conviction under the Act.

<sup>63</sup> *Id.* at para. 230 § 10.

<sup>64</sup> *Id.* at para. 1005 § 8-3(a)(1); *id.* at para. 1005 § 8-9-1(a)(2).

<sup>65</sup> H. Transcription Deb., 84th Gen. Assemb., at 208 (Ill. June 23, 1986).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 212. According to Representative Regan, requiring repeat child sex offenders to register with local authorities would allow people to know when a sex offender who was going to offend "again and again and again" moved into their community. *Id.* Interestingly enough, however, the intent of the bill was not community notification. When pressed by a fellow lawmaker about how the community would know if a habitual child sex offender moved into the neighborhood, Representative Parke claimed that community notification was "not the intent of the legislation." Instead, the purpose of the Act was to notify local police, not the public, when a habitual child sex offender moved into the area; any "information [was] to be held in confidentiality," and public inspection of registration information was strictly prohibited under the Act. *Id.*; see also ILL. REV. STAT. ch. 38, para. 229 (stating that public inspection of registration data is prohibited, and it is a Class B misdemeanor to permit the unauthorized release of registration information).

<sup>68</sup> H. Transcription Deb., 84th Gen. Assemb., at 216 (Ill. June 23, 1986).

time and paid the price for the crimes they have committed . . . to register their name and address . . . I wonder if [this bill] could withstand constitutional scrutiny. . . . This is a bad precedent.<sup>69</sup>

Despite Representative Young's concerns, HCSORA easily passed the House,<sup>70</sup> unanimously passed the Senate,<sup>71</sup> and went into effect on August 15, 1986.<sup>72</sup> The modern era of sex offender registration had begun.

¶19 The next significant change to Illinois' registration statute came six years later when the legislature deleted the term "habitual" from HCSORA and required every child sex offender to register with local police.<sup>73</sup> State Representative Frank Mautino proposed the change in response to the kidnapping and murder of six-year-old Kahla Lansing, who lived in his district in Spring Valley, Illinois.<sup>74</sup> Representative Mautino's bill created the Child Sex Offender Registration Act (CSORA), which required those convicted of any one of five sexual offenses to register with local police after their first conviction.<sup>75</sup> It is unlikely, however, that CSORA would have prevented Lansing's death because her attacker did not live in Illinois and therefore would not have been required to register with the state. Lansing's attacker was simply passing through Illinois when he kidnapped her.<sup>76</sup> Nevertheless, CSORA passed both chambers unanimously with no debate.<sup>77</sup> Two years later, the legislature amended the law to require that all sex offenders, not just child sex offenders, register with local police.<sup>78</sup>

¶20 In the ensuing years, the Illinois legislature greatly expanded the list of sex offenses that warranted registration. By 2007, according to Ed Yohnka of the American Civil Liberties Union (ACLU), the list "ha[d] grown so much . . . it's probably an open question as to whether it's still a useful tool for law enforcement."<sup>79</sup> Today, over thirty different crimes require registration as a sex offender.<sup>80</sup> The law requires most sex offenders to register annually for the ten years following their release, but more violent

<sup>69</sup> *Id.* at 212.

<sup>70</sup> *Id.* at 217 (passing by a vote of ninety-seven aye, seventeen no, and one present).

<sup>71</sup> S. Transcription Deb., 84th Gen. Assemb., at 137 (Ill. May 23, 1986).

<sup>72</sup> 1986 Ill. Laws 1467 (codified as amended at 730 ILL. COMP. STAT. 150/1–10 (1994)).

<sup>73</sup> Child Sex Offender Registration Act, 730 ILL. COMP. STAT. 150/1–2 (1994).

<sup>74</sup> S. Transcription Deb., 87th Gen. Assemb., at 52 (Ill. June 18, 1992).

<sup>75</sup> 730 ILL. COMP. STAT. 150/2(B)(1) (1994). An individual convicted of any of following offenses was required to register as a child sex offender when the victim was under eighteen years of age: criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse when the offense was a felony, aggravated criminal sexual abuse. *Id.* at 150/8; 720 ILL. COMP. STAT. 5/9.3 (1994).

<sup>76</sup> *People v. Rissley*, 651 N.E.2d 133, 137 (Ill. 1995). Repeat child sex offender Jeffery Rissley confessed to and was convicted of Kahla Lansing's death. Rissley was passing through Spring Valley, Illinois on his way to Michigan when he lured Lansing into his truck and sexually assaulted her. Rissley then strangled Lansing and abandoned her in a barn in Iowa. When authorities apprehended Rissley, he admitted to two previous sex offense convictions in Texas. He also admitted to being a pedophile who routinely sought children as a means of relief. Matt Murray, *Man Gets Death Penalty for Kidnapping, Killing Spring Valley Girl*, CHI. TRIB., Oct. 10, 1992, at 5.

<sup>77</sup> H. Transcription Deb., 87th Gen. Assemb., at 27, 30 (Ill. May 14, 1992); S. Transcription Deb., 87th Gen. Assemb., at 52 (Ill. June 18, 1992).

<sup>78</sup> H. Transcription Deb., 89th Gen. Assemb., at 91 (Ill. Feb. 9, 1995) (passing House Bill 204 by a vote of 113-0); S. Transcription Deb., 89th Gen. Assemb., at 75 (Ill. Mar. 15, 1995) (passing House Bill 204, without debate, by a vote of 56-0).

<sup>79</sup> Kevin McDermott & Eric Potter, *Rules for Sex Offenders too Tough?*, ST. LOUIS POST-DISPATCH, Apr. 16, 2007, at C1.

<sup>80</sup> See 730 ILL. COMP. STAT. 150/2(B) (2010).

offenders are required to register for the duration of their natural lives.<sup>81</sup> Offenders must not only register in those jurisdictions where they live and work, but also where they are temporarily domiciled, which includes any place they spend an aggregate of five or more days during one calendar year.<sup>82</sup> Sex offenders must provide local police with the following current information: photograph, address, place of employment, employer's telephone number, school attended, county of conviction, license plate numbers for every vehicle registered in the offender's name, the offender's age at the time of the offense, any distinguishing marks on the offender's body, all e-mail addresses, instant messaging identities, chat room identities, and other Internet communication identities that the offender uses or plans to use, all Uniform Resource Locators registered or used by the offender, and all blogs and other Internet sites maintained by the offender or to which the offender has uploaded any content or posted any messages or information.<sup>83</sup> Sex offenders are also prohibited from using any social networking sites<sup>84</sup> or serving as election judges.<sup>85</sup> Failure to register with local police is a Class 3 felony,<sup>86</sup> which is punishable by two to five years in prison and up to \$25,000 in fines.<sup>87</sup>

### B. Community Notification

¶21 In 1995 lawmakers passed the second component to Illinois' sex offender regulatory scheme.<sup>88</sup> The Child Sex Offender Community Notification Law (CSOCNL)<sup>89</sup> required the Illinois State Police to create and maintain a Statewide Child Sex Offender Database and to provide certain public entities—including schools and child care facilities—with the name, address, date of birth, and adjudication of every registered child sex offender in the state.<sup>90</sup> The law did not, however, require the State Police to make this information available to the general public.<sup>91</sup> Unlike previous sex offender laws, CSOCNL prompted a lively debate in the legislature.

¶22 Senator Robert Molaro, for example, believed CSOCNL failed to provide a comprehensive solution to the problem of sexual abuse in the state. According to Senator Molaro:

This [bill] isn't well thought out . . . If we're worried about a child sex offender living with us, what about a child murder[er]? . . . What about a child kidnapper? Why isn't that in the bill? . . . Here we are again haphazardly jumping into something because of something that happened

<sup>81</sup> *Id.* at 150/7.

<sup>82</sup> *Id.* at 150/3(a)(1)–(2).

<sup>83</sup> *Id.* at 150/3(a).

<sup>84</sup> Ray Long & Monique Garcia, *Law: Sex Offenders' Web Use is Limited*, CHI. TRIB., Aug. 12, 2009, at 13.

<sup>85</sup> Ray Long, *Laws Aim to Keep Sex Offenders from Kids*, CHI. TRIB., Aug. 15, 2008, at 2.

<sup>86</sup> 730 ILL. COMP. STAT. 150/10(a).

<sup>87</sup> *Id.* at 5/5-4.5-40(a); *id.* at 5/5-4.5-40(e).

<sup>88</sup> 1995 Ill. Laws 4453 (codified at 730 ILL. COMP. STAT. 152/101 (1996)).

<sup>89</sup> 730 ILL. COMP. STAT. 152/101 (1996).

<sup>90</sup> *Id.* at 152/120(a). Public entities required to receive notice of a child sex offender in their community included: school boards of public school districts and principles of schools in nonpublic districts, child care facilities in the county where the child sex offender lived, any person who was likely to encounter a child sex offender, and any member of the public wishing to inspect the records at police headquarters himself.

<sup>91</sup> *Id.* at 152/120(a).

in the newspaper. We have to be responsible here . . . . Everybody should know when a sex offender comes in. But we have to be responsible and not willy-nilly make bills that make no sense and just throw it out to the public and say let the Supreme Court or the police departments figure this out. We should figure it out and we should take the time to do it.<sup>92</sup>

¶23 State Representative Joel Brunsvold echoed Senator Molaro’s concerns, claiming CSOCNL was “not ready,” and lawmakers were “rushing to get this thing done.”<sup>93</sup> State Representative Coy Pugh added:

I understand that we all need to justify our existence. But when we talk about justifying our existence based on sacrificing the rights of the masses, then we have to rethink our positions or even our conscience . . . . At what point are we going to do not what’s right for our reelection, not what’s right for the local newspapers, not what’s right for our Leadership, who may or may not know what they are doing? . . . . When are we going to base our decisions on the rightness of the matter?<sup>94</sup>

¶24 Despite the concerns of Representative Pugh and others, CSOCNL passed the House by a vote of eighty-eight ayes, eleven nays, and fifteen present;<sup>95</sup> it passed the Senate by a vote of forty-eight ayes, no nays, and seven present.<sup>96</sup> Shortly thereafter, in an attempt to address some of the issues raised by Senator Molaro, the legislature passed the Child Sex Offender and Murderer Community Notification Law, which required police to notify specific public entities, such as school boards and daycare providers, when child murderers, not just child sex offenders, moved into the community.<sup>97</sup>

¶25 In 1997, the legislature amended CSOCNL to apply to all sex offenders, not just child sex offenders.<sup>98</sup> Finally, in 1999 the legislature required the State Police to make certain sex offender registration information available to the general public via the Internet.<sup>99</sup> Illinois’ Sex Offender Registration Website allows users to search for sex offenders by last name, city, zip code, county, compliance status, and crime.<sup>100</sup> It also allows users to map the registered sex offenders living in their community.<sup>101</sup> As of May 2010, there were 24,347 registered sex offenders listed on the website.

