

December 2015

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Recommended Citation

Norah M. Sloss, *Alternative Restrictions of Sex Offenders' Social Media Use & The Freedom of Speech*, 24 Cath. U. J. L. & Tech (2015).
Available at: <http://scholarship.law.edu/jlt/vol24/iss1/5>

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ALTERNATIVE RESTRICTIONS OF SEX OFFENDERS' SOCIAL MEDIA USE & THE FREEDOM OF SPEECH

Norah M. Sloss*

“The creation of the modern image of sexual offending owes much to the emergence of a mass media that can tell its readers and viewers how to respond and make sense of the deviant among us.”¹

—Terry Thomas

As technology advances, new mediums for communication of information and networking continue to rapidly evolve. The evolution of social media and social networking sites has increased society's reliance on the Internet by enabling people to communicate and network with each other instantaneously.² Modern technology and heightened dependence on the Internet in our society have created legal issues that courts have only begun to attempt to resolve throughout recent decades.³ However, as these issues become more complex and more widespread, the law has failed to create viable solutions to combating Internet crimes.⁴

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¹ TERRY THOMAS, *THE REGISTRATION AND MONITORING OF SEX OFFENDERS: A COMPARATIVE STUDY* 25 (2011) (noting that Terry Thomas is an Emeritus Professor of Criminal Justice Studies at Leeds Metropolitan University in the United Kingdom and he has focused his research on matters relating to sex offender registration and monitoring).

² Jasmine Fowlkes, *Viewpoint: Why Social Media Is Destroying Our Social Skills*, USA TODAY (Oct. 11, 2012, 11:01 AM), <http://college.usatoday.com/2012/10/11/opinion-why-social-media-is-destroying-our-social-skills/>.

³ STEPHEN T. HOLMES & RONALD M. HOLMES, *SEX CRIMES: PATTERNS AND BEHAVIOR* 128 (2d ed. 2002).

⁴ Ulf Wolf, *Cyber-Crime: Law Enforcement Must Keep Pace With Tech-Savvy Crimi-*

Social networking sites such as MySpace, Facebook, Twitter, and LinkedIn have made communications between strangers instantaneous and recurrent.⁵ Internet crimes, such as cyber-stalking, cyber-bullying, harassment, and solicitation, may be committed more easily through social media and social networking sites due to their anonymous nature.⁶ In particular, the use of social media and social networking sites make the commission of sex offenses, such as solicitation of minors, possession and distribution of child pornography, sexual harassment and abuse, and stalking, more problematic for law enforcement agencies to monitor and deter due to the high volume of internet communications occurring across national and international boundaries.⁷

Despite a growing recognition of the problem, the number of online sexual offense cases has continued to rise.⁸ Perhaps more troubling is the fact that a majority of these cases involve child pornography. Indeed, the number of cases in which the Internet and communications technologies are used to sexually solicit minors is increasing as well.⁹ In an attempt to prevent sex crimes, various states have enacted legislation to ban sex offenders from using social networking sites.¹⁰ Three such laws were challenged in federal court in Nebraska¹¹, Indiana¹², and Louisiana,¹³ and ultimately were found to violate the First Amendment.

This Note will examine how restrictions on sex offenders' social media use may violate the free speech clause of the First Amendment. Part I will discuss the evolution of restrictions on sex offenders' social media use. Part II will evaluate the competing First Amendment issues of sex offenders' rights to free

nals, GOVTECH.COM (Jan. 27, 2009), <http://www.govtech.com/dc/articles/Cyber-Crime-Law-Enforcement-Must-Keep-Pace.html>.

⁵ Susan Tardarnico, *Is Social Media Sabotaging Real Communication?*, FORBES: LEADERSHIP (Apr. 30, 2012, 8:52 AM), <http://www.forbes.com/sites/susantardarnico/2012/04/30/is-social-media-sabotaging-real-communication>.

⁶ Kimberly Mitchell et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, 47 J. ADOLESC. HEALTH 183, 186 (2010).

⁷ *Id.*

⁸ MICHAEL C. SETO, U.S. SENTENCING COMM'N, CHILD PORNOGRAPHY OFFENDER CHARACTERISTICS AND THE RISK TO RE-OFFEND 1 (2012), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Seto.pdf.

⁹ *Id.*

¹⁰ NAT'L DIST. ATT'YS ASS'N, RESTRICTION OR BAN OF SOCIAL NETWORKING USE FOR SEX OFFENDERS COMPILATION 4-13 (2013) [hereinafter NDAA, RESTRICTION], <http://www.ndaa.org/pdf/sex%20offenders%20and%20social%20>.

¹¹ Doe v. Nebraska (*Doe I*), 898 F.Supp.2d 1086 (D.Neb. 2012).

¹² Doe v. Prosecutor (*Doe II*), 705 F.3d 694 (7th Cir. 2013).

¹³ Doe v. Jindal (*Doe III*), 853 F.Supp.2d 596 (M.D.La. 2012).

speech. Part II will also discuss how protecting children on social networking sites is a compelling state interest. Part III will examine how federal and state courts and legislatures have approached full and partial bans on sex offenders' social media use in the past. Part IV will discuss recent legislation that aims to provide a solution to the First Amendment issues raised in the past by imposing notice requirements on sex offenders' social networking profiles and crime specific restrictions on social media use. Part IV will argue that a blanket ban on sex offenders' social media use is unconstitutional; however, partial restrictions on social media use, such as those used in Louisiana, based on the individual nature of one's committed sex offense are appropriate and easier to enforce. Additionally, imposing notice requirements on sex offenders' social media profiles is the functional equivalent of registering on a sex offender registry, which is already required by law and made available online, and is thus not more restrictive than existing restrictions for many registered sex offenders. Part IV will argue that Louisiana's revised statute, which defines the unlawful use of a social networking website, should serve as a model law for other states to adopt. Part V will conclude that legislation that restricts sex offenders' social media use through the use of crime specific restrictions and notice requirements on social networking sites are less restrictive than banning sex offenders' social media use. Such legislation should therefore be upheld by the states to best monitor sex offenders' activity and protect children on social networking sites. Through analyzing the history and evolution of restrictions on sex offenders' social media use, this Note will demonstrate why Louisiana's revised statute should serve as a model for other states to adopt as the best alternative to bans on sex offenders' social media use.

I. HISTORY OF RESTRICTIONS ON SEX OFFENDERS' SOCIAL MEDIA USE

The common restrictions placed on registered sex offenders have evolved to reflect the changing nature of methods of predation by sex offenders.¹⁴ Sexual offenses are particularly harmful and are serious crimes.¹⁵ Sexual offenses are often violent and intrusive experiences that invade the psychological and bodi-

¹⁴ Denise-Marie Ordway, *Sex offender laws, registries and policy questions: Research roundup*, JOURNALIST'S RESOURCE (Jul. 17, 2015), <http://journalistsresource.org/studies/government/criminal-justice/sex-offender-laws-registries-and-gender-research-roundup>.

¹⁵ U.S. SENTENCING COMM'N, SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES, at i (1996), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/199606-rtc-sex-crimes-against-children/199606_RtC_SCAC.pdf.

ly integrity of the person assaulted.¹⁶ These experiences are more harmful when the victim of a sexual assault is a child who does not understand the significance of what is happening to them.¹⁷

There are a variety of crimes that would cause a perpetrator to have to register as a sex offender, many of which involve crimes against children. Sex crimes are often divided into those considered “non-contact” crimes and those that involve contact.¹⁸ Non-contact crimes include those offenders who possess or distribute child pornography, but have no actual contact with children.¹⁹ Contact crimes are those involving actual contact with children such as solicitation, incest, and sexual assault.²⁰ Sex offender registration is based on laws that require people convicted of certain sex offenses to keep in contact with law enforcement authorities in order to notify them of any changes in their circumstances.²¹ Registries were created due to the belief that many sex offenders are likely to re-offend.²² Through the use of sex offender registries, law enforcement agencies have access to improved data and are thus better equipped to protect the public from future offenses in any given geographical area.²³ Through the act of registering, sex offenders are deterred and prevented from re-offending as well.²⁴ The public can also access sex offender registries to receive basic information about sex offenders living in their communities, which enables individuals and families to take steps to protect themselves and their children.²⁵

There are now over 500,000 registered sex offenders in the United States.²⁶ According to the U.S. National Center for Missing and Exploited Children, “sex offenders pose an enormous challenge for policy makers: they evoke unparalleled fears among constituents; their offenses are associated with a great risk of psychological harm; and most of their victims are children and youth.”²⁷ In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which requires the states to im-

¹⁶ THOMAS, *supra* note 1 at 2.

