UPDATING THE LAW TO KEEP PACE WITH NEWSFEEDS AND ONLINE VICTIMIZATION: THE NEED FOR LIMITED ACCESS TO SEX OFFENDERS' ONLINE IDENTIFIERS

INTRODUCTION

The advent of the internet enables minors to disseminate a massive amount of personal information on social networking websites. In turn, sex offenders can utilize these websites to stalk potential victims. Take Robert Legg for example. Legg used a social networking website in 2010 to solicit a thirteen-year-old boy for anal sex.[1] Legg used the screen name "BBDCcumpig" to engage in a conversation and ultimately request a rendezvous.[2] Luckily, in that case Legg communicated with an undercover police officer[3] but the possibility of using the internet to prey on a minor for sexual relations is not farfetched. One early study found almost one in five (nineteen percent) of the then-existing minor-internet-users surveyed received an unwanted sexual solicitation within the previous year.[4]

The example above is one illustration of keeping an eye on sex offenders, but monitoring is not a new concept.[5] Additionally, there is a

1. United States v. Legg, 713 F.3d 1129, 1130 (D.C. Cir. 2013).

2. *Id.; see also* Doe v. Nebraska, 898 F. Supp. 2d 1086, 1106 (D. Neb. 2012) (identifying that online child solicitations tend to start on instant messaging websites where an individual begins by "grooming" his or her victim through conversations that "kindle a friendship" and "build up self-esteem," which leads to meeting "for the purposes of real physical sex").

3. *Legg*, 713 F.3d at 1130.

4. David Finkelhor et al., *Highlights of the Youth Internet Safety Survey*, NAT'L CRIM. JUST. REF. SERVICE (Mar. 2001), https://www.ncjrs.gov/pdffiles1/ojjdp/fs200104.pdf. The survey notes that twenty-four percent of the solicitations purportedly came from adults eighteen years or older (forty-eight percent from other youth and the remaining twenty-eight percent unknown) however, the researchers acknowledge that identities are easy to disguise online and the actual age of the predators may be vastly different. *Id.* Regardless, this study is insightful to illustrate the prevalence of online sexual solicitations in the early years of the internet. *Id.*

5. *See infra* notes 6-10.

federal law that establishes a national system to register sex offenders,[6] a federal law that grants public access to a statewide sex offender registry,[7] a federal law that gives social networking websites the ability to compare its members to law enforcement databases,[8] several state laws prohibiting sex offenders from living near schools, parks, youth centers, and daycare facilities,[9] and civil commitment for sex offenders who are "likely to re-offend" if released.[10] Some argue the statutes are often intended to combat the danger of recidivism posed by sex offenders and to defend the states' interest in protecting vulnerable members of the community.[11] While others, however, think the reasoning behind the statutes are flawed and ignite a sex-offender to panic.[12]

Also, some restrictions, like being able to communicate on the internet,[13] implicate First Amendment rights for individuals who have completed their sentence. Recently, the United States Supreme Court clearly identified the internet, specifically social networking websites,[14] as the "modern public square" and designated it to be an important place to exchange ideas and protect free speech.[15]

On the one hand, existing sex offender registration laws may be too restrictive and inhibit rehabilitation.[16] Some argue that the statutes continue to punish convicted sex offenders by prohibiting a common form of communication and expressive activity unrelated to achieving the state's objective to curb victimization.[17] On the other hand, existing laws may be

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6. 34 U.S.C. § 20901 (Supp. V 2017).

7. *Id.* § 20920.

8. *Id.* § 20917 (purportedly the purpose of the statute is to enable a social networking website to monitor its members); *see also Terms of Service*, FACEBOOK, https://www.facebook.com/legal/terms/update (last updated July 31, 2019) (prohibiting convicted sex offenders from using its website).

9. *See* ARK. CODE ANN. § 5-14-128 (West 2013).

10. State v. Dennis K., 27 N.E.3d 500, 505 (N.Y. 2016).

11. *See* Electronic Security and Targeting of Online Predators Act, ch. 67, § 1, 2008 N.Y. Laws 3012, 3012.

12. *See* Emily Horowitz, *Timeline of a Panic: A Brief History of Our Ongoing Sex Offense War*, 47 SW. L. REV. 33, 35 (2017).

13. IOWA CODE ANN. § 692A.121 (West 2016).

14. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (citing that "Seven in ten American adults use at least one Internet social networking service.").

15. *Id.* at 1737.

16. Deborah Jacobs, *Why Sex Offender Laws Do More Harm Than Good*, ACLU OF N. J., https://www.aclu-nj.org/theissues/criminaljustice/whysexoffenderlawsdomoreha (last visited Mar. 31, 2019).

17. Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 15-16, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (No. 15-1194).

failing to keep pace with the rapidly advancing technology that is widely used by youth members in a community. People meet, socialize, and exchange information through online social networking websites[18] like Facebook, Snapchat, and Instagram. Websites are accessible to minors with minimal limitations[19] and easily present a platform where obscene or indecent material can be exposed to them.[20] Under these circumstances, sexual predators can communicate anonymously with minors on the internet and capitalize on their availability. Further, data shows social networking websites are often accessed through smartphones,[21] which can be spatially removed from a parent's watchful eye.

This Note acknowledges that there must be a balance between a convicted sex offender's First Amendment right to speak anonymously online and society's interest in protecting vulnerable members of the public. This balance can be appropriately struck by implementing a platform where the public can determine if a specific online identifier is linked to a sex offender but without disclosing personal information about that individual. This proposal is reasonable in light of a recent shift in modern sex offender jurisprudence.[22] The decision in *Packingham v. North Carolina*[23] tweaked a legislative principle[24] and recognized the need to balance the state's interest

18. *See* N.Y. CORRECT. LAW § 168-b (McKinney 2013) (historical and statutory notes reflect this as being the legislature's logic in enacting sex offender registration laws).

