

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
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SEXUAL ASSAULT REFORM ACT
1998 Warren M. Anderson Legislative Breakfast Seminar Series

MARCH 11, 1998



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WARREN M. ANDERSON

Warren M. Anderson is a distinguished alumnus of Albany Law School and an active member of the Government Law Center Advisory Board. Having served in the New York State Senate for thirty-five years, he is perhaps best known for his leadership during his tenure as President Pro Tem and Majority Leader from 1973 to 1988.

Warren Anderson began his legal career as an Assistant County Attorney in Broome. He then joined the law firm of Hinman, Howard & Kattell where he is currently practicing law. Throughout his career he has received numerous honors and awards.

PROGRAM DESCRIPTION

In furtherance of its mission to serve as a resource to all levels of government in the resolution of specific problems, the Government Law Center is pleased to present the seventh annual Warren M. Anderson Breakfast Seminar Series. Monthly breakfast programs feature experts addressing the legal aspects of a variety of policy issues pending before the Legislature. The seminars are designed to provide access to current legal information on a given topic. The Government Law Center welcomes your suggestions for future programs.

1998 HONORARY CO-HOSTS

The Government Law Center is grateful to the Leadership of the New York State Senate and Assembly for serving as honorary co-hosts of the 1998 Series:

Honorable Joseph L. Bruno
Senate Majority Leader

Honorable Sheldon Silver
Speaker of the NYS Assembly

Honorable Martin Connor
Senate Minority Leader

Honorable John Faso
Assembly Minority Leader

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INTRODUCTORY REMARKS

PATRICIA E. SALKIN, ESQ.

**Associate Dean & Director, Government Law Center
Albany Law School**

I would like to welcome our friends, old and new, to the 7th Annual Warren M. Anderson Legislative Breakfast program.

The Government Law Center of Albany Law School celebrates its 20th Anniversary this year. We are pleased to provide this Series and other beneficial programs during this commemorative year.

The Government Law Center was established at Albany Law School in 1978 to facilitate multi-disciplinary study of government and the problems facing government, to introduce law students to methods of policy analysis and to public service, and to serve as a resource to government at all levels in the resolution of specific problems. It is this last role which brings us here today.

This breakfast program was designed to provide policy makers and law makers with current information on the state of the law and its practical applications in New York and across the country. Each month the Government Law Center presents a discussion focusing on legal and policy aspects of an issue which is awaiting legislative action here in New York.

The Series is named in honor of former Senate Majority Leader Warren M. Anderson who is not only a distinguished alumnus of the New York State Legislature but also an alumnus of Albany Law School and a member of the Government Law Center Advisory Board. Senator Anderson is particularly pleased that the four legislative leaders agreed to serve as honorary co-hosts of the 1998 Breakfast Series. Albany Law School is proud and honored to have this bipartisan support.

We are pleased to make the contents of this year's Anderson Series available to a wider audience through this publication. Within it, five major issues before the New York State Legislature—Court Restructuring, the Sexual Assault Reform Act, School Reform, Brownfields, and Computers & Technology in the Year 2000—are examined. It is our intention that the information will serve as an effective resource to law makers and policy makers throughout the State, as the debates on these consequential topics continue in the months ahead.

SEXUAL ASSAULT REFORM ACT

March 11, 1998

PANELIST

HONORABLE KENNETH BRUNO

District Attorney

Rensselaer County

I would like to thank the Government Law Center for inviting me here to talk on this very important legislation. I would also like to commend the Governor and the Senate for this long overdue reform bill. The legislation is excellent in terms of empowering more victims, in increasing the penalties to sex offenders, and in strengthening the criminal procedure law, with regard to prosecuting these types of crimes.

Because of the short time we have to speak, I want to hone in on a specific portion of the bill which I hope gets passed in the final legislation. It relates to a case that we recently prosecuted in my office, showing a glaring loophole in the law addressed by this legislation. The section of the code (Section 130.60 of Penal Law) relates to sex abuse in the second degree as it is proposed. It would increase the age of the victim to a person less than 17 years old. Currently, the law splits. If the victim is less than 14 years old, it is an "A" misdemeanor. For victims between the age of 14 and 17, it is a "B" misdemeanor.