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ U.S. SENTENCING COMM’N, *supra* note 15.

²⁰ THOMAS, *supra* note 1 at 3.

²¹ *Id.* at 1.

²² *Id.* at 48-49.

²³ *Id.* at 1.

²⁴ *Id.* at 3.

²⁵ HOLMES & HOLMES, *supra* note 3, at 112.

²⁶ Press Release, Dept. of Justice, Department of Justice Activates National Sex Offender Public Registry Website (July 20, 2005) (*available at* http://www.amberalert.gov/newsroom/pressreleases/ojp_05_0720.htm).

²⁷ THOMAS, *supra* note 1 at 2-3.

plement their own sex offender registries.²⁸ The Act requires all states to have a registry in place that records the names of those convicted of offenses against children or a sexually violent offense.²⁹ If a state fails to comply, it loses 10 percent of its federal funding for crime control payable through local law enforcement assistance grants.³⁰

In 2006, Congress enacted the Federal Sex Offenders National Registration Act (SORNA),³¹ which mandates that sex offenders disclose the following information when they register with their state registry: address, employment information, social security number, and other personal information for monitoring purposes.³² SORNA was enacted with the aim of improving the quality of state registries, creating more consistency among them,³³ and establishing a floor for mandatory disclosures. The states may impose their own restrictions on registered sex offenders in addition to federal requirements, but they must meet the minimum requirements of SORNA.³⁴ Many states impose residency restrictions on registered sex offenders that regulate how close a registered sex offender may live or work in relation to schools or daycare centers.³⁵ Many states also impose restrictions on contact with minors,³⁶ obtaining commercial licenses,³⁷ alcohol and drug use,³⁸ and use of computers and the Internet.³⁹

In 2008, Congress enacted The Keeping the Internet Devoid of Sexual Predators Act (the KIDS Act), which requires registered sex offenders to provide their Internet identifiers to the authorities and notify them of any changes.⁴⁰ In *Alaska v. Doe*, the Supreme Court held that “an imposition of restrictive

²⁸ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (repealed 2009); *see also* THOMAS, *supra* note 1 at 45 (noting that the Act was passed as part of the Violent Crime Control and Law Enforcement Act, as a clear effort to enforce preventative measures).

²⁹ § 170101(a)(1), 108 Stat. at 2038; THOMAS, *supra* note 1 at 46.

³⁰ § 170101(f)(2)(A), 108 Stat. at 2042; THOMAS, *supra* note 1 at 45-46.

³¹ Sex Offenders Registration and Notification Act (SORNA), Pub. L. No. 109-248, §§ 101-155, 120 Stat. 587, 590 (2006) (codified at 42 U.S.C. §§ 16901 et. seq. (2012)).

³² U.S. DEP’T OF JUSTICE, THE NATIONAL GUIDELINES FOR REGISTRATION AND NOTIFICATION 26-33 (2015) [hereinafter DOJ, GUIDELINES], http://www.smart.gov/pdfs/final_sornaguidelines.pdf.

³³ THOMAS, *supra* note 1 at 50.

³⁴ DOJ, GUIDELINES, *supra* note 32, at 6.

³⁵ U.S. Dep’t of Justice, *Get Answers About Sexual Abuse and Associated Risks*, NAT’L SEX OFFENDER PUB. WEBSITE, <http://www.nsopw.gov/EN-US/Education/CommonQuestions#answer-12>, (last visited Feb. 15, 2015).

³⁶ *See, e.g.*, FLA. STAT. § 948.30(1)(e) (2015); OR. REV. STAT. § 144.102(4)(b)(B) (2015); N.C. GEN. STAT. § 14-208.17 (2015).

³⁷ *See, e.g.*, N.C. GEN. STAT. §§ 14-208.19A, 20-27.1, 20-37.14A.

³⁸ *See, e.g.*, N.M. STAT. ANN. § 31-20-5.2(C)(5) (2015); LA. STAT. ANN. § 15:561.5(5) (2015); N.C. GEN. STAT. § 15A-1343(b2)(9).

³⁹ *United States v. Love*, 593 F.3d 1, 11 (D.C. Cir. 2010); *see also, e.g.*, LA. STAT. ANN. § 15:561.5(16); GA. CODE ANN. § 42-8-35(b)(3) (2015).

⁴⁰ THOMAS, *supra* note 1 at 55.

measures on sex offenders adjudged to be dangerous is ‘a legitimate non-punitive governmental objective and has been historically so regarded.’⁴¹ Thus, many state restrictions on sex offenders’ activities have been upheld in order to protect public safety, which is the key issue in evaluating the restrictive nature of bans on sex offenders’ social media use.⁴² Therefore, it is necessary to examine the importance of social media to society by evaluating the advantages and disadvantages of social media use.

A. Importance of Social Media Access

Access to social media is extremely important to society. Social media use amongst young people is so widespread and frequent that it may even be considered essential for communication with others.⁴³ Facebook, the most popular social networking website,⁴⁴ has 1.23 billion monthly active users, 945 million mobile users, and 757 million daily users.⁴⁵ The primary use of social networking sites, such as Facebook, is to facilitate communication between people.⁴⁶ Through the use of instant and direct messaging on social networking sites,⁴⁷ constant interaction with others has become commonplace.⁴⁸

B. The Advantages of Social Media

However, there are many other useful aspects of social networking sites. MySpace has become a common platform for musicians and bands to promote

⁴¹ Alaska v. Doe (*Doe II*), 538 U.S. 84, 93 (2003).

⁴² See *id.* at 85 (explaining that the Alaska Legislature’s intent was to protect the public specifically from sex offenders); United States v. Love, 593 F.3d 1, 13 (D.C. Cir. 2010).

⁴³ AMANDA LENHART, PEW RES. CTR., TEENS, SOCIAL MEDIA, & TECHNOLOGY OVERVIEW 2015, at 2 (2015), http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf (finding that 92 percent of teens use the internet daily).

⁴⁴ *Online Exposure: Social Networks, Mobile Phones, and Scams Can Threaten Your Security*, 76 CONSUMER REPTS., June 2011, at 29-33 [hereinafter *Online Exposure*], <http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/facebook-concerns/index.htm>.

⁴⁵ Emil Protalinski, *Facebook passes 1.23 billion monthly active users, 945 million mobile users, and 757 million daily users*, THE NEXT WEB (Jan. 29, 2014, 10:12 PM), <http://thenextweb.com/facebook/2014/01/29/facebook-passes-1-23-billion-monthly-active-users-945-million-mobile-users-757-million-daily-users>.

⁴⁶ *About*, FACEBOOK, https://www.facebook.com/facebook/info?tab=page_info (last visited (Sept. 17, 2015)).

⁴⁷ MAEVE DUGGAN ET AL., PEW RES. CTR., SOCIAL MEDIA UPDATE 2014, at 10 (2015), http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf.

⁴⁸ *Id.*

and share their music.⁴⁹ Twitter, the most popular “micro blogging” site, has become extremely popular for public relations and advertising for both individuals and businesses.⁵⁰ Meanwhile, LinkedIn has become the primary method of professional networking online.⁵¹ Social media has become a major platform for news collection and distribution as well.⁵² During the 2012 presidential election, both President Obama and Mitt Romney used Facebook and Twitter as campaign tools.⁵³ Today, President Obama has 56.4 million twitter followers and has tweeted over 13,000 tweets.⁵⁴ Accordingly, social networking sites have become a powerful tool for facilitating communication socially, politically, and personally. Restrictions on social media use thus place a limit on the type and method of communication available to the public. The prevalence of social media and the various useful aspects of social networking sites show how restrictions on social media use can be prohibitive and restrict one’s ability to communicate and interact with others in a normal fashion.

