The Washington Post

Constitutional protection for anonymous speech takes a hit in PA (though preliminary damage estimates are low …)

By David Post
October 16, 2014

Pennsylvania's SORNA (sex offender registry and notification act) statute sets up a state registry, managed and maintained by the PA State Police, of persons previously convicted of certain specified sex crimes. Those individuals who have prior convictions for the specified crimes have to disclose various pieces of identifying information to the police for the purpose of including the information in the registry, including all telephone numbers used, "address of each residence or intended residence," name and address of all employers, vehicle identifications, and the like, along with:

"[A]ny designations or monikers used for self-identification in Internet communications or postings," and any "[d]esignation used by the individual for purposes of routing or self-identification in Internet communications or postings."

42 PA C S sec. 9799 In *Coppolino v. Comm'r of the Pa. State Police,* rejected a First Amendment challenge to these ID provisions. Coppolino argued that the Internet identification provisions unconstitutionally abridged his right to express himself anonymously in his Internet communications, but the seven judges of the Commonwealth Court disagreed.

This question has come up in connection with other state SORNA statutes a number of times, with inconsistent results – (to my eye, the best-reasoned and most thoughtful of the opinions in those cases remains Judge Kopf's, striking down Nebraska's version of the statute on 1st Amendment grounds, which I blogged about here). The *Coppolino* court reviewed those decisions, and it derived from them the following decisional principle: in deciding whether the right to speak anonymously on the Internet has been "substantially burdened" in violation of the 1st Amendment, the "determining factor" is whether the challenged provision "permits or makes likely disclosure of a registrant's Internet identifiers *to the public."* The PA statute didn't do that, the court held; although it did require the State disclose *some* of the identifying information in the Registry on a public website, the Internet identifiers only (!) had to be disclosed to the PA state police, to law enforcement officials in "other states in which the registrant lives, works, or attends school," and to "the federal government."

That can't possibly be the correct analysis or the correct result here. To begin with, I happen to know the cases that the court reviews, and I don't think the principle that the court extracts from those cases - that the right to speak anonymously only applies to anonymity-to-the-general-public (but not to anonymity-to-the police – is in there. But more importantly, what kind of right to anonymous communication would it be that would protect us against disclosure of identities to our neighbors but not against disclosure *to the state police and the federal government*?? That stands the First Amendment – which, of course, protects us against oppressive, speech-suppressive *government action* – completely on its head, and it is not, thankfully, the law – at least, not yet.

The "damage estimates" from this decision are low, largely because this is just one opinion from one PA court, and low-level state court opinions construing federal constitutional rights are rarely very influential (especially when they are poorly reasoned). But this battle is a very important one; I have said before that protecting our right to speak anonymously on the Net is going to be fiercely contested over the next decade or so, and these SORNA cases are just the first shots across the bow, and the development of this doctrine in these cases is going to matter for the long term. They're unsympathetic challengers – but if the Constitution is warped to leave them unprotected, we will all suffer – grievously.

[I have a suspicion that the case may not have been particularly well-lawyered on either or both sides, which is often a factor in producing poorly-reasoned opinions. Coppolino's attorney apparently framed this as an "overbreadth" challenge, which was unfortunate, for the lawyers and the court spent a great deal of time trying to dig itself out of the "overbreadth" mess. "Overbreadth," in First Amendment law, is a standing doctrine that allows a litigant to challenge a statute on 1st Amendment grounds even when the statute can be constitutionally applied to him/her, on the grounds that it unconstitutionally suppresses the speech of *others*. Coppolino here argued that the statute "is overbroad as applied to him because this provision is intended to protect minors from online predation and his offense did not involve the Internet or a minor." That, however, is not an "overbreadth" argument - if anything, it's a "reverse overbreadth" claim: he's saying that the statute *can* be constitutionally applied to others, but not to *me*. But there's no such thing as a "reverse overbreadth" challenge, and he doesn't need to invoke "overbreadth" to make that argument. It apparently confused the state's attorney (who makes the argument that the "overbreadth claim" had been waived) and wastes a great deal of everyone's time, not to mentioning weakening Coppolino's case.]

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