The case I referred to involves a defendant by the name of Robert Riley. He was convicted approximately 10 years ago of sex abuse in the third degree for having sexual contact with a girl who was 14 years old. He was convicted and got probation. In 1996, he was again arrested for sex abuse in the third degree for having sexual contact with another 14-year old. He was arrested, the case went to trial in 1997, and he was convicted of that charge. Since it is a class "B" misdemeanor, the most he can get is 6 months in jail, which he is serving.

I strongly support increasing that law so that a person who has sexual contact with anyone who is under 17 years old is charged with a class "A" misdemeanor. The

victim is no less a victim because she happens to be 14 instead of 13. Imagine trying to explain to her parents why it is a class “B” misdemeanor and not an “A” misdemeanor. It really does not make any sense. The bulk of the cases we get in Rensselaer County—and I imagine the same is true for other counties—are misdemeanor sexual abuse cases. They outnumber the more serious felonies. The “A” misdemeanor designation means they are going to have some teeth to them.

Robert Riley, although twice convicted of that “B” misdemeanor, does not have to register as a sex offender. No one in his neighborhood and in the community is going to know that he is a twice-convicted child molester. The law needs to address that issue so that all sex offenders should have to register. Everyone should know who and where they are, so that they can take appropriate steps in protecting themselves. People have a right to know.

Currently we consider a second misdemeanor “Driving While Intoxicated” within ten years to be a felony. A sex abuse and sexual assault misdemeanor is at least as serious, if not more so, than driving while intoxicated. We need to do the same with sexual assault misdemeanors. Two convictions in ten years should be a felony. It provides district attorneys offices with more options. The most jail time that a person can serve on a misdemeanor is a year in local jail. That is simply not enough for a twice-convicted sex offender. There are a lot of other aspects of this law which I hope we get to discuss today.

The case I mentioned alone is ample support for that change. Remove the distinction between a “B” misdemeanor and an “A” misdemeanor, making it applicable to all victims under 17 years old. I would like to see that made part of the final legislation.

Again, my thanks to the Government law Center for inviting me here to discuss the legislation.

PANELIST

ALFRED O'CONNOR

NYS Defenders Association

Like Senator Volker, I am also a graduate of Buffalo Law School, and I, too, have a connection to Senator Warren Anderson. I was in college about 20 years ago, working my way through school as a night janitor, and one of my chores was to clean his office. Now here it is 20 years later, and I'm still doing what a lot of people consider to be dirty work; that is, talking about the rights of sex offenders.

More accurately, I'm here to talk about the rights of citizens who are accused of sex offenses, but who are presumed, in the eyes of the law, to be innocent until proven guilty beyond a reasonable doubt by a jury of their peers. I've been practicing criminal law for approximately 13 years, and have handled some of these kinds of cases. I know from personal experience that they can be heart wrenching—especially when children are involved—not just for the victim, but for the victim's family, prosecutors, judges, defendants, and, contrary to all the jokes you might have heard, for defense lawyers as well.

There is a disturbing trend that I see in some of the reform efforts lately, perhaps in response to the stress and emotions that are inherent in these types of cases. Increasingly, we are seeing efforts to make these cases easier to prosecute, not because our laws are inadequate to protect victims or because prosecutors are at an unfair disadvantage in the court room. We are seeing reform efforts that are designed simply to convict people who are charged with sex crimes. We have moved beyond well-founded efforts to rid our laws of sexist notions about the nature of sexual assault, and to protect victims from embarrassment and humiliation in their dealings with the court system, police and prosecutors.

Lately, the call for reform has taken on a different and a more ominous tone. We now seem intent at chipping away at the rights of people charged with sex offenses. This pattern is clear in a number of provisions in the Sexual Assault Reform Act. Take a law of general applicability which applies to everyone who is charged with a crime, and simply say it does not apply the law in sex offense cases.

For example, there is a well-established principle in our system of law going back centuries; it holds that the defendant's prior bad conduct, or prior offenses, are not

admissible to prove guilt for the crime presently charged. The rule is grounded in the presumption of innocence. A person, however, should not be convicted because he or she is a bad person or because he or she once committed a crime. A person should only be found guilty when the government has proven, in the case on trial, guilt beyond a reasonable doubt. But the Sexual Assault Reform Act adds a footnote to this centuries-old rule, that says “except when you are charged with a sex crime.” Then, the prosecution can bring up all your prior bad conduct and juries can take that information into the jury room when they are deliberating. It stands the presumption of innocence “on its head” and establishes, instead, a presumption of guilt.