19. For example, membership to Facebook, Instagram, Snapchat, and Twitter only require users be thirteen years or older. *Terms of Service*, FACEBOOK, *supra* note 8; *Terms of Use*, INSTAGRAM, https://help.instagram.com/581066165581870 (last updated Apr. 19, 2018); *Terms of Service*, SNAP INC., https://www.snap.com/en-US/terms/ (last updated Feb. 18, 2019); *Terms of Service*, TWITTER, https://twitter.com/en/tos (last updated May 25, 2018). Interestingly, Facebook and Instagram, which are owned by the same company, Chris Hughes, Opinion, *It's Time to Break Up Facebook*, N.Y. TIMES, May 9, 2019, at SR1, prohibit convicted sex offenders from creating accounts. *Terms of Service,* FACEBOOK, *supra* note 8; *Privacy and Safety Center*, INSTAGRAM, https://help.instagram.com/131932550339730 (last visited Aug. 23, 2019).

20. *See* Finkelhor et al., *supra* note 4.

21. According to the Pew Research Center, ninety-five percent of teens have access to a smartphone, and forty-five percent say they are online "almost constantly" with large percentages on social networking websites. Monica Anderson, *Teens, Social Media & Technology 2018*, PEW RESEARCH CTR. (May 31, 2018), https://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/.

22. *Compare infra* note 43 (circumscribing several instances where sex offenders' rights are limited for an overriding governmental interest), *with* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (acknowledging there can be a limit to governmental restrictions on sex offenders' individual rights).

23. 137 S. Ct. at 1730.

24. Megan's Law established a system where convicted sex offenders register with law enforcement and that information must be made available to the public. *About Megan's Law*, NAT'L INST. OF JUST., (Jan. 21, 2009), https://www.nij.gov/topics/corrections/community/sex-offenders/pages/about-megans-law.aspx; *see also* Doe v. Sex Offender Registry Bd. (*The Collateral Consequence Case*), 41 N.E.3d 1058, 1071 (Mass. 2015) (quoting Poe v. Sex Offender Registry

with that of the convicted sex offender. Prior to *Packingham*, the court acknowledged that collateral consequences[25] associated with registering as a sex offender were reasonable in certain situations.[26] Part I examines the procedural requirement for registering as a sex offender, society's interest in public safety, and convicted sex offenders' First Amendment rights in the internet era. Part II explores the constitutionality of restrictions and regulations on sex offenders' access to the internet by analyzing statutes and court opinions upholding and vacating specific state statutes. Part III advocates for a universal system that creates the ability for the public to search a specific online identifier to see if it is connected to a registered sex offender while maintaining the offender's anonymity. This Note concludes that a narrowly tailored statute that grants public access to search online identifiers will sufficiently balance the community's interest in safety and a convicted sex offender's freedom of expression.

I. PURPOSE BEHIND SEX OFFENDER REGISTRATION LAWS

A. Registration Requirements

One purported purpose behind sex registration laws is to maintain the state's interest in protecting vulnerable members of the community, while avoiding the implementation of overly broad registration requirements.[27] Currently, the federal government requires sex offenders to register before completing their prison sentence or no later than three business days after being sentenced, if imprisonment is not required.[28] Accordingly, a sex offender must register, keep the registration up to date, identify the offender's employer, and if applicable, the offender's school.[29] Congress postulated the implementation of the nationwide registry would make sex offenders more visible to protect the public and children from offender recidivism after a series of crimes included the abduction, sexual assault, and murder of

Bd., 926 N.E.2d 187, 196 (Mass. 2010) (reasoning the attendant consequences of registration harms a sex offender's earning capacity, damages one's reputation, and brands the individual as a public danger but may be justified given society's interest in protecting the youth from sexual predators).

25. Collateral consequence is defined as "1. Any unforeseen or unplanned results of an action taken—esp. adverse ones. 2. *Criminal law*. The indirect implications of a criminal conviction . . . 3. A penalty for committing a crime, in addition to the penalties included in the criminal sentence. An example is the loss of a professional license." BLACK'S LAW DICTIONARY (11th ed. 2019).

26. *See infra* note 43.

27. *The Collateral Consequence Case*, 41 N.E.3d at 1071 (recognizing overly broad laws can distract the public and drain law enforcement recourses).

28. 34 U.S.C. § 20913 (Supp. V 2017).

29. *Id.*

children as young as five years old.[30] In line with Congress' intent to protect the community, several states require the registration of an offender's online aliases or identifiers to aid law enforcement in online investigations.[31]

The Jacob Wetterling Act (the "Act")[32] was the first federal law requiring sex offenders to register.[33] The Act required all states to implement a registry for sex offenders and those who committed crimes against children.[34] The Act originally required the information collected under a state registration program to be treated as private data and could only be used by law enforcement for investigative purposes.[35] Under the Act, states had discretion to disseminate registration information to the public only when deemed necessary to protect the public from a specific offender,[36] but the Act did not require nor permit universal dissemination. Congress passed the Act after a masked-predator abducted, sexually assaulted, and murdered eleven-year-old Jacob Wetterling as he returned home from a video store with his younger brother and friend.[37]

Congress modified the Act in 1996 after a convicted sex offender abducted, sexually assaulted and murdered seven-year-old Megan Kanka.[38] The Act's modification included a provision commonly called Megan's Law, which requires public access to some sex offender registration information.[39] Megan's mother spearheaded this law after she learned her neighbor across

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30. *Id.* § 20901.