C. The Dangers of Social Media

The legitimate uses of social media and social networking sites, such as communicating with friends and family, professional networking, and accessing news, provide valuable benefits to those who use them. However, the public nature of social media and social networking sites does implicate public safety risks, especially for minors.⁵⁵ The Children’s Online Privacy and Protection Act (COPPA)⁵⁶, mandates that Facebook requires users to be over 13 years

⁴⁹ Heather McDonald, *Promote Music on Myspace*, ABOUT CAREERS, <http://musicians.about.com/od/musicpromotion/ht/myspacemusicpr.htm> (last visited Sept. 26, 2015).

⁵⁰ Paul Gil, *What Exactly Is “Twitter?” What is “Tweeting?”*, ABOUT TECH., <http://netforbeginners.about.com/od/internet101/f/What-Exactly-Is-Twitter.htm> (last visited Sept. 26, 2015).

⁵¹ Dave Roos, *How LinkedIn Works*, HOW STUFF WORKS, <http://computer.howstuffworks.com/internet/social-networking/networks/linkedin.htm> (last visited Sept. 26, 2015).

⁵² Johnathan Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders From Social Media*, 89 IND. L.J. 1327, 1331-32 (2014).

⁵³ LEE RAINIE & AARON SMITH, PEW RES. CTR., POLITICS ON SOCIAL NETWORKING SITES MAIN FINDINGS 5 (2012), http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_PoliticalLifeonSocialNetworkingSites.pdf.

⁵⁴ Barack Obama (@BarackObama), TWITTER, <https://twitter.com/barackobama>, (last visited Sept. 18, 2015).

⁵⁵ CLAIRE LILLEY & RUTH BALL, NAT’L SOC. FOR THE PREV. OF CRUELTY TO CHILDREN, YOUNGER CHILDREN AND SOCIAL NETWORKING SITES: A BLIND SPOT 22 (2013), <http://www.nspcc.org.uk/globalassets/documents/research-reports/younger-children-social-networking-sites-report.pdf>.

⁵⁶ Children’s Online Privacy and Protection Act (COPPA), 15 U.S.C. §§ 6501-6506

of age; yet in 2011, more than one third of Facebook users were younger than 13.⁵⁷ One million children were harassed, threatened, or subjected to other forms of cyber-bullying on Facebook in 2011 as well.⁵⁸ A study conducted in 2006 by the National Center for Missing and Exploited Children found that approximately 13 percent of youth Internet users received unwanted sexual solicitations online.⁵⁹

A similar survey of juvenile victims of Internet-initiated sex crimes found that the majority of the victims met the predator willingly face-to-face and that 93 percent of those interactions involved sexual contact.⁶⁰ In 2010, a study in the *Journal of Adolescent Health* reported that in 82 percent of online sex crimes against minors, the offender used the victim's social networking site to gain information about the victim's likes and dislikes.⁶¹ The study also found that in 62 percent of online sex crimes against minors, the offender used the victim's social networking site to gain home and school information about the victim.⁶² Social networking sites provide child sex offenders with a wide array of people who share their sexual attraction to children as well.⁶³ Many child sex offenders use social networking sites to share and trade child pornography, chat with children, and establish personal connections with children in an attempt to locate children to abuse.⁶⁴ These findings demonstrate how sex offenders often use social networking sites to engage in sexual offenses, which creates a serious risk for minors.

D. Bans on Sex Offenders' Social Media Use

Due to the fact that online sex crimes against minors increasingly involve the use of social media, numerous states have recently enacted restrictions on sex offenders' social media use in order to prevent further sexual abuse of minors through the use of social media.⁶⁵ Laws that attempted to entirely ban sex

(2012).

⁵⁷ 15 U.S.C. § 6502(a)(1); *Online Exposure*, *supra* note 44, at 29-33.

⁵⁸ *Online Exposure*, *supra* note 44, at 29-33.

⁵⁹ JANIS WOLAK, DAVID FINKELHOR, & KIMBERLY MITCHELL, NAT'L CTR FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 7 (2006), http://www.missingkids.com/en_US/publications/NC167.pdf.

⁶⁰ Janis Wolak, David Finkelhor, & Kimberly Mitchell, *Internet Initiated Sex Crimes Against Minors: Implications for Prevention Based on Findings From A National Study*, 35 J. ADOLESC. HEALTH 424.e11, 424.e17 (2004).

⁶¹ Mitchell et al., *supra* note 6 at 185.

⁶² *Id.*

⁶³ HOLMES & HOLMES, *supra* note 3, at 129.

⁶⁴ *Id.*

⁶⁵ *See generally* NDAA, RESTRICTION, *supra* note 10, at 4-13 (stating that Florida, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Nebraska, New York, North Carolina, South

offenders' social media use in Indiana⁶⁶, Nebraska⁶⁷, and Louisiana⁶⁸ were challenged in federal court and struck down.

The Indiana statute, passed in 2012, applied to sex offenders who were required to register for committing several enumerated offenses, many of which involved crimes against children.⁶⁹ The statute banned registered sex offenders from using all social networking websites, instant messaging programs, and chat rooms.⁷⁰ The Louisiana statute, passed in 2011, applied to registered sex offenders whom were convicted of indecent behavior with juveniles, pornography involving juveniles, computer-aided solicitation of a minor, or video voyeurism.⁷¹ The statute banned registered sex offenders from using and accessing all social networking sites, chat rooms and peer-to-peer networks.⁷² The Nebraska statute, passed in 2010, applied to registered sex offenders who committed one or more sex offenses involving a minor.⁷³ The statute banned registered sex offenders from knowingly and intentionally using a social networking site, as well as any instant messaging or chat room service that allows a person who is less than 18 years of age to access or use it.⁷⁴

All three of these statutes applied to similar offenders—those who committed sex offenses involving minors.⁷⁵ Additionally, each statute also banned registered sex offenders from using all social networking sites.⁷⁶ Each statute was enacted with the purpose of protecting children from sexual predators online.⁷⁷ Yet, all three statutes were found unconstitutional in federal court due to First

Carolina, and Texas have adopted laws to prevent sex offenders from using social media).

⁶⁶ *Doe II*, 705 F.3d at 694-695.

⁶⁷ *Doe I*, 898 F.Supp.2d at 1086-87.

⁶⁸ *Doe III*, 853 F.Supp.2d at 596.

⁶⁹ *Doe II*, 705 F.3d at 696.

⁷⁰ *Id.* at 695-696.

⁷¹ *Doe III*, 853 F.Supp.2d at 599-600.

⁷² *Id.* at 599.

⁷³ NEB. REV. ST. § 28-322.05(1)(a-k) (2010). The following offenses require registration:

- (a) Kidnapping of a minor; (b) Sexual assault of a child in the first degree; (c) Sexual assault of a child in the second or third degree; (d) Incest of a minor; (e) Pandering of a minor; (f) Visual depiction of sexually explicit conduct of a child; (g) Possessing any visual depiction of sexually explicit conduct; (h) Criminal child enticement; (i) Child enticement by means of an electronic communication device; (j) Enticement by electronic communication; or (k) An attempt or conspiracy to commit any of the aforementioned offenses.

Id.

⁷⁴ *Doe I*, 898 F.Supp.2d at 1094.

⁷⁵ *Doe II*, 705 F.3d at 696; *Doe I*, 898 F.Supp.2d at 1094; *Doe III*, 853 F.Supp.2d at 599.

⁷⁶ *Doe II*, 705 F.3d at 695; *Doe I*, 898 F.Supp.2d at 1093-94; *Doe III*, 853 F.Supp.2d at 599.

⁷⁷ Hitz, *supra* note 52, at 1327.

Amendment violations.⁷⁸ Taken together, each case challenging these statutes provides a solid framework for a constitutional analysis of the restrictions on sex offenders' social media use.

II. FIRST AMENDMENT ANALYSIS

Several First Amendment issues arose in *Doe v. Prosecutor*⁷⁹, *Doe v. Nebraska*⁸⁰, and *Doe v. Jindal*⁸¹ (collectively the “*Doe* cases”) that ultimately led federal courts to find total bans on sex offenders' social media use unconstitutional. This section will discuss the constitutional rights of convicted sex offenders and then examine how each case presented free speech issues. The discussion will then shift to how each court balanced free speech interests with the compelling state interest of protecting children from sexual abuse online and ultimately concluded that total bans on sex offenders' social media use are unconstitutional.