This is not just a wide-eyed liberal’s opinion. Chief Justice Rehnquist and other federal judges, who are probably not card-carrying members of Ms. Small’s organization, think so too. When Congress passed this law two years ago, the Chief Justice and other federal judges condemned it, saying that Congress should repeal this law because it could “diminish significantly the protections and safeguards of persons accused in criminal cases.” The rule poses the danger of convicting an innocent person. I do not often agree with the views of the Chief Justice but, when he starts saying that, I think we have all got to start taking a look at what we are doing here.

The Sexual Assault Reform Act takes the same approach to bail. It denies bail in certain cases solely because a person has been charged or convicted of a sex crime.

There is another example from outside the Sexual Assault Reform Act that is worth mentioning. If I get a ticket on my way home today because I go through a red light, and I think the government has made a mistake, I can appeal that. If I get fined \$30, I can appeal it all the way to the Court of Appeals, if they will listen to me. If the State, however, believes I am a level 3, high risk, sexually violent predator—even if I have been convicted of a misdemeanor—for the rest of my life, where ever I go, the police will bang on the doors of my community and tell everyone, “watch your children, this guy is a sexually violent predator.” If I think the state has made a terrible mistake in my case, I am out of luck because I have no right to appeal. I think that is unfair.

There was a lot of cheering a few weeks ago when the Court of Appeals came down with a decision that said that the Sex Offender Registration Act does not include a right to appeal. The Court did not say that this is because these determinations are always fair. I have done a lot of work on these types of cases and, believe me, determinations are not always fair. There is no appeal because it was left out of the bill. Whatever your thoughts about the Sex Offender Registration Act, should we really be proud that we care so little about fairness in these matters that we do not even allow the

defendant the simple right to appeal?

I want to leave you with this one thought. When we think of sex offenders, most of us conjure up images of Ted Bundy, or the man who was convicted of murdering Megan Kanka. But, there is another kind of sex offender. Kelly Ann Michaels was a college student some years ago, an aspiring actress in New Jersey. She needed some extra money, so she took a job at the Wee Care Nursery School. She did a good job. She was hired as an aide and was promoted to the role of teacher. One day, an anxious parent thought her child, who was in the nursery school, was not acting right. She thought it might have something to do with the nursery school. The mother's vague suspicions soon grew into a blizzard of wild accusations against this young 19-year old college student. Kelly Ann Michaels was charged with 115 counts of sexual abuse against children after therapists, who were totally untrained and totally inept in the interrogation and interview of children in these situations, had interviewed them extensively. To make a long story short, she was convicted and sentenced to 47 years in prison. She was innocent of any wrong doing. There was never any physical evidence or corroboration whatsoever on any of these offenses. Kelly Ann Michaels was lucky. The injustice in her case was recognized. She was freed from prison.

So when we talk about sex offenders, let us remember Kelly Ann Michaels. We will only create more stories like hers if we continue to think it is legitimate to express our moral outrage about sex offenses by stripping away the protections of those who are charged with committing them.

Thank you.

PANELIST

MAUD EASTER

NYS Coalition Against Sexual Assault

I am the President of the New York State Coalition Against Sexual Assault. We represent a network of 76 rape crisis centers that serve every county across New York State. Our involvement in this piece of legislation stems from the experience of that network of rape crisis centers which has worked with thousands and thousands of sexual assault survivors every year. They try to help them make the very difficult decision about whether or not to look on the criminal justice system as a potential ally in resolving the horrible experience they had endured. Sexual assault survivors, very frequently, want above all else to make sure that the horrible crime that happened to them will not be repeated against someone else. They also want to see the sexual offender held accountable for his behavior. It is, however, a very hard decision for a sexual assault survivor to decide whether or not to report the crime to the police. The survivor is all too aware that the field of sex crimes is distinct from other crimes. We have to acknowledge this difference. When someone comes forward to report a sex crime, the great likelihood is that the survivor herself is going to be on trial, finding her behavior held up to a magnifying glass in a way that someone whose car is stolen, whose house had burned down, or who has been mugged on the street does not face. It is very hard for a sexual assault survivor to feel they are going to see justice from our current sex crimes code and our current criminal justice system.

