Note

MYSPACE, YOURSPACE, BUT NOT THEIRSPACE: THE CONSTITUTIONALITY OF BANNING SEX OFFENDERS FROM SOCIAL NETWORKING SITES

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ABSTRACT

In recent years there has been intense public pressure to enact increasingly restrictive and intrusive sex offender laws. The regulation of sex offenders has now moved online, where a growing amount of protected expression and activity occurs. The latest trend in sex offender policy has been the passage of state laws prohibiting sex offenders from visiting social networking sites, such as Myspace or Facebook. The use of these websites implicates the First Amendment right of expressive association. Broad social-networking-site bans threaten the First Amendment expressive association rights of sex offenders, who do not lose all of their constitutional rights by virtue of their conviction. Although social-networking-site bans are politically attractive on the surface, such prohibitions are fundamentally flawed because they are predicated on a number of widespread misconceptions about sex offenses and sex offender behavior. These misconceptions include the beliefs that all registered sex offenders are violent sexual predators who have extremely high recidivism rates and that Internet predators are increasing the incidence of sex crimes against minors. In fact, there is very little evidence to indicate that this type of legislation will help reduce sexual violence. This Note argues

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for empirically based and narrowly tailored sex offender policies that will strike the appropriate balance between protecting minors from sexual abuse and respecting sex offenders' constitutional rights. Such an approach is more likely to help rehabilitate offenders and thus protect children and others from sexual predators.

INTRODUCTION

The rise in popularity among youth of social networking sites such as Twitter, Facebook, and Myspace has increased public concern over the dangers that sexual predators pose online. Television programs such as *Dateline*'s *To Catch a Predator*[1] and high-profile incidents of Internet-related sex crimes have generated fears that minors on such sites are increasingly at "high risk of assault by repeat sex offenders."[2] Eager to protect potential victims from online predators, legislators have enacted measures to promote child safety on the web. These measures include laws regulating minors' access to harmful content online;[3] laws requiring sex offenders to register their Internet identities;[4] and, in the latest wave of legislation, laws prohibiting registered sex offenders from using social networking sites.[5]

Social networking sites have changed the way Americans communicate, share ideas, learn information, and organize themselves. No longer confined to personal social uses, these sites now also serve as accessible platforms for political and social organization. Given these expanding uses, courts should consider the implications of broad social-networking-site bans on sex offenders' right of expressive association.

This Note argues that recent legislation banning sex offenders from social networking sites impermissibly restricts sex offenders' First Amendment right to freedom of association, and that it

1. *To Catch a Predator* (NBC television broadcast).

2. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 2 (2007), *available at* http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf.

3. *See* Children's Internet Protection Act, Pub. L. No. 106-554, tit. XVII, 114 Stat. 2763A-335 (2000) (codified at 20 U.S.C. § 9134 (2006)) (requiring libraries to install filtering software on Internet-access terminals as a condition of federal funding).

4. *See* Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (codified at 42 U.S.C. § 16915a (Supp. II 2008)) (requiring sex offenders to provide all of their Internet identities to the sex offender registry).

5. For a discussion of restrictions on sex offenders' access to the Internet and their use of social networking sites, see *infra* Part I.

represents poor public policy. Part I examines federal courts' treatment of computer and Internet bans as a special condition of supervised release for sex offenders in child pornography cases.[6] It also examines the development of state legislation imposing Internet and social-networking-site bans. Part II explores how social networking sites are changing the contours of the right of expressive association and argues that these sites warrant First Amendment protection. Part III discusses the constitutional status of sex offenders, including offenders on probation or parole and those who have completed their sentences. Part IV addresses the constitutional issues raised by social-networking-site bans and the policy concerns with such bans, highlighting the ways in which these bans are inconsistent with the available empirical evidence on sexual violence and sex offender behavior. It concludes that these broad social-networking-site bans are likely unconstitutional as applied to offenders who have completed their sentences and that they represent poor public policy.

I. THE EVOLUTION OF INTERNET AND SOCIAL-NETWORKING-SITE BANS IMPOSED ON SEX OFFENDERS

The practice of imposing Internet restrictions on sex offenders originated in the courts. Before states sought to enact legislation banning sex offenders from social networking sites, some courts were already imposing restrictions on sex offenders' Internet access as a special condition of parole or supervised release.[7] These judicially imposed bans were broader than social-networking-site bans, usually prohibiting the offender from accessing computers or the Internet altogether. The first state legislative enactments in this area reflected some of the various judicial approaches to computer and Internet bans for sex offenders. But, more recently, states have begun

6. State courts have had less occasion to consider Internet and computer bans than have the federal circuit courts. For this reason, discussion of courts addressing such restrictions will be limited to federal courts. *See* Brian W. McKay, Note, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 233 (2003) (discussing the lack of divergence in state courts regarding Internet restrictions).

7. *See* Emily Brant, Comment, *Sentencing "Cybersex Offenders": Individual Offenders Require Individualized Conditions When Courts Restrict Their Computer Use and Internet Access*, 58 CATH. U. L. REV. 779, 781–83 (2009) (discussing how federal appellate courts have reviewed challenges to computer and Internet restrictions imposed on sex offenders as conditions of supervised release and how, recently, "certain states have attempted to take the problem into their own hands through legislation").

restricting specific online destinations in addition to imposing statutory computer and Internet bans. Although these social-networking-site bans may be narrower in scope than computer or Internet bans, several states have extended their application to *all* registered sex offenders, including those no longer on probation or parole. In many cases, the bans apply even when there is no connection between the underlying offense and the Internet or a social networking site.[8]

A. Internet Restrictions Upheld by Federal Courts as a Special Condition of Supervised Release

The vast majority of cases in which federal courts have considered computer and Internet bans have involved charges for the possession of child pornography, an increasingly Internet-related offense.[9] Congress has authorized federal courts to impose special conditions—such as Internet restrictions—on offenders placed on a term of supervised release after imprisonment.[10] Any condition imposed on the offender, however, must be "reasonably related" to the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the need to deter future criminal conduct, to protect the public, and to rehabilitate the

8. *See infra* Part I.B.1.

9. *See* Cheryl A. Krause & Luke A.E. Pazicky, *An Un-Standard Condition: Restricting Internet Use as a Condition of Supervised Release*, 20 FED. SENT'G REP. 201, 202 (2008) ("To date, aside from *Mitnick*, federal appellate courts have not considered Internet restrictions as a condition of supervised release in cybercrime cases; however, they have often considered them in child pornography cases." (citing United States v. Mitnick, No. 97-50365, 1998 WL 255343 (9th Cir. May 14, 1998))). Under the existing federal Sex Offender Registration and Notification Act, Pub. L. No. 109-248, §§ 101–155, 120 Stat. 587, 590–611 (2006) (codified at 18 U.S.C. § 2250 (2006) and 42 U.S.C. §§ 16,901–16,962 (2006)), also known as the Adam Walsh Child Protection and Safety Act, individuals convicted of "production or distribution of child pornography" are required to register with local law enforcement as sex offenders. 42 U.S.C. §§ 16911(3)(b)(iii), 16913 (2006). In some states, a conviction for possession of child pornography can trigger a lifelong requirement to register as a sex offender. *See, e.g.*, FLA. STAT. ANN. § 775.21(4)–(6) (West 2010) (requiring sex offenders to register based on certain predicate offenses, including possession, production, and promotion of child pornography); *see also* Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen on Sex Offender List*, CNN.COM (Apr. 8, 2009, 10:50 AM EDT), http://www.cnn.com/2009/CRIME/04/07/sexting.busts ("In many states, like Florida, if a person is convicted of a crime against children [such as possession of child pornography], it automatically triggers registration to the sex offender registry.").

10. *See* 18 U.S.C. § 3583(d) (2006) (delineating special supervised-release conditions courts shall and may impose).

defendant. The condition must also impose "no greater deprivation of liberty than is reasonably necessary" to achieve these purposes.[11]

In light of these requirements, federal appellate courts generally disfavor unconditional bans on computer and Internet use.[12] These courts have been especially reluctant to uphold bans when the offender was convicted only of possession of child pornography. Possession of child pornography and a past history of sexual exploitation of minors alone are generally not enough to justify unconditional bans;[13] rather, the defendant must have engaged in conduct *online* that resulted in direct exploitation of a minor.[14] In

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11. *Id.* The sentencing factors grant judges wide discretion under the Sentencing Guidelines to weigh and balance competing considerations in imposing conditions of supervised release. *Id.* § 3553 (2006).

12. *See, e.g.*, United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003) ("[O]ur sister circuits . . . have also declined to uphold a total ban on Internet access by defendants convicted of receiving child pornography . . . ."). *But see* Brant, *supra* note 7, at 785 (explaining the split among federal circuits—with some courts supporting a total prohibition, others endorsing a more narrow approach, and the rest adamantly opposing such bans—and noting that the most common approach utilizes a probation-officer exception); Christopher Wiest, Comment, *The Netsurfing Split: Restrictions Imposed on Internet and Computer Usage by Those Convicted of a Crime Involving a Computer*, 72 U. CIN. L. REV. 847, 860–61 (2003) ("[A] clear split exists. The Seventh, Second, and Third Circuits have upheld the liberal imposition of Internet prohibitions. On the other hand, the Eleventh, Fifth, Eighth, and Tenth Circuits favor a more restrictive approach toward Internet prohibitions." (footnotes omitted)).

This Note argues, however, that the federal appellate courts are not as divided over the issue of computer and Internet bans as other authors have contended. A closer look at the underlying facts of cases in which appellate courts have considered such restrictions reveals that these courts are generally reluctant to impose broad bans on computer and Internet usage and have upheld them only in cases with a "sufficient nexus" between the use of the Internet and the direct exploitation of children. *See, e.g.*, United States v. Heckman, 592 F.3d 400, 407 (3d Cir. 2010) ("If [defendant's ban is] upheld . . . , this would be the first time that we have upheld an Internet ban for a conviction involving the transmission of child pornography rather than the direct exploitation of children. In fact, considering these factors collectively, [the defendant's] special condition would be the broadest Internet ban upheld by any Circuit Court to date."); United States v. Alvarez, 478 F.3d 864, 867 (8th Cir. 2007) (emphasizing the importance of a "sufficient nexus" between the use of the Internet and direct exploitation of children in upholding a conditional ban on Internet access). Even in cases in which computer and Internet bans have been upheld, the circuit courts have strongly emphasized that such restrictions must not infringe a defendant's Internet use more than necessary and have "admonished sentencing judges to tailor Internet conditions narrowly to the end to be served." Krause & Pazicky, *supra* note 9, at 202.

13. *See, e.g.*, United States v. Fields, 324 F.3d 1025, 1027 (8th Cir. 2003) ("Appellate courts have overturned conditions seen as overly restrictive, especially in cases involving simple possession of child pornography.").

14. *See, e.g.*, United States v. Freeman, 316 F.3d 386, 387 (3d Cir. 2003) (rejecting a ban on computer and Internet usage following a conviction for possession of child pornography when there was no evidence that the defendant, a previously convicted child molester, used the Internet to contact young children).

cases lacking this online component, most federal appellate courts prefer narrowly tailored conditions—such as requiring installation of monitoring and filtering hardware, installation of software that blocks access to prohibited websites, or unannounced inspections of the offender's devices by probation officers—as alternatives to absolute bans.[15]

Conversely, for defendants convicted of "child pornography plus"—meaning the offender "engaged in threatening conduct beyond mere possession" of child pornography[16]—federal appellate courts have shown a greater willingness to uphold computer and Internet bans.[17] Conduct that may warrant harsher restrictions on computer and Internet use includes directly sexually exploitative conduct, such as the use of the Internet to develop an illegal sexual relationship with a minor;[18] use of the Internet to advise others on how to solicit children for illicit purposes;[19] sale of subscriptions to

15. *See, e.g.*, *Holm*, 326 F.3d at 878–79 (suggesting, as an alternative to a total ban on Internet access, "[v]arious forms of monitored Internet use" or other "precise restrictions that protect the child-victims used in Internet pornography"); *Freeman*, 316 F.3d at 392 (reversing a ban on the use of computers with Internet access without probation-officer approval and suggesting instead "a more focused restriction, limited to pornography sites and images," enforced through unannounced computer inspections). Furthermore, one circuit court has suggested that "the Government can check on [defendant's] Internet usage with a sting operation" as an alternative to a broad ban on Internet usage. United States v. Sofsky, 287 F.3d 122, 126–27 (2d Cir. 2002).

16. Krause & Pazicky, *supra* note 9, at 202.

17. *See, e.g.*, United States v. Boston, 494 F.3d 660, 668 (8th Cir. 2007) ("A restriction on computer usage does not constitute an abuse of discretion if . . . the defendant used his computer to do more than merely possess child pornography, particularly if the prohibition on computer usage is not absolute."); *Holm*, 326 F.3d at 878 ("We find it notable that this court's concerns . . . are reflected in the decisions of our sister circuits, which have also declined to uphold a total ban on Internet access by defendants convicted of receiving child pornography without at least some evidence of the defendant's own outbound use of the Internet to initiate and facilitate victimization of children."); *Fields*, 324 F.3d at 1027 ("In cases where defendants used computers or the internet to commit crimes involving greater exploitation, such [broad] restrictions have been upheld."); *see also* Krause & Pazicky, *supra* note 9, at 202 (noting that courts "have been more willing to affirm broad bans" when the defendant's conduct was more egregious than simple possession of child pornography).

