The Man Arrested for Praising Jesus

Lester Packingham's Facebook post is headed for the Supreme Court

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Lester Gerard Packingham was having a really good day back on April 27, 2010. The North Carolina man had just learned that a traffic ticket against him had been dismissed, so he logged onto his Facebook account and gleefully told the world: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court costs, no nothing spent… Praise be to GOD, WOW! Thanks Jesus."

At the same time, Brian Schnee, a police officer in Durham, was doing his job, working to identify registered sex offenders in the state who were accessing sites like Facebook. He came across Packingham's post and recognized the face but not the name on the page, "J.r. Gerrard." Because Schnee knew Packingham to be a sex offender the officer got a search warrant for Packingham's residence, where he found proof that Packingham was, indeed, "J.r. Gerrard" and that he had, indeed, opened the Facebook account.

Packingham's glee soon ended. He was indicted and ultimately convicted of violating a state law that makes it a felony for any person on the state's sex offender registry to "access" any "commercial social networking Website" that he or she "knows" does not restrict membership to adults. The sweeping measure, enacted in 2008, applies to approximately 20,000 North Carolina residents who have been placed on the offender registry for one reason or another. It has been used in more than 1,000 prosecutions like the one against Packingham.

But none of those other cases generated a successful U.S. Supreme Court appeal. For six years now Packingham has fought the charges, in and out of court, on the simple premise that it should not be a crime to express online joy (on Facebook or any other site) about the demise of a parking ticket. And prosecutors and state attorneys have been equally adamant since 2010 that the law that ensnared Packingham is a valid exercise of state power to protect the Internet's most vulnerable surfers from great harm.

Next week, the justices in Washington will hear oral arguments in the Packingham case. The primary dispute centers around Packingham's free speech rights: does the First Amendment protect his ability to be on Facebook as a sex offender? But just below the surface is a dispute about how far the state may go to punish someone for acting without criminal intent. As Packingham's lawyers put it: "[E]arly First Amendment cases establish basic principles restricting criminal punishment to persons proved to have acted with both 'an evil doing hand' and 'an evil meaning mind'" and Packingham is guilty of neither.

This legal point, offered in the broader context of the First Amendment challenge, explains why this case has generated interest from many of the same constituencies that have been arguing, loudly recently, that America has become "overcriminalized" by laws like the North Carolina law, which are triggered by what would otherwise be an innocent act. To civil libertarians, Packingham has been unfairly convicted of a crime without having the requisite *mens rea*—criminal intent. Under North Carolina's "access" law, the Cato Institute and the ACLU ask in their friend-of-the-court brief in the case, how exactly "does a person 'know' whether a website 'permits' participation by minors?"

North Carolina's answer? The statute is what is known as a "strict liability" law, a category typically seen in the realm of corporate regulations on matters like workplace safety and environmental protection. The law presumes that you know that your act is criminal; the online "access" itself, without more, is your crime and your act of being on Facebook is itself evidence of your intent to commit that crime. This is the essence not just of the North Carolina law but of similar laws barring sex offenders in other states.

To the defense bar, meanwhile, Packingham's new punishment is a "hidden sentence," a "collateral consequence" beyond the original sentence that violates his free speech and association rights under the First Amendment* because he intended no harm*. To technology geeks, the case is about the importance of the Internet in our modern age. To state officials, however, in North Carolina and beyond, Packingham's plight is simply the price of keeping children safe from sexual predators. The registry would lose much of its power, they contend, if unrehabilitated sex offenders were able to freely trawl social media sites trying to solicit and entice children.

North Carolina's sex offender registration law was enacted in 1995, just as the Internet was gearing up. Like similar laws around the nation it is based on the premise that "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment"; that is, that there is something inherent in the mind of a sexual offender that makes him more likely to succumb to temptation. If you are on the registry, there are severe restrictions on where you can live and work and socialize—all in the name of protecting children.

With the spread of social media, lawmakers suddenly realized that those on the sex offender registry could, theoretically, prey on victims without leaving the comfort of their homes. First, lawmakers considered increasing existing penalties for the crime of "exploiting a minor or soliciting a minor by computer." But they scrapped that approach and laid down broader limits on computer use—the law that caught up with Packingham.