<sup>92</sup> S. Transcription Deb., 89th Gen. Assemb., at 51–52 (Ill. Nov. 16, 1995).

<sup>93</sup> *Id.* at 42.

<sup>94</sup> *Id.* at 30.

<sup>95</sup> A bill must receive a majority in both houses and be signed by the governor to become law. ILL. CONST. art. IV, § 8. A present vote does not count towards the majority needed for a bill to become law. ILL. CONST. art. IV, § 9.

<sup>96</sup> S. Transcription Deb., 89th Gen. Assemb., at 61 (Ill. Nov. 16, 1995); H. Transcription Deb., 89th Gen. Assemb., at 58 (Ill. Nov. 16, 1995).

<sup>97</sup> 730 ILL. COMP. STAT. 152/105, 120 (1996).

<sup>98</sup> 730 ILL. COMP. STAT. 152/105, 120 (1997).

<sup>99</sup> 730 ILL. COMP. STAT. 152/115(b) (1999).

<sup>100</sup> Illinois’ Sex Offender Registration Information, <http://www.isp.state.il.us/sor/sor.cfm> (last visited Aug. 20, 2010).

<sup>101</sup> *Id.*

### C. Residency Restrictions on Child Sex Offenders

¶26 Illinois' residency statute first went into effect on July 7, 2000.<sup>102</sup> Prior to that, Illinois law restricted where child sex offenders could loiter, but not where they could live.<sup>103</sup> House Bill 4045, introduced by State Representative George Scully, prohibited child sex offenders from residing within 500 feet of schools, playgrounds, child care institutions, daycares and facilities providing programs or services directed towards persons under eighteen years of age.<sup>104</sup> While presenting the bill, Representative Scully noted that the *Chicago Sun Times* recently ran a cover story highlighting how Illinois law prohibited child sex offenders from loitering, but not from living near a school.<sup>105</sup> According to Representative Scully, House Bill 4045 was designed to remedy this "anomaly" in the law.<sup>106</sup> During debate, Representative Scully assured his colleagues that the bill was "quite constitutional and [did] not unreasonably restrict a person from residing within our community."<sup>107</sup> After a limited discussion, House Bill 4045 passed the House by a vote of one hundred and ten ayes, no nays, and three present.<sup>108</sup>

¶27 The Senate debate, however, was more robust. Senator William Shaw was concerned that the bill would prompt child sex offenders to flock to his district in Chicago's south suburbs due to inadequate housing in the city.<sup>109</sup> "I just don't know anywhere in Chicago proper that [a child sex offender] could live," claimed Senator Shaw.<sup>110</sup> But the suburbs have "more open space and . . . schools are farther apart."<sup>111</sup> Senator John Cullerton echoed his colleague's concern:

In Chicago, in my district, we have Lake Point Tower . . . two, three thousand people [live there] . . . [same with] the John Hancock Building. Nobody could live . . . there if they ever had [a child sex offense] conviction. It's just not practical . . . . It's tough to vote No on this bill [be]cause of what somebody could say . . . . I'm going to vote Present, because . . . [this bill] needs work.<sup>112</sup>

¶28 Chief Senate sponsor Senator Patrick O'Malley came to the bill's defense, stating, "basically what we're saying is that these people will not be allowed to live near places where they might be tempted to harm any of our children, whether they be in Chicago, in

<sup>102</sup> 2000 Ill. Laws 2051 (codified as amended at 730 ILL. COMP. STAT. 150/1-10 (2000)).

<sup>103</sup> See 720 ILL. COMP. STAT. 5/11-9.3(a) (1998) (prohibiting a child sex offender from being present in any school building without permission from the principal unless the offender is the parent or guardian of a student, and prohibiting a child sex offender from loitering in a public way within 500 feet of a school); *id.* at 5/11-9.4(b) (prohibiting a child sex offender from being present in a public park or loitering within 500 feet of a public park when persons under eighteen are present).

<sup>104</sup> 2000 Ill. Laws 2051 (codified as amended at 730 ILL. COMP. STAT. 150/1-10 (2000)).

<sup>105</sup> H. Transcription Deb., 91st Gen. Assemb., at 47 (Ill. Feb. 29, 2000).

<sup>106</sup> *Id.* at 53. Additionally, in an attempt to head-off potential eminent domain problems, the bill included a provision that specifically exempted child sex offenders who purchased their homes prior to the bill's effective date. *Id.* at 50.

<sup>107</sup> *Id.* at 47.

<sup>108</sup> *Id.* at 53.

<sup>109</sup> S. Transcription Deb., 91st Gen. Assemb., at 53-55 (Ill. Apr. 7, 2000).

<sup>110</sup> *Id.* at 55.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 60.

the suburbs or downstate Illinois.”<sup>113</sup> Senator Edward Petka agreed, claiming the bill was “a logical extension of what [the legislature had] done over the past several years in putting up protected zones around schools and around parks.”<sup>114</sup>

¶29 Senator James Clyborne, however, believed the bill unfairly applied to offenders who lived in their homes before a school or daycare moved into their neighborhood.<sup>115</sup> “They have been [in their homes] for ten years, haven’t bothered anyone. They’ve registered as sex offenders. [But now] we’re criminalizing them because [a] school [is] built 500 . . . feet from their home.” Senator O’Malley responded, claiming such a result was warranted given the high recidivism rate among child sex offenders.<sup>116</sup> He closed the debate by stating:

[T]his [legislation] is one more statement to [child sex offenders] who are predators on our children . . . [to] get out of Illinois . . . . [R]ecidivism is a real problem with these people . . . . These are people who are, like, in a candy shop, and let’s keep ‘em out of the candy shop ‘cause the candy tends to be our children.<sup>117</sup>

¶30 House Bill 4045 easily passed the Senate by a vote of fifty-three ayes and five present.<sup>118</sup> Governor George Ryan signed the bill into law on July 7, 2000.<sup>119</sup> At the time, only three other states had sex offender residency restrictions in place.<sup>120</sup>

#### D. Working out the Kinks

¶31 Throughout the years, Illinois lawmakers have been united in supporting tough sex offender regulations.<sup>121</sup> This support is likely due in part to strong public disapproval of sex offenders. For example, a 2005 Gallup poll found that sixty-six percent of respondents were “very concerned” about child molesters, whereas only fifty-two percent of people were as worried about other types of violent crime.<sup>122</sup> A 1997 Washington state survey found that the majority of respondents said they felt safer knowing where convicted sex offenders lived.<sup>123</sup> And a 2004 Alabama survey found that females and parents of minor children, two key voting constituencies, were more likely than males and non-parents to feel that community notification was important.<sup>124</sup> According to

<sup>113</sup> *Id.* at 54.

<sup>114</sup> *Id.* at 60–61.

<sup>115</sup> S. Transcription Deb., 91st Gen. Assemb., at 57 (Ill. Apr. 7, 2000).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 62.

<sup>118</sup> *Id.* at 67.

<sup>119</sup> Doug Finke, *Preteens Suspected of Sex Crimes, Murder Now Guaranteed Attorneys*, THE ST. J. REG., July 8, 2000, at Local.

<sup>120</sup> See ALA. STAT. § 15-20-26 (2000) (prohibiting sex offenders from living with 2000 feet of a school); CAL. PENAL CODE § 3003(g) (2000) (prohibiting certain sex offenders on parole from living within a quarter mile from a primary school); FLA. STAT. § 947.1405(7)(a)(2) (2000) (prohibiting sex offenders from living within 1000 feet of schools and other structures where children are present).

<sup>121</sup> See *supra* Part I.

<sup>122</sup> *The JonBenet Ramsay Case: The Greatest Fear*, THE ECONOMIST, Aug. 25, 2006, at 25.

<sup>123</sup> Jill Levenson et al., *Public Perceptions about Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES & PUB. POL’Y 137, 139 (2007).

<sup>124</sup> *Id.* at 140.

scholar Jill Levenson, “[s]ex offenders and sex crimes incite a great deal of fear among the general public and as a result, lawmakers have passed a variety of social policies designed to protect community members from sexual victimization.”<sup>125</sup>

¶32 In Illinois, sex offenders have become so despised that finding new ways to regulate them has, according to one newspaper, become a “rite of spring” for lawmakers in the state.<sup>126</sup> For example, in the latest legislative session alone,<sup>127</sup> Illinois lawmakers passed bills to: retroactively require all sex offenders, including those convicted before SORA’s enactment date, to register with local police;<sup>128</sup> ban all child sex offenders from entering public parks;<sup>129</sup> prohibit child sex offenders from operating, managing, being employed by or associated with any local fair when children under age eighteen are present;<sup>130</sup> increase the initial registration and renewal fee for sex offenders from \$20 and \$10, respectively, to \$100 for each fee individually;<sup>131</sup> require sex offenders to register within three days, not five days, of being temporarily domiciled in one location;<sup>132</sup> and prohibit child sex offenders from operating ice cream trucks, emergency vehicles, and rescue vehicles in the state.<sup>133</sup>

¶33 Because there is little, if any, organized opposition to these and other sex offender bills, there has been little political debate about the long-term effects of Illinois’ regulatory scheme. As State Representative Roger Eddy noted, “This is a very, very politically charged issue . . . and anyone who comes forward with easing penalties on a certain type of sex offender becomes an open target the next election.”<sup>134</sup>

¶34 This lack of legislative oversight, however, has led to some absurd results. For example, from 1996–2006 SORA required individuals convicted of kidnapping, aggravated kidnapping, unlawful restraint, or aggravated unlawful restraint against victims under age eighteen to register as sex offenders if the victim was not the perpetrator’s child. As a result, some individuals were required to register as sex offenders even though they committed no sex crime. For example, Charles Johnson was forced to register as a sex offender after he and four accomplices kidnapped a sixty-year-old woman and her twenty-month-old granddaughter in an attempt to extort ransom from the woman’s son.<sup>135</sup> Johnson pled guilty to armed robbery and aggravated kidnapping,

<sup>125</sup> *Id.* at 138.

<sup>126</sup> McDermott & Potter, *supra* note 79.

<sup>127</sup> Each legislative session runs for two years. The 96th legislative session began on January 1, 2009, and runs until December 31, 2010.

<sup>128</sup> S.B. 3084, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). This bill unanimously passed the Senate, and passed the House by a vote of 116-0, with 1 voting present. It was vetoed by the Governor and currently awaits legislative action.

