

Constitutional Protection for Anonymous Speech

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My presentation will address a set of closely-related cases which, in my opinion, expose serious cracks in the constitutional protection for anonymous Internet speech (and which have received considerably less attention than I believe they deserve).

The cases all involve 1st Amendment challenges to the “Internet identifier” disclosure requirements imposed by a complex inter-locking set of federal and State statutes (known collectively as “SORNA,” for “Sex Offender Registration and Notification Acts”) on “sex offenders” – defined broadly as persons who have been “convicted of a criminal offense that has an element involving a sexual act or sexual contact with another” under federal or State law.¹ Over 800,000 people (approximately ¼ of whom were juveniles at the time of the previous conviction) currently fall into this category.

SORNA requires these sex offenders to register, with local law enforcement authorities, and to reveal in their registration documentation *all* of the “Internet identifiers” – email addresses, social-networking handles, website usernames, and all other “designations used for self-identification or routing in Internet communication or posting” – that they “use or will use.”² Failure to comply with this disclosure requirement – which will last, for many of the individuals on whom it is imposed, for their entire lifetime – is a felony criminal offense (under both federal and State law).

One might be forgiven for thinking that a robust First Amendment right to communicate anonymously, derived from a line of Supreme Court cases starting with *Talley v California* and continuing through *McIntyre v Ohio Elections Comm’n* and the more recent *Watchtower Bible and Tract Society*, would not countenance a scheme under which hundreds of thousands of

¹42 USC §16911(1). The definition includes “all sexual offenses whose elements involve: (i) any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person’s body, either directly or through the clothing.” *Id.*

² 42 USC §16915a(e)(2). The Internet identifier information is in addition to a great deal of other identifying information, including name, address, Social Security number, place of employment, license plate numbers, etc., that must be included in the offender’s registration documentation. *See* 42 USC § 16914.

people possessing the full complement of constitutional rights³ are deprived of their ability to communicate anonymously when using the medium through which a great deal of inter-personal communication takes place these days. At the very least, one would expect that the government would bear a heavy burden, and would have to demonstrate that this abridgement of a fundamental right was “narrowly tailored” in meaningful ways to achieve some very important and otherwise-difficult-to-achieve governmental objective.

Eleven courts have now considered the question, and they are fairly evenly split. Six have struck the Internet identifier requirements down on “right to anonymity” grounds:

Doe v. Harris, 772 F.3d 563 (9th Cir. 2014) (CA law)
Doe v. Marion Cnty., 705 F.3d 694 (7th Circ. 2013) (IN law)
Doe v. Nebraska, 898 F.Supp.2d 1086 (D. Neb. 2012) (NE law)
Doe v. Jindal, 853 F.Supp.2d 596 (D. La. 2012) (LA law)
White v. Baker, 696 F. Supp. 2d 1289 (N.D. Ga. 2010) (GA law)
State of Illinois v Minnis (IL Cir. Ct., July 7 2015) (IL law)

and five have upheld them:

Doe v. Shurtleff, 628 F.3d 1217 (10th Cir. 2010)) (UT law)
Doe v. Raemisch, 895 F. Supp. 2d 897 (E.D. Wis. 2012) (WI law)
Doe v. Snyder, 101 F. Supp. 3d 672 (E.D. Mich. 2015) [now on appeal, 6th Circuit] (MI law)
Harris v. State, 985 N.E.2d 767 (Ind. App. 2013) (IN law)
Coppolino v. Comm'r of the Pa. State Police, 102 A.3d 1254 (Pa. Commw. Ct. 2014) (PA law)

It is troubling that the process has produced results that are indistinguishable from those one would get by flipping a coin to decide case outcome. It is perhaps more troubling that the courts (including those that have invalidated the requirements) are developing a framework within which identity disclosure laws will be evaluated and scrutinized that has ominous implications for the future of anonymous communication.

I will address three of the more troubling features of this line of developing doctrine, along with some of its implications for the future of anonymous communication.

