

# Why Don't You Take a Seat Away from that Computer?: Why Louisiana Revised Statute 14:91.5 Is Unconstitutional

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### Repository Citation

Eva Conner, *Why Don't You Take a Seat Away from that Computer?: Why Louisiana Revised Statute 14:91.5 Is Unconstitutional*, 73 La. L. Rev. (2013)  
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# Why Don't You Take a Seat Away from that Computer?: Why Louisiana Revised Statute 14:91.5 Is Unconstitutional

## PREFACE

During the 2012 Regular Session, the Louisiana Legislature amended Louisiana Revised Statutes section 14:91.5.<sup>1</sup> This amendment came in response to *Doe v. Jindal*, which declared the 2011 version of the statute unconstitutional.<sup>2</sup> This Comment was written in the fall of 2011 and therefore is no longer applicable to current Louisiana Revised Statutes section 14:91.5.<sup>3</sup> Nevertheless, it is published here because the issues raised by former section 14:91.5 are not unique to that particular statute but instead are implicated in state laws about sex offenders and social networking sites around the country.

The Louisiana Legislature made important changes in the 2012 amendment to section 14:91.5. First, the name was changed from “Unlawful use or access of social media” to “Unlawful use of a social networking website.”<sup>4</sup> Though not a substantive change, it demonstrates the transition in the law: from originally criminalizing most Internet access, to now only narrowly criminalizing sex offenders’ use of traditional social networking websites, such as MySpace and Facebook.<sup>5</sup> That transition was achieved through a number of changes, which, taken together, likely render the new version of Louisiana Revised Statutes section 14:91.5 constitutional.

Second, “intentional use of a social networking website” replaced “the using or accessing of social networking websites, chat rooms, and peer-to-peer networks” to describe what

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1. LA. REV. STAT. ANN. § 14:91.5 (2012); 2012 La. Sess. Law Serv. Act 205 (H.B. 620) (May 22, 2012) (West).

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

3. The Editors of the *Louisiana Law Review* commend this scholarship for identifying the problems in former Louisiana Revised Statutes section 14:91.5 and for effecting meaningful legislative revisions to this previously unconstitutional law. While the 2012 amendments to section 14:91.5 resolve many, if not all, of the constitutional deficiencies highlighted by this Comment, this scholarship remains relevant because of its practical impact on Louisiana law. The *Louisiana Law Review* congratulates the author for contributing to these noteworthy changes and for providing a constitutional example for other states that wish to enact or amend their laws regulating sex offenders and social networking sites.

4. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

5. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

constitutes the crime under the statute.<sup>6</sup> By adding an intent element and by eliminating chat rooms and peer-to-peer networks, the Legislature greatly narrowed the statute's Internet coverage.<sup>7</sup>

Even more important amendments changed the definition of *social networking website*. An insertion now declares that a *social networking website* is simply a website whose primary purpose is "facilitating social interaction with other users of the website"; furthermore, to be a *social networking website*, the site must allow users both to create webpages or profiles available to the general public and to communicate between users using those profiles.<sup>8</sup> The 2011 version of Louisiana Revised Statutes section 14:91.5 was much broader, forbidding sex offenders from accessing a website that met either criteria and including "a forum, chat room, electronic mail, or instant messaging."<sup>9</sup>

Additionally, the new 2012 version of Louisiana Revised Statutes section 14:91.5 specifically excepts many websites that were banned in the 2011 version of the statute, including websites that only offer photo sharing, email, or instant messaging, purely commercial websites, websites whose primary purpose is to disseminate news, and websites of government entities.<sup>10</sup> Even more importantly, the restrictions on chat rooms and peer-to-peer networks were removed in the 2012 revision.<sup>11</sup> The removal of chat room restrictions is the most significant change, as that subsection banned any website allowing communication between users—a very broad standard.<sup>12</sup>

Finally, although the last change to the law is beyond the scope of this Comment, new Louisiana Revised Statutes section 14:91.5 does not contain the subsection that gave probation officers discretion to waive any of the requirements of the law.<sup>13</sup>

These changes to Louisiana Revised Statutes section 14:91.5 likely render the statute constitutional under the Free Speech grounds addressed in this Comment.<sup>14</sup> The new version restricts

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6. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

7. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011). See also *infra* Part I.C.

8. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

9. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

10. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

11. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

12. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

13. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011). See also *infra* note 77.

14. See *infra* Part IV.

the disallowed websites to traditional social networking sites, which is likely narrowly tailored to the significant government interest of protecting children from sex offenders on the Internet.<sup>15</sup> However, despite the changes to Louisiana Revised Statutes section 14:91.5, this Comment remains relevant to many other laws across the country, demonstrating that a constitutional avenue exists to protect children from sex offenders online.

#### INTRODUCTION

You went to high school with John Doe. You remember your senior year when John got in trouble because his girlfriend was 16 and he was 18, but that was a long time ago. Last weekend, he was your cashier at the grocery store. You asked John how he was doing. He told you that because a new law had been passed in August of 2011, he could not use the Internet anymore. He had to close his Facebook account, which he had been using for the past three years to communicate with his cousins who live in California. John had been very involved with politics in his hometown but could no longer access the candidates' websites or follow them on Twitter. He could not get his news online anymore, but occasionally he still caught major stories on the local channels at five o'clock. He could not see the pictures of his baby niece on his sister's photo-sharing website. John had to give up on his fantasy football team. He was fired from his job as a computer technician and now works as a cashier at the grocery store; it was the only job that he could find without using any Internet career-searching resources. His pay was more than halved.

In the past two decades, laws targeting sex offenders have swept swiftly across America.<sup>16</sup> Very few issues in politics are both as popular and as nondivisive as the protection of children from sexual predators.<sup>17</sup> In the same time frame, the popularity of the Internet has skyrocketed.<sup>18</sup> Social networking sites have grown even faster than the Internet as a whole, and Americans now spend almost a quarter of their Internet time on these sites.<sup>19</sup> In less than a

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15. See *infra* Parts IV, V.

16. See discussion *infra* Part I.

17. Brian P. LiVecchi, "The Least of These:" A Constitutional Challenge to North Carolina's Sexual Offender Laws and N.C. Gen. Stat. § 14-208.18, 33 N.C. CENT. L. REV. 53, 55 (2010).

18. *United States of America Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm> (last visited Oct. 12, 2011).

19. Sarah Kessler, *Americans Spend 23% of Internet Time on Social Networks*, SOC. NETWORKING WATCH (Sept. 13, 2011), <http://www.social>

generation, the Internet has completely changed how people obtain information, interact with others, and conduct their lives.<sup>20</sup>

However, there is a dark underworld on the Internet that is both dangerous and misunderstood.<sup>21</sup> Many popular TV shows have only encouraged the idea that social networking websites are crawling with sexual predators: nefarious men lurking in the shadows, waiting for their chance to prey on innocent children.<sup>22</sup> For example, *To Catch a Predator* is based completely on the theme of confronting and humiliating men who solicit sexual encounters with children over the Internet.<sup>23</sup> Any child who came of age in the Internet era remembers the constant warnings from parents and teachers to stay away from chat rooms and to never give out his or her name or address, often with a warning about the murderers and rapists who lurk behind a virtual shield of anonymity.<sup>24</sup>

It would be a mistake to minimize the dangers of sex offenders over the Internet or the tragedies that have resulted from their actions.<sup>25</sup> However, strangers commit only 7% of child sexual assaults, not all of them initiated over the Internet.<sup>26</sup> Protecting children from online predators is a legitimate and important government goal, although the numbers show that the media and entertainment industry have exaggerated the risk of sexual predators online.<sup>27</sup> Those exaggerations have inspired a sweeping national trend of statutes that restrict or ban sex offenders from social networking sites or even the entire Internet.<sup>28</sup> Citizens in most states with such statutes have questioned their constitutionality; however, the trend is so recent that most of the statutes have not been challenged in court.<sup>29</sup>

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networkingwatch.com/2011/09/americans-spend-23-of-internet-time-on-social-networks.html.

20. *See id.*

21. *Online Predators: Help Minimize the Risk*, MICROSOFT SAFETY & SEC. CTR., <http://www.microsoft.com/security/family-safety/predators.aspx> (last visited Nov. 2, 2011).

