New York Law Journal

Albany Alone Now Decides Where Sex Offenders Live

Kevin Kearon, New York Law Journal
March 13, 2015

The Court of Appeals stunning reversal last month, in *People v. Diack*, of the Appellate Term, Second Department's reversal of a Nassau district court's dismissal of a criminal charge alleging a violation of a Nassau County ordinance severely restricting residency opportunities of registered sex offenders has significantly changed the landscape of this quintessentially incendiary Not In My Backyard (NIMBY) issue.

Nothing gets a neighborhood's blood boiling more quickly than the news that a convicted sex offender has moved to town or has been living there all along. New York law demands government supervision of the establishment or continuation of residence, change of address and more frequently the satellite tracking of the geographic wanderings of all registered sex offenders.

The Court of Appeals clarified whether local governments, including at the county, city, town and village levels, can seek to protect or mollify their residents by enacting their own geographic residency restrictions, as many have done. No, resoundingly, came the answer, on state preemption grounds.

The systematic tracking of sex offenders is a fairly recent phenomenon whose methods have been evolving over the last two decades. The concept of the public availability of a list of convicted sex offenders and the affirmative notification of local law enforcement and neighborhoods of the whereabouts of such individuals has led to a wide variety of predictable issues and many problems. Add to that the fervor of a variety of private watchdog groups with social media as a tool and politicians eager to accommodate them, and it is easy to see why there is no place to left to hide, which of course, is the very objective of such efforts.

Sex crimes, including rape, child molestation, sexual abuse, possession of child pornography and, seemingly, more and more, less serious varieties of sexual misconduct, are the only category of crime society will not forgive. Killers, arsonists, fraudsters, drug dealers and even terrorists whose sentences are served are all permitted to return to lives of anonymity and relative obscurity and seek the opportunity for rehabilitation, redemption and reintegration into society. For convicted sex offenders, not so much.

There are over 3,400 semi-autonomous municipal corporations with legislative authority, including 62 counties and 932 towns in New York. Just as the U.S. Constitution enumerates the powers of the federal government and the states, New York's Constitution specifically enumerates the powers of the state and allows local municipalities to write local "home rule," ordinances to govern themselves on so-called local issues, which do not conflict with the powers of the state. You don't generally see your village's mayor able to call out the state's national guard, for instance.

Local residents have agitated their local legislators to do everything possible to drive sex offenders from their borders and, if possible, prohibit them from crossing them. The most popular form of local law has been to prohibit registered sex offenders from establishing a residence within a designated distance from, typically, schools, parks, public libraries, day care centers, etc., whether or not there is evidence that in doing so, the number of sex crimes committed is reduced.

The intent and result of such efforts has been that such people, usually men, seeking to return and integrate back into society cannot do so. They are frequently forced to live in taxpayer-financed trailer parks, motels on the edge of town or dilapidated makeshift public housing units deep in industrialized areas and far from public facilities, transportation and the like. Even well-intended probation departments and social services agencies throughout the state attempting to help find and approve housing for such individuals are repeatedly finding that there is no place to legally house them.

For those, most, who have little sympathy for the plight of such persons, consider this; they have to reside somewhere. Forcing them to live on the street or in their cars is in no one's interest. The genie is out of the bottle and the debate apparently concluded on the wisdom of the forced registration and tracking of such individuals, so the primary question seems to be where they can live. The "anywhere but here" response is typical to the NIMBY argument which apparently forced the court to act.

When villages, towns or counties successfully drive offenders out of town by the enactment of local laws, doing so only drives them into their neighbor's town. The court acknowledged the state's interest in seeing that the "burden" of housing such people falls equally on municipalities throughout the state. Apart from the inherent inequity of some jurisdictions, less restrictive in their residency requirements, bearing a disproportionate share of such burden, the data showed a pattern of clustering such individuals in highly

concentrated areas, far from rehabilitative services, itself led to a series of problematic dynamics which ran counter to the public's interest in rehabilitation and reduced recidivism.

Criminal defense practitioners need to reflect upon *Diack*'s implications for their current and past sex offender clients, especially those whose residences or desired residences are permissible under state guidelines but not so under local law. These sorts of analyses are not simple and require the careful review of the application of a myriad of residency restrictions by a number of authorities from the terms and conditions of sex offender probation or parole for those under such supervision, to the restrictions contained under the state SORA scheme and related rules and regulations.

The New York Legislature and the governor will need to recognize that the Court of Appeals has established the state's exclusive authority by declaring that such was the Legislature's intent to begin with. Before *Diack*, such authority was hardly so clear that the Appellate Term didn't avoid erroneously affirming the rights of Nassau County's claims of home rule on the subject.

Diack presents an excellent opportunity for Albany to conduct a comprehensive review of this entire area, not to tighten the screws and make life more impossible for the convicted sex offender to rehabilitate and reintegrate, but to conduct honest hearings on the empirical data, on issues of recidivism, rehabilitation and the dubious benefit occasioned by the permanent or decades-long figurative branding of the scarlet letters, "SEX OFFENDER" on the foreheads of such people.

Irrational fear, ignorance, feelings of vigilantism, and NIMBY mentalities have not helped the very causes they seek to promote. Everyone cares about public safety. No one wants a single additional instance of rape or sexual assault. Intelligent legislative and public debate and policy discussions are more necessary now than ever. The relevant data must be sought, properly gathered and understood.

We sometimes are too quick to declare the existence of new crises when none exist. Public fear-mongering and political pandering on the issue of sex offenders is counterproductive, does little to provide for anyone's safety and makes impossible what ought to be the goal; a modern, progressive approach to the monitoring and management of sex offenders in a way which both promotes public safety and confidence and provides for a meaningful chance of rehabilitation and reintegration for the maximum number of such cases.

The books should be thrown open and a more effective and simplified structure of state-wide regulations implemented to include incentive-based behavior modification efforts with the promise of eventual declassification to give hope to the offender of the eventual removal of those seemingly indelible scarlet letters.

The need for such a revised and comprehensive scheme is especially necessary given the emerging trend of criminalizing or otherwise prosecuting relatively minor sexual indiscretions and misconduct previously unseen, much of it occasioned by modern technologies, including cases related to the ubiquitous availability of Internet pornography, the phenomenon of sexting, so-called revenge porn, and unlawful surveillance crimes, among others. There seems also to be an increased zeal in the prosecution of more traditional forms of sexual crimes based upon claims of lack of capacity to consent, including as a consequence of the voluntary consumption of alcohol and other recreational, if unlawful, intoxicants.

College students, in particular college men, are at increased risk of adverse consequences, including expulsion and criminal prosecution, in this new age of "zero tolerance" upon suspect claims of sexual assault due to controversial interpretations and applications of Title IX rights mandating disciplinary hearings and findings at federally benefitting colleges and universities.

Due process is a mere fraction of what it is in the courts and preponderance of the evidence standards of proof create a very slippery slope. New York has instituted similar rules at SUNY colleges and is debating making mandatory such sexual assault complaint resolution protocols at all private colleges in the state whether they receive federal funding or not.

Kevin Kearon is a partner at Barket Marion, Epstein & Kearon in Garden City He represented Michael Kramer in 'Village of Massapequa v. Kramer,' cited in Diack, and in 2014, obtained a trial-level, court-ordered dismissal of allegations of a violation of a local sex offender restricted residency ordinance. He and his firm have a case pending in the Eastern District.