18. *See, e.g.*, United States v. Crandon, 173 F.3d 122, 125–28 (3d Cir. 1999) (upholding an Internet ban against a defendant who used the Internet to meet a fourteen-year-old female with whom he engaged in sexual relations and of whom he took sexually explicit photographs, including one depicting the two of them engaging in sexual activity).

19. *See* United States v. Paul, 274 F.3d 155, 169 (5th Cir. 2001) (upholding a three-year ban on computer and Internet use against a defendant who possessed child pornography on his computer and advised other consumers of child pornography on how to find "young friends").

websites featuring child pornography;[20] or use of online child pornography to groom children for sexual relationships.[21] Even in these cases, however, courts remain hesitant to uphold absolute bans.[22] Instead, courts have held that bans should contain exceptions that allow the offender some legitimate uses of computers and the Internet. These exceptions include the probation-officer exception, in which the offender is banned from computer and Internet use unless specifically approved by a probation officer,[23] and the employment

20. *See Fields*, 324 F.3d at 1027 (upholding conditional computer and Internet restrictions against a defendant who operated an online child pornography service).

21. *See* United States v. Alvarez, 478 F.3d 864, 867–68 (8th Cir. 2007) (upholding a conditional Internet ban against a defendant who admitted that child pornography he accessed online played a role in his sexual assault of his two-year-old niece). "Grooming" refers to the process by which a child victim is lured into sexual abuse. For instance, child pornography may be shown to potential victims in order to normalize and encourage child sexual activities.

22. The Fifth and Eleventh Circuits have recently upheld lifetime bans on computer or Internet access in opinions that are not precedential. *See* United States v. Fortenberry, 350 F. App'x 906, 911 (5th Cir. 2009) (upholding a conditional lifetime ban barring the defendant from using the Internet without prior approval from a probation officer); United States v. Dove, 343 F. App'x 428, 433 (11th Cir. 2009) (upholding a lifetime Internet ban for a convicted sex offender who used the Internet to lure someone he thought was a thirteen-year-old girl to engage in sexual conduct, even though his contact was actually with an undercover investigator).

23. *See, e.g.*, United States v. Rearden, 349 F.3d 608, 620 (9th Cir. 2003) (noting that conditioning a defendant's access to the Internet on prior approval from a probation officer does not "involve a greater deprivation of liberty than is reasonably necessary for the purpose because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Office"); United States v. Zinn, 321 F.3d 1084, 1093 (11th Cir. 2003) (finding that an Internet prohibition was "not overly broad in that [the defendant] may still use the Internet for valid purposes by obtaining his probation officer's prior permission").

Some circuits have even struck down conditional bans that allowed use of a computer or the Internet only with the approval of a probation officer. *See, e.g.*, United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002) (holding that a conditional ban on Internet access subject to the approval of a probation officer was nonetheless "a greater deprivation on [the defendant's] liberty than [was] reasonably necessary"). In fact, such conditions have raised concerns among reviewing courts about the discretion afforded to probation officers. *See* United States v. Scott, 316 F.3d 733, 736 (7th Cir. 2003) ("Terms should be established by judges *ex ante*, not probation officers acting under broad delegations and subject to loose judicial review *ex post* . . . . Courts should do what they can to eliminate open-ended delegations, which create opportunities for arbitrary action—opportunities that are especially worrisome when the subject concerns what people may read. Is the probation officer to become a censor who determines that [the defendant] may read the *New York Times* online, but not the version of *Ulysses* at Bibliomania.com? Bureaucrats acting as guardians of morals offend the first amendment as well as the ideals behind our commitments to the rule of law."); United States v. Walser, 275 F.3d 981, 988 (10th Cir. 2001) (noting that "the vagueness of the special condition leaves open the possibility that the probation office might unreasonably prevent [the defendant] from accessing one of the central means of information-gathering and communication in our culture today").

exception, in which offenders are allowed to use computers and the Internet in the workplace or in an employment search.[24]

As some commentators have noted in the context of sex offender computer and Internet bans, federal appellate courts are "moving toward accepting the internet as a basic freedom that even convicts should not be permanently denied."[25] In striking down computer and Internet bans in child pornography possession cases, many courts have acknowledged that "[c]omputers and Internet access have become virtually indispensable in the modern world of communications and information gathering."[26] Some courts have likened the Internet's "instant link to information" to "opening a book" and its communicative properties to those of a telephone.[27] According to one court, just as a conviction for mail fraud would not justify a prohibition on the use of the mails,[28] a ban on Internet access would not be justified solely because "a computer with Internet access offers the possibility of abusive use for illegitimate purposes."[29] "A total ban on Internet access prevents use of e-mail, an increasingly widely used form of communication," and other legitimate "commonplace computer uses such as 'do[ing] any research, get[ting] a weather forecast, or read[ing] a newspaper online.'"[30] Consequently, an unconditional Internet ban "renders modern life . . . exceptionally difficult."[31] As a result, "a total restriction rarely could be justified."[32]

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24. *See, e.g.*, United States v. Peterson, 248 F.3d 79, 81 (2d Cir. 2001) (noting that the special condition of supervised release imposed by the district court banning the defendant from computer and Internet usage contained an exception for "employment purposes as authorized by the probation officer").

25. David Kravets, *30-Year Computer Ban for Sex Offender Overturned*, WIRED THREAT LEVEL (Apr. 2, 2010, 7:14 PM), http://www.wired.com/threatlevel/2010/04/computer-ban.

26. *Peterson*, 248 F.3d at 83; *see also Zinn*, 321 F.3d at 1093 ("[T]he Internet has become an important resource for information, communication, commerce, and other legitimate uses."); United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001) (finding that a special condition prohibiting the defendant from possessing a computer with Internet access was overly broad and a greater deprivation than necessary, given that it would "bar [defendant] from using a computer at a library to do any research, get a weather forecast, or read a newspaper online").

27. *White*, 244 F.3d at 1207.

28. *Sofsky*, 287 F.3d at 126.

29. *Peterson*, 248 F.3d at 83.

30. *Sofsky*, 287 F.3d at 126 (alteration in original) (quoting *White*, 244 F.3d at 1206).

31. United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003). Moreover, the court took into consideration the defendant's need to earn a living and to reenter society successfully, noting that "the conditions as currently written could affect his future productivity and jeopardize his rehabilitation." *Id.*

32. United States v. Scott, 316 F.3d 733, 737 (7th Cir. 2003).

B. State Social-Networking-Site Bans

The tailored approach of the federal courts to Internet restrictions in child pornography cases indicates a need to fashion individualized sentences for sex offenders, because not all sex offenders pose the same risks to the public after release. As states have begun to legislate in this area, however, many have enacted broader legislation restricting sex offenders' use of computers and the Internet. Some states have imposed explicit bans on the use of social networking sites by sex offenders. Unlike court-imposed computer and Internet bans, some states impose Internet restrictions on sex offenders without regard to whether the underlying offenses had any connection to computers or the Internet. Some states have enacted social-networking-site bans that apply to *all* registered sex offenders, including those who have completed their sentences. Some state laws even *require* courts to impose computer, Internet, or social-networking-site bans on certain offenders as conditions of probation or parole, curbing courts' discretion to impose narrowly tailored restrictions when circumstances warrant a more limited approach.

1. *Broad Bans Applying to Registered Sex Offenders Who Have Completed Their Sentences*. Some state legislatures have addressed the threat of online sexual predators by enacting blanket social-networking-site bans that apply to all registered sex offenders, regardless of the nature of their offenses and whether they have completed their sentences, including probation or parole. Thus, in these states, offenders who did not use a computer in the commission of the underlying offenses are still subject to a ban. North Carolina enacted such a statute in 2008, making it a Class I felony for a registered sex offender to access a "commercial social networking website."[33] The statute does not limit the ban to offenders serving

33. N.C. GEN. STAT. § 14-202.5(b) (Supp. 2010). For the purposes of the statute, North Carolina defines a "commercial social networking Web site" as an Internet site that:

> 1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
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> 2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
>
> 3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

probation or parole, or to those who are under some form of state supervision. Moreover, the statute does not restrict the ban to particular types of offenders, such as high-risk offenders, or types of offenses, like Internet-related sex offenses.[34] Rather, North Carolina bans all registered sex offenders from accessing all social networking sites where the sex offender "knows that the site permits minor children to become members or to create or maintain personal Web pages."[35]

Some states, including Nebraska, have elected to limit their social-networking-site bans to certain registered sex offenders, such as those who have committed crimes against children—including possession of child pornography.[36] Though Nebraska's ban is limited to one class of offenders, it applies to all registered sex offenders in that class, including those who have completed probation or parole.[37] The Nebraska ban prohibits more than just sex offender use of social networking sites—it bans the use of instant messaging and chatroom services as well.[38] Indiana has enacted a similar social-networking-site ban, limiting its application to registered sex offenders convicted of committing a crime against a child or found to be sexually violent predators.[39]

> 4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

Id. The statute excludes from its reach any website that "[p]rovides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform," or "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." *Id.* § 14-202.5(c).

34. *See id.* § 14-202.5(a) ("It is unlawful *for a sex offender who is registered* in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking web site." (emphasis added)).

35. *Id.* § 14-202.5(a) (2008).

36. NEB. REV. STAT. § 28-322.05(1)(a)–(j) (2009). Nebraska's social-networking-site ban, along with other provisions of its statute relating to sex offenders' use of computers and the Internet, was recently challenged in federal court. The court found parts of the statute unconstitutional as applied to sex offenders no longer on probation or parole, and the judge granted a new trial to address the constitutionality of the social-networking-site ban. *See* Doe v. Nebraska, 734 F. Supp. 2d 882, 937 (D. Neb. 2010); *see also infra* notes 123–26 and accompanying text.

37. *See* NEB. REV. STAT. § 28-322.05(1) (applying the ban to "[a]ny person required to register under the Sex Offender Registration Act").

38. *Id.* (prohibiting registered sex offenders from "knowingly and intentionally" using social networking sites, instant messaging services, or chatrooms that minors are allowed to use).

39. IND. CODE ANN. § 35-42-4-12(e) (LexisNexis 2009) (banning sex offenders convicted of offenses against children from knowingly or intentionally using a social networking site, instant

2. *State Bans Applying Only to Offenders on Probation or Parole*. Some social-networking-site bans do not apply to all registered sex offenders, but instead apply only to probationers or parolees convicted of certain sex offenses. Some states require courts to impose social-networking-site bans as a condition of probation or parole, rather than allowing courts the flexibility to fashion terms specific to the particular offender. For instance, New York mandates that for registered sex offenders who have committed an offense against a minor, offenders at greatest risk of reoffense, and offenders who used the Internet to facilitate commission of a crime, "the court shall require, as [a] mandatory condition[] of [probation or conditional discharge] that such sentenced offender be prohibited from using the internet to access . . . a commercial social networking website."[40]

Texas has taken a similar approach, applying its ban to registered sex offenders convicted of crimes against children, offenders who used a computer in the commission of the offense, and offenders assigned the highest risk level.[41] If such an offender is released on parole or mandatory supervision, the parole panel "shall prohibit the releasee from using the Internet to . . . access a commercial social networking site."[42] Minnesota has also elected to limit the reach of its social-networking-site ban to offenders who pose a higher risk to the community—those placed on "intensive supervised release."[43] Such offenders are not only prohibited from using social networking sites, but they are also banned from using instant-messaging programs or chatrooms that allow minors to use their services.[44]

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messaging program, or chatroom that "the offender knows allows a person who is less than eighteen (18) years of age to access or use"). If the offender contacts a child or a person he believes to be a child online through such services, the offense is a Class D felony. *Id.* § 35-42-4-12(e)(2). For the statutory definition of "sexually violent predator," see IND. CODE ANN. § 35-38-1-7.5(a) (LexisNexis Supp. 2010).

40. N.Y. PENAL LAW § 65.10(4-a)(b) (McKinney Supp. 2011).

41. TEX. GOV'T CODE ANN. § 508.1861(a)(1)–(3) (West Supp. 2010).

42. *Id.* § 508.1861(b)(2).

43. MINN. STAT. § 244.05(6)(c) (2009).

44. *Id.* The Minnesota Commissioner of Corrections has discretion to place offenders on intensive supervised release if it will further statutorily prescribed goals or if the inmate was convicted of certain offenses. *Id.* § 244.05(6)(b). All level III predatory offenders are placed on intensive supervised release. *Id.* § 244.05(6)(a). In order to enforce this prohibition, the Department of Corrections is authorized to conduct "unannounced searches" of the inmate's "computer or other electronic devices capable of accessing the Internet." *Id.* § 244.05(6)(b).

II. HOW SOCIAL NETWORKING SITES ARE REDEFINING EXPRESSIVE ASSOCIATION IN THE TWENTY-FIRST CENTURY

State social-networking-site bans are being imposed during an explosion in the popularity of social media. No longer simply sources of entertainment or leisure, social networking sites have become vital tools for social and political organization and expression, transforming how individuals communicate and collaborate. Indeed, social media have become a primary way in which individuals exercise their First Amendment freedom to associate with groups and causes. Thus, courts must consider whether broad social-networking-site bans infringe on this freedom of association by excessively burdening the ability of all sex offenders—including those who have already paid their debt to society—to exercise this right.