22. *See CSI: Crime Scene Investigation: A Thousand Days on Earth* (CBS television broadcast Apr. 10, 2008); *Series: Law and Order: Special Victims Unit*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/LawAndOrderSpecialVictimsUnit> (last visited Nov. 2, 2011).

23. Chris Hansen, 'To Catch A Predator' III, DATELINE NBC (Jan. 25, 2011, 5:42 PM), [http://www.msnbc.msn.com/id/11152602/ns/dateline\\_nbc/t/catch-predator-iii/#.TrHoM0PiGU8](http://www.msnbc.msn.com/id/11152602/ns/dateline_nbc/t/catch-predator-iii/#.TrHoM0PiGU8).

24. *Online Predators*, *supra* note 21.

25. *Id.*

26. Jasmine S. Wynton, *MySpace, YourSpace, but Not TheirSpace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1893–94 (2011) (citation omitted).

27. *Id.* at 1860.

28. *See* discussion *infra* Part I.A.

29. *See* discussion *infra* Part I.A–B.

Previous law review articles have addressed some issues with laws banning sex offenders from the Internet.<sup>30</sup> Yet, no article has systematically analyzed the issue from the perspective of a traditional Free Speech analysis.<sup>31</sup> This Comment approaches the Free Speech issues arising from laws restricting Internet access to sex offenders, particularly Louisiana's recently passed statute, to conclude that, while narrowly tailored social-networking-website restrictions on sex offenders could be constitutional, the language of Louisiana Revised Statutes section 14:91.5 is overbroad and unconstitutionally infringes on Free Speech.<sup>32</sup>

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30. See, e.g., Jessica McCurdy, *Outcasts: The Exclusion of Sexual Offenders from Social Networking Sites*, 47 AM. CRIM. L. REV. 1577 (2010); Wynton, *supra* note 26. Most have focused on questions of substantive and procedural due process, freedom of association, and ex post facto violations, instead of a time, place, and manner analysis for Free Speech.

31. *Id.*

32. The statute reads as follows:

A. The following shall constitute unlawful use or access of social media:

(1) The using or accessing of social networking websites, chat rooms, and peer-to-peer networks by a person who is required to register as a sex offender and who was previously convicted of R.S. 14:81 (indecent behavior with juveniles), R.S. 14:81.1 (pornography involving juveniles), R.S. 14:81.3 (computer-aided solicitation of a minor), or R.S. 14:283 (video voyeurism) or was previously convicted of a sex offense as defined in R.S. 15:541 in which the victim of the sex offense was a minor.

(2) The provisions of this Section shall also apply to any person previously convicted for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law which is equivalent to the offenses provided for in Paragraph (1) of this Subsection, unless the tribal court or foreign conviction was not obtained with sufficient safeguards for fundamental fairness and due process for the accused as provided by the federal guidelines adopted pursuant to the Adam Walsh Child Protection and Safety Act of 2006.

B. The use or access of social media shall not be considered unlawful for purposes of this Section if the offender has permission to use or access social networking websites, chat rooms, or peer-to-peer networks from his probation or parole officer or the court of original jurisdiction.

C. For purposes of this Section:

(1) "Chat room" means any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users.

(2) "Minor" means a person under the age of eighteen years.

(3) "Peer-to-peer network" means a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server.

Part I of this Comment addresses the content and history of Louisiana Revised Statutes section 14:91.5 and compares it with similar laws across the country to assist in the analysis of the statute and to offer contrasting examples of statutory language. Part II discusses the constitutionality of imposing post-release restrictions on sex offenders who have already completed their sentences, concluding that there are legitimate and constitutional reasons for the government to restrict the rights of certain classes, specifically the rights of sex offenders. Part III briefly discusses the specific Free Speech background relevant to an analysis of the issue. Part IV analyzes the Free Speech issues that arise out of Louisiana Revised Statutes section 14:91.5, concluding that it is overbroad and that it unconstitutionally restricts Free Speech. Part V suggests how the Louisiana Legislature could amend Louisiana Revised Statutes section 14:91.5 to be constitutional. With minor changes, Louisiana Revised Statutes section 14:91.5 could achieve the Legislature's goal of protecting children from sexual predators over the Internet while also respecting the constitutional rights of targeted sex offenders.