A. First Amendment Freedom of Speech

The Supreme Court has evaluated First Amendment challenges involving free speech issues through various levels of scrutiny based on the nature of the speech regulated. Such statutes regulating speech are thus deemed either a “content based” or “content neutral” restriction on speech.⁸² A statute is content-based if it regulates speech based on the content of the speech expressed.⁸³ In contrast, a statute is content-neutral if it regulates speech without reference to the content of the speech.⁸⁴ For example, a law that regulates the sound amplification of a rock concert held within a public park is content-neutral because it does not regulate the content of the conveyed speech, it simply regulates the noise level of the expressed speech to protect the public interest.⁸⁵ A law that prohibits offensive speech, such as wearing an item of clothing with profanity on it, is not content neutral because it restricts speech based on the words contained and the message conveyed, and therefore, would be subject to heightened scrutiny.⁸⁶

⁷⁸ *Doe II*, 705 F.3d at 703; *Doe I*, 898 F.Supp.2d at 1131; *Doe III*, 853 F.Supp.2d at 607.

⁷⁹ *Doe II*, 705 F.3d at 697-98.

⁸⁰ *Doe I*, 898 F.Supp.2d at 1107-08.

⁸¹ *Doe III*, 853 F.Supp.2d at 603-04.

⁸² *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

⁸³ *Id.* at 793-94.

⁸⁴ *Id.* at 792.

⁸⁵ *Id.*

⁸⁶ *Cohen v. California*, 403 U.S. 15, 18 (1971).

The Court will apply a strict scrutiny analysis if a statute is content based. Strict scrutiny requires the statute serve a compelling government interest, it is narrowly tailored to achieve that interest and it is the least restrictive means for achieving that interest.⁸⁷ If the statute is content neutral, the Court will apply an intermediate scrutiny analysis, which means the statute must serve a significant governmental interest, must be narrowly tailored to serve that interest, and must leave open ample alternative channels for communicating the information.⁸⁸ The court applies intermediate scrutiny when evaluating the constitutionality of restrictions on sex offenders' First Amendment rights.

B. Limits on First Amendment Rights

1. *Pell v. Procunier*:

The Supreme Court has not specifically defined the First Amendment rights of convicted sex offenders or other convicted felons. However, the Supreme Court has specifically addressed the First Amendment rights of prisoners.⁸⁹ In *Pell v. Procunier*, the Court notes that “a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”⁹⁰ Thus, prisoners are not denied their constitutional rights while imprisoned. However, they may be denied certain liberties if the exercise thereof interferes with the safety of the prison environment.⁹¹ The *Pell* Court held that prisoners' First Amendment rights were not violated when they were not permitted to initiate interviews with journalists.⁹² The Court held that due to safety concerns involving face-to-face interviews and discipline issues within prisons, the restriction on prisoners' communications with journalists did not violate their First Amendment rights.⁹³ The Court found that since such restrictions are normal within a prison environment and the inmates are left with alternative channels of communication, their freedom of speech is adequately protected.⁹⁴

⁸⁷ *Rock Against Racism*, 491 U.S. at 792.

⁸⁸ *Id.*

⁸⁹ *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that when a prison regulation impinges on inmates' constitutional rights, it is valid if it is reasonably related to legitimate penological interests).

⁹⁰ *Pell v. Procunier* 417 U.S. 817, 822 (1974).

⁹¹ *Id.* at 818.

⁹² *Id.*

⁹³ *Id.* at 827.

⁹⁴ *Id.* at 828.

2. *Beard v. Banks*:

In *Beard v. Banks*, the Court reiterated the notion that, “imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment. But, at the same time the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere.”⁹⁵ Yet the *Beard* Court also held that certain prisoners, who committed violent crimes and were held in the more secure level of the prison,⁹⁶ were not deprived of their First Amendment rights when they were denied access to newspapers, magazines, and personal photographs.⁹⁷ The Court found the need to strictly monitor these prisoners and hold them in more strict confinement due to their violent behavior in prison, which outweighed First Amendment concerns.⁹⁸ The Court emphasized the other First Amendment rights available to the prisoners⁹⁹ and the reasonableness of the restriction to maintain safety and promote better behavior among inmates.¹⁰⁰

C. Limits on First Amendment Rights for Registered Sex Offenders

The lower federal courts address the First Amendment rights of sex offenders’ in the *Doe* line of cases by analyzing the alternative channels of communication available to registered sex offenders if deprived of social media use and by balancing their First Amendment rights with the compelling interest of protection children’s safety.¹⁰¹ While the analysis of First Amendment rights of prisoners informs the analysis of registered sex offenders’ First Amendment rights, there is a crucial difference in the release status of prisoners and registered sex offenders.¹⁰² Many registered sex offenders have already completed their sentences and are released on probation, parole, or other forms of supervised release.¹⁰³ All registered sex offenders are already monitored by law enforcement through the act of registering as well.¹⁰⁴ Offenders receive greater constitutional protection as the punishment for their crime moves along the

⁹⁵ *Beard v. Banks* 548 U.S. 521, 528 (2006).

⁹⁶ *Id.* at 531-32.

⁹⁷ *Id.* at 527.

⁹⁸ *Id.*

⁹⁹ *Id.* at 531.

¹⁰⁰ *Id.*

¹⁰¹ Hitz, *supra* note 52, at 1347-48.

¹⁰² *Id.* at 1343.

¹⁰³ *Id.* at 1335.

¹⁰⁴ *Sex Offender Registration and Failure to Register FAQs*, U.S. DEP’T OF JUSTICE, http://www.smart.gov/faqs/faq_registration.htm (last visited Nov. 11, 2015).

continuum from more liberty-intrusive to less liberty-intrusive.¹⁰⁵ Therefore, it follows that the protection of registered sex offenders' First Amendment rights should be greater than that of prisoners. Many sex offenders have already served prison sentences.¹⁰⁶ Thus, the act of registering as a sex offender serves less of a punitive purpose and is less liberty-intrusive. It is up to the courts to determine to what extent those rights can be restricted in the interest of public safety.

D. First Amendment Right to Free Speech Analysis in *Doe* cases

As mentioned earlier, restrictions on free speech must be content neutral, which means that restrictions must not discriminate on speech based on its content.¹⁰⁷ Each *Doe* Court agreed that each statute banning sex offenders' social media use was a content neutral restriction because it restricted speech without reference to the expression's conduct.¹⁰⁸ Content neutral restrictions must satisfy intermediate scrutiny to be upheld as constitutional.¹⁰⁹ In other words, states may regulate content neutral speech if the regulation is narrowly tailored to serve a governmental interest and if the regulation leaves open ample alternative channels for communication of information.¹¹⁰ A regulation will be found to be narrowly tailored if it does not substantially burden more speech than necessary to serve its intended interest.¹¹¹ The Supreme Court has held, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."¹¹² In deciding whether bans on registered sex offenders' social media use was a First Amendment violation, the *Doe*¹¹³ Courts had to first recognize social media use as protected speech under the First Amendment then analyze how restrictive banning such speech would be for registered sex offenders.

¹⁰⁵ Hitz, *supra* note 52, at 1342.

¹⁰⁶ Jessica Ruane, *Sex Offenders Have Shockingly Short Sentences*, CRIMEWIRE (Oct. 12, 2012), <http://www.instantcheckmate.com/crimewire/sex-offenders-have-shockingly-short-sentences/> (stating that most first time sex offenders get sentences of less than three years or probation).

¹⁰⁷ *Rock Against Racism*, 491 U.S. at 791.

¹⁰⁸ *Doe II*, 705 F.3d at 698; *Doe III*, 853 F.Supp.2d at 605; *Doe I*, 898 F.Supp.2d at 1107.

¹⁰⁹ *Rock Against Racism*, 491 U.S. at 791.

¹¹⁰ *Id.*

¹¹¹ *Doe II*, 705 F.3d at 698.

¹¹² *Frisby v. Schultz*, 487 U.S. 474, 475 (1988).

¹¹³ *Doe II*, 705 F.3d at 695; *Doe III*, 853 F.Supp.2d at 607; *Doe I*, 898 F.Supp.2d at 1095.