1. *Content-neutrality and intermediate scrutiny*

³ The category of sex offenders on whom the Internet identifier disclosure obligations are imposed covers those individuals who have already served whatever punishment was imposed on them for their criminal activity. While courts have held that prisoners [cite] and parolees/probationers [cite] (as well as foreign nationals, the mentally incompetent, and others) may not enjoy the full panoply of constitutional protections, the sex offender registry provisions apply (and are intended to apply) to individuals who are, in the eyes of constitutional law at least, no different than other US citizens.

In 1st Amendment litigation, of course, a great deal depends on formal categorization and determining the “level of scrutiny” that courts will apply to the challenged government action.⁴ There appears to be a developing consensus that the SORNA identifier disclosure provisions do *not* warrant the highest level of 1st Amendment scrutiny; because the identifier provisions are deemed “content-neutral” – *i.e.*, because they apply to *all* Internet identifiers irrespective of the content of the speech to which those identifiers might be attached – they have been (with one exception) examined under a lesser, more generous “intermediate” standard, akin to that applied to “time, place, and manner” speech restrictions.

This is unfortunate. It encourages a kind of *ad hoc* judicial balancing of means and ends that accounts for much of the variation in outcome in the SORNA cases. Because the government need not show that the requirements are the “least speech-restrictive means of advancing the government’s interests,” courts have not required the government to show much in the way of “tailoring” of means to ends beyond some plausible (though entirely unsubstantiated by means of any actual evidence) increase in investigative efficiency in the future.⁵

It is also based on a logical fallacy: that because “content-based” speech discriminations get strict scrutiny, “*not*-content-based” speech discriminations necessarily get “*not*-strict

⁴ Many years ago my Con Law I professor, John Kramer, aptly described much constitutional litigation as turning entirely on the question of whether the government would be required to demonstrate a good reason, a very good reason, or a *darned* good reason, for doing whatever it was that it was doing.

⁵ Here, for instance, is the entirety of the court’s analysis of the “tailoring” of the SORNA registration requirements in *Doe v. Snyder*, 101 F.Supp.3d 672, ___ (ED Mich. 2015), which amounts to nothing more than an assertion that the registration provisions might, possibly, assist in the investigation and prosecution of future crimes:

Plaintiffs contend that SORA’s Internet provisions are not narrowly tailored because “they do nothing beyond what is accomplished by existing laws to protect minors from sexual crime” and note that “those [minor solicitation] laws did a much better job at narrowly targeting the behavior the state wanted to curtail” than SORA does.

However, SORA does go beyond the existing laws and provides further protection of minors from sexual crimes in two ways. First, whereas [Michigan’s child solicitation law] prohibits the online solicitation of minors, SORA’s Internet provisions create a database of online identities of persons convicted of sex offenses *which makes easier the investigation of crimes in which a minor (or adult) has been contacted through an online alias*. Second, as the Department of Justice’s Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART”) aptly suggests, “*knowledge that their Internet identifiers are known to the authorities may deter registered sex offenders from engaging in criminal behavior on the Internet.*”

Plaintiffs note that law enforcement has yet to use the Sex Offender Registration database to search for registrants’ Internet information to solve a crime. *But this in no way affects whether SORA is narrowly tailored to achieve the state’s significant and compelling interest in protecting minors.*

scrutiny.” It implies – oddly – that courts will give a *higher* degree of scrutiny to registration/disclosure requirements covering a *subset* of speech - *e.g.*, only political speech, per *McIntyre*, or only commercial speech - than to those that sweep more broadly and cover *all* speech (content-neutrally). Why should a (content-neutral) law requiring, say, *all* newspapers to obtain a pre-publication license receive *less* exacting scrutiny than one that only required licensing for those that publish information about the activities of labor unions, or electoral politics?

2. *Speaker discrimination*

The content-neutrality of identifier disclosure provisions like those in SORNA is a red herring, irrelevant to the constitutional analysis. The distinction between content-based and content-neutral speech restrictions is surely vital for protecting speech against government censorship. But the SORNA registration requirements are constitutionally objectionable *not* because the government is discriminating among different messages or among different viewpoints, violating its obligation to remain neutral among competing messages and viewpoints, but because the government is discriminating among different *speakers*, some of whom are permitted to exercise the constitutionally-protected right to speak anonymously while others are not.