## I. EXISTING INTERNET BANS

### A. *The Nationwide Trend*

#### 1. *Introduction*

Louisiana Revised Statutes section 14:91.5 seeks to keep specific subsets of sex offenders away from social networking

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(4) "Social networking website" means an Internet website that has any of the following capabilities:

(a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users.

(b) Offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging.

D. (1) Whoever commits the crime of unlawful use or access of social media shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence.

(2) Whoever commits the crime of unlawful use or access of social media, upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.

LA. REV. STAT. ANN. § 14:91.5 (2011).

sites.<sup>33</sup> It was passed with the intention of keeping predators from finding and seducing new child victims.<sup>34</sup> Louisiana is not the first state to enact such a law, and the content of other states' laws varies vastly.<sup>35</sup> A look at similar statutes enacted in other states is valuable in pinpointing the Louisiana statute's problems.<sup>36</sup>

Across the United States, laws restricting sex offenders' access to social networking sites can be analyzed along two axes: (1) to whom the ban applies, and (2) how much of the Internet it covers.<sup>37</sup> Some bans apply to all registered sex offenders, while others are more limited, targeting only those who committed their crimes against children or with a computer.<sup>38</sup> The bans also differ as to how much of the Internet they forbid.<sup>39</sup> Some statutes ban all Internet access, while others are narrowly aimed at classic social networking websites like Facebook and MySpace.<sup>40</sup> Most laws fall somewhere between those two extremes.<sup>41</sup>

Most statutes that have been passed differ considerably from the Louisiana law, especially regarding whom they affect.<sup>42</sup> When a law applies only to offenders still on probation or parole, the legal analysis differs from a law applying to offenders who have completed their sentences, even if the intent behind the laws was similar.<sup>43</sup> For instance, New York's statute does not apply to registered sex offenders who have completed their sentences but instead mandates an Internet ban as a condition of probation or parole for convicted sex criminals.<sup>44</sup> Because probationers and parolees have limited constitutional rights, the statute faces minimal

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33. LA. REV. STAT. ANN. § 14:91.5 (2011).

34. The intent of the Louisiana Legislature was not to ban sex offenders from the whole internet but instead to ban them from social networking websites. LA. S. JOURNAL, Reg. Sess., No. 27, at 550 (2011).

35. See discussion *infra* Part I.A.

36. See discussion *infra* Part V.

37. See discussion *infra* Part I.A.

38. IND. CODE § 35-42-4-12 (Westlaw 2013); NEB. REV. STAT. § 28-322.05 (Westlaw 2013), *invalidated by* Doe v. Nebraska, Nos. 8:09CV456, 4:10CV2366, 4:10CV3005, 2012 WL 4923131 (D. Neb. Oct 17, 2012); N.C. GEN. STAT. § 14-202.5 (Westlaw 2013).

39. See discussion *infra* Part I.A.2-4.

40. See discussion *infra* Parts I.A.3, I.C for statutes banning all or most of the internet. See discussion *infra* Parts I.A.2, I.A.4 for more narrowly construed statutes.

41. See discussion *infra* Part I.A.2-4.

42. See, e.g., MINN. STAT. § 244.05(6)(c) (Westlaw 2013); N.Y. PENAL LAW § 65.10(4-a)(b) (McKinney Supp. 2013); TEX. GOV'T CODE ANN. § 508.1861(a)(1)-(3) (West 2012).

43. Wynton, *supra* note 26, at 1869.

44. N.Y. PENAL LAW § 65.10(4-a)(b) (McKinney Supp. 2013); Wynton, *supra* note 26, at 1869.

legal challenges.<sup>45</sup> Texas has a similar statute for probationers and parolees convicted of certain sex crimes.<sup>46</sup> Minnesota's ban applies only to those offenders on probation or parole that are deemed a high risk to the community.<sup>47</sup> These and other narrow statutes differ significantly from Louisiana Revised Statutes section 14:91.5.<sup>48</sup> Only three states have passed statutes substantially similar to Louisiana's: North Carolina, Indiana, and Nebraska.<sup>49</sup> These statutes all apply to sex offenders who have completed their sentences and ban only certain websites.<sup>50</sup>