A. The First Amendment Right of Expressive Association

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[45] Although the First Amendment does not explicitly enumerate the right to freedom of association, it is well established that there is a "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[46] This right of expressive association protects the right of individuals to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[47] Even though social networking sites differ from traditional offline associations in many respects, the Supreme Court

45. U.S. CONST. amend. I.

46. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

47. *Id.* at 622. The Supreme Court has recognized two distinct rights of freedom of association. First, there is a right of intimate association, which is recognized as "a fundamental element of liberty protected by the Bill of Rights." Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987). Examples of intimate relationships to which the Court has extended constitutional protection are "those that attend the creation and sustenance of a family," *Roberts*, 468 U.S. at 619, such as "marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives," *Rotary Club*, 481 U.S. at 545 (citations omitted). Second, there is a right of expressive association, rooted in the First Amendment, which is the focus of this Note. For background regarding the constitutional evolution of both forms of the right of association, see generally John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010).

has defined protected expressive association broadly. Social networking sites, which support and complement traditional offline associations and facilitate the creation of new associations that might not otherwise exist, should come within that definition's reach.

To receive First Amendment protection, a group must, as a threshold matter, be engaged "in some form of expression, whether it be public or private."[48] This right of association extends to the individual, not just the group.[49] Moreover, as the Court explained in *Boy Scouts of America v. Dale*,[50] "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[51] The right of expressive association is "more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."[52]

The First Amendment does not protect all association, however. In *City of Dallas v. Stanglin*,[53] the Supreme Court declined to recognize "a generalized right of 'social association' that includes chance encounters in dance halls."[54] At issue in *Stanglin* was whether dance hall patrons coming together to engage in recreational dancing constituted a protected association.[55] Chief Justice Rehnquist, writing for the majority, observed that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity

48. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 3010 (2010) (Alito, J., dissenting) ("The First Amendment protects the right of '"expressive association"'—that is, 'the right to associate for the purpose of speaking.'" (quoting Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 68 (2006))).

49. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of *an individual* to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." (emphasis added)).

50. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

51. *Id.* at 655.

52. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

53. City of Dallas v. Stanglin, 490 U.S. 19 (1989).

54. *Id.* at 25.

55. *Id.*

within the protection of the First Amendment."[56] Some opportunities "might be described as 'associational' in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect."[57]

B. Social Networking Sites as Expressive Associations

Although the Supreme Court has recognized the Internet's important role in facilitating the dissemination of protected speech,[58] it has not acknowledged the Internet's role in facilitating expressive association to the same extent. Case law illustrates a well-protected right of expressive association for traditional, formal associations such as the National Association for the Advancement of Colored People (NAACP) and the Boy Scouts of America. But freedom-of-association doctrine has not yet adapted to the Internet age and its unconventional emerging associations.[59] As an increasing amount of expressive activity shifts to online spaces, expressive association protections must be extended from traditional associations to the new forms of association made possible by social media.[60]

Like traditional offline associations, social networking sites enable users to create communities for the purpose of expressing ideas, sharing information, and communicating with others—expressive activities that have traditionally been afforded First Amendment protection. Accordingly, such sites should qualify as protected expressive associations under the Supreme Court's broad definition.

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56. *Id.*

57. *Id.* at 24.

58. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997) ("This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . . '[T]he content on the Internet is as diverse as human thought.'" (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996))). The Supreme Court held in *Reno v. ACLU*, 521 U.S. 844 (1997), that expression on the Internet, like that in print media, receives full First Amendment protection. *See id.* at 849.

59. *See* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 748 (2008) (noting that freedom-of-association case law has generally been concerned with the rights of "existing, formal associations and has not yet been adapted to the networked world").

60. *See id.* at 785 (discussing emergent organizations that use email and other forms of digital communication and examining how relational surveillance implicates First Amendment interests).

In two recent cases, the Court has acknowledged the increasing importance of social networking sites as avenues of expression for individuals and associations. In *Citizens United v. Federal Election Commission*,[61] the Court explained that while "television ads may be the most effective way to convey a political message . . . it may be that Internet sources, such as blogs and social networking websites, will provide citizens with significant information about political candidates and issues."[62] The Court also explained, in *Christian Legal Society v. Martinez*,[63] that "the advent of electronic media and social-networking sites reduces the importance of . . . channels" of communication like newsletters, designated bulletin boards, and in-person networking events.[64]

As the Court has indicated, social networking sites are forcing the public to reconceptualize the notion of an association.[65] Members of online social networks can use the websites to "maintain pre-existing social networks" as well as to "build new networks with strangers based on shared interests, political views or activities."[66] On many social networking sites, members can create profiles sharing personal information and can communicate with other members through private messages, less-private "comments," instant

61. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

62. *Id.* at 913 (citations omitted).

63. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).

64. *Id.* at 2991.

65. *See* Christi Cassel, Note, *Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 669 (2007) (arguing that students who participate in online social networking spaces such as Myspace groups "deserve full protection to associate freely under the First Amendment"); Jonathan Sabin, Note, *Every Click You Make: How the Proposed Disclosure of Law Students' Online Identities Violates Their First Amendment Right to Free Association*, 17 J.L. & POL'Y 669, 703 (2009) (arguing that "blogs and social-networking activity, conducted with online aliases, email and IP addresses, are 'expressive associations'"). Krist Novoselic, bass player in the rock band Nirvana, has also argued that social networking is changing the First Amendment rights of assembly and political association. Focusing on the 2008 presidential campaign, Novoselic asserted that social networking has already changed the terrain of elections, stating that "[President Barack] Obama's campaign reinforced the power of association . . . ." Laila Barakat, *Former Nirvana Bassist to Visit Sac State*, STATE HORNET (Sacramento), Sept. 22, 2010, at A1 (alteration in original).

66. Minjeong Kim, *The Right to Anonymous Association in Cyberspace: US Legal Protection for Anonymity in Name, in Face, and in Action*, 7 SCRIPTED 51, 52 (2010).

messaging, blogging, and photo- or video-sharing capabilities.[67] Further, some sites allow members to exercise "a degree of selectivity" by making their profiles accessible only to certain individuals or groups.[68] Online networks like Facebook even allow members to create subgroups within the larger network based on shared interests in a particular social or political cause.[69] Before individuals are allowed to join these subgroups, however, they must become members of the larger online community by signing up for memberships and creating user profiles.[70]

Niche social networking websites that cater to specific groups, interests, or topics also resemble traditional associations. Unlike social networking sites that accommodate a more general audience, niche social networking sites like BlackPlanet and MyChurch target specific groups—African Americans and Christian churches that follow the Nicene Creed, respectively.[71] Because these social networking sites center on a certain theme, idea, or ideology, becoming a member communicates a certain message to the outside world. That message is deserving of protection as a form of expressive association.

The act of joining a particular social network in itself can be an expressive associational activity.[72] Online social networks have enabled people to organize more easily by "lower[ing] the costs of

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67. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, J. COMPUTER-MEDIATED COMM., Oct. 2007, http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html.

68. Sabin, *supra* note 65, at 724.

69. *See* Cassel, *supra* note 65, at 669 ("Some [Myspace] groups, such as Food Not Bombs and Support Same-Sex Marriages!, encourage support of popular social and political issues. Others, such as Occult Studies and Anarcho-Communism, offer a forum for people with alternative or unpopular views to discuss their ideas and opinions." (footnotes omitted)).

70. *See* Sabin, *supra* note 65, at 724 ("Also, like traditional organizations, Facebook has formalized membership procedures whereby individuals must create an elaborate user profile in order to join a particular network.").

71. *See* BLACKPLANET, http://www.blackplanet.com (last visited Apr. 5, 2011); MYCHURCH, http://www.mychurch.org/info/about.php (last visited Apr. 5, 2011). BlackPlanet claims to be the largest African-American website in the world and features "music, jobs, forums, chat, photos, dating personals and groups all targeted to the specific interests of the black community." BLACKPLANET, *supra*. The website MyChurch "hosts private social networks for churches" for "their congregations to help their members 'be church' online." MYCHURCH, *supra*. According to the site's "About Us" page, "[c]hurch members can post prayer requests, and share needs and resources on the bulletin board," and "[p]astors can send out announcements and upload their sermons." *Id.*

72. *See* Lathrop v. Donohue, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting) ("Joining is one method of expression.").

collective activity and decreas[ing] the importance of geographical proximity."[73] Social networking sites are not merely sources of leisure or entertainment; they have become serious tools for political and social organizing. Myspace's "Impact Channel" is an example of how these sites actively assist their members in advocating for political and social causes. Launched in 2007, the channel served as a virtual town square during the 2008 presidential election campaign, housing official Myspace profiles of the candidates and providing them with platforms from which to communicate directly with voters. The profiles, which also featured voter registration, fundraising, and volunteering tools,[74] formed an online community "designed to empower politicians, non-profits, and civic organizations to connect with users around the world and engage the Myspace community to drive political awareness and promote causes they care about."[75]

In the political context, social media outlets provide new tools for organizing and financing campaigns, mobilizing voters and volunteers, and finding out where candidates stand on the issues. The 2008 presidential election demonstrated how social networking sites can be used to "fuel[] political association" and can serve as robust platforms for grassroots organizing.[76] This historic election witnessed the emergence of new and creative uses of social media for civic and political purposes. Presidential candidates—in particular, President Barack Obama[77]—reached out to younger voters through social

73. Strandburg, *supra* note 59, at 750; *see also* Jay Krasovec, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101, 137 (1997) ("The ease of the Internet provides the ability and motivation for people to join a multitude of organizations they may have otherwise not. The home computer user simply has to pull-up an organization's home page and begin a dialogue.").

74. Alex Williams, *The Future President, on Your Friends List*, N.Y. TIMES, Mar. 18, 2007, at I1.

75. *Myspace Safety for Parents & Educators*, MYSPACE, http://www.myspace.com/help/safety/parents (last visited Apr. 5, 2011).

76. Steven Chea, *Nirvana Bassist Talks Politics, Social Networking*, SACRAMENTO PRESS, Sept. 24, 2010, http://www.sacramentopress.com/headline/37767/Nirvana_bassist_talks_politics_social_networking. According to Novoselic, social media are the "association" of the 21st century, and social networks will continue to shape the political future, especially in regard to campaign financing. *Id.*

77. President Obama went further than did other candidates in utilizing technology to help garner support and to interact with voters. His embrace of social media allowed for effective grassroots organizing unmatched by his opponents. In fact, a *Los Angeles Times* blog post dubbed President Obama the "first social media president." David Sarno, *Obama, the First Social Media President*, L.A. TIMES, Nov. 18, 2008, http://latimesblogs.latimes.com/technology/2008/11/obama-the-first.html. During the campaign, Obama's team posted eighteen hundred videos to YouTube, including his memorable speech on race. *Id.*

networking sites[78] such as Facebook, Twitter, and YouTube,[79] engaging youth in the political process in record numbers.[80] Realizing that social media can lower the barriers to participation in the political process by creating new ways to engage audiences in civic dialogue, President Obama continues to use social media in his presidency; YouTube, for example, features its own White House Channel.[81] President Obama publishes his weekly video address, along with other media, on the White House Channel, and he conducts live question-and-answer sessions with members of the public through YouTube's news and politics blog, CitizenTube.[82]

Social networking sites have also provided speakers and protestors around the world with uniquely visible platforms to reach interested fellow citizens in ways that street protests and rallies cannot.[83] For instance, social media played a significant role in helping Iranian dissident groups unite, organize, and voice their concerns to the outside world following Iran's disputed 2009 presidential election. To keep protestors from sharing footage of what was happening in the streets of Tehran, the Iranian government took steps to limit

78. *See, e.g.*, SUZANNE SOULE & JENNIFER NAIRNE, CIVIC EDUCATION AND YOUTH TURNOUT IN THE 2008 PRESIDENTIAL ELECTION: DATA FROM ENGAGED CITIZENS, WE THE PEOPLE ALUMNI NETWORK 12 (2009), *available at* http://www.civiced.org/pdfs/research/WPSA_Soule_Nairne.pdf ("Candidates reached out to [young voters], using technology to meet them on their turf to solicit their votes, time and money.").

79. In the words of one commentator, "The Obama team has written the playbook on how to use YouTube for political campaigns." Jose Antonio Vargas, *The YouTube Presidency*, WASH. POST, Nov. 14, 2008, http://voices.washingtonpost.com/44/2008/11/the-youtube-presidency.html (quoting Steve Grove, YouTube head of news and politics). This "new level of online communication" with the public helped "cultivate a sense of community amongst supporters." *Id.* (quotation marks omitted).

80. The 2008 election witnessed the third-largest youth voter turnout in American history. Press Release, Ctr. for Info. & Research on Civic Learning & Engagement, New Census Data Confirm Increase in Youth Voter Turnout in 2008 Election (Apr. 28, 2009), *available at* http://www.civicyouth.org/PopUps/Census_Youth_Voter_2008.pdf. Political analysts have cited this large youth turnout as a critical factor in President Obama's victory over Senator John McCain. Melissa Dahl, *Youth Vote May Have Been Key in Obama's Win*, MSNBC.COM (Nov. 5, 2008), http://www.msnbc.msn.com/id/27525497.