31. *E.g.*, N.H. REV. STAT. ANN. § 651-B:4-a (2016).

32. The Jacob Wetterling Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 129, 120 Stat. 600-01.

33. United States v. Elk Shoulder, 738 F.3d 948, 950 (9th Cir. 2013).

34. The Jacob Wetterling Act § 170101(a), 108 Stat. at 2038.

35. *Id.* § 170101, 108 Stat. at 2041-42.

36. *Id.* § 170101, 108 Stat. at 2042.

37. Bill Chappell, *Man Admits Abducting and Killing Jacob Wetterling in 1989,* NPR (Sept. 6, 2016, 3:45 PM), https://www.npr.org/sections/thetwo-way/2016/09/06/492849778/man-admits-to-abducting-and-killing-jacob-wetterling.

38. 34 U.S.C. § 20901 (Supp. V 2017).

39. Megan's Law is a nationwide database where anyone with access to the internet can conduct a search to see if a convicted sex offender lives within the community. *See About Megan's Law*, CAL. MEGAN'S LAW WEBSITE, https://www.meganslaw.ca.gov (last visited Aug. 26, 2019). California's Megan's Law website allows a person to search the specific name of an individual or do a radius search within a certain zip code. *Search Offenders*, CAL. MEGAN'S LAW WEBSITE, https://www.meganslaw.ca.gov/Search.aspx (last visited Aug. 26, 2019). The "offender profile" details the offender's name, known aliases, physical description including height, weight, ethnicity, the penal offense and year of conviction, risk assessment, home address, and identifying marks like tattoos and scars. Example of Offender Profile, *Search Offenders*, CAL. MEGAN'S LAW WEBSITE, https://www.meganslaw.ca.gov/Search.aspx (click on "Address Search"; enter desired address; click on any location pin; then click on "more info") (last visited Sept. 6, 2019). Presently, online identifiers are not automatically available to the public. *See id.*

the street, a twice convicted sex offender, is the one who sexually assaulted and murdered her daughter.[40]

Some scholars have argued the collateral consequences associated with sex registrations and notification laws are punitive rather than regulatory.[41] While the issue of laws being punitive rather than regulatory is not addressed in this Note, collateral consequences have been associated with criminal convictions for decades, regardless of the offense.[42] As the Ninth Circuit Court of Appeals explained in *Doe v. Harris*, sex offender registration laws should be categorized as a consequence of the conviction rather than as a restraint on an individual's liberty.[43]

B. State's Interest in Public Safety

The state's interest in protecting vulnerable members of a community justifies some collateral consequences.[44] Common legislative rhetoric includes declarations that the danger of sex offender recidivism justifies registration in order to aid law enforcement investigations and alert the public of safety concerns.[45] However, some argue that the registry itself causes recidivism because the attendant consequences (e.g., public shaming and challenges in finding a job or apartment) make life harder, which increases the possibility that an individual will commit a crime.[46]

1. Recidivism

According to the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART"), a governmental

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40. Joel B. Rudin, *Megan's Law: Can It Stop Sexual Predators--and at What Cost to Constitutional Rights*? CRIM. JUST. Fall 1996, 3, 3.

41. *See, e.g.*, Horowitz, *supra* note 12, at 35.

42. *See* Chandler v. Allen, 108 S.W.3d 756, 760-63 (Mo. Ct. App. 2003) (prohibiting convicted sex offender from working in state building); *see also* United States v. Zobel, 696 F.3d 558, 575 (6th Cir. 2012) (forbidding a child molester from lingering near places where children gather); Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (holding residency restriction within two thousand feet of school or child care facility constitutional); United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003) (barring a child-pornography collector from possessing any pornography or visiting pornographic websites); Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998) (noting typical collateral consequences of a conviction include the prohibition to vote, ability to hold public office, or serve as a juror).

43. 772 F.3d 563, 572 (9th Cir. 2014).

44. *See supra* note 42 and accompanying text.

45. CAL. PENAL CODE § 290.03 (West 2012 & Supp. 2019); N.J. STAT. ANN. § 2C:7-1 (West 2015).

46. *See, e.g.*, J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registries Make Us Less Safe?*, J.L. ECON. 161, 165 (2012) (arguing notification laws may have the perverse effect of increasing crime).

agency, sexual abuse is a learned behavior, likely to be recurrent.[47] SMART's research shows that sexual abuse is a conditioned behavior,[48] greatly influenced by negative or adverse circumstances in one's own early childhood development.[49] The study proffered that many sex offenders engage in a type of rationalization that justifies the abuse because there is an underlying problem in their self-regulation and impulse controls.[50]

Further, one expansive report compiled by SMART showed that sex offenders are less likely to be rearrested compared to general (non-sex related) offenders (forty-three percent compared to sixty-eight percent, respectively), and adult sex offenders have much higher rates of general reoffending rather than sexual reoffending.[51] But when compared to general offenders, sex offenders are more likely to re-offend with a sex crime than a non-sex related offense (5.3 percent compared to 1.3 percent, respectively).[52] In sum, sex offenders were less likely to commit another crime in general but when compared to general offenders, a sex offender is more likely to commit a sex offense. Also, one study noted that the type of sex offense is instructive to the propensity of an offender to be rearrested.[53] Some research examined the recidivism rates of rapists and child molesters and found the highest observed recidivism rates were among child molesters who harm boys,[54] with a lower recidivism rate for rapists, child molesters who victimize girls, and incest offenders.[55] Also, additional research illustrated that offenders are more likely to recidivate over time, contrary to general crime offenders who tend to settle down with age.[56]

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47. *Key Things to Know About Adults Who Sexually Offend*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING (May 2017), https://smart.gov/pdfs/AdultsWhoSexuallyOffend.pdf; *see also* State v. Timmendequas, 773 A.2d 18, 24 (N.J. 2001). In *Timmendequas*, a social worker testified on behalf of the defendant who killed Megan Kanka, that he had a very troubled upbringing, including that the defendant's father had sexually abused the defendant and his brother frequently, and that the two brothers once witnessed their father rape a seven-year-old girl. *Id.*

48. OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, *supra* note 47.

49. *Id.*

50. *Id.*

51. Roger Przybylski, *Chapter 5: Adult Sex Offender Recidivism,* OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, https://smart.gov/SOMAPI/sec1/ch5_recidivism.html (last visited Aug. 27, 2019).