That this constitutes an infringement of the 1st Amendment prohibition against abridging the freedom of speech, warranting the most exacting judicial scrutiny, finds support in an unexpected place: the Supreme Court’s 2010 decision in *Citizens United v. FCC*, 558 U.S. 310 (2010). Controversial for its holding that corporate speech is protected by the First Amendment, the *Citizens United* opinion also held, as a threshold matter, that the First Amendment prohibits content-neutral discrimination based on speaker identity⁶:

“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. *Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.* As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content. *Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.* By taking the right to speak from some and giving it to others, the Government deprives the

⁶ See Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 Fla. State Univ. L. Rev. 765 (2015), available at <http://scholars.law.unlv.edu/facpub/901>, for an excellent introduction to the 1st Amendment’s “speaker identity” doctrine and the impact of the *Citizens United* case.

disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United, 558 U.S. 310, ___ (emphasis added) (internal citations omitted)

This represents an alternate route that courts can and should take to analyze identity disclosure restrictions. When the government, as here, singles out a class of persons to deprive of a right protected by the 1st Amendment, it should be required to support that decision with more than the recitation of some possible, plausible benefits that might, in the future, flow from such action. The SORNA disclosure requirements have, as their stated purpose, facilitating the investigation of (and, possibly, deterring) *future* criminal activity by members of the covered population; but the mere statistical likelihood that some members of that population may engage in such activity should not be sufficient – even if it were supported by actual evidence put forward by the government⁷ – to impose

3. *Public disclosure and the nature of anonymity*

The courts appear to be rather deeply confused about the nature and value of anonymous speech. A consensus is developing in the SORNA cases that the right to speak “anonymously” means only a right to speak without revealing your identity *to the public at large*; it is not infringed or abridged, in other words, by measures requiring you to reveal your identity *to the*

⁷ The law enforcement rationale for the SORNA identity disclosure requirement rests on the underlying notion that individuals in the covered category (“sex offenders”) are more likely to be engaged in criminal activity in the future. The data on sex offender recidivism are highly complex, and have been greatly exaggerated in the past. See Ira Ellmann, ‘Frightening and High’: The Supreme Court’s Crucial Mistake About Sex Crime Statistics, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616429; Tamara Lave, ‘Inevitable Recidivism: The Origin and Centrality of an Urban Legend,’ 34 Int. J. Law and Psychiatry 186 (2011); Amanda Agan, “Sex Offender Registries: Fear Without Function?,” 54 J. Law and Econ. 207 (2011). As summarized by the Massachusetts Supreme Judicial court in a recent case:

[S]tudies have indicated that relatively few sex offenders reoffend. See, e.g., Hanson, Harris, Helmus, & Thornton, High-Risk Offenders May Not Be High Risk Forever, 29 J. Interpersonal Violence 2792, 2796 (2014) (finding 11.9 per cent over-all rate of sexual recidivism, although high-risk offenders reoffend more frequently than low-risk offenders). Other reports have shown that, contrary to popular belief, the rates of recidivism for sex offenders are actually lower than the rates of recidivism for those convicted of other crimes. See, e.g., Council of State Governments, Sex Offender Management Policy in the States, Strengthening Policy & Practice: Final Report 2 (2010).