New York is not unique in this. The United States Senate Judiciary Committee did a study of state laws on sexual assault in 1993 and found that 98% of sex crimes victims never see their attacker apprehended, incarcerated or convicted. Over one-half of all rape prosecutions—54%—involve either dismissal or acquittal. Only approximately 1 in 10 rapes reported to the police result in time served in prison. When the first listing of New York State's Sex Offender registry was published, it was very telling that none had served more than six months behind bars. These are supposedly, by the ranking of people evaluating the likelihood of repeat crime, the most serious sex offenders. Our current sex crimes law is simply not putting a spotlight on this very serious crime that affects one in three women and one in five children in our society. This is serious.

We need to look at what the realities of sexual assault are in the 1990s. We

need to craft our laws to be responsive to those realities. Because of our concern in this area, we at the Coalition were very glad to be involved in the process of looking at the whole of the sex crimes code—New York State’s laws on sexual assault—and crafting a way to bring those laws up to date. There has not been a major revision to the laws in this area for 30 years. In 1996, three representatives of our Coalition sat down with prosecutors across the State who specialize in sex crimes prosecution. We heard from representatives from rural and urban communities, and democratic and republican district attorney’s offices. It was a very bipartisan effort. We met with the Governor’s criminal justice advisor to discuss how we could bring the sex crimes law up to date. The Sexual Assault Reform Act resulted from this process. It was introduced as a Governor’s program bill at the end of last session. It immediately passed the Senate unanimously and the Senate passed it unanimously again on February 3 of this year, which was a nice day for that to happen for us because that was our lobby day. We had 550 advocates in town that day who certainly applauded the sponsor, Senator Volker, and all the democrats and all the republicans in the Senate who passed that legislation unanimously again. These advocates fanned out throughout the Assembly to say, “Please bring your House on board with this right away” and “Let’s get New York State’s sex crimes law updated this year.” Following that lobby day effort, Assemblyman Joseph Lentol, Chairman of the Assembly Codes Committee, has become a sponsor for the Sexual Assault Reform Act in the Assembly. We have been working with his staff and with the Speaker’s criminal justice staff, to help them understand these kinds of cases where survivors have not been able to have their voices heard in the courtroom.

There are six major provisions of this law that are central to our concern. We call this our “No Means No” Act. There is language in the rape 3, sodomy 3 provisions of the new law which says, if someone says “no,” it means “no.” Giving the victim a legal procedure that backs up the dignity and the validity of her refusal to consent to sex will set a new tone. It is a signal that the change in the sex crimes law has great value and that sex crimes need to be prioritized in a new way in this State.

In another somewhat related provision of the law, dealing usually with acquaintance rape situations, are strong provisions against the use of so-called “date rape” drugs like Rohypnol. It makes it not only illegal to use those drugs to render someone unable to remember the incident and to resist sexual assault, but also criminalizes peddling these drugs for that purpose. Most of the victims do not remember what happened to them. The hospital report luckily can document some of what took place. These are the perfect drugs in the hands of a sex offender, helping

him to commit his crime. We need to crack down on them in New York State.

Abused children often have trouble getting their voices heard. The proposed legislation will allow larger numbers of sexually abused children to tell their stories. It helps clarify for judges the criteria that are appropriate in determining a younger child's ability to testify. It moves from age 12 to age 9 the presumption of an ability to have your story heard if you are a victim of child sexual abuse. Section 130.16 of the proposed legislation would provide greater access to the courts for mentally incapacitated and disabled sexual assault victims, removing the current very antiquated corroboration requirement. These are the last vestiges of a century-old requirement that is inherently inappropriate for such a crime.

This bill also protects incarcerated youth from sexual violence by correctional employees. It extends to patients protection against sexual violence from health care providers. It preserves the integrity of the medical profession from people who abuse their positions of trust.

This law speaks to the realities of the kinds of sexual assault cases that we are seeing in the 1990s. We hope any of you who are Assembly Members and who work in Assembly offices will join us in urging the House to consider passing the legislation.

Thank you very much.