81. *whitehouse's Channel*, YOUTUBE, http://www.youtube.com/user/whitehouse (last visited Apr. 5, 2011).

82. Michael D. Shear, *Obama's YouTube Question and Answer Session*, WASH. POST, Feb. 1, 2010, http://voices.washingtonpost.com/44/2010/02/obamas-youtube-question-and-an.html.

83. Lyrissa Lidsky, *Why Governments Use Social Media and Why They Should*, PRAWFSBLAWG (Sept. 13, 2010, 9:19 AM), http://prawfsblawg.blogs.com/prawfsblawg/2010/09/why-governments-use-social-media-and-why-they-should.html.

Internet access and block text-messaging services.[84] Iranians quickly found "novel ways around the restrictions," however, by "blogging, posting to Facebook and, most visibly, coordinating their protests on Twitter."[85] Posting to Twitter did not replace traditional means of organizing, but it quickly became an extremely useful tool to win international attention. Social media played a similar role in the Egyptian revolution in early 2011, helping the revolutionaries to organize and garner international attention and support for their cause.[86] Although decades of despotic rule and repression "were kindling for the Egyptian revolution," social media were "both a spark and an accelerant for the movement."[87] Social networking sites like Twitter can thus help political movements gain momentum, coordinate their efforts, and circumvent security barriers more easily than traditional offline associations.[88]

Nevertheless, some critics argue that online networks are not formal enough to be entitled to constitutional protection or that social media platforms are built around weak ties[89]ties unlike those traditionally protected by the First Amendment right of association. Recognizing online social networking sites as protected expressive associations, however, would not create the same type of concerns as would extending constitutional protection to "chance encounters in dance halls."[90] Though social networking sites may be used for leisure and social purposes, the right of association is not limited to political forms of association. The Supreme Court has extended First

84. *See* Brad Stone & Noam Cohen, *Social Networks Spread Defiance Online*, N.Y. TIMES, June 16, 2009, at A11.

85. *Id.*

86. *See* Sam Gustin, *Social Media Sparked, Accelerated Egypt's Revolutionary Fire*, WIRED EPICENTER (Feb. 11, 2011, 2:56 PM), http://www.wired.com/epicenter/2011/02/egypts-revolutionary-fire.

87. *Id*.

88. *See* Evgeny Morozov, *Iran Elections: A Twitter Revolution?*, WASH. POST, June 17, 2009, http://www.washingtonpost.com/wp-dyn/content/discussion/2009/06/17/DI2009061702232.html ("Twitter is [being] used to publicize protests that are already going on—and bring the world's attention to the acts of violence committed by the regime. Twitter's open platform and excellent ability to quickly spread information in decentralized fashion are perfect for this . . . ."). Though critics may argue that platforms such as Twitter are not "particularly helpful for planning a revolution," they acknowledge that "in terms of involving the huge Iranian diaspora and everyone else with a grudge against Ahmadinejad, [Twitter was] very successful" during the Iranian protests. *Id.*

89. *E.g.*, Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, NEW YORKER, Oct. 4, 2010, at 42, 45–46.

90. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

Amendment protection to "forms of 'association' that are not political in the customary sense but that pertain to the social, legal, and economic benefit of the members."[91] Further, social networking sites help groups organize to engage in speech or assembly for political purposes, which is "the *kind* of activity to which the First Amendment ordinarily offers its strongest protection."[92] Social networking sites have also made it easier for individuals to connect with others who share similar interests or values. The strength of social networking sites is in their simplicity, informality, and flexibility. According to Professor Jonathan Zittrain, "The qualities that make Twitter seem inane and half-baked are what make it so powerful."[93] Because of their accessibility and their ability to democratize information and connect people across geographic boundaries, social networking sites should be recognized as the powerful tools for social and political organization that they are.

III. THE CONSTITUTIONAL RIGHTS OF SEX OFFENDERS

As the role of the Internet has expanded, sex offenders have challenged the constitutionality of statutes restricting their ability to access the Internet. Most challenges have been brought on the grounds that such restrictions are an invalid condition of probation, parole, or supervised release because they fail to meet the requirements of the relevant sentencing statute. Some offenders have challenged conditions on First Amendment grounds as well; however, courts have been generally reluctant to address these constitutional claims because to do so would require them to consider the differing rights of sex offenders.[94] Unlike persons who have not been convicted

91. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

92. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2732 (2010) (Breyer, J., dissenting) ("'Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech' in which '[c]ore political speech occupies the highest, most protected position.'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring))).

93. Stone & Cohen, *supra* note 84.

94. *See, e.g.,* United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001) ("Although the [defendant] also insists the prohibition violates his First Amendment rights, we do not reach this question. As discussed, the meaning of the condition itself makes it susceptible to remand, not its constitutionality."); United States v. Crandon, 173 F.3d 122, 128 (3d Cir. 1999) (dismissing defendant's First Amendment freedom of speech and association challenges to a computer and Internet ban without performing a constitutional analysis, on the grounds that the ban met the requirements set out in 18 U.S.C. § 3583). Courts have also been reluctant to engage in this constitutional review when the defendant is not a sex offender but a convicted computer hacker.

of a crime, who enjoy full constitutional rights, probationers and parolees have limited constitutional rights during their terms of conditional release. It is less clear, however, what kind of constitutional rights convicted persons possess once they have completed their terms of probation and parole.

A. Rights of Offenders on Probation, Parole, or Supervised Release

Federal and state sentencing statutes authorize courts and parole authorities to grant offenders terms of probation, parole, or supervised release, which "are all different forms of conditional release from prison."[95] Whereas probation is supervision imposed by a court as an alternative to imprisonment, parole is a form of supervision granted by a parole board following an early release from prison.[96] Similar to parole is the federal system of supervised release, a period of supervision which also follows a period of incarceration.[97] With supervised release, however, the offender's postconfinement monitoring is overseen by the sentencing court, rather than the U.S. Parole Commission.[98] With the passage of the Sentencing Reform Act of 1984 (SRA),[99] Congress abolished parole for federal prisoners in favor of a system of supervised release, making it the federal government's "preferred means of postconfinement monitoring."[100]

See, e.g., United States v. Mitnick, No. 97-50365, 1998 WL 255343, at *1 (9th Cir. May 14, 1998) (dismissing defendant's First Amendment challenge to supervised release conditions restricting him from accessing computers, without engaging in significant constitutional analysis). But some circuit courts have suggested, at the very least, that some Internet restrictions may impermissibly infringe upon the First Amendment rights of sex offenders, noting how indispensable the Internet is as a medium of communication and that "a total restriction rarely could be justified." United States v. Scott, 316 F.3d 733, 737 (7th Cir. 2003).

95. United States v. Weikert, 504 F.3d 1, 7 n.4 (1st Cir. 2007).

96. *Id.*

97. *Id*.

98. Gozlon-Peretz v. United States, 498 U.S. 395, 401 (1991).

99. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

100. *Gozlon-Peretz*, 498 U.S. at 401. Persons sentenced in federal court for conduct occurring before November 1, 1987, the effective date of the SRA, are with some exceptions subject to special parole, whereas those who were sentenced in federal court after November 1, 1987, are subject to supervised release under the SRA. *See id.* at 398. Although parolees and supervised releasees are governed by different rules under federal law, the constitutional status of these two groups is essentially identical. *Weikert*, 504 F.3d at 11 n.9 ("[S]upervised release is more closely akin to parole than to probation, and thus any distinction the Court might have drawn between parole and probation would not differentiate parole from supervised release." (citations omitted)). As the differences between parolees and supervised releasees are not

Most states, however, continue to utilize variations of the parole system.

Though judges and parole boards have broad discretion in fashioning special conditions for probation and parole, such discretion is limited by sentencing guidelines and other statutes. For instance, federal courts imposing conditions on supervised release must meet the requirements and limiting factors set out in 18 U.S.C. § 3553. This provision requires that the conditions be "reasonably related" to the statutory goals of deterring future criminal conduct, protecting the public, and rehabilitating the defendant, and "involve[] no greater deprivation of liberty than is reasonably necessary" to achieve those goals.[101] In deciding on the particular condition to impose, the court is to consider "the nature and circumstances of the offense and the history and characteristics of the defendant."[102]

In determining the validity of a probation or parole condition that impinges upon a fundamental right, courts will look to the relevant sentencing statute, laws governing the power of the parole authority, or general sentencing principles. Most jurisdictions embrace some variation of the general rule that conditions of probation or parole must be reasonably related to the government's interest in the rehabilitation of the offender and the protection of the public.[103]

Because challenges to probation or parole conditions are often decided on statutory or nonconstitutional grounds, however, the level of protection the Constitution affords to probationers and parolees has been left substantially unanswered. Unlike ordinary citizens, probationers and parolees "do not enjoy 'the absolute liberty to

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relevant to this Note's analysis, the term "parolee" will be used to refer to offenders under both the state parole system and the federal system of supervised release.

101. 18 U.S.C. § 3583(d)(1)–(2) (2006).

102. *Id.* § 3553(a)(1).

103. *See, e.g.*, United States v. Sines, 303 F.3d 793, 801 (7th Cir. 2002) ("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."); United States v. Ritter, 118 F.3d 502, 504 (6th Cir. 1997) ("[W]here a condition of supervised release is reasonably related to the dual goals of probation, the rehabilitation of the defendant and the protection of the public, it must be upheld." (quoting United States v. Bortels, 962 F.2d 558, 560 (6th Cir. 1992))); United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991) ("The restriction on [defendant's] association rights is valid if: (1) primarily designed to meet the ends of rehabilitation and protection of the public, and (2) reasonably related to such ends."). It would also be helpful if courts imposed an additional requirement that restrictions bear a reasonable relationship to the crime for which the offender was convicted or to the offender's potential future criminality.

which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] [and parole] restrictions.'"[104] The Supreme Court has taken a comparative approach to analyzing the level of protection that the Constitution affords to persons with diminished rights. There is "a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service."[105] On one end of the continuum are prisoners, who receive the least amount of constitutional protection.[106] Next are supervised releasees, followed in descending order by parolees and probationers.[107] Because federal supervised release is "meted out in addition to, not in lieu of, incarceration,"[108] it is considered to be a stronger punishment than probation, permitting a greater deprivation of constitutional rights.

B. Rights of Offenders Who Have Completed Their Sentences

Though the Supreme Court has to some extent articulated the constitutional space occupied by offenders who are on probation, parole, or supervised release, it has made no similar pronouncement regarding the constitutional status of those who have completed their sentences.[109] Unlike prisoners, these offenders have completed their

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104. Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (first alteration in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

105. Samson v. California, 547 U.S. 843, 848 (2006) (quoting United States v. Knights, 534 U.S. 112, 119 (2001)).

106. *See Griffin*, 483 U.S. at 874 n.2 ("We have recently held that prison regulations allegedly infringing constitutional rights are themselves constitutional as long as they are 'reasonably related to legitimate penological interests.'" (quoting O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987))).

107. *See Samson*, 547 U.S. at 850 ("[O]n the Court's continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers." (quoting United States v. Cardona, 903 F.2d 60, 63 (1st Cir. 1990))).

108. United States v. Reyes, 283 F.3d 446, 461 (2d Cir. 2002) (quoting *Cardona*, 903 F.2d at 63).

109. Because courts have upheld laws preventing felons from voting, serving on juries, and possessing guns, it is commonly assumed that felons have diminished constitutional rights in general. The abrogation of felons' rights in these areas, however, has been upheld on much narrower grounds. For instance, the Supreme Court has upheld laws disenfranchising felons based upon the express language of "participation in rebellion, or other crime" in the Apportionment Clause in Section 2 of the Fourteenth Amendment and because it was historically viewed as valid to disenfranchise criminals with felony convictions, not because felons have limited constitutional rights in general. Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974). Furthermore, the constitutionality of laws categorically excluding felons from exercising

terms of imprisonment, so there are no legitimate penological reasons to override the exercise of their fundamental rights. And unlike probationers and parolees, they are not subject to any supervisory control that might otherwise justify an impingement of their constitutional freedoms. Yet sex offenders are subject to severe regulations, such as residency restrictions, after completing their sentences. The Supreme Court has yet to review the constitutionality of sex offender laws, beyond registration requirements and community notification laws, making the constitutionality of these other restrictions unclear.[110]

Second Amendment rights is arguably unclear after *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). At least one court has held that such prohibitions violate state constitutional law when applied to nonviolent offenders. *See* Britt v. State, 681 S.E.2d 320, 322–23 (N.C. 2009) (holding that as applied to a nonviolent felon, a state law prohibiting felons from possessing firearms violated the North Carolina Constitution).

