THE LIMITS OF FREE SPEECH: SEX OFFENDERS, THE INTERNET, AND THE ILLINOIS SUPREME COURT

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I. INTRODUCTION

On October 20, 2016, in *The People of the State of Illinois v. Minnis*,[1] the Illinois Supreme Court unanimously rejected a constitutional attack on the Illinois Sex Offender and Registration Act ("Registration Act")[2] and the Sex Offender Community Notification Law ("Notification Law"),[3] based on a purported violation of the First Amendment of the United States Constitution.[4] The Court reversed and remanded a trial court's dismissal of an indictment against defendant Mark Minnis for his failure to disclose a Facebook photograph after he was previously convicted of criminal sexual abuse.[5] Additionally, the Court required Minnis to report as a "sex offender" and to disclose his use of the Internet, including his "identity" and "websites."

Minnis has significant legal implications for: (1) the First Amendment rights of convicted sex offenders and their disclosure obligations under the Registration Act and Notification Law; (2) the public policy underlying free

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1. 2016 IL 119563. Justice Charles Freeman authored the unanimous Opinion. On May 19, 2016, the Illinois Supreme Court heard oral arguments on this case at Benedictine University in Lisle, Illinois, before an audience of approximately 600 high school students and members of the general public, including this author. The parties' lawyers were subject to intense questioning by the Court, and afterwards, by members of the public, who were allowed to ask questions to the lawyers. The significant audience attendance and the excellent lawyer preparation validated the Court's decision to hold oral arguments outside Springfield, Illinois, where they are normally heard. Because of the importance of educating the public of the Court's actions and cases, future oral arguments can hopefully be held at other locations across the state.

2. 730 ILL. COMP. STAT. ANN. 150/3 (West 2016).

3. *Id.* 152/101.

4. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

5. 720 ILL. COMP. STAT. ANN. 5/11-1.50 (West 2016) (previously 720 Ill. Comp. Stat. Ann. 5/12-15(b) (West 2010)). The Illinois Court was confronted with an especially difficult factual case since Minnis claimed that the underlying conviction was based on his consensual sex between the then 16-year old juvenile defendant and the 14-year old female. *Minnis*, 2016 IL 119563, at n.1. The constitutional challenge to the Internet disclosure requirement involved both adult and juvenile offenders, undoubtedly because Minnis became an adult during these proceedings. *Id.* ¶¶ 3–9.

speech under the First Amendment and its application to the Internet (including social media, such as blogs and Facebook); (3) the Illinois Supreme Court's future interpretation of the First Amendment rights of sex offenders and future sex offender criminal statutes enacted or amended by the Illinois General Assembly; (4) the Illinois criminal justice system, in general, and sex offender cases specifically, how prosecutors charge sexual assault and abuse cases, and how lawyers defend sex offender cases, particularly for juvenile offenders, knowing the "stigma" attached to such registration status; and (5) the potential resolution of split decisions by some federal and state courts regarding the constitutionality of registration and notification statutes. As discussed herein, the Illinois Supreme Court in its Opinion has clearly enforced the General Assembly's intent to protect children against sex offenders and the public against potential sexual recidivists by limiting the First Amendment rights of offenders. Nevertheless, the limitations on free speech in sex offender cases may invite additional judicial or legislative review in future years.

II. BACKGROUND OF THE CASE

In 2010, Minnis was adjudicated a delinquent minor in McLean County for his Class A misdemeanor criminal sexual abuse conviction and was sentenced to twelve months of probation, rendering him a "sex offender" under the Registration Act.[6] (Minnis was a juvenile when indicted, but he became an adult during these legal proceedings.) Minnis promptly complied with the required annual disclosure[7] by notifying the local police that he had two e-mail addresses and a Facebook account; he repeated this disclosure in 2011.[8] Shortly before his 2014 filing, Minnis changed his Facebook photograph and disclosed his two email addresses to authorities, but not his Facebook account.[9] In September 2014, Minnis was indicted for failing to register as a sex offender under Section 3(a) of the Registration Act.[10] In July 2015, the circuit court granted Minnis' motion to dismiss the indictment; specifically ruling that the entire Registration Act's Internet disclosure requirement was unconstitutional on its "face" and "as applied" to Minnis, and it was "based solely on the first amendment."[11] The State appealed directly to the Illinois Supreme Court.[12] If Minnis "knowingly or wilfully" provided "false" information under the Registration Act (including incomplete information regarding his Facebook