<sup>129</sup> S.B. 2824, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). This bill unanimously passed the Senate, and passed the House by a vote of 91-17, with 7 voting present. It was signed by the Governor on July 19, 2010.

<sup>130</sup> H.B. 4675, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). This bill passed the House by a vote of 90-16, with six voting present, and unanimously passed the Senate. It was then amended in the Senate and currently awaits House approval.

<sup>131</sup> S.B. 1702, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). This bill unanimously passed the House and the Senate. It was signed by the Governor on July 19, 2010.

<sup>132</sup> S.B. 3176, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). This bill unanimously passed both the House and the Senate. It was signed by the Governor on July 19, 2010.

<sup>133</sup> Senate Bill 62 unanimously passed the Senate, and passed the House by a vote of 89 ayes, 14 nays, and 12 present. It was signed by the Governor on August 4, 2009. Pub. Act No. 96-0118 (Ill. 2010).

<sup>134</sup> McDermott & Potter, *supra* note 79.

<sup>135</sup> *People v. Johnson*, 870 N.E.2d 415, 417 (Ill. 2007).

but because he kidnapped a child under eighteen, to whom he was not a parent, he was required to register as a sex offender.<sup>136</sup> Although the Illinois Appellate Court found that Johnson's motive was not sexual in nature, the Illinois Supreme Court held that the state still had a rational basis for requiring Johnson to register as a sex offender.<sup>137</sup>

Recognizing the possibility that minors kidnapped by a non-parent could be at greater risk for sexual assault, the Court held that registration was a reasonable means of protecting the public and was constitutional as applied to Johnson.<sup>138</sup>

¶35 In another case, the Illinois Appellate Court required a minor convicted of kidnapping another minor for a joyride to register as a sex offender.<sup>139</sup> Sixteen-year-old Phillip C. was required to register as a sex offender after forcing seventeen-year-old Miguel B. into a car at knifepoint and instructing Miguel to give him a ride.<sup>140</sup> While he was driving, Miguel noticed a sheriff's car parked on the side of the road and was able to escape to safety.<sup>141</sup> On appeal, the court upheld SORA's registration requirements as applied to Phillip.<sup>142</sup> While acknowledging there was "no evidence that defendant sexually assaulted Miguel or that his motivation in kidnapping Miguel was sexual in nature," the court believed that "the legislature could rationally conclude that kidnapers of children pose such a threat to sexually assault those children as to warrant their inclusion in the sex offender registry."<sup>143</sup>

¶36 As a result of the bizarre outcomes in these cases and others, the legislature amended SORA in 2006 to apply only to "sexually motivated" offenses.<sup>144</sup> At the same time, lawmakers created a new registry to track and monitor individuals who harm children, but whose crimes are not sexual in nature.<sup>145</sup> The Child Murderer and Violent Offender Against Youth Registration Act (VOYRA) requires child murderers and violent offenders against youth to register annually with local police for ten years following their release. The State Police also make this information available to public via the Internet.<sup>146</sup>

¶37 VOYRA, however, does not expressly allow previously registered sex offenders to transfer onto VOYRA's list, even when their crime was non-sexual in nature.<sup>147</sup> Instead,

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 418–29.

<sup>138</sup> *Id.*

<sup>139</sup> *In re Phillip C.*, 847 N.E.2d 801, 803 (Ill. App. Ct. 2006).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 808.

<sup>144</sup> 2006 Ill. Laws 3273 amended the Sex Offender Registration Act, 730 ILL. COMP. STAT. 150/2(B)(1.5) (2000), by inserting, "the offense was sexually motivated as defined in Section 10 of the Sex Offender Management Board Act" into the list of triggering offenses. 2006 Ill. Laws 3273, 3309. Section 10 of the Illinois Sex Offender Management Board Act states that a crime is "sexually motivated" if one or more of the facts of the underlying offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature. See Illinois State Police, Illinois Sex Offender Registration Information, Frequently Asked Questions, <http://www.isp.state.il.us/sor/faq.cfm?CFID=23215816&CFTOKEN=94517634&jsessionid=ec30a6c10c5f924d39dc76556f18707f7456> (last visited Sept. 21, 2010).

<sup>145</sup> Child Murderer and Violent Offender Against Youth Registration Act, 730 ILL. COMP. STAT. 154/1 (2007).

<sup>146</sup> *Id.* at 154/1; see Illinois State Police, Child Murderer and Violent Offender Against Youth Registry, <http://www.isp.state.il.us/cmvo> (last visited Aug. 9, 2010).

<sup>147</sup> *People v. Johnson*, 870 N.E.2d 415, 427 (Ill. 2007).

the state's attorney in the offender's county of conviction has the sole discretion to approve or deny the offender's transfer request.<sup>148</sup> As a result, some individuals remain registered as sex offenders despite being convicted of non-sexual crimes.<sup>149</sup> For example, a quick search of the Illinois Sex Offender Registration Website in May 2010 found 174 child murderers registered as sex offenders. While some of these registrants were also convicted of a sexual offense, many were not; demonstrating the lingering results of the ill conceived 1996 SORA amendment.

¶38 Another problem with Illinois' residency statute is that, like the rest of Illinois' regulatory scheme, it is based on the belief that sex offenders re-offend at an unusually high rate. Recent studies, however, do not support this common belief. For example, a 2002 United States Department of Justice (DOJ) study, which tracked 272,111 criminals<sup>150</sup> in fifteen states, including Illinois, found that 67.5% of participants were rearrested for a new criminal offense within the first three years of their release from prison; whereas a similar 2003 DOJ study, which tracked 9691 sex offenders in the same fifteen states, found that only 5.3% were rearrested for a new sex crime within the first three years of their release.<sup>151</sup>

¶39 The extreme unpopularity of sex offenders has made it difficult to challenge Illinois' regulatory scheme in the Illinois courts; the Illinois Supreme Court has upheld both SORA and SOCNL against constitutional challenge.<sup>152</sup> The Court, however, has yet to consider the constitutionality of residency restrictions on child sex offenders in the state. Part III uses two recent decisions in other states to explore the validity of an ex post facto challenge against Illinois' residency statute. It also considers the need for judicial action given the resurgence of the preventive state.

### III. EX POST FACTO CHALLENGE TO ILLINOIS' RESIDENCY LAW

¶40 The United States Supreme Court and the Illinois Supreme Court have yet to consider whether residency restrictions on child sex offenders violate the ex post facto clauses of the United States or Illinois Constitutions. Two of Illinois' five appellate courts, however, have concluded that residency restrictions do not offend federal or state ex post facto prohibitions.<sup>153</sup> The Illinois decisions are consistent with the overwhelming

<sup>148</sup> *Id.*

<sup>149</sup> See Marion Buckley & J. Michael True, "Sex Offenders" But No Sex Crime? What SORA and VOYRA Could Mean for Your Clients, 95 ILL. B.J. 482, 485 (2007) (outlining instances where criminals are made to register as sex offenders for crimes that are non-sexual in nature).

<sup>150</sup> PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T JUST., BUREAU OF JUST. STATS., RECIDIVISM OF PRISONERS RELEASED IN 1994, 7 (June 2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>. Of the criminals tracked in the DOJ study, 22.5% were convicted of a violent offense (e.g., murder, sexual assault, and robbery), 33.5% were convicted of a property offense (e.g., burglary, auto theft, and fraud), 32.6% were convicted of a drug offense (primarily drug trafficking and possession), and 9.7% were convicted of a public-order offense (e.g., driving under the influence of drugs, weapons violations, or probation violations.). *Id.* at 8.

<sup>151</sup> PATRICK A. LANGAN ET AL., U.S. DEP'T JUST., BUREAU OF JUST. STATS., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, 24 (Nov. 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

<sup>152</sup> *People v. Cornelius*, 821 N.E.2d 288 (Ill. 2004) (making sex offender registry information available via the Internet does not violate substantive due process under the Illinois Constitution); *People v. Malchow*, 739 N.E.2d 433 (Ill. 2000) (holding that SORA does not violate due process under the United States Constitution).

<sup>153</sup> *People v. Morgan*, 881 N.E.2d 507 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. Ct.

judicial trend to uphold residency restrictions in other states.<sup>154</sup> Two recent cases in Indiana and Kentucky, however, question this line of reasoning, and may signal a change in the judicial approach to residency restrictions.<sup>155</sup> This section considers the viability of an ex post facto challenge to Illinois' residency statute, and the highlights the need for judicial intervention given the recent resurgence of the preventive state.

#### A. *Elements of an Ex Post Facto Challenge*

¶41 A statute is a prohibited ex post facto law if it is both retroactive and disadvantageous to the defendant.<sup>156</sup> To fit this criteria, a law must apply to events occurring before its enactment,<sup>157</sup> and it must criminalize an act which was innocent when done, increase the punishment for a previously committed offense, or alter the rules of evidence by making a conviction easier.<sup>158</sup> To determine whether a law criminalizes an act which was innocent when done, a reviewing court must first decide whether the statute in question creates a civil proceeding or a criminal penalty.<sup>159</sup> If the legislature intended to impose punishment, the court's inquiry ends; the statute is a prohibited ex post facto law. But, if the legislature intended to create a civil, non-punitive regulation, the court will continue its inquiry into the nature of the statute's effects.<sup>160</sup> Ultimately, the court will override the legislature's civil intent if "the statutory scheme is so punitive either in purpose or effect as to negate [the state's] intention to deem it civil."<sup>161</sup>

¶42 To determine the nature of a statute's effects, a reviewing court will likely analyze the five factors emphasized by the United States Supreme Court in *Smith v. Doe*.<sup>162</sup> These factors ask whether the regulation at issue is 1) traditionally regarded as punishment; 2) imposes an affirmative disability or restraint; 3) promotes the twin aims of punishment; 4) has a rational connection to a non-punitive purpose; and 5) is excessive with respect to its intended non-punitive purpose.<sup>163</sup> None of these factors alone is proof

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2005).

<sup>154</sup> See, e.g., *Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006) (applying Arkansas law); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (applying Iowa law); *Doe v. Baker*, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006) (applying Georgia law); *Salter v. State*, 971 So.2d 31 (Ala. Civ. App. 2007); *Boyd v. State*, 960 So.2d 717 (Ala. Crim. App. 2006); *Lee v. State*, 895 So.2d 1038 (Ala. Crim. App. 2004) (upholding residency restriction statutes against ex post facto challenges); *Thompson v. State*, 603 S.E.2d 233 (Ga. 2004); *Formaro v. Polk County*, 773 N.W.2d 834 (Iowa 2009); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *Hyle v. Porter*, 868 N.E.2d 1047 (Ohio Ct. App. 2006). *But see* *Nasal v. Dover*, 862 N.E.2d 571 (Ohio Ct. App. 2006).

