



Testimony of Allen Gilbert, executive director, ACLU-Vermont on Section 2 of S. 9, child protection bill, Feb. 3, 2015

It was interesting preparing this testimony. I've been here in the Statehouse representing the ACLU for 12 years. Only twice have I been asked to testify on language in Title 13, Chapter 19, which contains the state's riot act. The first time was in 2006. The second is now, concerning S. 9. I was surprised to see Chapter 19 of Title 13 is where the language in S. 9 defining "harm" comes from.

I don't think you want to include Section 2 in S. 9.

The reason is I don't think it will be successful.

There are two main reasons I don't think it will be successful.

The first is that the provision essentially deputizes every person in the state – regardless of age, gender, or knowledge – who at any point has care, custody, or supervision of a child, to make judgments that they may or may not be capable of making. I think people will be uncomfortable being put in this role. Anyone would be if they could be incarcerated for 10 years for making the wrong judgment. It's a sledge hammer approach to address a very complex problem.

The second reason I don't think the law will be successful is that its application will be subjective. The sledge hammer given prosecutors creates discretion so broad that I think only in the rarest of cases will charges under this provision be brought. However, as with any heavy weapon, mention of the law and its penalty might cause fear that leads the accused to essentially incriminate him or herself. The fact that the law's chief attribute is its ability to intimidate creates problems, problems that themselves could cause grave harm to someone who has, him or herself, not done harm, but has instead – in the state's eyes – not fulfilled deputized responsibilities.

The result of this is that people will be made to justify the actions they did -- or did not -- take. People will be made to prove their innocence, which turns a central tenant of our criminal justice system on its head. Other testimony has been given in the Senate Judiciary Committee that interpreting what the bill's language means requires knowledge of this particular statute, other child protection statutes, and Supreme Court decisions. That's a lot to ask of an average citizen of this state.

Up to now, the law has left judgments regarding harm to a child up to people who have a direct role in protecting a child's best interests. Section 2 of S. 9 changes that dramatically.

Below are some of the questions the ACLU has concerning how this law will be applied. Examples I use may seem far-fetched, but they are offered to illustrate how broad in scope this law would be.

- There is no exception for accidents, no exception for lack of intent. If a parent playing basketball at a father-daughter basketball game knocks a child during a rebound attempt,

the child gets up, rubs her shoulder and keeps playing, but it's later found she's suffered injuries – dislocated shoulder and elbow – could anyone offering care, custody, or supervision at the game, and subsequent to it, face liability for not reporting the harm?

- There is no exception for parents who oppose vaccinating their children, a belief that others feel can cause severe harm in the form of illness and even death. If my son and daughter-in-law have such a belief, and I sometimes watch over my grandchildren, must I report what the state believes is harm being done to the child because s/he hasn't been vaccinated? Must a school nurse provide a list of students she knows, from records at the school, haven't been vaccinated?
- Once a report of suspicion of harm is made, does the person to whom the report is made also become liable? Is a chain of liability created? How does that work? A DCF worker faces a 10-year jail sentence if s/he gets a report from a babysitter or a school nurse, feels the report is unfounded because the reporter has been reporting all sorts of suspicions to the DCF worker before, but it's found this one report is accurate – does the DCF worker face a jail sentence?
- A woman is trying to hold her family together, enduring harassment and perhaps abuse from her husband. The husband grows marijuana in a garden patch behind the house, enough to produce more than an ounce of leaves. They have children. Under the Section 2 provision, the wife must report the existence of the marijuana – yet doing so will likely result in further mistreatment from her husband and perhaps even the break-up of the family.

In fashioning this part of the bill, Section 2, to prevent crimes, we may succeed mainly in causing more crimes. If this provision were ever aggressively utilized by prosecutors, and maximum penalties imposed, we'd be creating a half-million-dollar expense for the state upon every conviction. (That would be the average cost of jailing an offender for 10 years.) Such a result is exactly what the state is trying to reverse, in terms of incarceration. We want fewer people in jail, not more.