Doe v. Sex Offender Registry Board, __ MA __ (2015).

police, provided that there are protections in place to guard against public disclosure of that information. The court in *Coppolino*, surveying the disparate results in the cases regarding the constitutionality of the SORNA identity disclosure provisions, wrote that “considering these cases together, the determining factor is whether a given statute permits or makes likely disclosure of a registrant’s Internet identifiers *to the public*,” and that “because none of the avenues of dissemination of registry information applicable under [the PA statute under examination] involve public disclosure of registrants’ Internet identifiers,” the requirement that registrants disclose their Internet identifiers does not burden the right to anonymous speech.”⁸

This seems, quite frankly, deeply misguided; the idea that your right to communicate anonymously is not abridged if you only have to reveal your identity to *law enforcement officials* (as long as those officials do not reveal it to the public at large on the publicly-accessible Sex Offender Registry web site) reflects a crabbed and cramped view of why the 1st Amendment protects the right to speak anonymously in the first place. It will *substantially* limit the 1st

⁸ This theme is repeated in many of the SORNA cases referenced above. *See, e.g., Doe v Snyder* (SORNA challenges turn on “who would have access to the reported information”; because Michigan statute “neither prohibits registrants from engaging in any particular speech on the Internet, nor does it unmask registrants’ anonymity to the public,” it did not unconstitutionally abridge the right to speak anonymously; though the statute “does unveil registrants’ anonymity to law enforcement, this does not, by itself, infringe upon Plaintiffs’ First Amendment rights”); *Doe v Shurtleff*, 628 F.3d 1217, ___ (Utah statute does not “permit [] the unrestricted disclosure of information to the general public” but only “sharing only among law-enforcement agencies, not the public at large, and only for the recited law-enforcement purposes”; “Although this narrow interpretation may still result in the disclosure of Mr. Doe’s online identifiers to state officials, such identification will not unnecessarily interfere with his First Amendment freedom to speak anonymously”); *White v. Baker* (holding that “the mere reporting of this information alone” - “email addresses, usernames and user passwords” - “is not speech. It does not constitute content and these items are simply the vehicles by which communication can occur on the internet. . . . The mere delivery of this information to the sheriff does not inhibit speech, is not a free speech gateway requirement, and does not implicate the First Amendment. *The First Amendment is, however, implicated when this disclosure requirement is coupled with [statutory provisions regarding disclosure]*”; because the statutory provision in question permitted identifier information to be disclosed to “government agencies conducting confidential background checks” and to the public if “necessary to protect the public concerning sexual offenders,” the right of anonymity was implicated: “[B]ecause of the possibility of disclosure and broad use of Plaintiff’s internet identifying information, Plaintiff legitimately asserts the regulation chills his protected free speech rights”); *Doe v. Raemisch*, 895 F. Supp. 2d 897 (E.D. Wis. 2012) (statutory requirement that registrants disclose “all email accounts, Internet username and addresses, and identifiers for any email account, website, or Internet address the offender creates, uses, or maintains for personal, family, or household use” does not violate right to speak anonymously because the information “is not placed on a registry accessible to the public”); *Doe v Harris* (holding that CA statute “chills anonymous speech because it too *freely allows law enforcement to disclose sex offenders’ Internet identifying information to the public*” by allowing “any designated law enforcement entity [to] provide information to the public about a person required to register as a sex offender . . . when necessary to ensure the public safety,” a condition “much too broad . . . to serve as an effective constraint on law enforcement decisions that may infringe First Amendment rights”) (emphases supplied throughout).

Amendment's role protecting citizens from government surveillance. If it were to become the dominant doctrinal position, it is very difficult to imagine the right to communicate anonymously surviving for much longer.

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The bottom line: If the First Amendment permits the government to require all members of any group that may show an elevated statistical likelihood to commit future crimes to disclose their Internet identifiers so long as that information is only used for law enforcement purposes, the right to anonymous speech hardly deserves to be designated as a "right" at all.

It is, as the Supreme Court has noted, "more than historical accident"⁹ that much current First Amendment doctrine was crafted in response to governmental efforts to impose speech restraints on an unpopular minority that often found itself in society's crosshairs: Jehovah's Witnesses, who have long been deeply unpopular for their unorthodox religious views, their conscientious objection during wartime, and their habit of house-to-house proselytizing. Sex offenders are as stigmatized and unpopular a minority group as any in the country at present, and I would suggest that, like the Jehovah's Witnesses, the fight for their constitutional rights will have a deep impact on all of our First Amendment rights, for better or for worse.

⁹ *Watchtower Bible*, 535 U.S. 150, 160 (2002).