1. Doe v. Prosecutor

In *Doe v. Prosecutor*, the Seventh Circuit found the Indiana statute clearly violated the First Amendment right to free speech because it precludes expression through the medium of social media¹¹⁴ and limits the right to receive information and ideas.¹¹⁵ The Seventh Circuit noted that illicit communication is only a subset of social network activity¹¹⁶ and found that the Indiana statute was not narrowly tailored because it was overly inclusive.¹¹⁷ The statute was found to be over inclusive because it banned sex offenders from all uses of social media, rather than just solicitation of minors, and therefore targeted substantially more activity than the evil it sought to redress.¹¹⁸

The Court also found the statute was not narrowly tailored because Indiana had other ways of combating unwanted communication between minors and sex offenders since solicitation of a minor is already a crime in Indiana that serves the same purpose of protecting children.¹¹⁹ The Seventh Circuit states, “[a]n adequate alternative does not have to be the speaker’s first or best choice . . . or one that provides the same audience or impact for the speech.”¹²⁰ The Seventh Circuit found that although the Indiana statute was not narrowly tailored, it did leave open ample alternative channels of communication because those affected by the statute still had various “old fashioned” methods of communication available to them.¹²¹ The Seventh Circuit ultimately found that the statute was not likely to stop sex offenders from engaging in illegal activity and that such a ban chills too much expressive conduct.¹²²

2. Doe v. Jindal

The court in *Doe v. Jindal* found the statute addressed protected speech under the First Amendment and aimed to promote a legitimate and compelling state interest of protecting children.¹²³ However, the ban on social media use unreasonably restricted uses of the Internet completely unrelated to the activities sought to be banned by the statute.¹²⁴ The statute not only banned the use

¹¹⁴ *Doe II*, 705 F.3d at 697-98.

¹¹⁵ *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

¹¹⁶ *Id.* at 699.

¹¹⁷ *Id.* at 700.

¹¹⁸ *Id.* at 699.

¹¹⁹ *Doe II*, 705 F.3d at 701.

¹²⁰ *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000).

¹²¹ *Doe II*, 705 F.3d at 700.

¹²² *Id.* at 701.

¹²³ *Doe III*, 853 F.Supp.2d at 604.

¹²⁴ *Id.*

of social networking sites, but also banned registered sex offenders from accessing social networking sites.¹²⁵ Thus, the court found the statute was unconstitutional because it was overbroad and not narrowly tailored to serve its' goal of protecting children from online predators.¹²⁶ Additionally, the court construed the statute to impose a sweeping ban on many commonly used websites, such as news sites and blogs.¹²⁷ Therefore, the statute failed to leave open ample alternative channels for communication of information by banning access to too many websites. The court found that this was problematic because it did not address the goal of the statute and involved a greater intrusion on registered sex offenders' First Amendment rights than was reasonably necessary.¹²⁸ The court also found it confusing for those seeking to comply with the statute since it was unclear which specific websites they would be prohibited from accessing.¹²⁹

3. *Doe v. Nebraska*

The court in *Doe v. Nebraska* noted the Supreme Court has made clear that First Amendment protections for speech extend fully to Internet communications as well as anonymous speech.¹³⁰ However, the court pointed to a flaw that all three statutes had in common,¹³¹ which was the bans did not "require a showing that the offender poses a present threat to use . . . [social media] to get at children,"¹³² and therefore it was not narrowly tailored to target those offenders who pose a risk to children through the use, or threatened use, of banned social media.¹³³ The court also pointed to how restricting social media use affects one's ability to read the news, video conference with family members, participate in political discussions, and network with professionals and business associates.¹³⁴ Thus, the court concluded that in addition to failing the narrowly tailored requirement, the Nebraska statute failed to leave open ample alternative channels for communication.¹³⁵

¹²⁵ *Id.*

¹²⁶ *Id.* (explaining that a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Doe III*, 853 F.Supp.2d at 604.

¹³⁰ *Doe I*, 898 F.Supp.2d at 1107; *see also* *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also* *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

¹³¹ Hitz, *supra* note 52, at 1351-56.

¹³² *Doe I*, 898 F.Supp.2d at 1111.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1109.

4. *Doe Courts Holding*

Ultimately, the *Doe* courts held that banning sex offenders' social media use violates the First Amendment right to free speech and is therefore unconstitutional.¹³⁶ Such bans substantially burden more speech than is necessary to protect children from sex offenders and are therefore not narrowly tailored.¹³⁷ They also fail to leave open ample alternative channels for communication of information due to society's dependence on social media for many legitimate activities unrelated to the goals of these statutes.¹³⁸ Therefore, in order to best protect children from sexual predation online, the states have to develop viable alternatives to banning sex offenders' social media use.

III. ALTERNATIVE APPROACHES TO TOTAL BANS OF SEX OFFENDERS' SOCIAL MEDIA USE

The burden on free speech presents challenges to state legislatures to create constitutionally permissible statutes that serve the purpose of protecting children from sex offenders while monitoring sex offenders' social media use. This Part will evaluate existing federal laws and various state statutes that aim to protect children from sexual predators online through alternative approaches to banning sex offenders' social media use.

A. Federal Legislation: SORNA Amendment 42 U.S.C. §16915b (2012)

In 2008, Congress passed 42 U.S.C. §16915b, which amended SORNA.¹³⁹ This statute allows the U.S. Attorney General to create an identification system that allows social networking websites to check online identifiers that an Internet user establishes in online communities and websites with those online identifiers registered with the National Sex Offender Registry.¹⁴⁰ Upon receiving an Internet identifier that matches a name on the National Sex Offender Registry, the social networking site may ask the Attorney General to disclose certain information related to the individual.¹⁴¹ This information is limited to the indi-

¹³⁶ *Id.* at 1119; *Doe III*, 853 F.Supp.2d at 607; *Doe II*, 705 F.3d at 695.

¹³⁷ *Doe I*, 898 F.Supp.2d at 1112; *see also Doe III*, 853 F.Supp.2d at 607; *see also Doe II*, 705 F.3d at 703.

¹³⁸ *Doe I*, 898 F.Supp.2d at 1109; *see also Doe III*, 853 F.Supp.2d at 607; *see also Doe II*, 705 F.3d at 699.

¹³⁹ Keeping the Internet Devoid of Sexual Predators (KIDS) Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (2008) (codified as amended at 42 U.S.C. § 16915b (2012)).

¹⁴⁰ *Id.* § 16915b(a).

¹⁴¹ *Id.* § 16915b(a)(2).

vidual's name, sex, resident address, photograph, and physical description.¹⁴²

Many social networking sites, such as Facebook, prohibit sex offenders from using their websites.¹⁴³ However, these rules are incredibly difficult to enforce. Many registered sex offenders who are on social media websites use Internet identifiers that are different from their own names.¹⁴⁴ Therefore, using the verification system to compare information held on the National Sex Offender Registry with these Internet identifiers is not helpful.¹⁴⁵ The federal checking system allows social networking sites to obtain information from the Department of Justice only if they are focused on social interaction and their users include a significant number of minors.¹⁴⁶ The statute clarifies the definition of social networking site to mean:

[a]n internet website 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 that offers a mechanism for communication with other users where such users are likely to include a substantial number of minors; and whose primary purpose is to facilitate online social interactions.¹⁴⁷

This definition of social networking sites demonstrates that by allowing social networking sites to access and compare Internet identifiers with those of the national registry, the federal checking system's purpose is to protect children from solicitation by sex offenders on social networking sites.¹⁴⁸

The federal checking system both provides the government and social networking sites with tools to monitor registered sex offenders' social media activity, while it also limits monitoring so as to not infringe on sex offenders' right to free speech.¹⁴⁹ However, the checking system holds social networking sites and the government responsible for identifying those sex offenders who are prohibited from using social networking sites rather than holding the offenders accountable for their own actions by forcing them to abide by legal restrictions on their social media use.¹⁵⁰ Although the checking system established by 42 U.S.C. § 16915b is a viable alternative to banning sex offenders' who use social media, it does not proactively deter registered sex offenders'

¹⁴² *Id.* § 16915b(a).

¹⁴³ Michael Martinez, *New LA Law: Sex Offenders Must List Status on Facebook, Other Social Media*, CNN (June 21, 2012, 12:49 PM), <http://www.cnn.com/2012/06/20/tech/louisiana-sex-offenders-social-media/index.html> (noting that Facebook's Statement of Rights and Responsibilities already bars sex offenders).