<sup>155</sup> *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009).

<sup>156</sup> *People v. Malchow*, 739 N.E.2d 433, 438 (Ill. 2000).

<sup>157</sup> *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

<sup>158</sup> *Id.*

<sup>159</sup> *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citation omitted).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (internal quotation and citation omitted).

<sup>162</sup> *Id.* at 97. In *Kennedy v. Mendoza-Martinez*, the United States Supreme Court enunciated a seven factor ex post facto test. 372 U.S. 144 (1963). In *Smith*, the Court found five factors "most relevant" to its analysis of Alaska's Sex Offender Registration Act. 538 U.S. at 97. Both Illinois courts to consider the constitutionality of the state's residency statute have applied the five *Smith* factors, not the seven *Mendoza-Martinez* factors. *People v. Morgan*, 881 N.E.2d 507, 510 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 779 (Ill. App. Ct. 2005). As such, this Comment considers only the five *Smith* factors deemed most relevant by the United States Supreme Court.

<sup>163</sup> *Smith*, 538 U.S. at 97.

of a punitive effect, but their consideration as a whole helps the court determine whether the statute in question is punitive or civil in nature.<sup>164</sup>

¶43 To date, both Illinois appellate courts to apply the *Smith* test upheld Illinois' residency law as creating a civil regulation, not retroactive punishment.<sup>165</sup> In *People v. Leroy*, the Illinois Fifth Appellate District held that residency restrictions did not violate the ex post facto clauses of the United States or Illinois Constitutions as applied to Patrick Leroy, a convicted child sex offender found living within 500 feet of a school playground in Alton, Illinois.<sup>166</sup> In *People v. Morgan*, the Illinois Third Appellate District relied on much of the same reasoning used in *Leroy* to uphold residency restrictions as applied to Jeffrey Morgan, a convicted child sex offender found living within 500 feet of a school in Rock Island, Illinois.<sup>167</sup>

¶44 In both cases, the courts ruled that Illinois' residency statute created a civil remedy, not a criminal penalty, and that the purpose of the law was to protect the general public, not to punish child sex offenders for past offenses.<sup>168</sup> Until recently, most courts to consider the issue have come to the same conclusion.<sup>169</sup> But in June 2009, the Indiana Supreme Court held that its state's 1000-foot residency restriction, as applied to a convicted child sex offender, violated the ex post facto clause of the state constitution.<sup>170</sup> Shortly thereafter, in October 2009, the Kentucky Supreme Court held that Kentucky's 1000-foot residency restriction, as applied to a convicted sex offender, violated the ex post facto clauses of both the federal and state constitutions.<sup>171</sup> Using the Illinois, Indiana, and Kentucky cases as a guide, this section evaluates the strengths and weaknesses of an ex post facto challenge to residency restrictions on child sex offenders in Illinois.

### 1. Threshold Inquiries for an Ex Post Facto Challenge in Illinois Court

¶45 A court reviewing the constitutionality of Illinois' residency law must make three initial determinations before proceeding to consider the five factors articulated in *Smith*. First, the court must determine whether the statute applies retroactively.<sup>172</sup> Illinois' residency statute clearly satisfies this requirement because it applies to all convicted child sex offenders, regardless of their date of conviction. Next, the court must consider whether the statute disadvantages the defendant by increasing the punishment for a

<sup>164</sup> *Id.*

<sup>165</sup> *See infra* Part III.B.

<sup>166</sup> *Leroy*, 828 N.E.2d at 782.

<sup>167</sup> *Morgan*, 881 N.E.2d at 512.

<sup>168</sup> *Id.*; *Leroy*, 828 N.E.2d at 782.

<sup>169</sup> *See, e.g.*, *Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006) (applying Arkansas law); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (applying Iowa law); *Doe v. Baker*, 2006 WL 905368 (N.D. Ga. 2006) (applying Georgia law); *Salter v. State*, 971 So.2d 31 (Ala. Civ. App. 2007); *Boyd v. State*, 2006 WL 25832 (Ala. Crim. App. 2006); *Lee v. State*, 895 So.2d 1038 (Ala. Crim. App. 2004) (upholding residency restriction statutes against ex post facto challenges); *Thompson v. State*, 603 S.E.2d 233 (Ga. 2004); *Formaro v. Polk County*, 773 N.W.2d 834 (Iowa 2009); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *Hyle v. Porter*, 2006 WL 2987735 (Ohio Ct. App. 2006). *But see* *Nasal v. Dover*, 862 N.E.2d 571 (Ohio Ct. App. 2006).

<sup>170</sup> *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009).

<sup>171</sup> *Commonwealth v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009).

<sup>172</sup> *People v. Malchow*, 739 N.E.2d 433, 438 (Ill. 2000).

previously committed offense.<sup>173</sup> Illinois' residency statute also satisfies this requirement because it increases the punishment for past sex crimes by prohibiting some offenders from residing within 500 feet of areas where they were previously allowed to live based solely on their offender status.<sup>174</sup>

¶46 Finally, a reviewing court must determine whether the legislature intended to impose punishment or to enact a civil regulation.<sup>175</sup> Recall that federal and state ex post facto prohibitions apply only to criminal, not civil, laws. To determine whether the legislature intended to create a civil regulation, a reviewing court will consider the legislature's express and implied intent.<sup>176</sup> The United States Supreme Court affords "considerable deference . . . to the intent as the legislature has stated it."<sup>177</sup> As such, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."<sup>178</sup> While maintaining a strong presumption in favor of constitutionality, a reviewing court will also likely consider the statute's text, structure, and enforcement procedures to help determine the legislature's intent.<sup>179</sup>

¶47 Both Illinois courts to consider the constitutionality of Illinois' residency statute concluded that Illinois lawmakers intended to create a civil regulation.<sup>180</sup> According to the *Leroy* court, "[w]here a legislative restriction is an incident of the state's power to protect the health and safety of its citizens, the restriction will be considered to evidence an intent to exercise that regulatory power, and not a purpose to add to a punishment."<sup>181</sup> As a result, the court concluded that "the intent of the Illinois General Assembly in passing [Illinois' residency statute] was to create a civil, nonpunitive statutory scheme to protect the public rather than to impose a punishment."<sup>182</sup>

¶48 The Illinois courts, however, paid only cursory attention to the threshold question of legislative intent; and both failed to address the statute's text, structure, and enforcement procedures, three factors other courts have found determinative.<sup>183</sup> For example, in considering the text and structure of Indiana's residency statute, the Indiana Supreme Court ruled that by omitting a purpose statement and placing Indiana's residency statute solely within the criminal code, the Indiana legislature created ambiguity regarding its civil intent.<sup>184</sup> The Indiana court also expressed concern that the Indiana statute failed to exempt offenders convicted prior to the statute's effective date, or those who purchased their homes prior to the statute's effective date.<sup>185</sup> According to the Indiana court, "with a single exception, [Indiana's] residency restriction does not

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<sup>173</sup> *Id.*

<sup>174</sup> 720 ILL. COMP. STAT. 5/11-9.3(b-5) (2010); *id.* at 5/11-9.4(b-5).

<sup>175</sup> *Smith v. Doe*, 538 U.S. 84, 92 (2003).

<sup>176</sup> *Id.* at 93 (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997)).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 92 (quoting *Hudson*, 522 U.S. at 100).

<sup>179</sup> *Id.* at 92–94.

<sup>180</sup> *People v. Morgan*, 881 N.E.2d 507, 510 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 779 (Ill. App. Ct. 2005).

<sup>181</sup> *Leroy*, 828 N.E.2d at 779 (quoting *Smith*, 538 U.S. at 93–94).

<sup>182</sup> *Id.*

<sup>183</sup> *Smith*, 538 U.S. at 92–94.

<sup>184</sup> *Id.* (citing *State v. Pollard*, 908 N.E.2d 1145, 1149 (Ind. 2009)).

<sup>185</sup> *Pollard*, 908 N.E.2d at 1150.

appear to include a civil or regulatory component.”<sup>186</sup> The “single exception” cited by the court was a provision that allowed some individuals to petition the court ten years after their release to be declassified as child sex offenders.<sup>187</sup> Based largely on this exception, the Indiana court “assum[ed] without deciding” that the Indiana legislature intended to create a civil regulatory scheme.<sup>188</sup>

¶49 Similar to Indiana’s residency statute, Illinois’ residency statute is located solely within the state’s criminal code and does not contain a purpose statement clarifying the legislature’s intent.<sup>189</sup> Although Illinois’ residency statute does exempt offenders who purchased their homes prior to the law’s effective date, the Illinois law does not contain a grandfather clause exempting those convicted of a sex offense before the statute’s enactment date.<sup>190</sup> Furthermore, unlike the Indiana law, Illinois’ residency statute does not provide a mechanism for offenders to petition the court for declassification as a child sex offender—the “single exception” stressed by the Indiana court.

¶50 In addition to failing to address the statute’s text and structure, the Illinois courts also failed to evaluate the statute’s enforcement procedures. Under Illinois’ residency law, a child sex offender found living in a prohibited zone is guilty of a Class 4 felony,<sup>191</sup> which is punishable by one to three years in prison and up to \$25,000 in fines.<sup>192</sup> This is similar to the penalty facing those who violate Indiana’s residency law. Under Indiana’s residency statute, a child sex offender found living in a prohibited zone is guilty of a Class D felony,<sup>193</sup> which is punishable by six months to three years in prison and up to \$10,000 in fines.<sup>194</sup> The penalties for violating the Illinois and Indiana statutes, however, are greater than the penalty facing those found violating Kentucky’s residency statute; a law which the Kentucky Supreme Court held was the result of a civil legislative intent.<sup>195</sup> Under the Kentucky statute, a sex offender found living in a prohibited zone is guilty of a Class A misdemeanor for the first offense,<sup>196</sup> which is punishable by up to one year in prison<sup>197</sup> and up to \$500 in fines.<sup>198</sup>

¶51 Although Illinois’ residency statute bears many similarities to the Indiana statute, which the Indiana court ruled created ambiguity regarding Indiana’s legislature’s civil intent, both Illinois courts to consider the issue were reluctant to infer a punitive intent from a seemingly civil regulation. This reluctance is likely a result of the United States Supreme Court’s presumption in favor of constitutionality and the need for “clearest proof” before overriding the legislature’s civil intent.<sup>199</sup> Even courts that have held

<sup>186</sup> *Id.* at 1149.