52. *Id.*

53. *Id*.

54. *Id*.

55. *Id*.

56. Prescott & Rockoff, *supra* note 46, at 180.

Contrarily, some posit there is a contradictory nature to sex offender recidivism findings,[57] highlighting a study where prisoners who committed homicide, rape or other sexual assaults were amongst those with the lowest re-arrest rates.[58] Yet, some argue that it is well established that a significant number of sex offenses are never reported to authorities, making recidivism studies inherently flawed.[59] In the alternative, one study found that requiring registration reduced recidivism, presumably because of the increased monitoring.[60]

2. Reduced Expectation of Privacy

The implementation of increased monitoring ties into another reason legislators justify registration laws, which is that persons convicted of sex offenses have a reduced expectation of privacy.[61] Drafters of the California Penal Code note that monitoring and surveilling sex offenders is justified in order to arm members of the public with tools to protect themselves and their children.[62]

Legislators rationalize convicted offenders have a reduced expectation of privacy as a collateral consequence of their felony because the public has a legitimate interest in protecting themselves against precarious persons.[63] The Supreme Court acknowledges that a criminal conviction can subject an offender to a type of public shaming, if the conviction is publicized,[64] and that potential humiliation is exacerbated given the geographic reach of the internet.[65] However, at least one court held that these considerations do not render sex registration notification requirements as a punitive punishment but rather the purpose of the notification system is "to inform the public for its own safety, not to humiliate the offender."[66] Unfortunately, attendant humiliation can be connected to the publication and notification requirements

57. *See* Joshua E. Montgomery, *Fixing A Non-Existent Problem with an Ineffective Solution:* Doe v. Snyder *and Michigan's Punitive Sex Offender Registration and Notification Laws*, 51 AKRON L. REV. 537, 565 (2017) (arguing "[h]igher rates of recidivism have been inaccurately reported").

58. *Id.* at 564-65, 565 n.184.

59. OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, *supra* note 47.

60. Prescott & Rockoff, *supra* note 46, at 180.

61. CAL. PENAL CODE § 290.03 (West 2012 & Supp. 2019).

62. *Id.*

63. *Id.*

64. Smith v. Doe, 538 U.S. 84, 99 (2003).

65. *See id.*

66. *Id.*

for convicted sex offenders,[67] but these consequences stem from the crime itself.[68]

C. First Amendment Rights

1. Before the Internet

Ward v. Rock Against Racism made it clear that in a public forum, the government may impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided the restrictions (1) do not regulate the expression's content, (2) are narrowly tailored to serve a legitimate governmental interest, and (3) leave open sufficient substitute forms of communication.[69] Guidelines that are narrowly tailored to serve a particular governmental interest, like protecting citizens from unwelcomed and excessive noise in a traditional public space, are constitutional.[70] Also, when it comes to a First Amendment content-neutral analysis, the government is not required to prove a restriction is the least intrusive way to further its interests.[71] "Physical places . . . remain important spaces to gather and express views," but as the Supreme Court acknowledged "it is clear that the most important place for exchanging views, and protesting others, is the [i]nternet."[72]

2. After the Internet

Accordingly, the internet presents an interesting challenge because it is a common platform where people gather to express their views and opinions. The internet is used to spread content, sounds, pictures, and videos, which enables users, located in no particular geographical location, to access an unprecedented breadth of expression and communication.[73] In *Reno v. American Civil Liberties Union*, a seminal case addressing constitutional rights and the internet, the Court analogized the internet's utility for

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67. *Id.*

68. *Id.* at 101.

69. 491 U.S. 781, 791 (1989). In *Ward*, the court held that the city had a substantial interest in protecting the community from aggravating noise even though the respondent claimed freedom of speech in a public park. *Id.* at 796. The Court upheld the regulation as constitutional because it promoted a substantial government interest that would not be achieved without the regulation, and the terms were not broader than necessary. *Id.* at 800-01.

70. *Id.* at 796.

71. *Id.* at 798-99.

72. Katie Miller, *Constitutional Law—Sex Offenses and Free Speech: Constitutionality of Ban on Sex Offenders' Use of Social Media: Impact on States with Similar Restrictions*, 93 N. DAKOTA L. REV. 129, 134 (2018) (citing Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017)).

73. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851 (1997).

communication to the traditional telephone.[74] However, times have changed since 1997 when the Court thought the "odds are slim" an internet user could accidently stumble upon explicit content.[75] The Court said communications received by radio or television only required passive action, whereas obtaining information from the internet required active steps and that a child would need astute sophistication and ability to come across inappropriate information.[76] That is not the case today. Granted, companies have developed software to help parents control the material their children have access to,[77] but the platforms presently exploited are the very websites that are "constantly"[78] used by minors.