110. Elissa Zlatkovich, Note, *The Constitutionality of Sex Offender Residency Restrictions: A Takings Analysis*, 29 REV. LITIG. 219, 220 (2009). Though many states in recent years have enacted residency restrictions banning sex offenders from certain areas offline—such as schools, childcare facilities, or other places where children congregate—only one federal court of appeals has considered the constitutionality of such restrictions. *See* Doe v. Miller, 405 F.3d 700, 703–04 (8th Cir. 2005) (upholding the constitutionality of an Iowa statute that prohibited persons who had committed a criminal sex offense against a minor from residing within 2,000 feet of a school or childcare facility). Notably, the lower court in *Doe v. Miller* found that Iowa's residency restriction violated the Fourteenth Amendment right to substantive and procedural due process, the Ex Post Facto Clause, and the Fifth Amendment right against self-incrimination. Doe v. Miller, 298 F. Supp. 844, 880 (S.D. Iowa 2004). As with Internet restrictions, residency restrictions go beyond both the sex offender registration schemes deemed constitutional by the Supreme Court and the federal Sex Offender Registration and Notification Act, Pub. L. No. 109-248, §§ 101–155, 120 Stat. 587, 590–611 (2006) (codified at 18 U.S.C. § 2250 (2006) and 42 U.S.C. §§ 16,901–16,962 (2006)). To date, the Court has only upheld sex offender registration laws on two occasions: in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), and in *Smith v. Doe*, 538 U.S. 84 (2003), both decided on March 5, 2003. The statutes presented in both cases required only that sex offenders register with state or local law enforcement and that the resulting information be made publicly available after the offenders' release from prison. *See Conn. Dep't of Pub. Safety*, 538 U.S. at 4–5 (noting that Connecticut's sex offender registration law requires offenders to "register with the Connecticut Department of Public Safety (DPS) upon their release into the community" and that it also "requires DPS to compile the information gathered from registrants and publicize it"); *Smith*, 538 U.S. at 90 ("The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system."). Since these two cases were decided, a number of states have added residency restrictions to their sex offender regulatory schemes, which have been "challenged on various constitutional grounds, with mixed results for plaintiffs." Zlatkovich, *supra*, at 220. Some courts have upheld residency restrictions over due process, cruel and unusual punishment, and ex post facto challenges. *See, e.g.*, Denson v. State, 600 S.E.2d 645, 647 (Ga. 2004) (holding that a statute prohibiting convicted sex offenders from living within 1,000 feet of a daycare facility was not an unconstitutional ex post facto law as applied to a convicted sex offender who already lived within 1,000 feet of a day care facility). Other state courts have struck down residency restrictions on due process, equal protection, and

Several federal courts reviewing the constitutionality of Internet restrictions on sex offenders who are no longer subject to supervision have acknowledged the dearth of precedent on the subject. For instance, in *Doe v. Shurtleff*,[111] a federal district court held that a Utah law requiring registered sex offenders to disclose their Internet identifiers to the state violated the First Amendment.[112] The court noted the state's failure to "cite any authority . . . supporting the proposition that a sex offender who has completed his prison term and is not on parole or probation gives up First Amendment rights."[113] The district court relied on Supreme Court precedent holding that "even people in custody have First Amendment rights," and on the Tenth Circuit's ruling "that a complete, unconditional ban on internet access as a condition of supervised release is overly broad and impermissible," even for a repeat sex offender.[114] The district court further found that the defendant had "not given up his right to anonymous Internet speech because of his status as a sex offender."[115]

A similar challenge was brought in *Doe v. Marion County*[116] against an Indiana law requiring registered sex offenders to submit to searches of their personal computer equipment and to consent to the

takings grounds, among others; People v. Leroy, 828 N.E.2d 769, 777 (Ill. App. Ct. 2005) (holding that the plaintiff sex offender's right to due process was not violated by a state statute prohibiting child sex offenders from living within 500 feet of a school and that the regulation was not a cruel and unusual punishment in violation of the Eighth Amendment). *See* Mann v. Ga. Dep't of Corr., 653 S.E.2d 740, 760 (Ga. 2007) (holding that a residency restriction was an impermissible taking without adequate compensation, as applied to a registered sex offender who purchased a home in accordance with the statute but was forced to move out when a childcare center later opened within 1,000 feet of his home); Elwell v. Township of Lower, No. CPM-L-651-05, 2006 WL 3797974, at *14–15 (N.J. Super. Ct. Dec. 22, 2006) (holding that a local residency restriction violated the plaintiff sex offender's substantive due process rights under the New Jersey Constitution because it was overly broad and failed to balance the nature of the rights affected and the extreme intrusion on those rights with the public need for the law). Arguably, the constitutionality of statutorily mandated residency restrictions is unclear.

111. Doe v. Shurtleff, No. 1:08-CV-64 TC, 2008 WL 4427594 (D. Utah Sept. 25, 2008), *vacated as moot*, 2009 WL 2601458 (D. Utah Aug. 20, 2009).

112. *Id.* at *19. The court enjoined enforcement of the section of Utah's sex offender registry statute requiring registration of online identities. *Id.* at *9. In response, the Utah legislature amended its statute to address the constitutional violations, and the court permitted its enforcement. *See* Doe v. Shurtleff, No. 1:08-CV-64 TC, 2009 WL 2601458, at *1 (D. Utah Aug. 20, 2009). The Tenth Circuit rejected the defendant's constitutional challenge to the revised statute. Doe v. Shurtleff, 628 F.3d 1217, 1220 (10th Cir. 2010).

113. *Shurtleff*, 2008 WL 4427594, at *19.

114. *Id.* at *19–20.

115. *Id.*

116. Doe v. Marion Cnty., 566 F. Supp. 2d 862 (S.D. Ind. 2008).

installation of monitoring hardware or software on their devices.[117] The district court ruled that sex offenders who "[h]ave completed their sentences and are no longer on parole, probation, or any other form of court supervision" were "entitled to full Fourth Amendment protection, without the lowered expectation of privacy" that supervised releasees have.[118] Because the plaintiffs had completed their punishments and "returned to society," they "ha[d] rights under the United States Constitution."[119] "A person's status as a felon who is no longer under any form of punitive supervision . . . does not permit the government to search his home and belongings without a warrant."[120] Accordingly, the court found that the "unprecedented new law, however well-intentioned," violated the plaintiffs' Fourth Amendment rights.[121]

Most recently, a federal district court reviewed the constitutionality of several amendments to the Nebraska Sex Offender Registration Act,[122] including one requiring registered sex offenders to consent to warrantless searches of their computers and to the installation of monitoring hardware or software.[123] After noting that the requirement was "foreign to the federal Sex Offender Registration and Notification Act," the court ruled that the search requirement was unconstitutional as applied to "persons who [were] not presently on probation, parole or court-monitored supervision" at the time of its enactment.[124] The court observed that "cases dealing with installing equipment to monitor persons during periods of court or parole supervision are not persuasive" because "they either (1) involve a judicial determination based on an individualized assessment of need or (2) deal with persons who have a lessened expectation of privacy because they have not yet been released from criminal justice supervision."[125] The court found that the state had "cited no case" to support its position that a sex offender "who has completed his or her punishment and supervision for a sex crime was

117. *Id.* at 865.
118. *Id.* at 865, 879.
119. *Id.* at 866.
120. *Id.* at 883.
121. *Id.* at 866.
122. NEB. REV. STAT. §§ 29-4001 to -4014 (2009).
123. Doe v. Nebraska, 734 F. Supp. 2d 882, 896–97 (D. Neb. 2010).
124. *Id.* at 897, 900.
125. *Id.* at 902.

held to have a weaker claim to Fourth Amendment protection than ordinary citizens."[126]

Although the Supreme Court has not yet addressed the constitutionality of social-networking-site bans, several federal courts have struck down other restrictions on sex offenders' Internet use.[127] Without precedent or case law to suggest otherwise, federal courts seem unwilling to hold that sex offenders who have completed their sentences have limited First and Fourth Amendment rights.

IV. CONSTITUTIONAL AND POLICY CONSIDERATIONS OF SOCIAL-NETWORKING-SITE BANS

A conviction for a sex offense does not completely eradicate an individual's constitutional rights. Social-networking-site bans, however, threaten those rights retained by sex offenders. First Amendment concerns should lead states to enact more narrowly tailored restrictions on the use of social networking sites by sex offenders on probation, parole, or supervised release, and to abandon such legislation altogether for those offenders who have already completed their sentences. Furthermore, broad social-networking-site bans will likely be ineffective at reducing sexual violence, as they are based on a number of faulty assumptions concerning sex offenders and the nature of sexual assault. States should carefully reevaluate the myths underlying social-networking-site bans in order to fashion more empirically based laws that adequately serve the goals they purport to meet.

126. *Id.* The Nebraska statute also included a social-networking-site ban; however, the judge granted a new trial to address the constitutionality of this ban. *Id.* at 899 ("Factually, both sides have failed to produce a record that would allow me to determine how Neb. Rev. Stat § 28-322.05 (making it a crime for certain offenders to use social networking sites and instant messaging or chat room services that allow a person under 18 to access or use such site or service) would actually impact particular Plaintiffs or offenders more generally. Whether the challenge is 'as-applied' or 'facial,' I must understand, as a factual matter, how the statute works. . . . [M]y independent research suggests [the statute] may have far reaching (and, perhaps, unintended) consequences."). This is the only case to date involving a challenge to a social-networking-site ban, and it is still pending.

127. Doe v. Shurtleff, No. 1:08-CV-64 TC, 2008 WL 4427594, at *4 (D. Utah Sept. 25, 2008), *vacated as moot*, 2009 WL 2601458 (D. Utah Aug. 20, 2009).

A. The Constitutionality of Social-Networking-Site Bans Targeting Sex Offenders

Even though some state statutes treat all sex offenders alike, not all registered sex offenders have the same legal status. Offenders on probation, parole, or supervised release have diminished constitutional rights and thus receive less constitutional protection than those who are no longer under state supervision. At least some courts have afforded traditional constitutional protections to sex offenders who have completed their sentences.[128] As a result, blanket social-networking-site bans should not apply with the same force to all registered sex offenders.

When reviewing the constitutionality of social-networking-site bans that apply to *all* registered sex offenders, courts should apply different standards to offenders on probation, parole, or supervised release than to those who are not under state supervision. In the context of the right to anonymous speech and the right against suspicionless searches, courts have applied the same standards to sex offenders who have completed their sentences as would apply to nonoffenders. It is thus likely that in analyzing whether social-networking-site bans impermissibly infringe upon the associational rights of sex offenders not on probation, parole, or supervised release, courts would use the same constitutional standards that apply to nonoffenders.

It is unclear what standards would apply to offenders serving terms of probation, parole, or supervised release—all of whom possess limited constitutional rights. Unlike restrictions determined at sentencing, some social-networking-site bans are automatically imposed without an individualized assessment of the offender's likelihood to recidivate or to commit Internet sex crimes. Many of these bans are not "designed to prevent conduct similar to that which [the offender] had been convicted of," but rather are restrictions on associational freedoms "quite independent of any criminal activity."[129] Therefore, normally relevant sentencing rules should apply. If courts do apply constitutional standards, they will likely use a less stringent form of the test, similar to what courts have done when applying the

128. *See supra* notes 111–26 and accompanying text.

129. Best v. Nurse, No. CV 99-3727(JBW), 1999 WL 1243055, at *3 (E.D.N.Y. Dec. 16, 1999).

Fourth Amendment totality-of-the-circumstances test to searches and seizures of probationers and parolees.[130]

1. *Sex Offenders Who Have Completed Their Sentences.* State regulations that seek to ban all registered sex offenders from accessing social networking sites directly infringe on the First Amendment right of association. Online social networks should be recognized as expressive associations, given that a substantial amount of expressive activity occurs on such sites. A complete ban on the use of social networking sites would significantly burden sex offenders' ability to engage in that protected expressive activity.[131] The Constitution affords standard First Amendment protection to offenders who are no longer on probation, parole, or supervised release.[132] While the right of expressive association is not absolute, it can only be infringed upon "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[133]

States have a compelling interest in protecting minors from sexual violence. It is questionable, however, whether social-networking-site bans, broadly applied, pass constitutional muster.[134]

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130. *See, e.g.*, Samson v. California, 547 U.S. 843, 852 (2006) ("Examining the totality of the circumstances pertaining to petitioner's status as a parolee . . . we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.").

131. *See supra* Part III.

132. *See supra* Part III.B.

133. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). The "significantly less restrictive" language used in *Roberts* has been equated with the strict scrutiny standard. John D. Inazu, *The Unsettling 'Well-Settled' Law of Freedom of Association*, 43 CONN. L. REV. 149, 176 n.142 (noting that in *Roberts*, the Court held that "the state achieved its interest through 'the least restrictive means'" and "that the 'incidental abridgement' of protected speech '[was] not greater than [was] necessary,'" and that in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), four dissenting Justices likened the *Roberts* test to strict scrutiny (alterations in original) (quoting *Roberts*, 468 U.S. at 626, 628) (citing *Boy Scouts of Am.*, 530 U.S. at 640)).

134. In *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010), before ordering a new trial to address the constitutionality of a social-networking-site ban on free speech grounds, a federal district court judge expressed his concern that the statute "may have far reaching (and, perhaps, unintended) consequences." *Id.* at 899. The judge attached to the opinion his independent research, which illustrated "numerous examples of sites that might plausibly be banned for [sex] offenders subject to the criminal provisions" of the law. *Id.* These included chatrooms on Breastcancer.org, DiabetesDaily.com, and CivilWarHome.com; popular instant messaging services such as Yahoo! Messenger and Gmail Chat; social networking sites such as Facebook, Myspace, and LinkedIn; community language learning sites such as LiveMocha.com; issue networking sites such as OneClimate.net; and medical networking support groups such as DailyStrength.org. *Id.* Attachment A, 2010 U.S. Dist. LEXIS 84621, at *148–54.

