



Senate Judiciary Committee

February 27, 2018

RE: SB 871-874, 878-880

Position: Oppose

The ACLU of Michigan supports preventing child abuse and sexual abuse. We too agree that recent events shed light on the systemic failure of many individuals in protecting against this abuse and that there are several areas of improvement that must be addressed. Accountability is critical and it is imperative that we make access to the courts easy, safe, and secure for all victims of sexual abuse. The ACLU of Michigan recognizes and appreciates the extreme emotional pain any person goes through as the result of sexual abuse, and we wish to highlight some concerns for this legislature to consider in its attempts to address this complex issue. Accordingly, we oppose several aspects of this bill package as written because of these unintended consequences.

Constitutionality of Expanding Criminal Statute of Limitations

As an initial matter, there are constitutional implications to removing and increasing the criminal statute of limitations retroactively. The U.S. Constitution's Ex Post Facto provision prohibits the Federal Government and the States from enacting laws with certain retroactive effects where that law makes illegal an act that was legal when committed, increases penalties for an infraction after it has been committed, or changes the rules of evidence to make evidence to make conviction easier.¹ The U.S. Supreme Court repeatedly held that increasing criminal statute of limitations retroactively is an Ex Post Facto violation of the Constitution in cases where the statute of limitations has already tolled. The U.S. Supreme court noted that to permit legislatures to do so is an "erosion of the separation of powers" and risks "arbitrary and potentially vindictive legislation."²

As a principle, removing the statute of limitations for crimes should be done with great caution as they were enacted to ensure the ripeness of a lawsuit and protect constitutional rights such as due process—pillars of our legal system. By removing the statute of limitations, we limit an individual's ability to effectively defend themselves by limiting the accessibility to defensive evidence and potentially may deprive them of true due process. There must be a balance to the system by addressing the deeper issues of the criminal justice system, such as the abuse of prosecutorial discretion and racial disparities. Any legislation that would extend statute of limitations should be accompanied by reforms to also ensure due process protections, such a directives to create a greater responsibility for prosecutors,

¹ See Art. I, § 9, cl. 3 (Federal Government); Art. I, § 10, cl. 1 (States).

² See *Weaver*, *supra*, at 29, and n. 10, 101 S.Ct. 960. See *Fletcher v. Peck*, 6 Cranch 87, 137–138, 3 L.Ed. 162 (1810) (viewing the Ex Post Facto Clause as a protection against "violent acts which might grow out of the feelings of the moment").

addressing the accessibility of the appeals process, and expanding access to attorneys for indigent defendants during appeals process.

Autism Spectrum Disorders, Child Pornography, and the Criminal Justice System

Secondly, there is an important misstep of our criminal justice system that warrants highlighting: the intersection of developmental disabilities and sexual crimes. Child pornography is too easily accessible and certainly horrible to imagine. As we seek to combat this abuse, we must take the opportunity to put in the appropriate safeguards that meet the true intention of this legislation without causing unintended consequences.

Approximately 1 in 45 children have been diagnosed with a developmental disability such as Autism Spectrum Disorder ("ASD"). This disability is characterized the inability to read others or understand non-verbal communication that often leads to inappropriate social conduct. Individuals with ASD find themselves rejected by friends and their communities because they are unable to navigate the complex, obscure rules of social interaction. Accordingly, many people with ASD find refuge in computers as a way to approach society, while avoiding uncomfortable in-person interactions.

A recent study found that 93% of boys and 62% of girls are exposed to online pornography before age 18.³ For individuals with ASD, this becomes a means to explore ideas of sexuality and romance that may be their only source of information about sexuality well into adulthood. As they become more isolated, they spend an increasing amount of time online, where child pornography is easily accessible. At these times, the line between legal and illegal is blurred by the individual's curiosity coupled their obliviousness to the social and legal taboos surrounding child pornography. This may manifest itself in the viewing and downloading thousands of images without truly understanding that the children in pictures and videos are the victims of abuse.

This behavior is not predictive of future involvement with child pornography or offenses against children and has less to do with propensity for sexual deviance, and more to do with their lack of intuitive awareness of social/moral/legal constraints. Enhancing punishments for possession of child pornography are driven by the pervasive belief that a person who views these images must also be capable of sexually abusing a child. However, it is widely accepted that people with ASD lack the ability to manipulate children for abuse and research repeatedly shows that their inability to read other people's intentions makes them especially vulnerable to being sexually abused by others and much more likely to be victims than victimizers.

This issue also highlights the problem with mandatory minimums. Mandatory minimums eliminate judicial discretion to consider individual circumstances, like a person's developmental disability and the underlying factors that led to their conduct. The ACLU has long advocated against mandatory minimums because they generate unnecessarily harsh sentences, tie judges' hands, create racial disparities in sentencing and empower prosecutors to force defendants to bargain away their

³ Sabina, Chiara, Ph.D., Wolak, Janis, Ph.D., and Finkelhor, David, Ph.D., *Cyber Psychology & Behavior*, Vol 11, No. 6, 2008, *The Nature and Dynamics of Internet Pornography Exposure for Youth*.

constitutional rights. We hope that while this legislature considers these policies, it will consider measure to address the impact of this legislation on this very vulnerable community.

Increase Penalties for Mandatory Reporters

Finally, enhancing criminal penalties against mandatory reporters for the failure to report is cause for concern. Richard Wexler, Executive Director of the National Coalition for Child Protection Reform, noted that even trained mandatory reporters often call in “patently absurd” cases for fear of being punished for failing to report. We recognize that while there are certainly situations where reporting makes sense and is necessary, there may be certain circumstances that are not best handled by law enforcement or state intervention, but rather within a family. Examinations to check for sexual abuse are intrusive, and even tactics, such as repeated questioning, can sometimes produce false allegations from young children who haven’t been abused. The ensuing investigation can then traumatize children, or worse, place them needlessly in foster care. We do not want to silence survivors and victims of sexual abuse nor do we want to empower abusers. We also do not want to create an environment that forces people to choose between facing potential criminal penalties over avoidable or unnecessary long term collateral consequences on a family.

Ultimately we desire to see policies that create positive change and consider all of the potential ramifications and hope to be further included in the conversation to address these issues.

Respectfully submitted,

Kimberly Buddin
Policy Counsel
American Civil Liberties Union of Michigan
Kbuddin-crawford@aclumich.org