

TESTIMONY OF THE
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
ON H.B. 2742 PROVIDING FOR THE REGISTRATION BY SEX OFFENDERS
OF INTERNET ACCOUNTS AND IDENTIFIERS TO ASSIST
IN THEIR REMOVAL FROM COMMUNICATION WEB SITES

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BEFORE THE HOUSE CHILDREN AND YOUTH COMMITTEE

October 7, 2010

Good afternoon Chairwoman Bishop and members of the Children and Youth Committee.

My name is Karl Baker. I am the Chief of the Appeals Division of the Defender Association of Philadelphia. However, I have been asked to speak to you on behalf of American Civil Liberties Union of Pennsylvania where I have served as a member of the Board for twenty-five years.

Our concerns with House Bill 2742 rest on both policy and First Amendment grounds. We believe that the expansive approach of this statute's efforts to monitor and limit the access of former sex offenders to Internet networking and communication sites provides false protection to children who are at risk of sexual assault, while impermissibly restricting the First Amendment rights of former offenders.

You should understand that the broad mission of our organization encompasses the civil liberties of both children and former defendants. Perhaps our longest running and most expensive litigation in Pennsylvania involved a suit we brought in 1990 on behalf of children in Philadelphia's

foster care system. In Baby Neal v. Casey we charged a range of governmental defendants with violating the children's constitutional and statutory rights by failing to provide them with basic mandated services. It was finally resolved by a settlement agreement in 1999, which was followed by several years of intensive monitoring and periodic progress reports.

By the same token, the Pennsylvania ACLU has sought to protect the First Amendment rights of all participants on the Web against government censorship, even when the expressed legislative motive was "to protect minors from 'indecent' and 'patently offensive' communications on the Internet." Janet Reno v. ACLU, 521 U.S. 844, 849 (U.S. 1997). In Reno v. ACLU we challenged the federal Communications Decency Act of 1996, first before a federal three-judge panel in Philadelphia, and then successfully defended the panel's ruling striking down the statute before the United States Supreme Court.

That legislation criminalized speech by prohibiting "the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." Reno at 859. The Court reasoned that "regardless of the strength of the government interest in protecting children," the level of discourse of adults on the Internet "simply cannot be limited to that which would be suitable for a sandbox" by prohibiting the display of pictures and language that would not be unlawful for use among adults. Reno at 875. Rather, it concluded that there was an adequate alternative to government censorship on the Internet. It explained that adult supervision through parental control software was "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is

inappropriate for their children.” Reno at 855.

The Court’s discussion in Reno of how the First Amendment was violated by governmental censorship is instructive in this context, where the purpose of House Bill 2742 is also to censor speech on the Internet. Indeed, this Committee describes how House Bill 2742 is largely modeled on a statute authored by New York State Attorney General Andrew Cuomo. It has distributed a news article about that statute entitled: “NYS Attorney General Works To Purge Sex Offenders From Social Websites.” That title clearly captures the purpose of House Bill 2742, which is to facilitate the removal from social web sites of all former sex offenders, even those who have completed their sentence. However, under our Constitution persons who have been convicted of a crime and have served their sentence do not lose their Free Speech rights under the First Amendment.

The Supreme Court in Reno described the robust nature of the Internet as a forum for free speech and expression. It stated:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." (cite) We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Reno v. Aclu, 521 U.S. 844, 870 (U.S. 1997).

Of course, that level of “scrutiny” is “strict scrutiny”. Where strict scrutiny is applied to judge a First Amendment infringement, the government must show that the challenged statute is

narrowly tailored to serve a compelling governmental interest. In Reno the Court stated:

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so.

Reno at 879. In House Bill 2742 the sponsors of this legislature have selected a content-based identifier to purge a group of individuals from a fully protected First Amendment forum, despite the fact that the United State Supreme Court has already identified a less restrictive method of protecting minors from harm; *i.e.* parental control software.

I suspect that the response will be, “but we are only removing their anonymity.” However, the United State Supreme Court has long recognized the value of anonymity under the First Amendment, and has protected the rights of individuals to remain anonymous in their speech as a means of protecting themselves from governmental oppression and social ostracism. A recent leading case is McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). In that case the Court struck down a statute that prohibited the distribution of anonymous campaign leaflets where the Legislature had sought to protect against fraud, libel and false advertizing. In McIntyre, after noting our long and respected tradition of anonymous publication (even by the authors of the Federalist Papers), the Court went on to explain its value as follows:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

McIntyre at 341-42. Indeed, in a remark that is directly relevant to our current situation, the Court explained:

The freedom to publish anonymously extends beyond the literary realm. In Talley [v. California], 362 U.S. 60, 64 (1960)] . . . Justice Black noted that "persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."

McIntyre at 342.

A simple search on Google using the terms "repeal" and "Megan's Law" turns up over 8,000 responses. Many of those involve blogs, forums, web sites, and articles that criticize Megan's Law and call for its repeal.¹ Some encourage readers to follow their efforts on Facebook. On most of those sites content is offered anonymously. However, this bill would deny the protection of anonymity to former offenders and encourage removal of an entire content-based group from this protected First Amendment forum.

Challenges have been brought against this type of statute in at least three other states. Two Federal District Courts have either declared the statutes unconstitutional or issued a preliminary injunction. White v. Baker 696 F.Supp.2d 1289 (D. Ga., 2010); Doe v. Shurtleff, 2008 U.S. Dist. LEXIS 73787 (D. Utah, (2008)). In a third case a federal court recently ordered the issue to trial, stating: "People who are convicted of crimes, even felony crimes relating to children, do not forfeit their First Amendment right to speak by accessing the Internet." Doe v. Nebraska, 2010 U.S. Dist. LEXIS 84621 (D. NB, Aug. 16, 2010).