Currently, there is not an effective way to determine the identity or age of the person communicating from the other side of the computer screen.[79] This is important because adults are legally allowed to engage in certain types of sexual expression with each other, which is protected by the First Amendment.[80] As a matter of constitutional custom, the Court acknowledges governmental regulation of speech on the internet is more likely to chill the free exchange of ideas and expression than to encourage it.[81] Importantly, the government's interest in encouraging freedom of expression in a democratic society outweighs most benefits that may be gleaned from censorship.[82]

3. Right to Anonymity

Several cases discuss sex offender registration laws on the grounds of protected anonymous speech.[83] Courts acknowledge that a person's decision to remain anonymous is a type of speech protected under the First

74. *Id.* at 852.

75. *Id.* at 854.

76. *Id.*

77. Carolyn Bunting, *What Are Parental Controls and How Can They Help Children Stay Safe Online?*, PARENTINFO, https://parentinfo.org/article/what-are-parental-controls-and-how-can-they-help-children-stay-safe-online (last updated May 2018).

78. *See supra* note 21.

79. *Reno*, 521 U.S. at 855 & n.20 (noting that an e-mail address provides no authoritative information about the person connected to it and there is no "reliable list" to look up such information).

80. Sable Commc'ns of Cal., Inc. v. F.C.C., 492 U.S. 115, 124, 126 (1989) (holding that a "dial-a-porn" service had a constitutional right to engage in protected speech because the telephone messages were indecent but not obscene).

81. *Reno*, 521 U.S. at 885.

82. *Id.*

83. *See* Doe v. Harris, 772 F.3d 563, 569 (9th Cir. 2014); Doe v. Shurtleff, 628 F.3d 1217, 1227 (10th Cir. 2010); Doe v. Snyder, 101 F. Supp. 3d 672, 701 (E.D. Mich. 2015).

Amendment.[84] Anonymity can be used as a shield to "protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[85]

Laws impeding anonymous speech will not be protected when "an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression."[86] In other words, the First Amendment protects anonymity when it is a prerequisite for speech.[87]

Further, registered sex offenders who have completed their sentence enjoy the full liberties granted by the First Amendment.[88] And in the context of publishing an offender's online identifier to the public, the Ninth Circuit Court of Appeals determined such conduct would violate the First Amendment because the offender would possibly chill his/her speech without the shield of anonymity.[89] Also, it is likely that sex offenders engaged in protected First Amendment speech may find anonymity important because it "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[90]

II. EXPLORING THE CONSTITUTIONALITY OF RESTRICTIONS AND REGULATIONS

A. Existing Statutes

Several state statutes implement varying degrees of restrictions or regulations when it comes to monitoring convicted sex offenders' internet identifiers.

Under federal law, social networking websites are permitted to compare information maintained on the National Sex Offender Registry with the online identifiers of its members, so long as the information is not shared with the public.[91] Legislative history for the law indicates that the internet is

84. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

85. *Id.* at 357.

86. *Shurtleff*, 628 F.3d at 1225.

87. *Id.*; *see also* Buckley v. Amer. Constitutional Law Found. Inc., 525 U.S. 182, 200 (1999) (holding a Colorado law that required initiative-petition circulators to wear an identification badge chilled speech); *McIntyre*, 514 U.S. at 355 (reasoning that a statute that required leafleteers to put their names on campaign literature "undeniably impede[d] protected First Amendment activity").

88. *Harris*, 772 F.3d at 572.

89. *Id.* at 579–80.

90. *Id.* at 581.

91. 34 U.S.C.A. § 20917 (West 2017); *see also id.* § 20916(e) (West 2017). The statute defines some key terms as follows:

a playground for sexual predators because the popularity of social networking websites amongst minors and the anonymous nature of online communications.[92]

Also, Congress enacted the law to enable a website to prescreen or remove convicted sex offenders from its service, aid law enforcement in finding potential violations of law, and to prohibit certain high risk sex offenders from using the internet to victimize children.[93] However, accessing social networking websites is generally not prohibited; offenders just need to turn over their online monikers to law enforcement.[94]

Regarding online identifiers, some states only divulge the monikers for law enforcement purposes,[95] however a few states are in line with my proposal:

Louisiana:

> [T]he registry shall contain the ability to search by telephone numbers, e-mail addresses, online screen names, or other online identities to provide information to the person conducting the search regarding whether or not that information has been linked to a sex offender or child predator. This search shall not disclose the name or any other identifying information about the offender to the person conducting the search, except to identify that the information has been linked to a sex offender or child predator.[96]

Alaska:

> [T]he department may provide a method for, or may participate in a federal program that allows, the public to submit an electronic or messaging address or Internet identifier and receive a confirmation of whether the address or identifier has been registered by a registered sex offender or child kidnapper.[97]

> The term "social networking website"—(A) means an internet website—(i) that allows users, through the creation of web pages or profiles or by other means, to provide information about themselves that is available to the public or to other users; and (ii) that offers a mechanism for communication with other users where such users are likely to include a substantial number of minors; and (iii) whose primary purpose is to facilitate online social interactions; and (B) includes any contractors or agents used by the website to act on behalf of the website in carrying out the purposes of this Act.

Id. Additionally, "[a]s used in this Act, the term 'Internet identifiers' means electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting." *Id.*

92. *See id.* § 20917.

93. People v. Ellis, 162 A.D.3d 161, 165 (N.Y. App. Div. 2018).

94. *Id.* (noting that requiring registration of an online identifier is something separate and distinct from banning access a social networking website); *see also* DEL. CODE ANN. tit. 11, § 4120 (2015 & Supp. 2018).

95. *E.g.*, CAL. PENAL CODE § 290.45 (West 2012 & Supp. 2019) (authorizing law enforcement to release a sex offender's online identifier when necessary for public safety).