6. *Minnis*, 2016 IL 119563, ¶ 3.
7. *Id.* ¶ 4; 730 ILL. COMP. STAT. ANN. 150/6.
8. *Minnis*, 2016 IL 119563, ¶ 4.
9. *Id.* ¶ 5.
10. *Id.*
11. *Id.* ¶ 6. As the Court noted, "[t]he parties base their arguments exclusively on the first amendment." *Id.* at n.3. However, the American Civil Liberties Union of Illinois and the Electronic Frontier Foundation submitted *amicus curiae* briefs in support of the defendant, which also invoked the free speech guaranty of the Illinois Constitution. Ill. Const. 1970, art. I, §4. *Id.* ¶ 7, n.3. The Court did not address this state issue. Since the Illinois Constitution may provide for greater free speech under state law protections than the federal law does under the Court's "lockstep" doctrine, this argument may be raised on remand. *See* People v. Di Guida, 152 Ill. 2d 104, 118–22 (1992).
12. *Minnis*, 2016 IL 119563, ¶ 1.

account), he can be found guilty of a Class 3 felony, which carries a sentence of up to five years imprisonment.[13]

III. REGISTRATION ACT AND NOTIFICATION LAW

"The Registration Act and the Notification Law 'operate in tandem, providing a comprehensive scheme for the registration of Illinois sex offenders and the dissemination of information about these offenders to the public.'"[14] A sex offender who is subject to the Registration Act is then subject to the Notification Law.[15]

The Registration Act (under a different name) was enacted in 1986 and was expanded in 2007.[16] Section 3(a) of the Registration Act requires a sex offender to "register in person" with local law enforcement and to "provide accurate information" required by the Illinois State Police.[17] Section 3(a) further requires a sex offender to disclose and periodically update two categories of Internet information—identities and websites—and these disclosures include:

> all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use, all Uniform Resource Locators (URLs) registered or used by the sex offender, all blogs and other Internet sites maintained by the sex offender or to which the sex offender has uploaded any content or posted any messages or information.[18]

In addition, Section 3(a) mandates that a sex offender submit other information, including a current photograph and his/her current address, place of employment, telephone numbers, vehicle license numbers, and distinguishing marks on the body.[19] The offender must report in person to an appropriate law enforcement agency at least once, and up to four times, per year.[20] With certain limited exceptions, a sex offender must register for a ten-year period.[21]

The Notification Law, which was enacted in 1995, requires that the Illinois State Police maintain a sex offender database that identifies sex offenders and makes their relevant information available to the persons identified by this statute.[22] The statute mandates that Section 3(a) of the Registration Act information be disclosed to counties and other entities, such as institutions of higher learning, public school boards, child care facilities, the Illinois Department of Children and Family Services, social service agencies providing services to minors, and volunteer organizations providing services to minors.[23] This information must be disclosed to the victim of the offense, and outside

13. *Id.* ¶ 5; 730 ILL. COMP. STAT. ANN. 150/10, 5/5-4.5-40(a) (West 2016).
14. *Minnis*, 2016 IL 119563, ¶ 25 (quoting People v. Cornelius, 213 Ill. 2d 178, 181 (2004) (citation omitted)).
15. *Id.* ¶ 27.
16. *Id.* ¶ 26.
17. 730 ILL. COMP. STAT. ANN. 150/3(a).
18. *Id.*; *Minnis*, 2016 IL 119563 ¶¶ 9, 26.
19. 730 ILL. COMP. STAT. ANN. 150/3(a); *Minnis*, 2016 IL 119563 ¶ 26.
20. 730 ILL. COMP. STAT. ANN. 150/6; *Minnis*, 2016 IL 119563 ¶ 26.
21. 730 ILL. COMP. STAT. ANN. 150/7.
22. *Minnis*, 2016 IL 119563 ¶ 27.
23. *Id.*; 730 ILL. COMP. STAT. ANN. 152/120(a)(1)–(10).

Cook County, to other victims of sex offenses.[24] Disclosure to other individuals or entities is discretionary. Law enforcement officials "may disclose" this information to "any person likely to encounter a sex offender."[25] Subject to this governmental discretion, the public may also obtain this information upon request, or through the Internet from the Illinois State Police.[26] Information regarding juvenile sex offenders is limited to those persons whose "safety may be compromised" by the offender and to senior school personnel; the registration information must also be kept separate from other school records.[27] In addition, "juvenile sex offenders may petition for termination of registration two years after their initial registration."[28]

IV. THE ILLINOIS SUPREME COURT'S ANALYSIS

The *Minnis* Court compared the free speech rights of sex offenders under the First Amendment to the offenders' Internet disclosure obligations. According to the Illinois Supreme Court, the First Amendment right to freedom of speech includes the right to publish writings anonymously, as a "'shield from tyranny of the majority'" and "'retaliation'" from "'an intolerant society.'"[29] As such, the "threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech . . . harming not only [individuals,] but society as a whole, which is deprived of an uninhibited marketplace of ideas," especially when criminal sanctions are imposed.[30] The Court underscored that First Amendment free speech extends to communications through the Internet.[31] According to the Court, "'any person with a phone line can become a town crier with a voice that resonates farther than could from any soapbox'" and "'[t]hrough the use of Web pages . . . the same individual can become a pamphleteer . . . [as] [t]he content on the Internet is as diverse as human thought.'"[32]