## 2. North Carolina's Statute

North Carolina passed one of the first laws addressing the issue of sex offenders and social networking websites.<sup>51</sup> That statute, which has goals similar to the Louisiana version, approaches the issue in almost the exact opposite manner as Louisiana: The restricted websites are narrow and well-defined, but the statute applies to a much broader class of people.<sup>52</sup> The North Carolina statute makes it a crime for all registered sex offenders to access or create pages on any social networking website that permits minors to be members.<sup>53</sup> For purposes of the statute, North Carolina defines *commercial social networking website* more narrowly than Louisiana.<sup>54</sup> For example, North Carolina provides exceptions for

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45. See *infra* Part II.

46. TEX. GOV'T CODE ANN. § 508.1861(a)(1)–(3).

47. MINN. STAT. § 244.05(6)(c) (Westlaw 2013).

48. *Id.*; N.Y. PENAL LAW § 65.10(4-a)(b); TEX. GOV'T CODE ANN. § 508.1861(a)(1)–(3).

49. IND. CODE § 35-42-4-12 (Westlaw 2013); NEB. REV. STAT. § 28-322.05 (Westlaw 2013), *invalidated by* Doe v. Nebraska, Nos. 8:09CV456, 4:10CV2366, 4:10CV3005, 2012 WL 4923131 (D. Neb. Oct 17, 2012); N.C. GEN. STAT. § 14-202.5 (Westlaw 2013).

50. See IND. CODE § 35-42-4-12; NEB. REV. STAT. § 28-322.05; N.C. GEN. STAT. § 14-202.5.

51. Wynton, *supra* note 26, at 1860.

52. N.C. GEN. STAT. § 14-202.5.

53. *Id.*

54. The relevant portion of the North Carolina statute reads as follows:

(b) For the purposes of this section, a “commercial social networking Web site” is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(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,

sites that are solely for “photo-sharing, electronic mail, instant messenger, or chat room or message board platform”<sup>55</sup> or sites that are primarily for “facilitation of commercial transactions involving goods or services between its members or visitors.”<sup>56</sup> North Carolina’s Internet restriction is much narrower than Louisiana’s, although it applies broadly to all sex offenders, even those whose crimes had no connection to the Internet or to minors and those who have completed their sentences.<sup>57</sup>

### 3. Nebraska’s Statute

The Nebraska law shares major similarities with Louisiana Revised Statutes section 14:91.5.<sup>58</sup> Instead of a clearly delineated

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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.

(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.

N.C. GEN. STAT. § 14-202.5.

55. The statute is unclear about what the word *solely* means here. Many sites that offer email also offer other services. See GOOGLE—PRODUCTS, <http://www.google.com/intl/en/about/products/index.html> (last visited Nov. 2, 2011). Gmail accounts are linked to Google, Google News, Google+, Google Docs, etc. See also YAHOO!, [www.yahoo.com](http://www.yahoo.com) (last visited Nov. 2, 2011). Yahoo! Mail is also linked to many other services.

56. N.C. GEN. STAT. § 14-202.5. The North Carolina statute would permit access to many websites that the Louisiana statute bans, including the websites of political candidates, most news websites, craigslist, email websites, job search websites, and most websites that are purely for informational exchange like Wikipedia.

57. *Id.*

58. NEB. REV. STAT. § 28-322.05 (Westlaw 2013), *invalidated by Doe v. Nebraska*, Nos. 8:09CV456, 4:10CV2366, 4:10CV3005, 2012 WL 4923131 (D. Neb. Oct 17, 2012). The Nebraska law defines *social networking web site* as follows:

Social networking web site means a web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator’s permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page,

restriction applying to all sex offenders, Nebraska and Louisiana narrow those affected by the Internet ban but broadly define the terms controlling the website restrictions.<sup>59</sup> The Nebraska law limits itself to those who committed sex offenses against children or by using computers but includes offenders who have completed their sentences.<sup>60</sup> However, the actual restrictions are not well-defined and leave the statute open to an overbreadth challenge.<sup>61</sup>

#### 4. *Indiana's Statute*

Only Indiana's statute narrowly restricts both who is affected and which websites are banned.<sup>62</sup> Indiana's legislation applies only to persons convicted of sex offenses against minors, not to all registered sex offenders.<sup>63</sup> The statute bans certain sex offenders from accessing instant messaging sites, chat rooms, or social

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instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile.