96. LA. REV. STAT. ANN. § 15:542.1.5 (2016).

97. ALASKA STAT. ANN. § 18.65.087 (West 2019).

Arizona:

> The department of public safety shall maintain a separate database and search function on the website that contains any required online identifier of sex offenders whose risk assessments have been determined to be a level two or level three and the name of any website or internet communication service where the required online identifier is being used. This information shall not be publicly connected to the name, address and photograph of a registered sex offender on the website. [98]

B. Unconstitutionally Overbroad Statutes

In *Packingham v. North Carolina*,[99] the defendant challenged a state statute that made it unlawful for a convicted sex offender to access a commercial social networking website "where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages on the commercial social networking [website]."[100] North Carolina defined a social networking website as one that: (1) earns revenue from the operation of the website; (2) enables an introduction between two or more people for the purposes of "friendship, meeting other persons, or information exchanges"; (3) allows users to create profiles that contain a breadth of personal information; and (4) gives members the ability to communicate with each other through message boards or private chat rooms.[101]

In 2010, Mr. Packingham posted the following statement on his personal Facebook account: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent . . . Praise be to GOD, WOW! Thanks JESUS!"[102] Purportedly, Mr. Packingham posted about a positive experience he had while fighting a traffic ticket.[103] Around the time of his posting, the local police department began monitoring registered sex offenders for violation of the state statute.[104] The police charged and indicted Mr. Packingham for violating the statute, which was a Class 1 felony.[105]

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98. ARIZ. REV. STAT. ANN. § 13-3827 (2010 & Supp. 2018).
99. 137 S. Ct. 1730, 1733 (2017).
100. N.C. GEN. STAT. ANN. § 14-202.5 (2017).
101. *Id.*
102. *Packingham*, 137 S. Ct. at 1734.
103. *Id*.
104. *Id.*
105. *Id.* at 1733, 1734.

The Court held that the statute violated Mr. Packingham's First Amendment rights.[106] The Court reasoned that the First Amendment establishes a fundamental right "that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[107] The Court acknowledged that the internet is and will be a tool for criminals to stalk and solicit victims but the governmental interest in preventing criminals from soliciting victims cannot outweigh constitutional protections.[108] The Court famously reasoned that:

> By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.[109]

In ruling on the statute, the Court held the state cannot mandate "a complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture" because the law burdened more speech than necessary to further the government's legitimate interests.[110]

Again, in *Doe v. Prosecutor*, [111] the court held a statute unconstitutional because it broadly prohibited an unnecessary amount of speech by prohibiting the use of a website based on the mere presence of a minor rather than targeting the specific "evil of improper communications to minors."[112] The court reasoned that the state already had other measures in place to prevent inappropriate communications between convicted sex offenders and minors[113] and specified that "[t]he state 'must do more than simply posit the

106. *Id.* at 1737.

107. *Id.* at 1735 (noting that as the internet is a "vast democratic" forum, with social networking websites being the medium in particular where First Amendment rights are protected and upheld).

108. *Id.* at 1736.

109. *Id.* at 1737 (noting that convicted sex offenders may especially need the internet because it can be a medium for rehabilitation through "the world of ideas" it presents).

110. *Id.* at 1738.

111. The Indiana Statute Case, 705 F.3d 694 (7th Cir. 2013). Indiana's sex crime code § 35–42–4–12 prohibited certain sex offenders from "knowingly or intentionally us[ing]: a social networking web site" or "an instant messaging or chat room program" that "the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program." *Id.* at 695–96 (quoting IND. CODE ANN. § 35-42-4-12 (LexisNexis 2009) (amended 2013, 2014).

112. *Id.* at 695 (reasoning the statute banned all communication on social networking sites because the state sought to prevent communication between convicted sex offenders and minors but in doing so the statute prohibited speech that may not have had anything to do with communicating with minors).

113. *Id.* at 699; *see also* IND. CODE ANN. § 35-42-4-6 (LexisNexis Supp. 2018) (it is a felony to solicit children under sixteen to engage in sexual conduct); *Id.* § 35-42-4-13 (it is a misdemeanor to communicate with a minor that the person believes to be a child less than fourteen years of age

existence of the disease sought to be cured,' and 'the regulation [must] in fact alleviate these harms in a direct and material way.'"[114]

The court noted that social networking websites are platforms where predators can stalk minors before an actual solicitation or crime occurs.[115] However, the court in *Doe v. Prosecutor* reasoned that the statute did not focus on individuals who were "likely' to commit the redressable evil," but rather the law acted as a blanket prohibition on all access.[116] The court concluded and suggested an amendment to the statute that only those on supervised release could be banned from accessing social networking websites,[117] which the legislature adopted.[118]

Further, in *Doe v. Nebraska*[119] the court held a statute unconstitutional for banning convicted sex offenders from using social networking sites because the statute's language did not leave open ample alternatives for communication.[120] The court also reasoned that the ban was not contingent upon the use of the internet to solicit minors but rather broadly prohibited based on an expansive speculative risk.[121] Further, the court rationalized the general information learned from social networking websites may not be replicated elsewhere.[122] Curiously, the court referred to social media as a utility,[123] which highlights the court's understanding that there is an inherent serviceability to social networking websites. The court said the language of

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"concerning sexual activity with the intent to gratify the sexual desires of the person or the individual commits inappropriate communication with a child").

114. *The Indiana Statute Case,* 705 F.3d at 701.

115. *Id.*

116. *Id.* at 702-703.