The purpose of the measure, state attorneys have told the Supreme Court in their briefs, was to respond to the "special challenges to society as it attempts to protect its most vulnerable members" from the perils of the Internet. Social media "does not merely allow predators to communicate more easily with children whom they stalk. It also allows them to gain intimate information about children's social lives, families, hobbies, and hangouts."

But there is no evidence that Packingham was or is a predator trawling through Facebook stalking children. He was on the sex offender registry in the first place because of a 2002 conviction for "taking indecent liberties" with a 13-year-old girl (he was 21 at the time). The judge gave Packingham the lowest possible sentence and then immediately suspended it. Instead of prison time, Packingham did 24 months of supervised probation. In 2004, Packingham completed his probation without any problems. He stayed out of trouble after his probation, too. Until that traffic ticket was dismissed in 2010.

Packingham first tried to get the case dismissed by arguing that the law violated his constitutional right to free expression. The trial judge rejected that argument. The "access" law fairly balanced the "activities of sex offenders" with the "protection of minors," the judge ruled before allowing the case to go to trial. Prosecutors did not allege that he had done anything wrong on Facebook. They didn't have to. Because Facebook was a site that children could access, Packingham was found guilty. Once again, a judge cut him break. There was no prison sentence.

Packingham nevertheless appealed his conviction and won. The law was too broad, a panel of judges on the North Carolina Court of Appeals concluded, because it could be interpreted to bar Packingham from performing even a Google search or "purchasing items on Amazon." Then it was the prosecution's turn to appeal. And *they* won. The North Carolina Supreme Court restored Packingham's conviction. The state's law did not infringe Packingham's First Amendment-protected speech, the court's majority concluded, it just restricted his conduct, the act of "accessing" the Internet.

To the bipartisan coalition that supports "*mens rea*" reform, the folks who believe that no one should be convicted of a crime without evidence of evil intent, Lester Packingham is an unlikely hero: a guy who committed a crime merely by praising Jesus. The Cato Institute told the justices in Washington that "North Carolina's far-reaching criminalization of speech, information-gathering, and expression is unconstitutional for at least three reasons," one of which is that the statute is "hopelessly vague." (Another reason, also touching on the notion of "intent," is that the statute is "overbroad"; that it encompasses websites the surfing of which is clearly constitutional),

To the National Association of Criminal Defense Lawyers, the North Carolina law is "one of a growing number of federal and state laws that effectively impose criminal punishments outside the normal, individualized criminal sentencing process, categorically stripping citizens of constitutional rights with little or no effort to tailor the restraints they mandate to the objectives they purport to serve." To the Electronic Frontier Foundation, the North Carolina statute impermissibly "bars" citizens like Packingham "from the collective communicative life of the nation" as seen through online social interactions.

To prosecutors and government organizations, however, the burden of these laws on men like Packingham is small compared to the benefit gained in public safety. They say in their briefs filed in support of North Carolina that the lawmakers who enacted the law and the prosecutors and judges who are enforcing it are simply "seeking a practical solution to a practical problem" posed by social media sites frequented by children. "Today's sex offenders have access to a far greater number of potential victims than those in the pre-Internet days when offenders were generally limited to in-person contact," is the essence of the argument.

And to victims rights groups, and advocates seeing to combat the sexual exploitation of children, the North Carolina law is a targeted and lawful approach to a particularly dangerous situation created by the intersection of curious teenagers and new technologies. There is no good reason, this argument posits, why those already on a sex offender registry should not be required to stay away from certain social media sites renown for encouraging people to connect and share personal details about their lives.

Intent aside, the case likely will turn on the legal standard the justices select to evaluate the statute. If they see the law as curtailing Packingham's First Amendment rights in a direct way they will review the law using a heightened level of scrutiny and it might not survive such a review. If they see the law as curtailing Packingham's First Amendment rights in an indirect way, by blocking his access rather than his expression or association, then the law could survive. Either way, the future of Internet "access" laws for sex offenders won't likely be the same. Which is why tens of thousands of men in North Carolina, and countless more across the nation, are waiting to see how thankful they ought to be for Jesus and Facebook.