<sup>187</sup> *Id.* at 1149 n.4.

<sup>188</sup> *Id.* at 1150.

<sup>189</sup> See 720 ILL. COMP. STAT. 5/11-9.3(b-5) (2010); *id.* at 5/11-9.4(b-5).

<sup>190</sup> See *id.* at 5/11-9.3(b-5); *id.* at 5/11-9.4(b-5).

<sup>191</sup> *Id.* at 5/11-9.3(d); *id.* at 5/11-9.4(e).

<sup>192</sup> 730 ILL. COMP. STAT. 5/5-4.5-45(a) (2010); *id.* at 5/5-4.5-45(e); *id.* at 5/5-4.5-50(b).

<sup>193</sup> IND. CODE. § 35-42-4-11(c) (2007).

<sup>194</sup> IND. CODE § 35-50-2-7(a) (2009).

<sup>195</sup> *Commonwealth v. Baker*, 295 S.W.3d 437, 443 (Ky. 2009).

<sup>196</sup> KY. REV. STAT. § 17.545(4)(a) (2009).

<sup>197</sup> KY. REV. STAT. § 532.090(1) (2009).

<sup>198</sup> KY. REV. STAT. § 534.040(2)(a) (2009).

<sup>199</sup> Indeed, in concurring to uphold Alaska’s registration and community notification law, Justice Souter stated:

To me, the indications of punitive character . . . and the civil indications weighted heavily by the

residency restrictions violate ex post facto prohibitions have refused to hold that lawmakers enacted such restrictions solely as a means of punishing sex offenders.<sup>200</sup> As such, a reviewing court will likely proceed to the next step in the ex post facto analysis, which is whether the statute in question is so punitive, either in purpose or effect, as to negate the legislature's civil intent.<sup>201</sup>

## 2. Historically Regarded as Punishment

¶52 To determine whether a statute is so punitive so as to overcome the legislature's civil intent, a reviewing court will likely apply the five factor test articulated in *Smith*. The first *Smith* factor requires the court to determine whether the restriction at issue has been historically regarded as punishment.<sup>202</sup> According to the United States Supreme Court, "[a] historical survey [is] useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition."<sup>203</sup>

¶53 One penalty historically regarded as punishment is banishment. In *United States v. Ju Toy*, Justice Brewer defined banishment as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life."<sup>204</sup> According to Justice Brewer, "[b]y all the authorities the banishment of a citizen is punishment, and punishment of the severest kind."<sup>205</sup> In the colonial era, court-sanctioned banishments were believed to deter crime and protect the public.<sup>206</sup> Illinois, however, eventually outlawed the practice, finding it contrary to public policy.<sup>207</sup>

¶54 In considering the similarities between residency restrictions and banishment, the Illinois courts concluded that Illinois' residency statute was not akin to the historical punishment of banishment because it did not ban offenders from the entire community; it simply limited where within the community certain offenders could live.<sup>208</sup> Unlike colonial criminals, child sex offenders are free to move about the community, demonstrating the non-punitive nature of the Illinois law according to the court.<sup>209</sup>

¶55 Residency restrictions, nevertheless, resemble banishment in important ways. First, both penalties severely geographically limit the places where individuals may reside. For example, a study in Oklahoma City, which has a 2000-foot protected zone around schools, playgrounds, parks and childcare facilities, found that less than 16% of the city was legally inhabitable by sex offenders, and most of that land was industrial and lacked

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Court are in rough equipoise. . . . What tips the scale [in favor of upholding the Alaska law] is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur with the Court's judgment.

*Smith v. Doe*, 538 U.S. 84, 92, 110 (2003) (Souter, J., concurring).

<sup>200</sup> *State v. Pollard*, 908 N.E.2d 1145, 1150 (Ind. 2009); *Baker*, 295 S.W.3d at 443.

<sup>201</sup> *Smith*, 538 U.S. at 92.

<sup>202</sup> *Id.* at 97.

<sup>203</sup> *Id.*

<sup>204</sup> 198 U.S. 253, 269–70 (1905) (Brewer, J. dissenting).

<sup>205</sup> *Id.* at 269.

<sup>206</sup> William Garth Snider, *Banishment: The History of its use and a Proposal for its Abolition under the First Amendment*, 24 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 476 (1998).

<sup>207</sup> *Id.* at 465.

<sup>208</sup> *People v. Morgan*, 881 N.E.2d 507, 510–11 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 780 (Ill. App. Ct. 2005).

<sup>209</sup> *Leroy*, 828 N.E.2d at 780.

residential housing.<sup>210</sup> A recent Colorado study recommended against implementing residency restrictions in that state claiming, “in urban areas, a large number of schools and childcare centers are located within various neighborhoods, leaving extremely limited areas for sex offenders to reside if restrictions were implemented.”<sup>211</sup> A similar study in Orange County, Florida, found that only 5% of the county’s residential areas were outside the prohibited buffer zone.<sup>212</sup>

¶56 Additionally, both penalties operate to deprive offenders of meaningful connections to their communities. For example, a 2004 survey of Florida sex offenders found that half of respondents reported being forced to move from a residence in which they had been living due to that state’s 1000-foot restricted zone around schools, parks, playgrounds, public school bus stops, and areas where children congregate.<sup>213</sup> As the mother of a convicted Florida sex offender explained:

My husband and I wanted [our son] to come live with us for awhile, while he got adjusted to life on the outside and got on his feet. He was not allowed to do so because we live within 1,000 feet of a school bus stop. So he had to go to a different county, where he had no support system. He was placed in a dirty disgusting motel because it was the only place he could find to live. It was next door to a XXX nudie place . . . . He was very lonely and depressed . . . . He eventually started drinking again and violated parole by staying out too late.<sup>214</sup>

¶57 For this offender, and others like him, residency restrictions pose a significant challenge in securing suitable housing. This challenge also creates a palpable threat to the community because sex offenders who cannot find suitable housing become transient and difficult to track. According to one Iowa sheriff, “We are less safe as a community now than we were before residency restrictions” because so many offenders have been forced into transience by the Iowa law.<sup>215</sup> Even for non-homeless offenders, residency restrictions often push offenders away from the supervision, treatment, stability, and supportive networks they need to build successful, law-abiding lives.<sup>216</sup> In a 2005 survey of Florida sex offenders, for example, half of respondents reported that residency restrictions prevented them from living with a supportive family member,<sup>217</sup> and 60% of respondents said that residency restrictions created emotional suffering.<sup>218</sup>

<sup>210</sup> Sean Murphy, *Experts Say Sex Offender Zones Problematic*, DAILY ARDMOREITE, Nov. 9, 2006.

<sup>211</sup> SEX OFFENDER MGMT. BD., DIV. CRIMINAL JUSTICE, COLO. DEP’T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004) [hereinafter REPORT ON SAFETY ISSUES], available at [http://dcj.state.co.us/odvsom/Sex\\_Offender/SO\\_Pdfs/FullSLAFinal01.pdf](http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf).

<sup>212</sup> Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact on Residency Restriction Laws Using GIS*, JUST. RES. & POL’Y, Fall 2006, at 1, available at <http://jrso.metapress.com/content/k2530613xk34/?p=0df5202fd96848f68f99e8b7d785a5f7&pi=6>.

<sup>213</sup> HUMAN RIGHTS WATCH, *supra* note 5, at 102.

<sup>214</sup> *Id.* at 103.

<sup>215</sup> *Id.* at 10.

<sup>216</sup> *Id.* at 9.

<sup>217</sup> Jill S. Levenson, *Sex Offender Residence Restrictions: A Report to the Florida Legislature 4* (Oct. 2005) (unpublished manuscript, available at <http://ccoso.org/residencerestrictionsFL.pdf>).

<sup>218</sup> *Id.*

¶58 Despite the difficulty many offenders face in finding suitable housing, most courts, including those in Illinois, have concluded that residency restrictions are not akin to banishment because some, albeit limited, housing is still available to offenders.<sup>219</sup> The Kentucky Supreme Court, however, came to the opposite conclusion, finding that state’s 1000-foot restriction prevented offenders “from residing in large areas of the community.”<sup>220</sup> While recognizing that Kentucky’s residency statute was not identical to banishment because it still allowed offenders to visit prohibited areas, the court nonetheless found that the law worked to “expel[] registrants from their own homes, even if their residency predated that statute or arrival of the school, daycare, or playground.”<sup>221</sup> Such a restriction was “decidedly similar to banishment.”<sup>222</sup>

¶59 Illinois sex offenders face similar challenges in finding suitable housing in the state. Illinois currently imprisons 1000 sex offenders who have met their parole date but cannot be released because they are unable to secure suitable housing.<sup>223</sup> This lack of suitable housing is due in part to the fact that Illinois’ residency statute works in conjunction with common preexisting neighborhood designs, which tend to center around schools and playgrounds, thereby depriving child sex offenders of housing options. Additionally, economic decline in once prosperous Illinois cities, like East St. Louis where Patrick Leroy, the defendant in *People v. Leroy*, lived has led to a scarcity of safe, affordable housing for all residents, not just for child sex offenders.<sup>224</sup> As Judge Kuehn, the lone dissenter in *Leroy*, explained:

The historical evolution of East St. Louis has resulted in a present-day community that possesses a plethora of schools and playgrounds. At the same time, there is a paucity of decent housing. The schools and playgrounds are by-products of an economic expansion that East St. Louis experienced immediately after the second world war. Countless factories and manufacturing plants provided employment and grew East St. Louis into a workingman’s town . . . . The Eisenhower years presented a time when a lot of East St. Louis children were in need of a lot of schools . . . . Over the years that ensued, the manufacturing and production plants would disappear, along with the families that once populated the town’s crowded neighborhoods. Nicely maintained middle-class homes became slums, which were condemned and torn down . . . . Today, remaining homes like the one Leroy was ordered to leave tend to cluster around areas

<sup>219</sup> See cases cited *supra* note 169.

<sup>220</sup> *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009).

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

<sup>222</sup> *Id.*

<sup>223</sup> Twohey, *supra* note 6. According to Twohey, “[s]ex offenders have long been prohibited from living in households with children under 18 and within 500 feet of a school, park or child-care facility. A 2005 law expanded the restrictions by prohibiting more than one sex offender from living under the same roof unless in halfway homes licensed by the Department of Corrections or other residential facilities operated by the state, such as nursing homes. Many halfway homes that once housed sex offenders closed because they could not meet the new licensing requirements, such as 24-hour security, or because of community opposition. . . . The problem is, after serving parole behind bars these offenders are released into the community with no supervision or transitional support.” *Id.* The article does not distinguish between child sex offenders and other types of sex offenders.