Despite the *Minnis* Court's recognition of the substantial breath of First Amendment rights, it emphasized that "'the right of free speech is not absolute at all times and under all circumstances.'"[33] Therefore, according to the Court, "the right to anonymous speech is not absolute."[34] In rejecting Minnis' claim of constitutional overbreadth, the Court required a showing of specific present

24. 730 ILL. COMP. STAT. ANN. 152/120(a); *Minnis*, 2016 IL 119563 ¶ 27.
25. 730 ILL. COMP. STAT. ANN. 152/120(b).
26. *Id.* 152/120(c)–(d).
27. *Id.* 152/121(a)–(b).
28. *Id.* 150/3-5(c); *Minnis*, 2016 IL 119563 ¶ 28.
29. *Minnis*, 2016 IL 119563 ¶ 22 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342, 357 (1995)).
30. *Id.* ¶¶ 14, 24 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)).
31. *Id.* ¶ 23.
32. *Id.* (quoting Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 870 (1997)). Interestingly, in the post-Minnis oral argument discussion, numerous high-school students asked questions to the lawyers that suggested a potential dislike for government regulation of the Internet, especially their Facebook accounts. Although these questions did not constitute a scientific sample, this questioning may reflect, in my experience, a greater generational use of social media by such students, an issue that the legislature and the courts may need to consider further in future years.
33. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942)).
34. *Id.*

objective harm or a threat of specific future harm, a burden Minnis did not meet.[35] The Illinois Supreme Court rejected the defendant's "as applied" challenge, holding that since the circuit court did not hold an evidentiary hearing and make findings of fact, any such challenge was "premature."[36]

As to Minnis' facial challenge to the Registration Act as overbroad, the Court stated that a statute can only be invalidated "if a substantial number of its applications to protected speech are unconstitutional, judged in relation to the statute's plainly legitimate sweep,"[37] a burden not met by defendant. The Internet disclosure obligation was deemed "retroactive," *i.e.*, covering the time period since the last disclosure; thus it "does not operate as a prior restraint" on a sex offender's conduct.[38] After reviewing the language of the Registration Act and its legislative history, the Court concluded that the legislature intended to protect the public in two ways: (1) by providing crucial information to law enforcement officials who monitor the movements of sex offenders; and (2) by disseminating the information to the public.[39] Moreover, Illinois' sex offender laws are consistent with those of other states. Further, "[s]ince 1996, every state . . . has had a law providing for mandatory registration of sex offenders and corresponding community notification."[40]

Although Minnis conceded that the Internet disclosure does not ban any speech directly, he argued that the "hostility of the public against scarlet-letter-tagged sex offenders" drives the "speakers" on the Internet "into silence," and that effectively becomes a "ban" on free speech.[41] The Court rejected this argument, stating: "[a]lthough the public availability of the website information may have a lasting and painful impact on sex offenders, these consequences flow not from the statutory registration and notification scheme but from the fact of conviction, which is already a matter of public record."[42]

Additionally, Minnis argued: (1) a "strict scrutiny" First Amendment analysis should be applied because the disclosure requirements against sex offenders are "content-based laws" (*i.e.*, laws applicable to particular speech because of the topic discussed or the idea or message conveyed), and are presumptively unconstitutional unless a restriction is narrowly tailored to serve a compelling governmental interest (which Minnis claimed did not occur); and (2) the Registration Act and Notification Law "chills substantially more speech than is necessary to further the governmental interest."[43] In this latter regard, Minnis also argued that juvenile sex offenders "'have a low risk of reoffending and a high potential for rehabilitation due to their continuing brain development.'"[44] The Court rejected these arguments, engaged in a comparative analysis, adopted an "intermediate scrutiny" constitutional standard, and concluded

35. *Id.* ¶¶ 15, 49–51.
36. *Id.* ¶ 19.
37. *Id.* ¶ 24.
38. *Id.* ¶ 48.
39. *Id.* ¶ 34.
40. *Id.* ¶ 37.
41. *Id.* ¶ 35 (internal quotations omitted).
42. *Id.*
43. *Id.* ¶¶ 36–38.
44. *Id.* ¶ 38.

that: (1) Illinois sex offender laws are "content-neutral," (*i.e.*, they "impose burdens on speech without reference to the ideas or views expressed");[45] and (2) the remedy of sex offender disclosures laws enacted by the legislature "advances the substantial governmental interest of protecting sex offenses against children and protecting the public from the dangers against recidivist sex offenders," outweighing any "chilling effect."[46] Equally true, these disclosures "empower the public, if it wishes, to make the informed decision to avoid such interactions [with the sex offenders]."[47]