By banning all use of social networking sites by sex offenders, such regulations go "far beyond what [is] necessary to achieve a legitimate governmental purpose."[135] Some of the social-networking-site bans proscribe a substantial amount of constitutionally protected activity, as they arguably prevent sex offenders from engaging in legitimate protected expression not only on social networking sites[136] but also on other websites with social networking capabilities, such as political blogs[137] or the *New York Times* website.[138]

There are less restrictive ways of serving states' compelling interest than such blanket prohibitions. Although courts have held that states cannot constitutionally subject offenders no longer on probation or parole to less restrictive alternatives—such as unannounced searches of computer equipment or the installation of monitoring hardware and software[139]—states can narrow the

135. Shelton v. Tucker, 364 U.S. 479, 489 (1960).

136. *See Legislative Memo: The Electronic Security and Targeting of Online Predators Act (e-STOP)*, N.Y. CIVIL LIBERTIES UNION (2008), http://www.nyclu.org/node/1814 (last visited Apr. 5, 2011) ("[A] tremendous amount of communication takes places [*sic*] between adults on social networking sites. Many people visit MySpace, for example, to engage in political speech or advocacy, or to learn about music performances. However the proposed e-STOP law would subject to criminal suspicion and prosecution former [sex] offenders engaged in lawful speech that is directed to an adult audience, without any intent that the speech reach minors.").

137. Blogs, short for "web logs," have become an increasingly popular form of expression today. *See* Jay M. Zitter, *First Amendment Protection Afforded to Blogs and Bloggers*, 35 A.L.R. 6th 407, 416 (2008) (noting that "persons [on blogs] . . . may feel freer to criticize over the Internet than they would in person or in print" and that many blogs "deal with politics, business, and [the like]").

138. Many news websites, such as the *New York Times*, have blogs or allow members to adopt nicknames or usernames, post information which other users can view, leave messages or comments, or direct links to other social networking sites. Furthermore, there are other websites with social networking capabilities that sex offenders could be banned from using, such as Digg, which helps facilitate the sharing of information online. *What Is Digg?*, DIGG, http://about.digg.com/about (last visited Apr. 5, 2011) ("We're here to promote that conversation and provide tools for our community to discuss the topics that they're passionate about."). Another example is LinkedIn, a social networking site on which over ninety million professionals exchange information and employment opportunities. LINKEDIN, http://www.linkedin.com (last visited Apr. 5, 2011). There are even online social networking and support groups for offenders, which may help the rehabilitation process by providing job postings and information on where to locate a house, find a meal, or get an identification card. *See* MYCONSPACE, http://www.myconspace.org (last visited Apr. 5, 2011) (noting that this is a "website where you access information about jobs, put up a resume, find out about civil rights issues and news, [and] post information about yourself and your life").

139. *See Doe*, 734 F. Supp. 2d at 901 (holding a requirement that sex offenders submit to searches and monitoring of computer equipment unconstitutional as applied to offenders no longer on probation or parole or under court supervision); Doe v. Marion Cnty., 566 F. Supp. 2d 862, 888 (S.D. Ind. 2008) (holding unconstitutional a law requiring sex offenders no longer

application of social-networking-site bans to only those sex offenders who used the Internet or social networking sites in the commission of their underlying offenses.[140] Indeed, some states have taken this more narrowly tailored approach.[141] Requiring a nexus between the prohibited online activity and the offense would prevent unnecessary restrictions on the First Amendment rights of the significant group of sex offenders who have committed only technical sex offenses and who did not use a computer, the Internet, or a social networking site in the commission of the underlying sex offense.

Moreover, states can limit the application of broad social-networking-site restrictions to forbid only unlawful and unprotected expressive activities, such as using social networking sites to communicate with or to seek sexual relationships with minors.[142] Most state regulations banning sex offenders from social networking sites make criminal the mere act of accessing the website, even if done with the intent of engaging in political speech or advocacy, thereby abridging offenders' freedom to engage in a substantial amount of lawful expressive activity.[143] The First Amendment should require "a more precise restriction" than a total ban on all use of these online forums by registered sex offenders.[144]

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under any other kind of court supervision to consent to searches of their computer equipment or Internet-capable devices).

140. The Supreme Court has held, at least in the traditional free speech context, that limiting restrictions to a certain class of people is a permissible way of narrowly tailoring a law to promote compelling government interests. *Cf.* United States v. Playboy Entm't Grp., 529 U.S. 803, 815 (2000) ("Targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.").

141. *See, e.g.*, TEX. GOV'T CODE ANN. § 508.1861(a)(1)–(3) (West 2009) (applying a social-networking-site ban to registered sex offenders convicted of crimes against children, offenders who used a computer or the Internet in the commission of the offense, and offenders assigned the highest numeric risk level of three).

142. *Cf.* Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (holding that the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251–2260 (2006), was overly broad and violated the First Amendment because it banned not only real child pornography, which is unprotected speech, but also sexually explicit images that appeared to depict minors but that were produced without using real children, abridging the freedom to engage in a substantial amount of lawful speech).

143. For instance, a North Carolina statute prohibits all registered sex offenders from accessing or using social networking sites, regardless of the purpose behind their use of such sites. *See supra* Part I.B.1.

144. *Free Speech Coal.*, 535 U.S. at 258. As the Supreme Court stated in response to the government's argument that it was necessary to ban virtual child pornography because pedophiles can use it as a means to victimize children, "There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral

2. *Sex Offenders Currently on Probation, Parole, or Supervised Release.* As discussed earlier, relevant sentencing rules will likely apply when courts are reviewing the constitutionality of social-networking-site bans as applied to sex offenders who remain under state supervision. Under those rules, even if the state action is found to have some rehabilitative or deterrent purpose and to promote public safety, there is usually a requirement that the conditions imposed be reasonably related to such ends.[145] For an offender who has not used a computer, the Internet, or a social networking site in the commission of the sex offense, it is unlikely that a social-networking-site ban would be reasonably related to the offender's rehabilitation or to the protection of the public from the offender's potential future crimes. Such a ban would not be primarily designed to prevent the offender from reengaging in the conduct for which he was convicted.

On the other hand, because sex offenders on probation, parole, or supervised release have diminished rights, states may face lower constitutional limits on restricting associational freedoms. Although it is unclear how much lower the constitutional requirements might be for restrictions that are not imposed as part of a sentence, probationers and parolees still retain some First Amendment rights. Case law suggests that even in the probationer and parolee context, there should be some narrow tailoring, and restrictions should be "no greater than needed where they infringe on First Amendment rights."[146] As several circuit courts have suggested in the context of sex offender Internet bans, the state's interest in protecting children from sexual victimization online can be achieved through significantly less restrictive means, such as the installation of monitoring and filtering software, unannounced searches of the offender's computer, or prohibiting the use of the Internet without probation-officer

purposes, yet we would not expect those to be prohibited because they can be misused." *Id.* at 251.

145. *See, e.g.*, Birzon v. King, 469 F.2d 1241, 1243 (2d Cir. 1972) ("[W]hen a convict is conditionally released on parole, the Government retains a substantial interest in insuring that its rehabilitative goal is not frustrated and that the public is protected from further criminal acts by the parolee. Although a parolee should enjoy greater freedom in many respects than a prisoner, we see no reason why the Government may not impose restrictions on the rights of the parolee that are reasonably and necessarily related to the interests that the Government retains after his conditional release.").

146. Best v. Nurse, No. CV 99-3727(JBW), 1999 WL 1243055, at *4 (E.D.N.Y. Dec. 16, 1999).

approval.[147] There is no reason why these less restrictive means would not be equally applicable in the context of social-networking-site bans. If an offender who used the Internet or a social networking site to facilitate the commission of a sex offense poses a significant threat, however, a more restrictive ban may be the only means by which the state can achieve its compelling interest.[148] Only in those cases should blanket bans pass constitutional muster.

B. Social-Networking-Site Bans Are Based on Widespread Faulty Assumptions about Sex Offenders

Current sex offender laws are predicated upon several widespread but faulty assumptions about sexual violence and sex offender behavior. Like sex offender registration requirements and residency restrictions, social-networking-site bans are another well-intentioned—but ultimately misguided—approach to sex offender management. Broad social-networking-site bans are a flawed means of protecting children at risk of sexual assault. While failing to provide real protection to children, such measures also thwart the successful reintegration of sex offenders into the community, which is crucial to prevent recidivism. Rather than continuing to blindly enact social-networking-site bans, states should reexamine the public policy concerns underlying current sex offender regulation and consider whether social-networking-site bans adequately serve their purported goals.

1. *Myth: All Registered Sex Offenders Are Violent Sexual Predators, Rapists, or Pedophiles.* Perhaps the most erroneous assumption underlying American sex offender policy is the belief that all registered sex offenders are violent sexual predators, rapists, or pedophiles. Unfortunately, the sex offender registration system's one-size-fits-all approach has reinforced this notion by requiring the registration of both violent sex offenders and those who have committed only nonviolent, technical sex offenses—offenses that "may have had little or no connection to sex" but that trigger registration in that state.[149]

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147. *See supra* notes 15, 23 and accompanying text.

148. *See supra* notes 16–21 and accompanying text.

149. HUMAN RIGHTS WATCH, *supra* note 2, at 39. Sex offender registries are intended to aid investigations by providing law enforcement with a list of the usual suspects, which can be cross-checked whenever a sex crime occurs. *Id.* at 4. This legislative policy choice reflects the questionable assumption that known sex offenders commit most sex crimes. *Id.* Yet because sex

States have made varying policy choices in defining which offenses require criminals to register as sex offenders.[150] As a result, state sex offender registries vary greatly, so that a qualifying sex offense in one state may not require registration in the next. Once a person is a registered sex offender in one state, however, he is always considered a sex offender in any other state.[151]

In many states, offenders who have committed nonviolent offenses such as prostitution, streaking, or public urination can be required to register.[152] Furthermore, juvenile sex offenders in most states are subject to sex offender regulations, including registration requirements, community notification, and residency restrictions.[153] Though some minors' offenses can be serious, minors are often subject to sex offender regulations for nonviolent conduct such as statutory rape in a consensual sexual relationship, "playing doctor," or "exposing themselves."[154] Thus, many sex offenders subjected to harsh and punitive regulations are not the dangerous sexual predators

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offenses are largely underreported, and thus underprosecuted, it is likely that most offenders are not known to law enforcement. *Id.* In the end, registries can have the effect of providing the public with a dangerously false sense of security. *See id.*

150. *See* BRENDA V. SMITH, NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517369 (listing for each state the offenses requiring registration, information maintained in registries, information about community notification and websites, limitations on residency and employment, and duration of the registration requirement).

151. Under the Adam Walsh Act, a sex offender who is required to register in one state and who knowingly fails to register or update registration following relocation to another state can be imprisoned for up to ten years. 18 U.S.C. § 2250 (2006).

152. HUMAN RIGHTS WATCH, *supra* note 2, at 39–40 (finding that at least five states require registration for adult prostitution-related offenses, at least thirteen require it for urinating in public (only two states require a child to be present), at least twenty-nine states require registration for a teenager who had consensual sex with another teenager, and thirty-two states require flashers and streakers to register (only seven states require a child to be present)).

153. *Id.* at 8.

154. *Id.* Many commentators have criticized the policy behind requiring children who are convicted of sex crimes to register as sex offenders. Some of the conduct, "while frowned upon, does not suggest a danger to the community" and merely "reflects the impulsiveness and perhaps difficulty with boundaries that many teenagers experience and that most will outgrow with maturity." *Id.* Moreover, even though there is "little statistical research on recidivism by youth sex offenders, the studies that have been done suggest recidivism rates are quite low." *Id.* at 9. Currently, the "sending of nude or seminude pictures [by text message], a phenomenon known as sexting, is a fast-growing trend among teens." Feyerick & Steffen, *supra* note 9. Sexting that involves the transmission and receipt of pornographic images of minors is treated as child pornography in most states, and conviction of a crime against children automatically triggers sex offender registration in many states. *Id.* Thus, a child may have to register as a sex offender for sending naked pictures of himself or herself.

whom the public fears. Moreover, the more cluttered state registries are with technical sex offenders, the more difficult it can be for law enforcement to identify offenders who actually pose a threat to the public and thus warrant careful monitoring.[155]

2. *Myth: Strangers Commit Most Sexual Offenses.* Another popular misconception is that most sex offenses are committed by strangers. Research consistently shows, however, that an overwhelming majority of sex offenses are committed by victims' relatives or acquaintances, regardless of whether the victim is a child or an adult.[156] According to the Department of Justice (DOJ), only 13.8 percent of all sexual assault cases reported to law enforcement agencies involved offenders who were strangers to their victims.[157]

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155. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 9 ("[T]he proliferation of people required to register even though their crimes were not serious makes it harder for law enforcement to determine which sex offenders warrant careful monitoring."); *id.* at 45 ("Another law enforcement official told Human Rights Watch, 'The expansion of state sex offender registries to include more offenses and longer registration periods has really compromised our ability to monitor high-risk sex offenders.'").