¹⁴⁴ Joshua Rhett Miller, *16 percent of sex offenders nationally manipulate identities, study finds*, FOX NEWS (Jul. 25, 2012), <http://www.foxnews.com/us/2012/07/25/16-percent-sex-offenders-nationally-manipulate-identities-study-finds/>.

¹⁴⁵ See THOMAS, *supra* note 1, at 54-55.

¹⁴⁶ 42 U.S.C. § 16915b(b).

¹⁴⁷ *Id.* § 16915a(e)(1).

¹⁴⁸ SORNA § 101, 42 U.S.C. § 16901.

¹⁴⁹ KIDS Act § 3(c)(3), 42 U.S.C. § 16915b(c)(3).

¹⁵⁰ See THOMAS, *supra* note 1, at 57.

from using social media to harm children.

B. State Legislative Alternatives to Banning Social Media Use

Many state courts have recently struck down bans on sex offenders' social media on First Amendment grounds.¹⁵¹ Statutes banning sex offenders' social media use in California, North Carolina, Illinois, Kentucky, New Jersey, and many others have been challenged in state courts.¹⁵² However, many other states have amended their statutes to provide alternative restrictions to bans on sex offenders' social media use.¹⁵³ Many states have amended their statutes to include restrictions on social media use as conditions of probation or parole rather than prohibiting it overall.¹⁵⁴ For example, Minnesota,¹⁵⁵ South Carolina,¹⁵⁶ and Texas¹⁵⁷ statutes require that when a registered sex offender is released on probation or parole, the offender must be prohibited from using social media as a condition of his or her release. The Minnesota and Texas statutes further provide that upon the probation or parole officer's discretion, this condition may be modified if doing so does not jeopardize public safety¹⁵⁸ or constitute an undue hardship on the individual offender.¹⁵⁹

The use of restrictions on sex offenders' social media as a condition of probation or parole is a viable alternative to banning sex offenders' social media use. The Constitutional rights of probationers, parolees, and those on supervised release have not been fully defined by or addressed by the courts.¹⁶⁰ However, the Supreme Court has made clear that probationers and parolees "do not enjoy the absolute liberty to which every citizen is entitled."¹⁶¹ Judges and parole boards retain broad discretion in ordering conditions of probation

¹⁵¹ NDAA, RESTRICTION, *supra* note 10, at 1.

¹⁵² Dara Kerr, *Sex offenders battle state courts for Facebook accounts*, CNET (May 30, 2012, 8:56 PM) <http://www.cnet.com/news/sex-offenders-battle-state-courts-for-facebook-accounts/>.

¹⁵³ See LA. STAT. ANN. § 14:91.5(A)(1), *amended by* 2012 La. Acts 205; see also IND. CODE § 35-42-4-12 (2015), *amended by* 2014 Ind. Acts 168.

¹⁵⁴ Jasmine S. Wynton, *Myspace, Yourspace, But Not Theirspace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1867-69 (2011).

¹⁵⁵ MINN. STAT. § 244.05(6)(c) (2015).

¹⁵⁶ S.C. CODE ANN. § 23-3-555(D) (2015).

¹⁵⁷ TEX. GOV'T. CODE ANN. § 508.1861(b)(1)(A-B) (2015).

¹⁵⁸ MINN. STAT. § 244.05(6)(c).

¹⁵⁹ TEX. GOV'T. CODE ANN. § 508.1861(c)(1).

¹⁶⁰ See Wynton, *supra* note 154, at 1860.

¹⁶¹ Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

and parole, which are limited by sentencing guidelines.¹⁶²

Courts have upheld conditions of release that have implicated fundamental rights. In *United States v. Sines*, the Seventh Circuit found that “[a] court may impose conditions of supervised release which implicate fundamental rights so long as those conditions are *reasonably related to the ends of rehabilitation and protection of the public from recidivism*.”¹⁶³ Therefore, the courts have broad discretion in imposing conditions of release on offenders as long as the conditions could reasonably provide some sort of rehabilitation for the offender or prevent them from re-offending.

1. Recidivism of Sex Offenders

In order to create statutes and conditions of release that best protect children by preventing sex offenders from re-offending, it is crucial to discuss the risk of recidivism by sex offenders. Recidivism, the commission of a subsequent offense, is often measured by subsequent arrest, subsequent conviction, or subsequent incarceration.¹⁶⁴ Policy specialists and social scientists have found that sex offenders are more likely to reoffend than any other class of criminals.¹⁶⁵ Sex offenders are at a higher risk of reoffending when they become sexually preoccupied, have access to victims, and fail to acknowledge their recidivism risk.¹⁶⁶ Risk assessments of sex offenders often group sex offenders into high risk, medium risk, and low risk offenders based on the seriousness of the offense and the level of culpability by the offender.¹⁶⁷

A study by Dr. Michael C. Seto found that many registered sex offenders who commit online offenses, mostly involving child pornography, have either an official record of prior sexual offenses or admitted to committing a prior contact sexual offense.¹⁶⁸ Thus, it is likely that sex offenders who have committed contact sexual offenses, such as rape or sexual assault, will engage in online sexual offending as well.¹⁶⁹ Dr. Seto explains that online child pornography offenders have a strong motivation to sexually offend against children due to their sexual interest in children, but have more inhibitions about acting on their motivations, and are therefore at a very high risk of re-offending

¹⁶² Wynton, *supra* note 154, at 1880.

¹⁶³ *United States v. Sines*, 303 F.3d 793, 801 (7th Cir. 2002).

¹⁶⁴ Tim Bynum et al., *Recidivism of Sex Offenders 2* (Ctr. for Sex Offender Mgmt., 2001), <http://www.csom.org/pubs/recidsexof.pdf>.

¹⁶⁵ Wynton, *supra* note 154, at 1895.

¹⁶⁶ Bynum et al., *supra* note 164, at 12.

¹⁶⁷ THOMAS, *supra* note 1, at 3.

¹⁶⁸ SETO, *supra* note 8, at 2.

¹⁶⁹ MAX TAYLOR & ETHEL QUAYLE, *CHILD PORNOGRAPHY: AN INTERNET CRIME* 74-75 (2003).

through use of the Internet.¹⁷⁰ The circumstances surrounding the risk of recidivism for sex offenders, such as access to victims and the high risk of re-offending for online sexual offenders, clearly supports the need for states to narrowly tailor their restrictions on sex offenders' social media use. Restricting registered sex offenders' social media use as a condition of probation, parole, or supervised release is reasonably related to rehabilitation and protection of the public from recidivism for those offenders who used the Internet or social media to commit a sex offense.

Therefore, statutes should not include limitations on social media use as a condition of probation, parole, or supervised release, unless the sex offender used the Internet to perpetuate his or her crime, which the Minnesota¹⁷¹ and Texas¹⁷² statutes reflect. The New York statute¹⁷³ also reflects this methodology and specifically addresses those offenders at risk of recidivism. The statute applies to registered sex offenders who committed an offense against a minor, are at greatest risk of re-offense, and used the Internet to facilitate commission of a crime. Furthermore, it requires that offenders be prohibited from using the Internet to access social networking sites as a mandatory condition of probation or conditional discharge.¹⁷⁴ This alternative approach of restricting sex offenders' social media use through conditions of probation, parole, and supervised release is more narrowly tailored to those offenders who committed sex offenses through the use of social networking sites, yet is more effective in protecting children for a period of time.

2. *Limitations of Conditional Approach*

The key issue with these statutes is that they only apply for a probationary period, parole, or supervised release.¹⁷⁵ While this may be all that is necessary to combat recidivism in some cases, it is less comforting to the public.¹⁷⁶ Furthermore, it still holds probation and parole officers responsible for monitoring sex offenders' social media use rather than the individual offender.¹⁷⁷ This cre-

¹⁷⁰ SETO, *supra* note 8, at 3.

¹⁷¹ MINN. STAT. §244.05(6)(c).

¹⁷² TEX. GOV'T. CODE ANN. §508.1861(a).

¹⁷³ N.Y. PENAL LAW § 65.10(4)(a-b) (2015).

¹⁷⁴ *Id.*

¹⁷⁵ Wynton, *supra* note 154, at 1869.

¹⁷⁶ HOLMES & HOLMES, *supra* note 3, at 223.

