



NYCLU
NEW YORK CIVIL LIBERTIES UNION

Capital Region Chapter
90 State Street, Suite 518
Albany, New York 12207
(518)436-8594 (518)426-9341(f)
e-d@nyclu-crc.org

August 7, 2007

Schenectady County Legislature
620 State Street
Schenectady, New York 12305

Dear Legislator:

Now that more than a month has elapsed since the Schenectady County Legislature's passage of Local Laws 03-07 and 04-07, it should be clear to all that this legislation was passed in haste, without careful attention either to New York state law or to constitutional protections.

Results of the 105th Assembly District special election prove that voters already recognize these facts. They have sent a strong message that these laws, in their current form, are invidious. The Schenectady County Legislature should listen to the voices of its constituents.

New York state law already puts severe but carefully-thought-out restrictions on those who have been convicted of sexual offenses. Under the provisions of Megan's Law, even the least threatening ex-offender must register with local police for twenty years and all others, unless specifically exempted, must register for life. Those deemed most dangerous must personally verify their addresses with local law enforcement every ninety days. See New York State Correction Law, Article 6-C, §§ 168 et seq.¹

And, as a matter of policy, the state has determined that it is appropriate to impose certain locational restrictions on two very specific cadres of paroled or conditionally discharged sex offenders – those who are convicted sex offenders whose victims were under the age of 18 at the time of the offense and all Level 3 sex offenders. See Executive Law § 259-c(14) and Penal Law § 65.10(4-a), referencing Penal Law § 220.00, subd. 14. These locational strictures reflect the judgment of the legislature that it serves an important public safety purpose to ban only these two categories of sex offenders from entering on school grounds, where school grounds are defined to include "any area accessible to the public" located within one thousand feet of a school, which includes "sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants." Even so, the amendment permits even these offenders who are students or parents of students to obtain a waiver of the locational restrictions. *Id.*

Schenectady County Local Laws 03-07 and 04-07 violate state pre-emption principles that prohibit local governmental entities from exercising authority in a manner that is

¹ New York State's Megan's Law is modeled upon the provisions of a federal statute, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. §§ 14701 et seq.

inconsistent with overriding state law and policy. *New York State Club Association v. City of New York*, 69 N.Y.2d 211, 217 (1987)("with respect to inconsistency ... there need not be an express conflict between state and local laws to render a local law invalid"). See also *People v. DeJesus*, 54 N.Y.2d 456, 468 (1981); *Con Edison of New York v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983). A finding of preemption is justified by the belief that "[s]uch laws, were they permitted to operate in a field pre-empted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns." *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96-97 (1987).

In this case, the state legislature expressed state policy when, under State Penal Law, it established a sentencing regime for convicted sex offenders and when, under the State Correction Law, it established a statewide registration and notification regime concerning post-incarceration monitoring of convicted sex offenders and when, under the State Penal Law, it crafted certain "mandatory conditions," including imposing locational requirements on some, but not all, sex offenders. In this case, the New York legislature has enacted an extensive and comprehensive statutory regime governing post-incarceration monitoring of convicted sex offenders. In enacting Megan's Law, the state legislature was motivated by the dual goals of protecting the public and facilitating future law-enforcement efforts. Accordingly, the state's policy is to require registration of convicted sex offenders and the identification of the location of their residence to facilitate law-enforcement monitoring. And, as a matter of policy, state law further encourages post-incarceration sex offenders to live in communities where the offenders have family or community ties; this policy rests upon rehabilitative interests.

The Schenectady County ordinances undermine these state policies and interests. They ignore registration and identification and impede the ability of law enforcement officials to know where the ex-offenders are living. They completely disregard the state's rehabilitative interests of having ex-offenders live with their families, attend school and/or visit their minor children who are attending school. And they create an undue burden on surrounding municipalities which contravenes the state's interest in balancing and allocating law enforcement resources. They undermine the function of imposing "special conditions" on certain sex offenders through the probation, parole and conditional release functions. While the County of Schenectady may disagree with the state legislature's regime, it may not adopt local ordinances that are entirely inconsistent with the state's overriding interest in regulating the behavior of convicted sex offenders upon release from prison.

Also, the local laws are inconsistent with New York state law regarding the criminal sentencing of convicted sex offenders. New York State has enacted a detailed and comprehensive regulatory scheme for sentencing persons convicted of sex offenses and has, therefore, pre-empted the County of Schenectady from adding further layers of punishment, including banishment, in this area. Accordingly, Schenectady County Local Laws 03-07 and 04-07 both "thwart the operation of the State's overriding policy concerns," contrary to the holding of *Jancyn*, and impose "additional restrictions on rights granted by State law," namely the right to be free to engage in interstate and intrastate travel, the right to form and maintain familial associations in the community and the right to be free from cruel and unusual and excessive punishment. Schenectady County may not create policies contrary to state policy intended to govern the post-prison monitoring and oversight of convicted sex offenders. Accordingly, it is our opinion that

Schenectady County's attempt to legislate in this area is inconsistent with overriding state policy and violates Article IX § 2 (c) of the New York State Constitution.

There are substantial data suggesting that overly restrictive laws force ex-offenders underground. Many ex-offenders simply stop registering, become invisible to local police and stop using the very community support services that may inhibit them from re-offending. Recent research suggests that ex-offenders who receive rehabilitative treatment in their communities may be as much as forty percent less likely to re-offend (cf. R. K. Hanson et al., "First Report of the Collaborative Outcome Data Project on the Effectiveness of Treatment for Sex Offenders," *Sexual Abuse: A Journal of Research and Treatment*, 14(2), 2002, and F. Losel and M. Schmucker, "The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-analysis," *Journal of Experimental Criminology*, 1, 2005).