156. *See, e.g.*, DAVID FINKELHOR, HEATHER HAMMER & ANDREA J. SEDLAK, SEXUALLY ASSAULTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 5 (Office of Juvenile Justice & Delinquency Prevention, Bulletin No. NCJ 214383, 2008), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/214383.pdf (noting that a 1999 study indicated that 10 percent of all child sexual assault victims were assaulted by a family member, 64 percent by an acquaintance, and 25 percent by a stranger—a category that includes someone the child knew by sight but not on a personal basis); LAWRENCE A. GREENFELD, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT, 1997, at 4 (Bureau of Justice Statistics, Bulletin No. NCJ 163392, 1997), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF ("Three out of four rape/sexual assault victimizations involved offenders . . . with whom the victim had a prior relationship as a family member, intimate, or acquaintance."); PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 21 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/210346.pdf ("Only 16.7 percent of all female victims and 22.8 percent of all male victims were raped by a stranger. In general, female victims tended to be raped by current or former intimates, defined in this study as spouses, male and female cohabiting partners, dates, boyfriends, and girlfriends. In comparison, male victims tended to be raped by acquaintances, such as friends, teachers, coworkers, or neighbors." (cross-reference omitted)); Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1403 (2009) ("More than ninety percent of sex crimes against children are committed by fathers, stepfathers, relatives, and acquaintances, rather than by . . . strangers. In fact, the percentage of nonstranger molestations may be even higher as the majority of this type of sexual abuse is not reported and/or prosecuted." (footnotes omitted)).

157. HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (Bureau of Justice Statistics, Bulletin No. NCJ 182990, 2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf (detailing victim-offender relationship statistics for sexual assault cases).

The other 86.2 percent of reported sexual assaults were committed by someone known to the victim, such as a family member or acquaintance.[158] In particular, the DOJ reported that when the victim was a child, 34.2 percent of offenders were family members and 58.7 percent were acquaintances, while only 7 percent were strangers.[159]

Despite these statistics, legislators have chosen to focus on the threat posed by the predatory-stranger sex offender.[160] Legislatures that enact bans on sex offender use of computers, the Internet, and social networking sites overstate the threat posed by online sexual predators "to the neglect of the everyday sexual violence committed by known and familiar family, friends and acquaintances"—the "most common sexual threats" that victims face.[161] This kind of "stranger-danger" legislation ignores the fact that, even in cyberspace, many threats that children face are posed by individuals with whom the child has a preexisting relationship.[162]

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158. *Id.*

159. *Id.* For adult victims, 11.5 percent of sexual assaults were committed by family members, 61.1 percent were committed by acquaintances, and 27.3 percent were committed by strangers. *Id.*

160. *See, e.g.*, *Bill Analysis: Hearing on AB-2208 Before the Assemb. Comm. on Appropriations*, 2009–2010 Leg., Reg. Sess. (Cal. 2010), *available at* ftp://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2201-2250/ab_2208_cfa_20100511_154020_asm_comm.html ("The author contends this bill will provide additional protection from known sex offenders. As the Internet becomes today's playground, social networking websites are increasingly being utilized by children and youth. There must be clear restrictions on sex offenders' access to these websites to protect our children on-line." (quotation marks omitted)).

161. Richard Wright, *Introduction* to SEX OFFENDERS: FAILED POLICIES, NEW DIRECTIONS 4 (Richard Wright ed., 2009); *see also* Saxer, *supra* note 156, at 1403 ("[C]urrent legislation and public awareness focusing on the stranger may keep us from addressing solutions that would aid the majority of victims." (footnotes omitted)). Focusing on online victimization—at the expense of the more substantial threat of victimization offline—"creates a danger that known risks will be obscured, and reduces the likelihood that society will address the factors that lead to known risks, and often inadvertently harm youth in unexpected ways." Andrew Schrock & danah boyd, *Online Threats to Youth: Solicitation, Harassment, and Problematic Content*, *in* INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY AND ONLINE TECHNOLOGIES app. C, at 5 (2008), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf.

162. JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 2 (2006), *available at* http://www.unh.edu/ccrc/pdf/CV138.pdf ("[F]indings suggest new directions are needed for safety and prevention education [online]. . . . For instance the increase in unwanted sexual solicitations and harassment from people youth know offline suggests the focus should not be simply on the danger from people youth do not know in person."); *see also* Kimberly J. Mitchell, David Finkelhor & Janis Wolak, *The Internet and Family and Acquaintance Sexual Abuse*, 10 CHILD MALTREATMENT 49, 49 (2005) ("Although the stereotype of Internet crimes involves unknown adults meeting juvenile victims online, Internet

3. *Myth: Sex Offenders Recidivate at a Higher Rate than Any Other Criminals.* Sex offenders are subject to more onerous regulations after serving their terms of imprisonment, probation, or parole than any other group of criminals.[163] Policymakers have justified this differential treatment on the ground that sex offenders are more likely to reoffend than are any other class of criminals.[164] Some federal legislators have described sex offenders' rates of recidivism as "astronomical," citing rates as high as 90 percent.[165] Many studies indicate, however, that sex offender recidivism rates are much lower than policymakers and the public believe. Research indicates that sex offenders, as a group, do not suffer from higher rates of recidivism than other categories of criminals;[166] in fact, studies

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use can also play a role in sexual crimes against minors by family members and acquaintances.").

163. *See* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 447 (2010) ("The degree to which the lower-level governments have targeted sex offenders, as distinct from other criminals, is notable."). Contributing to this differential treatment of sex offenders is the common assumption that, as a group, sex offenders specialize in only sex crimes. At least one recent study, however, indicates that, as "a group and across various measures, sex offenders [have] low levels of specialization and persistence in offending in absolute and relative terms." Terance D. Miethe, Jodi Olson & Ojmarrh Mitchell, *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types*, 43 J. RES. CRIME & DELINQ. 204, 204 (2006).

164. *See, e.g.*, Press Release, U.S. Rep. Anthony Weiner, D-N.Y., New Study Shows Sex Offenders Living Too Close to Our Kids (Jan. 28, 2007), *available at* http://www.weiner.house.gov/news_display.aspx?id=82 ("Unlike other criminals, sex offenders pose a unique challenge to law enforcement and communities due to high recidivism rates.").

165. HUMAN RIGHTS WATCH, *supra* note 2, at 25 n.38 ("[W]e know that more than 40 percent of convicted sex offenders will repeat their crimes" (quoting Sen. Kay Bailey Hutchinson, R-Tex.)); *id.* ("A study of imprisoned child sex offenders found that 74 percent had a previous conviction for another child sex offense." (quoting Rep. Jim Ramstad, R-Minn.)); *id.* ("There is a ninety percent likelihood of recidivism for sexual crimes against children. Ninety percent. That is the standard. That is their record. That is the likelihood. Ninety percent." (quoting then-Rep. Mark Foley, R-Fla.)). Unfortunately, policymakers rarely cite and are rarely asked about the source or credibility of such figures. *Id.*

166. Recidivism is generally understood as the commission of a subsequent offense, but there are several operational definitions for this term. For instance, "recidivism may occur when there is a new arrest, new conviction, or new commitment to custody." CTR. FOR SEX OFFENDER MGMT. (CSOM), RECIDIVISM OF SEX OFFENDERS 2 (2001), *available at* http://www.csom.org/pubs/recidsexof.pdf. This explains why studies may have differing outcomes, as each criterion measures something different. Using subsequent arrests as the determining criterion for "recidivism" often will result in higher recidivism rates, because not every arrest results in a conviction. Using subsequent convictions will result in lower recidivism rates, but scholars generally place more confidence in this criterion, as it means the offender has been through the legal process and was found guilty. Finally, using subsequent incarceration as a criterion can yield different results, as there are two ways in which offenders may be sent back to prison. One

find that "recidivism rates for sex offenders are lower than for the general criminal population."[167]

For example, a 2003 DOJ study of sex offenders released from prisons in fifteen states in 1994 found that only 5.3 percent were rearrested for a new sex crime within three years of release, and only 3.5 percent were convicted.[168] As compared to non-sex offenders released from state prison, "sex offenders had a lower overall rearrest rate."[169] The overall rearrest rate of non-sex offenders was 68 percent, whereas the rearrest rate of sex offenders—for any type of offense, not just sex offenses—was 43 percent.[170] A study from the New York State Division of Criminal Justice Services also revealed that registered sex offenders are more likely to be rearrested for a non-sex offense than for a sex offense and that "sex offenders are arrested and/or convicted of committing a new sex crime at a lower rate than other offenders who commit other new non-sexual crimes."[171]

The sex offender registration regime reflects the misconception that offenders who have committed sex crimes in the past will likely

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is through the commission of a new offense, and the other is through a technical violation of parole, which may not involve a subsequent criminal offense, but rather a violation of a condition of release, such as consuming alcohol. *Id.* Moreover, it is important to distinguish whether the new arrest, conviction, or commitment to custody is for a new sex offense or for a non-sex offense. *See id*. at 3 ("For the purpose of their studies, researchers must determine what specific behaviors qualify sex offenders as recidivists. They must decide if only sex offenses will be considered, or if the commission of any crime is sufficient to be classified as a recidivating offense."). Overall, how one defines "recidivism" is very important.

167. CSOM, MYTHS AND FACTS ABOUT SEX OFFENDERS 3 (2000), *available at* http://www.csom.org/pubs/mythsfacts.pdf.

168. PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1–2 (Bureau of Justice Statistics, Bulletin No. NCJ 198281, 2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf (reporting that sex offenders are less likely than non-sex offenders to be rearrested for any offense; specifically, within three years of release only 43 percent of sex offenders are rearrested as compared to 68 percent of non-sex offenders, and only 5.3 percent of sex offenders are rearrested for another sex crime).

169. *Id*. at 2.

170. *Id*. at 14. Compared to other groups of offenders, sex offenders' rearrest rate was low. Robbers' rearrest rate was 70.2 percent, larcenists' was 74.6 percent, and burglars' was 74 percent. Those convicted of homicide had the lowest rearrest rate, 40.7 percent. *Id.*

171. N.Y. STATE DIV. OF PROB. & CORR. ALTS., RESEARCH BULLETIN: SEX OFFENDER POPULATIONS, RECIDIVISM AND ACTUARIAL ASSESSMENT 4 (2007), *available at* http://www.dpca.state.ny.us/pdfs/somgmtbulletinmay2007.pdf (emphasis omitted). Of sex offenders appearing on the registry, 15 percent were arrested for a new offense within a year, and only 2 percent were arrested for a new sex offense. *Id.* at 3. The same report also revealed that for individuals convicted of any type of crime, 8.7 percent were rearrested within three years for violent felony offenses, 7 percent for felony drug offenses, and 14.8 percent for other felony offenses. *Id.* at 4.

do so again. The overemphasis on known sex offenders reinforces the erroneous assumption that previously convicted sex offenders are, and will continue to be, responsible for most sex crimes. That is a dangerous approach to sex-offender policy, given that "[t]he vast majority of sex crimes are committed by someone who is not on the Sex Offender Registry."[172] According to a 1997 DOJ study, six out of seven offenders imprisoned for rape or sexual assault had not previously been convicted of a violent sex crime.[173] Moreover, a study of New York prisoners revealed that during 2005–06, approximately 94 percent of those arrested for sex offenses had no prior sex-offense convictions.[174] None of these offenders would have been on the sex offender registry.[175] As a result, laws promoting Internet safety should be designed with the presupposition that most online sexual predators are likely not on any sex offender registry.

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172. *"Myths and Facts": Current Research on Managing Sex Offenders*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., http://criminaljustice.state.ny.us/nsor/som_mythsandfacts.htm (last updated Apr. 2008) (emphasis omitted).

173. GREENFELD, *supra* note 156, at 22.

174. *"Myths and Facts": Current Research on Managing Sex Offenders*, *supra* note 172.

175. *See* JUSTICE POLICY INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH AND COMMUNITIES 13 (2008), *available at* http://www.justicepolicy.org/images/upload/08-11_RPT_WalshActRegisteringHarm_JJ-PS.pdf ("As most people who commit sex offenses are 'first-time offenders,' meaning that they have never been convicted of a sex offense, the majority of people committing sex offenses would not already be on the registry."). Furthermore, because "most sex crimes are not reported, and as a result, are not prosecuted," there is an even stronger likelihood that most sex offenders who pose a threat to the public are not already known to law enforcement. *"Myths and Facts": Current Research on Managing Sex Offenders*, *supra* note 172; *see also* CSOM, *supra* note 167, at 2 ("A 1992 study estimated that only 12% of rapes were reported. The National Crime Victimization Surveys conducted in 1994, 1995, and 1998 indicate that only 32% of sexual assaults against persons 12 or older were reported to law enforcement. . . . The low rate of reporting leads to the conclusion that . . . convicted sex offenders . . . in the United States represent less than 10% of all sex offenders living in communities nationwide." (citations omitted)). As a result, researchers have concluded that sex offender registries have limited value in preventing sex crimes. *See* JUSTICE POLICY INST., *supra*, at 14–15 ("The supposed purpose of the registries is to protect youth and adults from potential sexual predators. But evidence shows that most people who experience sexual abuse are victimized by people they know, including family members, and thus registries do not necessarily make us safer."). Sex offender registries are only useful to the extent that they inform law enforcement authorities and the public of known sex offenders—which cannot include offenders who are not on the registry. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 2, at 44–45 (quoting a Minnesota law enforcement official, who explained, "[Minnesota's registry] gives us a place to start, but most suspects we arrest are not previously convicted sex offenders. Last year, Minnesota had 585 sex offender convictions, and only 58 of those individuals had a prior conviction for a sex offense."); Miethe et al., *supra* note 163, at 225 ("By narrowing initial investigation of sex crimes to registered sex offenders, police agencies may help promote the stereotypical image of specialization and thereby inadvertently increase the victimization risks from those sexual predators who have remained undetected by the criminal justice system.").