¹⁷⁷ Emily Sweeney, *Probation 2.0: How technology is changing probation work*, BOSTON GLOBE (Nov. 29, 2012), <https://www.bostonglobe.com/metro/regionals/south/2012/11/29/probation-how-technology-changing-probation-work-probation-officers-tap-social-media/Qtv52cQffeVbkAsJqcg6lK/story.html>.

ates difficulty in enforcement since probation and parole officers are not able to constantly monitor the physical actions of their offenders and would therefore undoubtedly struggle to monitor the social media activity of their offenders as well.

Although these statutes are difficult to enforce, they provide an alternative to total bans on sex offenders' social media use through a narrowly tailored approach that is reasonably related to the rehabilitation of sex offenders and the protection of children. Thus, other states can look to the Minnesota, Texas, and New York statutes as models for restricting sex offenders' social media use, and amend their statutes to reflect a similar construction. However, these statutes should be improved upon to provide more permanent solutions. For example, if an offender violated a condition during probation, parole, or supervised release, or has demonstrated that he or she continues to pose a threat to children, the appropriate sentencing authority should be able to impose restrictions on those offenders' social media use as a condition of registration following the end of their sentence, which would have a much more permanent effect.

IV. SOLUTION OF MORE PERMANENT LEGISLATION

As previously addressed, some states have implemented statutes that ban sex offenders' social media use only for those offenders who have facilitated a sex offense through use of the Internet or a social networking site as conditions of probation, parole, and supervised release, which only protects the public from recidivism for short periods of time.¹⁷⁸ This Part will address how states could enact legislation specifically catered to different offenses, which would protect children's safety without infringing the free speech right of sex offenders to partial access of social media. This Part will argue that Louisiana's revised statute defining unlawful use of a social networking site provides the best means to restrict sex offenders' use of social media within the confines of the First Amendment. By doing so, the Louisiana statute serves as a model for other states to follow.

A. Legislation that Expands Notice Requirements

In addition to revising their existing statute, Louisiana enacted a new statute in 2012 requiring registered sex offenders to include an indication that they are a sex offender or child predator on their social network profiles.¹⁷⁹ The statute also requires offenders to include notice of the crime for which they were con-

¹⁷⁸ NDAA, RESTRICTION, *supra* note 10, at 1.

¹⁷⁹ LA. STAT. ANN. § 15:542.1(D)(1).

victed, the jurisdiction of the conviction, a description of their physical characteristics, and their residential address.¹⁸⁰ Jeff Thompson, the Louisiana state representative who sponsored the bill, said the new statute provides the same notice to people “in whose home you are injecting yourself via the Internet.”¹⁸¹ He explained he is not trying to create a ban on sex offenders’ social media use, but is simply trying to create an expansion of existing notice requirements.¹⁸² This alternative approach to bans on sex offenders’ social media use is effective in protecting the safety of children because it provides notice to the public of the presence of sex offenders whom are using social networking sites, and gives the public an opportunity to avoid communication with them, if they choose to do so. This approach also holds the individual offender accountable for abiding by the restrictions, much like any other registration requirements.

1. Proposed Legislation: 2014 N.J. S.B. 140

New Jersey has recently proposed a bill modeled after the new Louisiana statute.¹⁸³ The proposed legislation in New Jersey requires disclosure of the fact that the individual is a sex offender and, “include[s] notice of the crime for which he was convicted, the jurisdiction of the conviction, a description of his physical characteristics, and his residential address.”¹⁸⁴ The proposed New Jersey legislation and the Louisiana statute are viable and effective alternatives to bans on sex offenders’ social media use. They function very similarly to existing notice requirements imposed by state and national sex offender registries.¹⁸⁵

2. Compelled Speech

The Louisiana and New Jersey approaches are enforceable as conditions of registration, and are thus permanently applicable. However, these laws may face First Amendment challenges under the compelled speech doctrine.¹⁸⁶ The Supreme Court has held, “[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views.”¹⁸⁷ By forcing registered

¹⁸⁰ *Id.*

¹⁸¹ Martinez, *supra* note 143 (statement of Louisiana State Rep. Jeff Thompson).

¹⁸² *Id.*

¹⁸³ S. Res. 140, 216th Leg., 2014 Sess. (N.J. 2014).

¹⁸⁴ *Id.*

¹⁸⁵ Compare 18 U.S.C. § 2250 with LA. STAT. ANN. § 15:542.1(D)(1).

¹⁸⁶ See generally Wynton, *supra* note 154, at 1878-89.

¹⁸⁷ United States v. United Foods Inc., 533 U.S. 405, 410 (2001).

sex offenders to provide notice of their status as a sex offender and disclose the offense, jurisdiction of the offense, their physical characteristics, and their residential address, the government is compelling speech, but not compelling individuals to express a certain viewpoint. The Court in *Rumsfeld v. FAIR* held that compelled speech violations result from the fact that the “complaining speaker’s own message was affected by the speech it was forced to accommodate.”¹⁸⁸ Consequently, the Louisiana and New Jersey statutes could be struck down if a court finds that an individual sex offender’s own message is affected by disclosing their status as a sex offender on their social media profiles.

However, this is unlikely because the notice requirements of the Louisiana statute and the proposed bill in New Jersey do not express a message or viewpoint; they simply reiterate what is already publicly available information on state and national sex offender registries online.¹⁸⁹ The individual publication of this information on one’s own social networking profile does not change the analysis. These statutes are similar to those of many states that require registered sex offenders to post signs on their homes during Halloween.¹⁹⁰

For example, under Maryland law, the Maryland Division of Parole and Probation provides registered sex offenders with signs that read, “NO CANDY,” and require them to post these signs in their windows during Halloween.¹⁹¹ Since Halloween is a holiday that is almost exclusively celebrated by children and their families, state legislatures have found it necessary to limit sex offenders’ interactions with children by providing the public with extra notice of sex offenders in their community through the sign.¹⁹² The “NO CANDY” signs do not explicitly state the registration information of individual sex offenders; however, Maryland is still expanding existing notice requirements for registered sex offenders by compelling them to post the signs in a very recognizable and public manner.

Legislation that expands notice requirements of sex offender registration laws, like that of Louisiana and New Jersey, are not more problematic. The Louisiana statute and the proposed bill in New Jersey aim only to expand existing notice requirements of sex offender registries without expressing a message or viewpoint. Therefore, both should be permitted alternatives to bans of

¹⁸⁸ *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 49 (2006).

¹⁸⁹ See S. Res. 140, 216th Leg., 2014 Sess. (N.J. 2014); see also LA. STAT. ANN. § 15:542.1(D)(1).

¹⁹⁰ Cynthia Dizikes, *No Halloween for Maryland’s sex offenders*, L.A. TIMES, (Oct. 31, 2008), <http://articles.latimes.com/2008/oct/31/nation/na-pumpkin31> (explaining that Indiana, Missouri, California, New Mexico, and Louisiana have enacted similar laws).

¹⁹¹ Peter Hermann, *Sex Offenders and Halloween—They Don’t Mix*, BALT. SUN, (Oct. 29, 2010, 1:10 PM), http://weblogs.baltimoresun.com/news/crime/blog/2010/10/sex_offenders_and_halloween_t.html.

¹⁹² See generally *id.*

sex offenders' social media use throughout the states.

B. Legislation that Specifies by Offense

The aforementioned statutes that provide for bans on sex offenders' social media use during probation, parole, and supervised release specify that these restrictions only apply to those sex offenders who committed specific offenses against minors and those offenders who committed such an offense through the use of the Internet.¹⁹³ These statutes would provide a more permanent alternative to bans on sex offenders' social media use if they were conditions of registration rather than conditions of probation, parole, and supervised release.