Also, in the current instance, those affected by these laws may be forced to cluster in rural areas of Schenectady County where there is less law-enforcement and community supervision. Having such restrictions in place in Schenectady County would likely force ex-offenders to move to more rural areas, such as Duanesburg, Princetown and the western sections of Glenville and Rotterdam, that would not contain nearby schools, parks and child-care centers but would pose other problems, such as a high concentration of offenders with no ties to the community; isolation; lack of work, education and treatment options, and an increase in the distance traveled by agents who supervise offenders. Studies have shown that disrupting ex-offenders' lives in this manner correlates with increased recidivism. (cf. Colorado Sex Offender Management Board, "Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community," Colorado Department of Public Safety, Denver, CO, 2004 and R. K. Hanson & A. J. R. Harris, "Dynamic Predictors of Sexual Recidivism," Department of the Solicitor General of Canada, Ottawa, 1998.) No evidence points to any effect on offense rates of school proximity residential restrictions. See, e.g., Kansas Department of Corrections, "Twenty Findings of Research on Residential Restrictions for Sex Offenders and the Iowa Experience with Similar Policies," available at www.dc.state.ks.us/publications/sex-offender-housing-restrictions/; see also "Level Three Sex Offenders Residential Placement Issues," 2003 Report to the Legislature, Minnesota Department of Corrections, and "Sex Offender Residence Restrictions," A Report to the Florida Legislature, October 2005, Jill S. Levinson, Ph.D.

The detrimental community impacts of residency restrictions have recently been highlighted by the Iowa County Attorneys Association. In a forceful statement this prosecutor group argued against residency restrictions for many of the same reasons articulated above. We urge you to review closely the "Statement on Sex Offender Residency Restrictions in Iowa," dated February 14, 2006, issued by the Iowa County Attorneys Association. For your convenience, a copy of this Statement is attached. It is also available on the Internet at:

<http://www.cacj.org/PDF/Statement%20on%20Sex%20Offender%20Residency%20Restrictions.pdf>.

Finally, it is clearly unconstitutional to evict law-abiding citizens from their homes, and effectively banish them from an entire county, based on an *ex-post facto* law, which increases the punishment for the original crime after it is committedⁱ. In fact, there are *two* different ways in which these local laws violate the *Ex Post Facto* Clause. First, as

described in Note 2 below, it is unconstitutional to apply these punitive banishment laws to anyone whose triggering conviction occurred before the effective date of the local laws. Secondly, as in *Kentucky v. Baker* (see Note 2) where the court recently held a similar statute unconstitutional, the laws are *doubly* unconstitutional in that they purport to evict people already residing in Schenectady County. Courts and legislators in this State have recognized an “individual’s interest in not being displaced involuntarily” from a residence, when the exercise of police power makes his or her use of the property unlawful. See *Village of Valtie v. Smith*, 36 NY2d 102 (1975). Upon information and belief, no such banishment law has ever been upheld in the absence of a grandfather clause. It is shocking to think that the County Legislature would force people who already have paid for any crime they may have committed to uproot or abandon their families, to break leases with landlords, and to forsake communities where they may have lived in peace for decades.

We strongly urge the Schenectady County Legislature to reconsider its actions and rescind these onerous, unjust and unconstitutional laws. If you should persist in enforcing these laws, we would be left with no other option but to pursue litigation with all the attendant legal costs to the county which that implies. If you seek to amend these laws rather than repeal them, we strongly recommend that you bring them into conformity with New York State practice. Other communities which have tried to initiate restrictions that are more coercive than state standards are already being sued.

Sincerely,

Melanie Trimble Kathy Manley Terence Kindlon David Giacalone

Melanie Trimble Kathy Manley, Esq. Terence Kindlon, Esq. David Giacalone, Esq.
Exec. Dir. NYCLU Kindlon & Shanks Kindlon & Shanks

ⁱ The Second Circuit Court of Appeals recently stated, “...It is hard to improve on the definition of the Ex Post Facto Clause set out in an early Supreme Court case, *Calder v. Bull*, 3 US 386, 390 (1798). In that case Justice Chase described the following kind of legislation as prohibited ... ‘3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed contrast to registration, *banishment* was considered punishment, stating, “...a State that decides to punish an individual is likely to select a means deemed punitive in our tradition ... The most serious offenders [in colonial times] were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one.” *Smith v. Doe*, at 97-98. The *Smith* Court also further distinguished the registration law from ones such as the Schenectady laws, stating, “...offenders subject to the Alaska statute are free to move where they wish...” *Smith*, at 101. More recently, in *Kentucky v. Baker*, a Kentucky District Court held that a very similar sex offender residence restriction violated the *Ex Post Facto* Clause, stating, ...this Court finds it nearly impossible to understand how any court reviewing SORR’s [sex offender residence restrictions] would not make a finding that the penalty has historically been considered a punishment. ... [A]pplication of these statutes to the defendants herein, each of who have triggering sex offender convictions which pre-date the effective date of the statute, constitutes an ex post facto punishment which is barred by both the United States Constitution and the Kentucky Constitution.” *Kentucky v. Baker*, at 19 and 33 (Kenton District Court, Fourth Division, Case Numbers 07-M-00604 et.al. 2007)(available at www.theparson.net/so/residencyrestrictions.source.prod_affiliate.79.pdf.)