PANELIST

DEBORAH SMALL

New York Civil Liberties Union

I am a legislative director, not an attorney, so most of my work involves examining proposed legislation and commenting on it from the civil liberties point of view. That is what I will do with the proposed Sexual Assault Reform Act.

We go through cycles of dealing with crime in this country and where we put our focus. Who is the criminal of the year? For the past couple of years it has been sex offenders. They are the national bogeyman, and the focus of much attention and legislative proposals across the nation. This is not an unwanted focus. While crime rates have been falling around the country, sex crimes have not. The ages of victims—children and teenagers—around the country have been falling. It is not inappropriate for legislators to be looking to the victims and to be looking for ways to correct what is a national problem.

Unfortunately, as with most areas addressing criminal justice issues, our approach to addressing sex offenses has been mostly a punitive one. Lock them up. Lock them up longer. Keep them away from society. When their time is up, lock them away in a mental health facility. Keep them there as long as possible. What is interesting about that is that it is exactly how we treat drug abusers. The thought is that, if we keep them away from society for as long as possible, we will increase public safety. Unfortunately, the public is not acting in its own interest when it takes this approach. From a statistical point of view, when we lock people up longer, it increases the number of their offenses.

We also stereotype sex offenders. They are sinister people, following kids and hanging around schools looking for people to victimize. While this may, indeed, represent a small portion of sex offenders, most look just like the people I see in this room—average, everyday people. They have families, children, and siblings. Many times, the victims are people that they know. The idea, therefore, that if we can somehow identify these people, lock them up and be safer, is false.

Most people who commit sex crimes are never apprehended. We feel that, if we know the people who committed the crimes, we could point them out to our children and they will be safer. For every person we can point out as convicted, there are five or six

other people in that child's immediate environment who are potential sex offenders, who we have no right to know about. Limiting our focus to those offenders who have been apprehended and notifying people about them is not an effective way to protect the public.

The majority of people who commit these acts are people who were themselves molested. In conversations about the victim, we always refer to she or her, as if the only victims of sex offenses are women and girls. The same people who perpetrate the offenses, many of whom are men, were themselves the victims of sex offenses.

The psychological and psychiatric communities have a general consensus that the best way to change behavior is through treatment, not incarceration. Incarceration has a good role to play in that many studies have shown that once apprehended and treated, the levels of recidivism go down. Thus, it is important to have laws that encourage the apprehension and incarceration of people who commit sex crimes. The idea, however, that keeping them there longer is better—one of the things this legislation is proposing—is simply wrong. Incarceration must be coupled with intensive treatment. As with all other criminals, they eventually will be let out of jail and reenter the community. What is it that we are doing to people, from the time they come into the system to the time they are released, to help them not re-offend?

There is very little in the proposed legislation to address that issue. It focuses on the punitive nature, making it easier to prosecute even where the evidence is not sufficient to sustain a prosecution for another type of offense, as we heard about earlier this morning. Are sex crimes so peculiar that we want to change our standards for proof or our criteria for determining whether or not someone is guilty just because they are being charged with a sex offense?

I will mention one recent case showing where some of this public hysteria can take us to. A young man from the South, age 19, was convicted of getting his 15-year old girlfriend pregnant. Her parents were aware that they were in a relationship. They even wanted to get married. The prosecutor, however, chose to bring sex offense charges against him. He was tried. The jury was told this was a strict liability crime and that if he did indeed have sex with this girl and caused her pregnancy, then he was guilty. They brought back a charge of guilty. He is now a convicted sex offender and, because the state he lives in has sex offender registry, is required to register for the rest of his life as a sex offender. Is this what the law was designed to address? Legislative approaches to these problems tend to use a very broad brush to deal with issues that are sometimes better addressed on an individual basis. The whole idea of having a

judicial system, with judges, is to allow for individual determination of what is the best outcome to achieve justice in a case. The major problem with this legislation is that it would not do that. It would take away the ability to use discretion in what type of evidence would be used to convict people. We need to be asking ourselves, as a society, is this the way that we want to go and will this program really reduce the incidents of sex abuse in our society? I think that it will not. We must focus on treatment and education. Every child needs to be taught that they ought to be afraid of any older person addressing them in an inappropriate way, not just the person who spent five years in jail for a sex crime.

Thank you.