117. *Id.*

118. Act of Mar. 26, 2014, P. L. 168-2014, § 73, 2014 Ind. Acts 2030, 2126. The Act addressed by the Court states that:

> A sex offender who knowingly or intentionally violates a: (1) condition of probation; (2) condition of parole; or (3) rule of a community transition program; that prohibits the offender from using a social networking web site or an instant messaging or chat room program to communicate, directly or through an intermediary, with a child less than sixteen (16) years of age commits a sex offender Internet offense, a Class A misdemeanor.

Id.

119. 898 F. Supp. 2d 1086 (D. Neb. 2012).

120. *Id.* at 1109. The Court addressed the following part of the statute:

> Any person required to register under the Sex Offender Registration Act . . . and who knowingly and intentionally uses a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use its social networking web site, instant messaging, or chat room service, commits the offense of unlawful use of the Internet by a prohibited sex offender punishable as a Class I misdemeanor for a first offense.

Id. at 1094 *(*citing Act of May 29, 2009, L.B. 285, § 1, 2009 Neb. Laws 502, 502).

121. *Id.* at 1111.

122. *Id.* at 1117-18 (noting how Twitter and Facebook played an important role in disseminating news about the demonstrations in Cairo's Tahrir Square).

123. *Id.* at 1109.

the statute had the effect of criminalizing a significant amount of protected speech[124] making the statute too broad. The court posited that the statute restricted convicted sex offenders "from associating with friends, family, and business associates over the [i]nternet (the most common method of association in the modern age) to communicating with consumers, customers, or manufacturers regarding a commercial product or service, to posting and discussing one's political opinions on an interactive blog or news web site."[125]

The above-mentioned cases illustrate the judicial branch's modern shift away from the mere acceptance of collateral consequences to a recognition of sex offenders' First Amendment rights to participate in "the modern public square,"[126] which warrants a heightened level of justification.

C. Narrowly Tailored

The First Amendment permits states to enact legislation that might prevent the commission of a sex offense[127] and several state statutes have been constitutionally upheld.[128]

Generally, a statute is narrowly tailored if it criminalizes no more than is necessary to fulfil the government's interest in law enforcement and public safety.[129] A complete ban on something can be justified if the government has a substantial interest in eradicating "an appropriately targeted evil."[130] This standard means the government can only regulate that which is necessary to further the government's interest, nothing more.[131] The government cannot regulate expression to the point where the cost outweighs the benefit.[132] Yet, a regulation will not be deemed invalid simply because there is some "less-speech-restrictive alternative."[133]

When the government does ban a particular forum for speech and expression, there must remain "ample alternative channels of communication."[134] In one case, a plaintiff challenged a statute prohibiting

124. *Id*. at 1119.

125. *Id.*

126. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

127. *Id.* (acknowledging the issue of collateral consequences where a convicted offender continues to be punished even after he or she completed his or her sentence and is no longer under the supervision of the criminal justice system).

128. *See infra* notes 131-37 and accompanying text.

129. Frisby v. Schultz, 487 U.S. 474, 485 (1988).

130. *Id.*

131. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

132. *See id.*

133. *Id.* at 800.

134. The Indiana Statute Case, 705 F.3d 694, 697 (7th Cir. 2013).

most registered sex offenders from using social networking websites, instant messaging services, and chat programs.[135] The district court, however, listed several alternatives to social networking sites that included: any place where there is the ability to congregate with others, civic meetings, radio shows that accept call-in listeners, newspapers and magazines that publish letters to the editor, message boards, commenting on online stories that do not require a Facebook account, emailing friends and family, contacting politicians, publishing a blog, or the use of social networking sites that do not permit minors.[136]

In *Doe v. Snyder*, six plaintiffs challenged a law on the ground that it unconstitutionally restricted their right to anonymous speech.[137] The court upheld the law that required registrants to report any "designation used in [i]nternet communications or postings"[138] because it did not prohibit registrants from engaging in any particular speech on the internet or unmask the registrants' anonymity to the public.[139] The court further reasoned that the registration information did "unveil registrants' anonymity to law enforcement; however, this does not, by itself, infringe upon [p]laintiffs' First Amendment rights."[140]

Additionally, in *Doe v. Shurtleff*, the plaintiff challenged a law based on his right to anonymous speech.[141] Yet, the court determined online identifier registration did not chill the claimant's speech.[142] The court reasoned that because the legislature amended the statute to hold the online identifier information could be used solely for investigative purposes,[143] it was not unconstitutional under the First Amendment.[144] The court held the state did not violate the claimant's rights because the disclosure of his online identifier did not happen until after he uttered the speech and not at the time he

135. *Id.* at 695.

136. *Id.* The district court entered judgment for the state, however the offender appealed and won. *Id.* at 696-97, 702.

137. 101 F. Supp. 3d 672, 701 (E.D. Mich. 2015).

138. *Id.* at 703-04 (quoting MICH. COMP. LAWS § 28.725(1)(f) (West 2012)). However, the court declared unconstitutional other portions of the statute as void for vagueness. *See generally Snyder*, 101 F. Supp. at 672.

139. *Id.*

140. *Id.* at 703.

141. 628 F.3d 1217, 1221 (10th Cir. 2010) (arguing the registration requirement, which had no restrictions on how the state could use or publish the offender's internet identification information, improperly infringed on the defendant's First Amendment right to anonymous speech by forcing public disclosure of what he intended to be anonymous speech).

142. *Id.* at 1225.

143. *Id.* at 1221.

144. *Id.* at 1225.

communicated his speech.[145] Anonymous speech is said to be chilled, and protected, only when a person is forced to reveal his or her identity as a pre-condition to the communication.[146]

III. APPLICATION AND GUIDELINES FOR PROPOSAL

In this modern internet era, the judicial branch acknowledges that a complete ban on access to social networking websites is unconstitutional[147] but providing law enforcement with online identifiers for investigative purposes is constitutional.[148] In line with court precedents, this Note proposes there should be a national system that enable the public to search whether a particular online identifier is connected to a registered sex offender but without disclosing the offender's personal information. This narrow variation is an appropriate balance between sex offender's First Amendment right to anonymous speech and society's interest in protecting vulnerable members of the public.