<sup>224</sup> *People v. Leroy*, 828 N.E.2d 769, 788 (Ill. App. Ct. 2005) (Kuehn, J., dissenting).

where schools still operate . . . . A number of former school buildings still stand, despite their closure. Their adjoining playgrounds render the surrounding neighborhoods off limits to the likes of Patrick Leroy.<sup>225</sup>

¶60 Despite the housing inadequacies confronting many child sex offenders, the majority opinions of both Illinois court decisions failed to consider the impact that neighborhood design and economic decline have on the residency options available to child sex offenders in the state.<sup>226</sup>

¶61 Although residency restrictions share some similarities with banishment, the Indiana Supreme Court took a different approach in its analysis of the first *Smith* factor. Instead of analogizing Indiana's residency law to banishment, the court compared the law to other types of restraints typically placed on probationers and parolees.<sup>227</sup> Because restricting where a probationer or parolee may live is a common condition of release, the Indiana Supreme Court held that Indiana's residency law was akin to a traditional form of punishment, namely supervised probation or parole. According to the court, this factor alone favored treating the effects of the statute as punitive as applied to the offender in the Indiana case.<sup>228</sup>

¶62 The success of any legal challenge to Illinois' residency law will turn, in part, on the living patterns of those in compliance with the law. Unfortunately, there have been no studies analyzing the impact of Illinois' residency law on child sex offenders in the state. If offenders face severely limited housing options, which effectively isolate them from their communities, then residency restrictions may be akin to the historical punishment of banishment. This is especially true if banishment is understood to mean expulsion from part, not all, of a community. This argument, however, has already been rejected by two of Illinois' five appellate courts. Therefore, for a challenge to be successful it must either arise in one of the three districts yet to consider the issue or, alternatively, it must abandon the analogy to banishment and instead embrace the reasoning employed by the Indiana Supreme Court.

### 3. Affirmative Disability or Restraint

¶63 The second *Smith* factor used to determine whether a particular law is so punitive as to negate the legislature's civil intent is whether the statute in question imposes an affirmative disability or restraint.<sup>229</sup> Here, a reviewing court must evaluate how the statute's effects are felt by its subjects.<sup>230</sup> If the disability or restraint is minor or indirect, the statute is unlikely to be punitive.<sup>231</sup> In considering the second *Smith* factor, both Illinois courts refused to allow the presence of a limited disability or restraint to sway their ultimate conclusion that Illinois' residency law created a civil regime.<sup>232</sup> Although

<sup>225</sup> *Id.*

<sup>226</sup> *People v. Morgan*, 881 N.E.2d 507, 510–11 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 780–781 (Ill. App. Ct. 2005).

<sup>227</sup> *State v. Pollard*, 908 N.E.2d 1145, 1151 (Ind. 2009).

<sup>228</sup> *Id.*

<sup>229</sup> *Smith v. Doe*, 538 U.S. 84, 99–110 (2003).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 100.

<sup>232</sup> *People v. Morgan*, 881 N.E.2d 507, 511 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 781 (Ill. App. Ct. 2005).

the *Leroy* court “would not characterize the disability or restraint imposed by [Illinois’ residency statute] as minor or indirect,” it was “not convinced that the presence of this factor alone [was] sufficient to create a punitive effect from [the legislature’s] non-punitive purpose.”<sup>233</sup>

¶164 The dissent in *Leroy* was “completely at odds” with the majority’s conclusion, especially in light of the legal protections traditionally afforded to one’s home.<sup>234</sup> According to Judge Kuehn, “Our history has always placed great emphasis upon, and given great deference to, the place where an American chooses to live. The inalienable rights that compose our most cherished values are inextricably tied to an American’s ability to settle, and to live, in a place of his or her choosing.”<sup>235</sup> Illinois residency law “does not simply prohibit [convicted child sex offender] Patrick Leroy from living in certain areas around this state . . . [it] effectively *removes* [him] from his lifelong residence.”<sup>236</sup> Thus, “the retroactive disability and restraint imposed by [Illinois’ residency law] . . . directly infringes upon traditionally guarded freedoms and otherwise protected personal liberties.”<sup>237</sup>

¶165 Other courts have also held that residency laws impose an affirmative disability or restraint on child sex offenders.<sup>238</sup> The Indiana Supreme Court, for example, found the disability or restraint imposed by that state’s residency law to be “neither minor nor indirect,” due, in part, to the statute’s failure to exempt offenders who established their homes prior to a prohibited entity moving into their neighborhood.<sup>239</sup> According to the Indiana court, sex offenders are “subject to constant eviction because there is no way for [them] to find a permanent home in that there are no guarantees a school or youth program center will not open within 1000 feet of any given location.”<sup>240</sup> As a result, the second *Smith* factor “clearly favor[ed]” treating the effects of the Indiana’s residency law as punitive as applied to the defendant in the Indiana case.<sup>241</sup>

¶166 The Kentucky Supreme Court also found it “difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint.”<sup>242</sup> The Kentucky court was concerned about the “constant threat of eviction” and “collateral consequences” facing offenders under Kentucky’s residency law.<sup>243</sup> According to the court, the Kentucky law “could, for example, impact where an offender’s children attend school, access to public transportation for employment purposes, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender.”<sup>244</sup> As a result, the

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<sup>233</sup> *Leroy*, 828 N.E.2d at 781.

<sup>234</sup> *Id.* at 789 (Kuehn, J., dissenting).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* (emphasis original).

<sup>237</sup> *Id.* at 790.

<sup>238</sup> *State v. Pollard*, 908 N.E.2d 1145, 1150 (Ind. 2009); *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009).

<sup>239</sup> *Pollard*, 908 N.E.2d at 1150.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Baker*, 295 S.W.3d at 445.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* (quotation omitted).

court had little difficulty concluding that Kentucky's residency law "clearly impose[d] affirmative disabilities and restraints upon registrants."<sup>245</sup>

¶167 Illinois challengers may have less work to do with this *Smith* factor because, while Illinois courts viewed the restraint imposed by the state's residency law as non-punitive, they nonetheless recognized that the law does operate as an affirmative disability or restraint on child sex offenders.<sup>246</sup> The challenge then is to convince a reviewing court that this factor should be afforded sufficient weight to affect their overall analysis under *Smith*.

#### 4. Twin Aims of Punishment

¶168 The third factor a reviewing court will consider to determine whether the effects of a law are punitive is whether the statute in question promotes either of the twin aims of punishment: retribution or deterrence.<sup>247</sup> The assumption underlying this *Smith* factor is that if a statute promotes retribution or deterrence, it is more likely punitive than regulatory.<sup>248</sup> Reiterating the statute's public safety goals, the Illinois courts rejected the possibility that Illinois' residency law inflicted retribution for past sex offenses.<sup>249</sup> According to the *Leroy* court, "the purpose of [Illinois' residency law is to] protect[] children from known child sex offenders, and . . . [t]here is no evidence that [the law was] designed as a form of retribution."<sup>250</sup> In considering the deterrent effect of the statute, the *Leroy* court noted that it was "reasonable" to believe that Illinois' residency law might deter future crimes by limiting the contact child sex offenders have with children, but "even an obvious deterrent purpose does not necessarily make a law punitive."<sup>251</sup> To hold otherwise, claimed the court, "would severely undermine the government's ability to engage in effective regulation."<sup>252</sup>

¶169 The *Leroy* court, however, seemed to focus its inquiry on whether the Illinois legislature *designed* Illinois' residency statute to inflict retribution or deterrence, not whether the *application* of the statute tends to promote either of the twin aims of punishment. According to Judge Kuehn, one need only examine Patrick Leroy's circumstances to understand how Illinois' residency law advances retribution.<sup>253</sup> Leroy was convicted in 1987 of criminal sexual assault.<sup>254</sup> He served six years in prison and upon his release returned to his childhood home to live with his aging mother. Besides prison, this was the only home Leroy had ever known. For over a decade, Leroy lived within 500 feet of an elementary school and never re-offended. In May 2003, authorities discovered Leroy was violating of Illinois' residency law and forced him to move. "Absent a tendency to promote retribution," asked Judge Kuehn, "what legitimate purpose would legislators have in removing Patrick Leroy from his home, given the fact

<sup>245</sup> *Id.*

<sup>246</sup> *People v. Morgan*, 881 N.E.2d 507, 511 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 781 (Ill. App. Ct. 2005).

<sup>247</sup> *Smith v. Doe*, 538 U.S. 84, 97 (2003).

<sup>248</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

<sup>249</sup> *Morgan*, 881 N.E.2d at 511; *Leroy*, 828 N.E.2d at 781.

<sup>250</sup> *Leroy*, 828 N.E.2d at 781.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 790 (Kuehn, J., dissenting).

<sup>254</sup> *Id.* at 784.

that he has lived there for 10 years without re-offending?”<sup>255</sup> According to Judge Kuehn, a restriction, like Illinois’ residency statute, “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.”<sup>256</sup>

¶70 The Kentucky Supreme Court was also concerned about the expansive nature of the restriction. According to the court, “When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.”<sup>257</sup> Thus, by failing to make an individualized assessment of the dangerousness of each offender, the Kentucky court concluded that its state’s statute promoted retribution, one of the traditional aims of punishment.<sup>258</sup>

¶71 The Indiana Supreme Court, however, took a different approach, refusing to address whether Indiana’s residency statute promoted retribution and focusing instead on the law’s “substantial” deterrent purpose.<sup>259</sup> According to the court:

By prohibiting sex offenders from living in certain proscribed areas [Indiana’s] residency restriction statute is apparently designed to reduce the likelihood of future crimes by depriving the offender of the opportunity to commit those crimes. In this sense the statute is an even more direct deterrent to sex offenders than the Act’s registration and notification regime.<sup>260</sup>

Thus, according to the Indiana court, the deterrent factor alone favored treating the statute as punitive as applied to the offender in the Indiana case.<sup>261</sup>

¶72 The United States Supreme Court, however, has been hesitant to hold that the presence of a deterrent purpose renders an otherwise civil statute punitive. According to the Court, “Any number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal . . . would severely undermine the Government’s ability to engage in effective regulation.”<sup>262</sup> Furthermore, in upholding Alaska’s sex offender registration and community notification law, the Court stated that a “statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.”<sup>263</sup> As such, “[t]he State’s determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the [Alaska registration and community notification] statute a punishment under the *Ex Post Facto* Clause.”<sup>264</sup>

<sup>255</sup> *Id.* at 791 (Kuehn, J., dissenting).