1. Louisiana's Revised Statute: LA. STAT. ANN. § 14:91.5 (2015).

The statute that most closely exemplifies this solution is Louisiana's revised statute.¹⁹⁴ Since *Doe v. Jindal*, Louisiana revised its statute to specify that unlawful use of a social networking site applies to "the intentional use of a social networking website by person who is required to register as a sex offender and who was convicted of indecent behavior with juveniles, pornography involving juveniles, computer-aided solicitation of a minor, or video voyeurism."¹⁹⁵ The revised statute also applies to those offenders who were convicted of various aggravated offenses in which the victim was a minor.¹⁹⁶

a. Enforceability

Louisiana's revised statute is more narrowly tailored and applies permanently to those registered sex offenders who are at risk of re-offending through the use of social media by only restricting the amount of speech that is necessary to protect the state's intended interest, children's safety. The statute states:

(2)(a) "Social networking website" means an Internet website, the primary purpose of which is facilitating social interaction with other users of the website and has all of the following capabilities: (i) [a]llows users to create web pages or profiles about themselves that are available to the general public or to any other users. (ii) Offers a mechanism for communication among users. (b) "Social networking website" shall not include any of the following: (i) [a]n Internet website that provides only one of the following services: photo-sharing, electronic mail, or instant messaging. (ii) An Internet website the primary purpose of which is the facilitation of commercial transactions

¹⁹³ MINN. STAT. §244.05; TEX. GOV'T. CODE ANN. §508.1861; N.Y. PENAL LAW § 65.10(4)(a-b).

¹⁹⁴ See generally LA. STAT. ANN. § 14:91.5.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* § 15:541.

involving goods or services between its members or visitors. (iii) An Internet website the primary purpose of which is the dissemination of news....¹⁹⁷

Louisiana's Revised Statute is also more enforceable than the conditions of probation, parole, and supervised release because it holds the individual offenders accountable for their own actions.¹⁹⁸ By restricting social media use of those sex offenders' who facilitated their offenses through the Internet or social media, like any other condition of initial registration as a sex offender, Louisiana can ensure that those specific sex offenders may be rehabilitated and that the public will be protected from their possible recidivism.

2. *Ample Alternative Channels of Communication*

There may be some concerns that Louisiana's revised statute does not leave open ample alternative means for communication for those sex offenders that it applies to. The courts would need to explicitly address and clarify this issue to determine whether or not social media is such an invaluable method of communication that banning its use would not leave open ample alternative channels for communication of information.¹⁹⁹ However, as the court in *Doe v. Prosecutor* found, deprivation of social media use does leave open ample alternative methods of old-fashioned communication.²⁰⁰ Furthermore, the restrictions on social media use in Louisiana's revised statute do not apply to websites that provide only photo sharing, electronic mail, or instant messaging, primarily facilitate commercial transactions involving goods and services between its' members or visitors, primarily disseminate news, and belong to a government entity.²⁰¹ Therefore, under the revised statute, while registered sex offenders may be restricted from using Facebook²⁰² or Twitter²⁰³, they would still be able to access Gmail²⁰⁴, Amazon²⁰⁵, Netflix²⁰⁶, CNN²⁰⁷, and many other websites that provide services unrelated to social networking with children. Louisiana's revised statute only prohibits the use of social networking sites that are primarily used for facilitating social interaction.²⁰⁸ Therefore, it is not likely to be found too restrictive for failing to leave open ample alternative channels

¹⁹⁷ *Id.* § 14:91.5(B)(2)(a).

¹⁹⁸ *Id.* § 14:91.5.

¹⁹⁹ See Hitz, *supra* note 52, at 1356-58.

²⁰⁰ *Doe II*, 705 F.3d at 696-99, 703.

²⁰¹ LA. STAT. ANN. § 14:91.5B(2)(b).

²⁰² FACEBOOK, <https://www.facebook.com> (last visited Nov. 22, 2015).

²⁰³ TWITTER, <https://www.twitter.com> (last visited Nov. 22, 2015).

²⁰⁴ GMAIL, <https://www.mail.google.com> (last visited Nov. 22, 2015).

²⁰⁵ AMAZON, www.amazon.com (last visited Nov. 22, 2015).

²⁰⁶ NETFLIX, <https://www.netflix.com> (last visited Nov. 22, 2015).

²⁰⁷ CNN, www.cnn.com (last visited Nov. 22, 2015).

²⁰⁸ LA. STAT. ANN. § 14:91.5B(2)(a).

of communication, which makes it more effective at targeting the activity the statute seeks to prohibit.

C. Louisiana Revised Statute Provides Model Solution

Although Louisiana and New Jersey's notice oriented statutes do provide a viable alternative to banning sex offenders' social media use, they are more difficult to enforce.²⁰⁹ The revised Louisiana statute that specifies unlawful use of a social networking website based on the crime committed by each individual sex offender is less restrictive and more enforceable than a total ban on every registered sex offenders' social media use.²¹⁰ This statute serves as a model for other states to look towards in constructing their own restrictions on registered sex offenders' social media use because it specifies exactly which sex offenses the statute applies to, which types of social networking use is prohibited, and what the consequences are for offenders whom do not comply with the statute.²¹¹

The revised Louisiana statute restricts social media use of those offenders who have been convicted of indecent behavior with juveniles, pornography involving juveniles, computer-aided solicitation of a minor, or video voyeurism.²¹² These specific sex offenses all involve harm to children. Thus, preventing offenders who have been convicted of these crimes protects both offenders and the public against recidivism and ultimately protects children from sexual predation.²¹³ This statute also specifies which types of social networking sites sex offenders are prohibited from using.²¹⁴ Furthermore, the statute specifies that "unlawful use" of a social networking website means to "create a profile on a social networking website or to contact or attempt to contact other users of the social networking website."²¹⁵ The statute makes very clear to whom the statute applies and what activity is restricted. Moreover, it also clearly defines the consequences for failing to comply with the statute:

Whoever commits the crime of unlawful use of a social networking website shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence. Whoever commits the crime of unlawful use of a social networking website, upon a second or subsequent con-

²⁰⁹ Martinez, *supra* note 143.

²¹⁰ LA. STAT. ANN. § 14:91.5A(1).

²¹¹ *Id.* § 14:91.5.

²¹² *Id.* § 14:91.5A(1).

²¹³ HOLMES & HOLMES, *supra* note 3, at 130.

²¹⁴ LA. STAT. ANN. § 14:91.5B(2)(a).

²¹⁵ *Id.* § 14:91.5B(3).

viction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.²¹⁶

Thus, Louisiana's revised statute provides notice of the consequences for failing to comply for registered sex offenders and ultimately protects the public from recidivism.²¹⁷ This statute is also much less restrictive on the freedom of speech and a better alternative to banning social media use for all registered sex offenders.²¹⁸ Furthermore, it is a more enforceable and permanent solution because the statute automatically applies to registered sex offenders upon conviction of one of the enumerated offenses rather than on an individual basis during probation or parole.²¹⁹ The specifications of the statute also make it much more feasible for law enforcement to identify which offenders the statute applies to and what activity is prohibited.²²⁰ Thus, the revised Louisiana statute should serve as a model for other states to adopt in order to restrict registered sex offenders' social media use in a manner that is less restrictive on free speech and best protects children from online sexual predation.

V. CONCLUSION

As technology continuously advances, society's dependence on the Internet and younger generations' use of social media will continue to increase. Thus, the protection of children online has undeniably become a compelling state interest. States must incorporate and enforce laws that protect social interaction online to ensure the safety of children. However, these laws cannot deprive individuals of their constitutional liberties. Complete bans on registered sex offenders' social media use deprive them of their right to free speech and are therefore unconstitutional.

As an alternative to such bans, the states should implement more narrowly tailored restrictions of sex offenders' social media use that specifically apply to those whom actually facilitated a sex offense through the use of the Internet or social media. The states can look to recent changes in sex offender registration laws throughout the country that emphasize the importance of offensive specific language, and the expansion of notice requirements to create effective and enforceable laws that provide rehabilitation for offenders and protection for the public. The states should specifically look to the revised Louisiana statute that defines unlawful use of a social networking website by registered sex offenders

²¹⁶ *Id.* § 14:91.5(C).

²¹⁷ *Id.*; HOLMES & HOLMES, *supra* note 3 at 130.

²¹⁸ Eva Conner, *Why Don't You Take A Seat Away From That Computer?: Why Louisiana Statute 14:91:5 is Unconstitutional*, 73 LA. L. REV. 883, 884-85 (2013).

²¹⁹ Wynton, *supra* note 154, at 1867.

²²⁰ LA. STAT. ANN. §§ 14:91.5(A)(1), (B)(2)(a).

as a model. The revised Louisiana statute provides a clearly enforceable and permanent alternative to banning sex offenders' social media use and furthers the compelling interest of protecting children.