Times have changed since the advent of the internet. Before parents worried about their children being solicited by predators in parks and malls; today the danger lies online. The world no longer simply consists of the physical world where parents can visually monitor their children to prevent danger. Now, there is the physical world and the virtual world.[149] The founder and CEO of an online safety advisory firm believes the internet is a replication of the real world.[150] For example, an online "chat room," is like a social gathering or party, because every person in the room can talk with one another and the conversation can be "overheard" by those around,[151] an "instant messenger" is similar to a private conversation between two people,[152] and "social networking websites" reflect typical social situations like school, restaurants and recreational activities, where people gather with other individuals interested in the same things.[153]

Given that the internet is the new "modern public square," this Note advocates for a national database that gives parents, organizations, and

145. *Id.*

146. Peterson v. Nat'l Telecomms. & Info. Admin., 478 F.3d 626, 632 (4th Cir. 2007).

147. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

148. Doe v. Snyder, 101 F. Supp. 3d 672, 701-02 (E.D. Mich. 2015).

149. M. Megan McCune, *Virtual Lollipops and Lost Puppies: How Far Can States Go to Protect Minors Through the Use of Internet Luring Laws*, 14 COMMLAW CONSPECTUS 503, 505 (2006).

150. Doe v. Nebraska, 898 F. Supp. 2d 1086, 1105 (D. Neb. 2012).

151. *Id.*

152. *Id.*

153. *Id.*

minors access to search whether a specific online identifier is connected to a convicted sex offender. This tool should be implemented as a national requirement, similar to the adoption of Megan's Law,[154] and reflect Louisiana's[155] current statute.

The proposed system should operate on a tiered system, similar to the Adam Walsh Child Protection and Safety Act of 2006,[156] which divides sex offenders into three different tiers based on the offense. A tier I offender qualifies as anyone who is not a tier II or tier III offender.[157] A tier II offender is someone whose offense is punishable by imprisonment for more than one year and engaged in sex trafficking of a minor, coercion and enticement of a minor, transportation with intent to engage in criminal sexual activity, abusive sexual contact and involves the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, or production or distribution of child pornography.[158]

A tier III offender is someone whose offense is punishable by imprisonment for more than one year and is comparable to or more severe than an aggravated sexual abuse or sexual abuse or abusive sexual contact against a minor who has not attained the age of thirteen years, involves kidnapping of a minor (unless committed by a parent or guardian), or occurs after the offender becomes a tier II sex offender.[159] In turn, only tier II and III offenders would be eligible for the search inquiries.

Further, the search of an online alias should not return the breath of information published under Megan's Law, but it should inform searchers whether the online identifier is linked to a registered sex offender. This tool will enable parents and minors to have more control over their online associational ties while maintaining the convicted sex offenders' anonymity. The search will only return a simple "yes" or "no" response to the inquiry rather than identifying name, age, location, etc. of the individual.

In the context of online victimization, the government maintains an important interest in protecting the vulnerable members of the community from sexual predators. The National Center for Missing and Exploited Children monitors a "CyberTipline," which enables the public and online service providers to report instances of suspected child sexual exploitation.[160]

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154. *See supra* note 24.

155. LA. STAT. ANN. § 15:542.1.5 (2016).

156. Adam Walsh Child Protection and Safety Act, § 20911 (Supp. V 2017).

157. *Id.* § 20911(2).

158. *Id.* § 20911(3).

159. *Id.* § 20911(4).

160. *Exploited Children Statistics*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILD., http://www.missingkids.com/footer/media/keyfacts#exploitedchildrenstatistics (last visited Mar. 31, 2019).

In 2018, the CyberTipline received around 18.4 million reports, most of which related to child sexual abuse images, online enticements, child sex trafficking and child sexual molestation.[161]

Given the magnitude of child exploitation, a law that grants public access to online identifiers will better equip parents, while being narrowly tailored. Considering that registered sex offenders (who have completed their sentence) enjoy the full liberties granted by the First Amendment,[162] disclosing online identifiers does not violate rights to anonymous speech. A sex offender is not forced to reveal his or her identity as a pre-condition to expression, which is the test outlined by the court.[163] The true identity of the person connected to the online identifier will not be disclosed and the individual can remain anonymous.

It may be argued the proposed system could chill some speech because an unsuspecting individual may stop communicating with a convicted sex offender once they find out the person is linked to sexual misconduct, but the same could happen in person and Megan's law publications have been upheld.[164] Further, this proposal is significantly less intrusive than the breadth of information disclosed through the registry.

CONCLUSION

The crux of this argument rests upon existing sex offender laws' necessity to keep pace with rapidly advancing technology, which is widely and naively used by vulnerable members of the community. Websites are accessible to minors with inadequate limitations and easily present a platform where unlawful sexual advances from adults are forced upon them.[165] A national database would give parents, organizations, and minors the ability to ascertain whether a specific online identifier is linked to a convicted sex offender while maintaining an offender's anonymity.

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161. *Id.*

162. Doe v. Harris, 772 F.3d 563, 572 (9th Cir. 2014).

163. Doe v. Shurtleff, 628 F.3d 1217, 1225 (10th Cir. 2010).

164. Smith v. Doe, 538 U.S. 84, 99, 105-06 (2003).

165. N.Y. CORRECT. LAW § 168-b (McKinney 2013).

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