¹ Here are several examples:

- 1) <http://www.wikilaw3k.org/forum/Law-Ethics/Name-ONE-child-that-was-quot-saved-quot-by-megan-39-s-law-363235.htm>
- 2) <http://www.gopetition.com/petitions/repeal-megans-law.html>
- 3) <http://thnt.gns.gannetonline.com/article/B3/20060306/SPECIAL07/101120016>
<http://constitutionalights.blogspot.com/2010/07/international-megans-law-must-be-killed.html>
- 4) <http://theparson.net/so/>
- 5) <http://justiceinjersey.org/contents/sornaadam-walsh-act/113-2/repeal-adam-walsh-act-laws/>
- 6) <http://www.talkleft.com/story/2009/2/9/12152/72794>
- 7) http://www.operationawareness.com/whats_new_22.html.

Whether you agree or disagree with the criticisms that former sex offenders may raise on the Internet is irrelevant to whether they are entitled to First Amendment protection. Personally, however, I agree with many of the criticisms raised on policy grounds against this bill, and against earlier Megan's Law statutes. Moreover, recent government and academic studies have borne out many of these criticisms. I have attached two reports from our sister states: one funded by the U.S. Justice Department and conducted by the New Jersey Department of Corrections;² and the other conducted by three professors at the University of Albany, School of Criminal Justice using data supplied by the New York Division of Criminal Justice.³

The New Jersey study has several relevant findings. First, it shows that there has been a downward trend in sex crimes since 1985, but that the greatest rate occurred **before** the passage of Megan's Law. Second it revealed that the law did not seem to have any demonstrable effect in reducing, 1) the rate of first time sexual offenses, 2) the already low rate of sexual re-offending, and 3) the most prevalent form of sexual offending, which is child molestation and incest. Finally, it found that the law had no effect on reducing the number of victims involved in sexual offenses. The authors concluded: "Given the lack of demonstrated effect of Megan's Law on sexual offenses, the

² Two versions are attached: a summary of the study published by the Justice Department ("Sex Offender Registration and Notification: Limited Effects in New Jersey" <http://www.ncjrs.gov/pdffiles1/nij/225402.pdf>); and the complete study published by The Research & Evaluation Unit Office of Policy and Planning New Jersey Department of Corrections ("Megan's Law: Assessing the Practical and Monetary Efficacy," hereinafter "Assessing", <http://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>).

³ J. Sandler, N. Freeman & K. Socia, "DOES A WATCHED POT BOIL? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law," Vol. 14 Psychology, Public Policy, and Law, No. 4, at 284-302 (2008) (hereinafter, "Watched Pot").

growing costs may not be justifiable.”⁴

The New York study is equally revealing, particularly for this bill. The authors highlighted one of their most important conclusions in the “abstract” that opens their article. In that summary paragraph they state: “Analysis also shows that over 95% of all sexual offense arrests were committed by first-time sex offenders, casting doubt on the ability of laws that target repeat offenders to meaningfully reduce sexual offending.” While House Bill 2742 seeks to purge all persons previously convicted of a sex offense from public web sites, it does not address the fact that 95% of all new sex offenses are committed by first time offenders.

However, the New York study also undermines a number of related false assumptions that have led to the present legislation. Thus, the authors go on to explain:

. . . The limited effectiveness of registration and community notification laws may be due to the fact that these laws were largely based on commonly held myths and misconceptions regarding sexual offenses and sex offenders. First, community members commonly believe that most, if not all, sex offenders will inevitably re-offend (cites). However, as stated earlier, research has found relatively low recidivism rates for sex offenders (ranging from 5% to 19%; (cites)). Furthermore, offenders without prior sexual-offense convictions commit the majority of sexual offenses. In the current study, only about 4% of those arrested for a sexual offense had a prior sexual offense conviction. . . .

Second, registration and community notification laws are based on the false assumption that strangers commit most sexual offenses. However, the research unequivocally finds that sex offenders are more likely to victimize family members, intimate partners, or acquaintances. In fact, according to a Bureau of Justice study

⁴ “Assessing”, Executive Summary at 2 (citations omitted). The cost of implementing a ten-year/lifetime registration program in Pennsylvania is not just what it costs to support the infrastructure and labor necessary to continually update the data received about registrants’ pictures, addresses, employment, schools, Internet identifiers and passwords, and to place information on the web. It also includes the cost of prosecuting and incarcerating those who will inevitably fail to comply, either intentionally or based on their homelessness, mental illness, poor health, or advanced age. Currently registrants are subject to a set of mandatory minimum sentences that range from 2-4 years for a first offense to 7-14 years.

(cite), 93% of child sexual abuse victims knew their abuser (34.3% were family members and 58.7% were acquaintances). In addition, approximately 9 out of 10 adult rape or sexual assault victims had a prior relationship with the offender either as a family member, intimate, or acquaintance (cite).

“Watched Pot” at 297-98.

House Bill 2742 would seek to purge all former sex offenders from public web sites, where most of the crimes of those offenders were committed against someone they knew, and only a small percentage of that grouping will ever commit a subsequent sex offense. Even among the small percentage who will re-offend, most of those offenses will again be committed against a family member or an acquaintance, with no involvement of the Internet.

This law may sound good at first blush, but it will merely provide parents with a false sense of security when they **should** be turning their attention to providing careful direction to their children and employing parental control software. Indeed, since approximately 40% of all abusers of children are children themselves under the age of 18,⁵ this is an additional reason why parents should not place false hopes in a good-sounding government panacea that may end up harshly penalizing their own.

⁵ Howard Snyder, Bureau of Justice Statistics, “Sexual Assault of Young Children as Reported to Law Enforcement,” July 2000, <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf> at p. 8.