It is similarly erroneous to assume that cordoning sex offenders off from society and modern life—offline as well as online—will help reduce recidivism. Research shows that this approach to sex offender management is counterproductive to the rehabilitation of offenders and, as a result, may put society in more danger by aggravating factors associated with recidivism. According to researchers, "[T]he resulting stigmatization of sex offenders is likely to result in disruption of their relationships, loss of or difficulties finding jobs, difficulties finding housing, and decreased psychological well-being, all factors that could increase their risk of recidivism."[176] Existing sex offender policies make it harder for sex offenders to reenter society, start new lives, and form new relationships, thus making it more difficult for them to "discard their criminal patterns."[177] By placing "further obstacles for the [sex] offender to regain stability in his life," such punitive laws exacerbate the risk of recidivism, while at the same time instilling a false sense of security in the communities they are supposed to protect.[178]

4. *Myth: Sex Offenders Are Increasingly Targeting Children Online.* Contrary to legislators' claims that convicted sex offenders are increasingly targeting children online, studies show decreasing percentages of youth are receiving unwanted sexual solicitations on the Internet.[179] Further, Internet sex crimes against minors have not

176. Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 141, 141 (2006); *see also* HUMAN RIGHTS WATCH, *supra* note 2, at 9 (noting that sex offender regulations such as residency restrictions can "push former offenders away from the supervision, treatment, stability, and supportive networks they may need to build and maintain successful, law abiding lives").

177. Wakefield, *supra* note 176, at 142.

178. Amol N. Sinha, *Sects' Offenders: The Inefficacy of Sex Offender Residency Laws and Their Burdens on the Free Exercise of Religion*, 16 CARDOZO J.L. & GENDER 343, 344–45 (2010); *see also* Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step From Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 175 (2005) (finding that residency restrictions may increase the types of stressors that can trigger reoffense); Wakefield, *supra* note 176 (suggesting that sex offender registries, notification requirements, and residency restrictions may actually make it more likely that sex offenders will reoffend).

179. *See* WOLAK ET AL., *supra* note 162, at 2 (noting that a second survey revealed a smaller proportion of youth who received unwanted sexual advances online, although aggressive solicitations did not similarly decline); Janis Wolak, David Finkelhor, Kimberly J. Mitchell & Michelle L. Ybarra, *Online "Predators" and Their Victims: Myths, Realities and Implications for Prevention and Treatment*, 63 AM. PSYCHOLOGIST 111, 121 (2008) ("Sex crimes against youth have *not* increased. . . . [S]everal sex crime and abuse indicators have shown marked declines

surpassed the number of sex crimes committed against minors offline.[180] One recent study revealed that a "smaller proportion of youth Internet users received unwanted sexual solicitations in [2005] than in [1999–2000]"; approximately one in seven children surveyed received solicitations in 2005, compared to one in five in 2000.[181] The same study indicated that "[a]cquaintances played a growing role in many of the unwanted solicitation incidents."[182] It also found that roughly half of the unwanted sexual solicitations came from other minors.[183] Another study revealed that "Internet sex crimes involving adults and juveniles more often fit a model of statutory rape—adult offenders who meet, develop relationships with, and openly seduce underage teenagers—than a model of forcible sexual assault or pedophilic child molesting."[184] Such data may indicate a need for different policy approaches, such as focusing more prevention efforts on youth who engage in risky online behavior.

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during the same period that Internet use has been expanding. From 1990 to 2005, the number of sex abuse cases substantiated by child protective authorities declined 51% . . . ." (emphasis added)).

180. Schrock & boyd, *supra* note 161, app. C, at 10.

181. WOLAK ET AL., *supra* note 162, at 15.

182. *Id.* at 1 ("In [Youth Internet Safety Survey 2], 14% of solicitations were from offline friends and acquaintances compared to only 3% in [Youth Internet Safety Survey 1]."); *see also* Schrock & boyd, *supra* note 161, app. C, at 10, 15 ("[T]he majority of sexual molestations are perpetrated primarily by those the victim knows offline, mainly by family members or acquaintances. This appears to be partly true of Internet-initiated sexual offenses as well, as a considerable percentage (44%) of Internet sexual offenders known to youth victims were family members. . . . [Fifty-six percent] were committed by people known to the victim offline, including neighbors, friends' parents, leaders of youth organizations, and teachers; known cases involving strangers are extremely rare." (citations omitted)).

183. *See* WOLAK ET AL., *supra* note 162, at 17 ("Those younger than 18 were identified as solicitors in a substantial number of incidents—43% of all solicitations and 44% of aggressive solicitations."). Based upon data from Youth Internet Safety Survey 2, conducted in 2005, 43 percent of unwanted sexual solicitations came from individuals seventeen years of age and younger, 30 percent came from persons eighteen to twenty-five years of age, 9 percent from people twenty-six years of age and older, and 18 percent were unknown. *Id.* at 25 tbl.4.

184. *Id.* at 111. In 2000, there were an estimated five hundred arrests by federal, state, and local law enforcement for Internet-initiated sex crimes, 95 percent of which were nonforcible. *Id.* at 114–15. This research indicates that efforts to limit the occurrence of Internet sex crimes should not be focused only on offenders, but also on educating youth about sexual violence and online risk-taking. This may help to reduce the occurrence of Internet-initiated sex crimes. *Cf.* INTERNET SAFETY TECHNICAL TASK FORCE, *supra* note 161, at 28 (observing that "in most incidents of Internet-initiated offline encounters between adults and minors, the minor knows that the adult is older (usually in his or her twenties), knows that sex is desired, and believes that she or he can consent to a sexual encounter").

Although the threat posed by some sex offenders online is real, it is far less substantial than the threat that predators pose offline. In addition, focusing on online sexual predators detracts attention from other emerging threats that children face on the Internet, such as online harassment and bullying.[185]

5. *Myth: Internet Restrictions Will Help Protect Minors Online.* Poorly considered laws such as blanket social-networking-site bans may prove impractical to enforce. Though some states specify methods of enforcement in their statutes—such as the installation of monitoring software or periodic, unannounced examinations of the offender's computer or Internet-enabled devices[186]—a number of states do not.[187] Even those states that provide for enforcement through monitoring technologies may encounter problems because "probation officers generally lack the necessary funding for proper monitoring equipment and often fail to obtain the technical expertise required for adequate training."[188] Moreover, the effectiveness of filtering technologies has been questioned as the number of online social networks increases, making it "almost impossible for probation officers to ensure that these [filtering] programs remain up-to-date."[189] Although it may be possible to exclude sex offenders from certain physical locations through residency restrictions, this exclusionary

185. INTERNET SAFETY TECHNICAL TASK FORCE, *supra* note 161, at 4 ("Bullying and harassment, most often by peers, are the most frequent threats that minors face, both online and offline."); *see also* Heather Braegger, *Rutgers University Student Tyler Clementi Yet Another Victim of Bullying and Harassment*, ASSOCIATED CONTENT (Oct. 4, 2010), http://www.associatedcontent.com/article/5860312/rutgers_university_student_tyler_clementi.html ("A college student at Rutgers University jumped to his death in what is yet another suicide that can be linked to bullying.").

186. *See, e.g.*, 730 ILL. COMP. STAT. 5/3-3-7(a)(7.11)(ii)–(iii) (Supp. 2010) (requiring offenders to submit to "periodic unannounced examinations of the offender's computer" or Internet-capable device and mandating the installation of hardware or software systems that monitor Internet use).

187. *See, e.g.*, N.C. GEN. STAT. § 14-202.5 (Supp. 2010) (failing to provide specific methods of enforcement for its social-networking-site ban).

188. Brant, *supra* note 7, at 805 (noting that "the growth of the personal computer and the Internet has further complicated busy probation officers' caseloads with offenders who are often more computer savvy than the officers attempting to supervise them").

189. *Id.*; *see also* Jane Adele Regina, Comment, *Access Denied: Imposing Statutory Penalties on Sex Offenders Who Violate Restricted Internet Access as a Condition of Probation*, 4 SETON HALL CIRCUIT REV. 187, 203 (2007) ("[A]n unwieldy Internet landscape complicated by the technological prowess of particular offenders threatens every method of computer surveillance with the potential for subversion. . . . [P]robation officers face the impractical task of staying abreast of myriad pornographic sites that morph and change on a daily basis in order to effectively program the filtering software.").

approach may prove unworkable in cyberspace, especially as more website operators incorporate social networking features.[190] The anonymity afforded by the Internet means that offenders can "merely borrow computers or choose different login names" to access restricted areas.[191] In light of the existing technological limitations, these restrictions may not achieve the objectives driving Internet and social-networking-site bans.

CONCLUSION

Concerns with state social-networking-site bans are twofold: First, these bans impermissibly restrict the First Amendment rights of sex offenders, who do not lose their constitutional rights just because they have committed a sex offense. Second, even if the bans are constitutional as applied to certain offenders, they are unlikely to keep minors safe online because they are predicated on mistaken premises about sexual violence and sex offender behavior.

Several courts reviewing the constitutionality of Internet-related restrictions have acknowledged the dearth of precedent concerning the rights of sex offenders, especially those who are no longer on probation, parole, or supervised release. In the absence of case law suggesting that these offenders have diminished constitutional rights as a general matter, courts have found such restrictions unconstitutional. In light of these recent cases, it is critical that state legislatures strike the right balance between offenders' liberty interests and public safety. Some of these restrictions have failed to

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190. As more websites move toward social networking models, the distinction between a non-social networking site and a social networking site has become less clear. For instance, many news websites, such as CNN.com or NYTimes.com, have blogs. Thus, members may adopt nicknames or usernames; post information that other users can view; and leave messages, comments, or direct links to other social networking sites. Will a registered sex offender be able to read the *New York Times* online, or will he be relegated to reading the print version? What happens when the *New York Times* goes out of print? *See* Jolie O'Dell, New York Times *Will Go Out of "Print" Sometime in the Future*, MASHABLE (Sept. 8, 2010), http://mashable.com/2010/09/08/nytimes-print ("At a recent conference, *The New York Times*' publisher and chairman Arthur Sulzberger, Jr., stated that he eventually expects the 'Gray Lady' will no longer be a physical newspaper.").

191. Regina, *supra* note 189, at 199; *see also* United States v. White, 244 F.3d 1199, 1205 (10th Cir. 2001) ("Despite the apparent constraint, the [defendant] may visit a library, cybercafe, even an airport, and log onto the Internet. The Internet is also accessible *via* web-t.v. by attaching an electronic device to a television. Consequently, if the district court targeted this special condition . . . to prevent [the defendant from] using the Internet to order child pornography, it missed the mark.").

find the appropriate balance, however, and impermissibly burden sex offenders' rights of association and expression.

Studies demonstrate that the majority of existing sex offender policies are not based on reliable evidence, and they are not sensitive to the needs and interests of the victims, the general public, or the offenders. Like other existing policies, social-networking-site bans are not likely to produce any visible public safety gains or significant reductions in offender recidivism. In fact, they may do more harm than good by instilling a false sense of security among the public and by perpetuating myths about the nature of sexual violence, making it more difficult for legislators to craft effective solutions. Rather than promulgating popular but highly ineffective laws such as social-networking-site bans, states should use available research to design laws that will serve the ends that they are intended to meet, restricting the rights of sex offenders only to the extent necessary to meet these ends.[192]

This is not to say that all social-networking-site bans are per se inappropriate. For some offenders—specifically, those who have used the Internet or a social networking site in the commission of the underlying sex offense—such bans may be an appropriate condition of probation or parole. States considering this type of legislation should consider how federal courts have struck a balance between protecting the public and rehabilitating the offender on the one hand, and protecting the offender's liberty interests on the other. Federal courts have struck this balance by generally opposing unconditional Internet bans and by upholding restrictions only when there is a sufficient nexus between the underlying conduct and the Internet or social-networking-site ban. Given the political unpopularity of sex offenders, bans on sex offender Internet use are better left to the courts, which can fashion more individualized conditions tailored to the specific offense and the specific offender before them. This practice would lower the risk that state legislatures will unfairly infringe on offenders' rights through the one-size-fits-all approaches that many have taken. Blanket bans from the Internet and social networking sites are not the way to protect children from sexual

192. States considering such legislation should take active steps toward formulating well-informed sex offender policies based on what is known about sexual violence, sex offenders, and strategies that will reduce recidivism and ultimately increase public safety. This can be facilitated by hosting public forums or by supporting research institutions and experts in conducting research on sex offender treatment and the effectiveness of existing policies.

abuse. Unfortunately, the reality is that "[p]eople want a silver bullet that will protect their children, [but] there is no silver bullet. There is no simple cure to the very complex problem of sexual violence."[193]

193. HUMAN RIGHTS WATCH, *supra* note 2, at 2 (alteration in original) (quoting Patty Wetterling, a child safety advocate whose son was abducted in 1989 and is still missing).