<sup>256</sup> *Id.*

<sup>257</sup> *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009).

<sup>258</sup> *Id.*

<sup>259</sup> *State v. Pollard*, 908 N.E.2d 1145, 1152 (Ind. 2009).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Smith v. Doe*, 538 U.S. 84, 102 (2003) (quotation omitted).

<sup>263</sup> *Id.* at 103.

<sup>264</sup> *Id.* at 104. In his concurring opinion, however, Justice Souter expressed concern about the lack of

¶73 Nevertheless, there is a strong argument that Illinois' residency statute promotes the twin aims of punishment by failing to determine which child sex offenders are likely to re-offend. By subjecting all child sex offenders to the same prohibition, regardless of their crime or risk of re-offense, Illinois' residency law exacts retribution on those who intend to abide by the law. Additionally, the Illinois law seeks to deter those offenders who may re-offend by removing them from areas where children are present. This obvious deterrent effect, however, does not appear to be enough for the United States Supreme Court or for the two Illinois courts to consider this issue. As such, any effective challenge to Illinois' residency law must rest on more than the third *Smith* factor alone.

##### 5. Rational Relationship to a Non-Punitive Purpose

¶74 The next factor a reviewing court will weigh to determine whether Illinois' residency law amounts to retroactive punishment is whether the statute bears a rational connection to a legitimate non-punitive purpose.<sup>265</sup> Both Illinois courts to consider the issue had little trouble concluding that Illinois' residency statute bore a rational connection to the legitimate non-punitive purpose of protecting children from known child sex offenders.<sup>266</sup> The Indiana Supreme Court similarly found that its state's residency statute had "a purpose other than simply to punish sex offenders," namely to advance public safety.<sup>267</sup> Both statutes, therefore, easily satisfied the fourth *Smith* factor.

¶75 The Kentucky Supreme Court focused instead on whether the connection between Kentucky's residency statute and public safety was indeed rational.<sup>268</sup> Noting that the statute did little to prohibit offenders from actually interacting with children, it was "difficult" for the court to see "how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present."<sup>269</sup> Kentucky's residency law did nothing to prohibit offenders from working with children, visiting schools and playgrounds while children were present, or living with children, including their victims.<sup>270</sup> The Kentucky court therefore concluded that its state's statute might bear a connection to public safety, but "the statute's inherent flaws prevent that connection from being 'rational.'"<sup>271</sup>

¶76 Judge Kuehn echoed the Kentucky court's conclusion. According to Judge Kuehn, Illinois' residency law "inhibits nothing" because child sex offenders can still reside close

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individualized assessment required by the Alaska statute.

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.

*Id.* at 109 (Souter, J., concurring).

<sup>265</sup> *Id.* at 97.

<sup>266</sup> *People v. Morgan*, 881 N.E.2d 507, 511 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 782 (Ill. App. Ct. 2005).

<sup>267</sup> *State v. Pollard*, 908 N.E.2d 1145, 1152 (Ind. 2009).

<sup>268</sup> *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 445–46.

enough to children to tempt their desires.<sup>272</sup> Offenders “can live just outside the restricted area, gaze out their kitchen window, and covet the children that they see playing on a school playground some 500 feet away.”<sup>273</sup> The arbitrary nature of the restriction, coupled with its inability to prohibit offenders from interacting with children, made Illinois’ residency statute “pointless” in the eyes of the *Leroy* dissent.<sup>274</sup>

¶77 Recent studies also indicate that residency restrictions do nothing to prohibit sex offenders from re-offending. For example, a 2005 report to the Florida legislature concluded that “there is no evidence that proximity to schools increases recidivism, or, conversely, that housing restrictions reduce re-offending or increase community safety.”<sup>275</sup> A 2004 Colorado study, which examined a random sample of sex offenders on probation in the Denver area, found that offenders did not cluster in areas where children were present, and concluded that residency restrictions “should not be considered as a method to control sexual offending recidivism.”<sup>276</sup> A similar 2003 Minnesota study found no correlation between the residential location of that state’s sex offenders and their likelihood to re-offend.<sup>277</sup> According to scholar Asmara Tekle-Johnson, “In the face of empirical data evidencing that [residency restrictions] are ineffective and grossly over inclusive, the fit between [residency restrictions] and an alleged non-punitive purpose of public safety is beyond irrational.”<sup>278</sup>

¶78 Notwithstanding recent empirical data, the rationality factor may be a difficult obstacle for those challenging Illinois’ residency law to overcome. First, rationality is a low standard to meet.<sup>279</sup> Furthermore, the United States Supreme Court considered the fourth *Smith* factor “a [m]ost significant” element in its determination that the effects of Alaska’s SORA’s were non-punitive and therefore constitutional under the federal Ex Post Facto Clause.<sup>280</sup> The arguments advanced by the Kentucky Supreme Court,<sup>281</sup> therefore, may prove more effective when considered within the context of the final *Smith* factor discussed next.

## 6. Excessive in Relation to Non-Punitive Purpose

¶79 Finally, a restriction may amount to punishment under *Smith* if it is excessive with respect to the state’s non-punitive purpose.<sup>282</sup> A court weighing this factor must determine whether the regulatory means are reasonable in light of the state’s non-punitive objective.<sup>283</sup> In applying the last *Smith* factor, both Illinois courts concluded that Illinois’

<sup>272</sup> *People v. Leroy*, 828 N.E.2d 769, 792 (Ill. App. Ct. 2005) (Kuehn, J., dissenting).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Levenson, *supra* note 217, at 4.

<sup>276</sup> REPORT ON SAFETY ISSUES, *supra* note 211, at 4.

<sup>277</sup> MINN. DEP’T. OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 11 (2003) [hereinafter LEVEL THREE SEX OFFENDER REPORT], available at <http://www.leg.state.mn.us/docs/2003/mandated/030175.pdf>.

<sup>278</sup> Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 633 (2009).

<sup>279</sup> *Cf.* U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (holding that in applying rational basis review, the Court will uphold the law if any state of facts could reasonably be conceived to sustain it).

<sup>280</sup> *Smith v. Doe*, 538 U.S. 84, 102 (2003) (citation and quotation omitted).

<sup>281</sup> See *supra* notes 268–271 and accompanying text.

<sup>282</sup> *Smith*, 538 U.S. at 97.

<sup>283</sup> *Id.* at 105.

residency statute set forth a reasonable method by which to promote public safety, and the law was not excessive in relation to its non-punitive goal for two reasons.<sup>284</sup> First, when compared to the thirteen other states with residency restrictions at the time, Illinois' 500-foot restriction was the least restrictive in geographical terms.<sup>285</sup> Additionally, while the statute "restrict[ed] residency to some extent, it [did] not otherwise restrict the movement and activities of child sex offenders."<sup>286</sup> As such, the law bore a reasonable relationship to the non-punitive purpose of protecting children from known child sex offenders, and set forth a reasonable means by which to accomplish that goal.<sup>287</sup>

¶80 The Illinois decisions rested on the assumption that restricting sex offenders' proximity to children would reduce their likelihood to re-offend. Underlying this assumption is the common belief that sex offenders re-offend at an unusually high rate, and therefore require special attention to prevent recidivism.<sup>288</sup> Both assumptions, however, are disputed by research.

¶81 First, studies suggest that sex offenders do not re-offend at an unusually high rate and may actually be less likely to re-offend than other criminals.<sup>289</sup> For example, a 1998 meta-study of 61 sex offender recidivism studies concluded that, "[o]n average, the sexual offense recidivism rate was low" for sex offenders.<sup>290</sup> The study found recidivism rate for rapists and child molesters, arguably the two most despised sex offender groups, was 18.9% and 12.7%, respectively.<sup>291</sup> Furthermore, regulating where sex offenders may legally reside does little to prevent individuals from re-offending. A 2007 study by the Minnesota Department of Corrections, which analyzed the re-offense patterns of 224 sex offenders released from prison between 1990 and 2002, found that residential proximity to children had very little impact on the offender's opportunity to re-offend.<sup>292</sup> Just over half of the recidivists came into contact with their victim through "social or relationship proximity," not by living near the victim or living near places the victim frequents.<sup>293</sup> Additionally, residency restrictions do little to limit the risk posed by family members, acquaintances and friends; people who perpetrate an overwhelming majority of sexual offenses.<sup>294</sup> A 2000 DOJ study found that only 7% of child sex victims reported being abused by strangers.<sup>295</sup> The remaining 93% of victims knew their offenders, 34.2% of whom were family members, and 58.7% of whom were acquaintances.<sup>296</sup>

¶82 Recent research also demonstrates that individualized risk factors can help predict which offenders are most likely to re-offend. For example, a 2004 meta-analysis of

<sup>284</sup> *People v. Morgan*, 881 N.E.2d 507, 511–12 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 782 (Ill. App. Ct. 2005).

<sup>285</sup> *Leroy*, 828 N.E.2d at 782.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *See supra* Part II.

<sup>289</sup> *See supra* notes 150–151.

<sup>290</sup> R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCH. 348, 359 (1998).

<sup>291</sup> *Id.*

<sup>292</sup> MINN. DEP'T. OF CORRECTIONS, SEX OFFENDER RECIDIVISM IN MINNESOTA (Apr. 2007).

<sup>293</sup> *Id.*

<sup>294</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

ninety-five studies involving more than 31,000 sex offenders found that factors such as negative family background, problems with friends and lovers, and deviant sexual interests are important predictors of sexual recidivism.<sup>297</sup> Other research demonstrates that dynamic risk factors, such as unemployment, isolation, depression and instability can predict the likelihood of re-offense.<sup>298</sup> The study concluded that “[i]nterventions directed towards the highest risk offenders are most likely to contribute to the public safety.”<sup>299</sup>

¶83 Given the limited effect residency restrictions have on reducing recidivism, applying them to all child sex offenders, regardless of risk, seems excessive. This is particularly true considering the indefinite nature of Illinois’ residency law. It was this lack of individual assessment, in part, that led the Indiana Supreme Court to hold its state’s residency law unconstitutional.<sup>300</sup> According to the court, the law failed to “consider the seriousness of the crime, the relationship between the victim and the offender, or [make] an initial determination of the risk of re-offending.”<sup>301</sup> As such, by “[r]estricting the residency of offenders . . . without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes.”<sup>302</sup>

¶84 Like Indiana’s residency statute, Illinois’ law fails to account for individualized risk factors, which can be important predictors of recidivism. In addition, despite applying only to child sex offenders, both the Illinois and Indiana statutes capture offenders who have not committed a sex offense against a child.<sup>303</sup> The Illinois law, for example, applies to individuals who commit kidnapping, aggravated kidnapping, unlawful restraint, and aggravated unlawful restraint, when the victim is under eighteen years of age and the defendant is not a parent of the victim.<sup>304</sup> As previously discussed, Illinois’ SORA contains the same provision, but SORA’s provision applies only to offenses deemed “sexually motivated.”<sup>305</sup> Illinois’ residency statute has no such provision, applying to sexual and non-sexual crimes alike. A combination of these factors, namely the ineffectiveness of residency restrictions in preventing re-offense, the lack of individualized risk assessment, and the broad definition of “sex offender,” coupled with the constant threat of eviction, led both the Indiana and Kentucky Supreme Courts to conclude that their state’s respective residency restrictions were excessive when

<sup>297</sup> Grant T. Harris & Marnie E. Rice et al., *A Multi-Site Comparison of Actuarial Risk Instruments for Sex Offenders*, 15 PSYCHOL. ASSESSMENT 413–425 (2003).