Minnis also argued that, in addition to the unfavorable treatment of juveniles as sex offenders, the disclosure obligation applied to "too many people" and the courts should undertake an "individualized risk assessment" of each offender as part of its "independent duty" to review these policy issues.[48] In rejecting the defendant's characterization that Illinois' sex offenders' registration requirement was "poor policy," the Court emphasized that its "task" was to decide whether the legislature violated the Constitution and that on "questions of policy," the "legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems."[49] According to the Court, under the intermediate scrutiny standard, the legislature does not have to adopt the "least restrictive" means of advancing the government's content-neutral interest.[50]

Moreover, the Illinois sex offender laws were somewhat narrowly-tailored because: juveniles can petition to have their registration terminated after two years; school access to a juvenile sex offender's registration is limited to more senior school personnel; and "despite its plainly legitimate sweep," the Internet disclosure provision does not mandate disclosure of individuals with whom the sex offender interacts.[51] Accordingly, Minnis failed to show that Section 3(a) of the Registration Act is facially unconstitutional and that it was substantially overbroad in violation of the First Amendment.[52]

Finally, the *Minnis* Court distinguished three federal court cases that invalidated state sex offender notification statutes, one which stated that "[b]logs frequently, and perhaps mostly, involve discussion of matters of public concern. Blogs are by their nature open to the public and pose no threat to children . . . . A site publicly available on the Internet poses no threat to children—after all, every police officer in the world can see it."[53] The Illinois Supreme Court disagreed. The Court stated that "these courts failed to recognize the breath necessary to protect the public" or "to engage in the comparative analysis of

45. *Id.* ¶¶ 33–34.
46. *Id.* ¶ 45.
47. *Id.*
48. *Id.* ¶ 39.
49. *Id.* ¶ 41.
50. *Id.* ¶ 42.
51. *Id.* ¶ 48.
52. Although the *Minnis* Court did not expressly hold that the constitutional challenge to the Notification Law was denied, in light of the "tandem" nature of the two sex offender statutes, it is clearly implied. *Id.* ¶ 49.
53. *Id.* ¶ 46 (quoting Doe v. Nebraska, 898 F. Supp. 2d 1086 1121 (D. Neb. 2012).

whether the chilling effect was substantially broader than that required by the statutory purpose."[54]

V. CONCLUSION

The *Minnis* case has significant legal implications for the First Amendment, sex offenders, the Internet, the Illinois courts, and the Illinois criminal justice system. The *Minnis* Court detailed the competing policy considerations underlying the First Amendment (free speech, including the right to remain anonymous), the broad scope of the Internet and blogs, and the governmental interest in protecting children from exploitation by sexual offenders and the public from sexual recidivists.

Several other *Minnis* lessons are gleaned from the Illinois Supreme Court's recent decision upholding the Registration Act and the Notification Law. First, since defendant Minnis, on remand, may raise new issues, including constitutional issues such as free speech rights under the Illinois Constitution, the Illinois Supreme Court may be called upon to review his case again or other sex offender and Internet cases. Second, since some federal courts have invalidated state statutes requiring registration of sex offenders or notification to their communities, the split between certain federal and state courts regarding limitations on sex offenders' free speech rights may eventually be addressed by the United States Supreme Court. Third, since the *Minnis* Court clearly left future modifications of sex offender laws to the legislature, and since the registration disclosure and notification requirements as a "sex offender" are significant and have a stigma attached to them, the Illinois General Assembly may want to revisit the scope of the Registration Act and Notification Law (*e.g.*, a ten-year reporting requirement and other broad categories of disclosures), and particularly, the effect of the disclosures and notification requirements on juveniles. Fourth, because of the stigma of being a sex offender, as recognized by the *Minnis* Court, prosecutors must continue to engage in thorough investigations of sex crimes cases, and they must be particularly careful when deciding whether to charge, or to seek indictments of, juveniles and adults for sex crimes. Fifth, from the standpoint of a defense attorney, all federal and state law defenses should be promptly raised and evidentiary hearings should be requested when First Amendment "as applied" constitutional challenges are raised. Moreover, the significant sex offender disclosures requirements underscore that defense counsel must carefully advise his/her client about the consequences of a guilty plea or a trial conviction arising from such statutes. Finally, the First Amendment free speech rights of sex offenders in the context of the Internet and the criminal justice system, as reviewed by the Illinois Supreme Court, may present significant new legal and policy issues in years to come.[55]

54. *Id.* ¶¶ 46–47.

55. The *Minnis* Court, for example, referenced the defendant's argument that juveniles have "continuing brain development," and thus, potential for rehabilitation. *Id.* ¶ 38. As further medical research is done in this area, additional legal arguments on behalf of juveniles regarding such research may be presented to the Illinois legislature and the Illinois courts.