<sup>298</sup> See R. KARL HANSON ET AL., PUB. SAFETY CAN., ASSESSING THE RISK OF SEXUAL OFFENDERS ON COMMUNITY SUPERVISION: THE DYNAMIC SUPERVISION PROJECT (2007) available at [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/crp2007-05-en.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/crp2007-05-en.pdf) (concluding that trained community supervision officers can reliably score valid and useful sex offender risk assessments).

<sup>299</sup> R. KARL HANSON & KELLY MORTON-BOURGON, PUB. SAFETY CAN., PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS 1 (2004), available at [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2004-02-pred-se-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-02-pred-se-eng.pdf).

<sup>300</sup> *State v. Pollard*, 908 N.E.2d 1145, 1153–54 (Ind. 2009).

<sup>301</sup> *Id.* at 1153.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* (“In addition to applying to offenders convicted of five discrete crimes against children: child molesting, child exploitation, child solicitation, child seduction, and kidnapping where the victim is less than eighteen years of age, the [Indiana] statute also applies to an offender found to be a sexually violent predator,” which encompasses seventeen specific offenses that may or may not be against a child.) (internal quotation omitted).

<sup>304</sup> 720 ILL. COMP. STAT. 5/11-9.3(c)(2) (2010); *id.* at 5/11-9.4(d)(2.5).

<sup>305</sup> See *supra* Part II.D.

considered in light of their public safety purpose.<sup>306</sup> Any challenge to Illinois' residency law, therefore, must emphasize these factors if it hopes to be successful.

*B. Need for Judicial Intervention given the Resurgence of the Preventive State*

¶85 The resurgence of preventive lawmaking in recent years has many observers concerned, and with good reason. Preventive lawmaking not only threatens the liberty interests of disfavoured groups, but it also presents a slippery slope with few principled limits. According to Janus, sex offender laws “provide a template for an expansive version of the preventive state” by legitimizing outsider jurisprudence.<sup>307</sup> Outsider jurisprudence is the belief that the state may single out groups of “others” for inferior legal treatment.<sup>308</sup> In the past, the state has attempted to distinguish a group based on the physical characteristics of its members—by race, gender, or disability.<sup>309</sup> But today, modern outsider jurisprudence thrives on the belief that the risky person is different at some basic level than the rest of the population; and the new outsider status is based on risk of dangerousness, not physical traits.<sup>310</sup>

¶86 Historically, outsider status has been used to justify everything from slavery, to the forced sterilization of “mental defectives,”<sup>311</sup> to the internment of Japanese Americans during World War II.<sup>312</sup> Once a group is labelled as “other,” and their threat considered sufficiently great, there is little to prevent lawmakers from curtailing the civil liberties of members. Thus, one significant problem with the resurgence of outsider jurisprudence, according to Janus, is that it “places no principled limits on the degradation of rights for the outside group.”<sup>313</sup>

¶87 More concerning still is the complete lack of political will to resist or question the re-emergence of outsider jurisprudence, at least as it pertains to sex offenders. According to *The Economist*, this lack of political will is not surprising given the political “ratchet effect” that accompanies most sex offender laws. In describing the “ratchet effect,” *The Economist* states that:

Stricter curbs on paedophiles win votes. And to sound severe, such curbs must be stronger than the laws in place, which in turn were proposed by politicians who wished to appear tough themselves.<sup>314</sup> . . . [As a result, e]very lawmaker who wants to sound tough on sex offenders has to propose a law tougher than the one enacted by the last politician who wanted to sound tough on sex offenders.<sup>315</sup> . . . Few politicians dare to

<sup>306</sup> *State v. Pollard*, 908 N.E.2d 1145, 1153–54 (Ind. 2009); *Commonwealth v. Baker*, 295 S.W.3d .3d 437, 447 (Ky. 2009).

<sup>307</sup> Janus, *supra* note 36, at 587. Although Janus refers to sexual predator laws, which only include civil commitment statutes, his reasoning applies with equal force to sex offender registration, notification and residency restrictions.

<sup>308</sup> *Id.*

<sup>309</sup> See discussion *supra* Part I.

<sup>310</sup> *Id.*

<sup>311</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>312</sup> *Kormatsu v. United States*, 323 U.S. 214 (1944).

<sup>313</sup> *Id.*

<sup>314</sup> *America's Unjust Sex Laws*, THE ECONOMIST, Aug. 8, 2009, at 9.

<sup>315</sup> *Unjust and Ineffective*, THE ECONOMIST, Aug. 8, 2009, at 22.

vote against such laws, because if they do, the attack ads practically write themselves.<sup>316</sup>

¶88 Illinois has witnessed its own “ratchet effect” in the twenty-four years since HCSORA’s inception. During that time, Illinois lawmakers have routinely cited the risk of recidivism as one justification for the state’s increasingly harsh sex offender regulatory scheme. Lawmakers have claimed, for example, that “recidivism is a real problem with these people,”<sup>317</sup> and that sex offenders are “compulsive and repetitive”<sup>318</sup> and have “never been cured.”<sup>319</sup> By using the risk of recidivism as a key marker of “otherness,” Illinois lawmakers have not only preyed on the fears of the public, but they have also harnessed the legitimacy of science and medicine to reinforce the alleged deviance of the outsider group. According to Janus, “risk-assessment is seen as an expert endeavour, one that is increasingly seen as scientific.”<sup>320</sup> As a result, “dangerousness serves as a stable ingredient of the person . . . [an] internal characteristic . . . that justifies both the prediction of future behaviour and the creation of outsider status.”<sup>321</sup> The resulting classification, therefore, appears “natural and inevitable” and completely “untainted by the invidious prejudice” that in fact drives the classification.<sup>322</sup>

¶89 As Part II demonstrated, residency restrictions are simply the latest in a long line of preventive measures designed to limit the alleged dangerousness of child sex offenders in the state. Although recent research demonstrates that residency restrictions do little to prevent crime<sup>323</sup> and may actually do more harm than good,<sup>324</sup> the public’s strong disdain of sex offenders provides little incentive for politicians to change. Any call for restraint, therefore, must originate with the court.

¶90 To date, however, Illinois courts have been reluctant to overturn Illinois’ regulatory scheme, upholding both SORA and SOCNL against constitutional challenges. This outcome is not surprising given the courts’ general failure to consider the impact of the law within the larger context of the preventive state. According to Steiker,

Courts and commentators often tend to conclude, too quickly, that if some policy or practice is not ‘really’ punishment, then there is nothing wrong with it . . . . Not only do courts and commentators often trivialize objections to actions of a ‘merely’ preventive (as opposed to punitive) state, they also do not tend to see the various preventive policies and practices . . . as part of a unified problem . . . . Rather, each individual preventive practice has been treated as *sui generis* rather than as a facet of a larger question in need of a more general conceptual framework.<sup>325</sup>

<sup>316</sup> *America’s Unjust Sex Laws*, *supra* note 314.

<sup>317</sup> S. Transcription Deb., 91st Gen. Assemb., at 62 (Ill. Apr. 7, 2000) (comments of Sen. O’Malley).

<sup>318</sup> H. Transcription Deb., 84th Gen. Assemb., at 212 (Ill. June 23, 1986) (comments of Rep. Regan).

<sup>319</sup> *Id.*

<sup>320</sup> Janus, *supra* note 36, at 592.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *See supra* Part III.A.6.

<sup>324</sup> *See supra* Part III.A.2.

<sup>325</sup> Steiker, *supra* note 34, at 777–778.

¶91 The Illinois courts, however, may soon be faced with an opportunity to re-evaluate the legitimacy of the preventive state. As Part III showed, a viable challenge to Illinois' residency statute exists under the ex post facto clauses of both the United States and Illinois Constitutions. For the Illinois Supreme Court, and the three Illinois Appellate Courts yet to consider the issue, such a challenge provides an opportunity to place a principled limit on the power of the preventive state. Given the laundry list of regulations confronting child sex offenders today, any thorough constitutional review of Illinois' residency statute must consider the proper role of the preventive state. Namely, to what extent should the constitutional limits designed to cabin the powers of the punitive state apply to laws aimed at preventing crime?

¶92 Additionally, the Illinois courts should also consider the underlying purpose of Ex Post Facto Clauses. A close examination of Illinois' residency law demonstrates that it clearly fails the three policies the Ex Post Facto Clauses were designed to protect. First, by applying to all child sex offenders, regardless of conviction date, Illinois' residency law deprives offenders convicted prior to the statute's effective date of fair warning of the law's effect. Additionally, by retroactively changing the penalties associated with certain crimes, Illinois' residency law frustrates reliance on existing laws in general. Most importantly, Illinois' residency law is the result of a largely unchecked political process, which has thrived on the perceived "otherness" of an unpopular group. This political "ratchet effect" has left child sex offenders with little recourse, and is precisely this type of unchecked legislative power that the Ex Post Facto Clauses were designed to prevent.

#### IV. CONCLUSION

¶93 Residency restrictions are the latest wave in a continuing effort by lawmakers to respond to public concern about the presence of sex offenders in the state. In their rush to appease the public, however, lawmakers have failed to consider the long-term impact of their chosen regulatory scheme. The resurgence of preventive lawmaking is cause for concern; not only for sex offenders, but for all citizens, because a government without principled limits is one of limitless power. Residency restrictions are not an effective means of preventing crime. More importantly, they violate the basic notions of fairness that the Constitution was designed to protect. Although two of Illinois' five appellate courts have upheld Illinois' residency statute against ex post facto challenges, recent decisions in other states may signal a change in the judicial landscape. The time has come for the Illinois Supreme Court to check the powers of the preventive state, and hold residency restrictions unconstitutional.