*Id.* § 29-4001.01(13).

The Nebraska law defines *instant messaging* as follows:

Instant messaging means a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions or computer file attachments to other selected users of the service through the Internet or a computer communications network.

*Id.* § 29-4001.01(10).

The Nebraska law defines *chat room* as follows: "Chat room means a web site or server space on the Internet or communication network primarily designated for the virtually instantaneous exchange of text or voice transmissions or computer file attachments amongst two or more computers or electronic communication device users." *Id.* § 29-4001.01(3).

Under these definitions, the Nebraska statute would allow access to most political candidates' webpages, to many important news sources (the sites that do not permit direct communication between member profiles but instead only comments on articles), and perhaps even to email. However, the Nebraska statute states that those definitions are specifically for the purposes of the Sex Offender Registration Act, which does not include the "Unlawful Use of the Internet" law that is comparable to Louisiana Revised Statutes section 14:91.5. *See id.* § 29-4001.01; *id.* § 28-322.05. There is nothing to indicate whether Nebraska will analogize those definitions to its Unlawful Use statute; however, if it did not, the terms in Nebraska Revised Statutes section 28-322.05 would be left with no definitions at all.

59. *See supra* note 58 and accompanying text; LA. REV. STAT. ANN. 14:91.5 (2011).

60. NEB. REV. STAT. § 28-322.05.

61. *Id.*; Wynton, *supra* note 26, at 1868.

62. IND. CODE § 35-42-4-12(a)-(b), (e) (Westlaw 2013).

63. *Id.* § 35-42-4-12(b). The statute does, however, provide an exception for those convicted of an offense while in a consensual relationship in which the age difference is less than four years. *Id.* § 35-42-4-12(a).

networking websites that permit access to minors.<sup>64</sup> It defines *instant messaging programs* and *chat rooms* as software that allows two or more users to “communicate over the Internet in real time using typed text”<sup>65</sup> and *social networking websites* as those that have members register, allow them to create personal profiles, and facilitate introduction between people via online communication.<sup>66</sup> However, the Indiana law specifically excepts email programs and message boards.<sup>67</sup> The Indiana statute is the only statute that narrowly and clearly defines both whom the statute affects and the websites that it restricts, and it has not faced any constitutional challenges.<sup>68</sup>

#### B. Doe v. Nebraska

Nebraska’s law limiting sex offenders’ access to social networking websites, the statute most similar to Louisiana’s, is the only statute that has been challenged in court.<sup>69</sup> In *Doe v. Nebraska*,<sup>70</sup> the United States District Court for the District of Nebraska found that Nebraska’s Unlawful Use of the Internet by a Prohibited Sex Offender Statute was unconstitutional as applied to

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64. *Id.* § 35-42-4-12(e).

65. *Id.* § 35-42-4-12(c).

66. The Indiana Code defines *social networking web site* as follows:  
As used in this section, “social networking web site” means an Internet web site that:  
(1) facilitates the social introduction between two (2) or more persons;  
(2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;  
(3) allows a member to create a web page or a personal profile; and  
(4) provides a member with the opportunity to communicate with another person.  
The term does not include an electronic mail program or message board program.

*Id.* § 35-42-4-12(d). This definition explicitly permits email and message board programs. It also would allow access to most political candidates’ websites and many news sources. Although it is more restrictive than the North Carolina statute, it still permits much more access than Louisiana Revised Statutes section 14:91.5.

67. *Id.* § 35-42-4-12(c).

68. *See id.* § 35-42-4-12.

69. NEB. REV. STAT. § 28-322.05 (Westlaw 2013), *invalidated by Doe v. Nebraska*, Nos. 8:09CV456, 4:10CV2366, 4:10CV3005, 2012 WL 4923131 (D. Neb. Oct 17, 2012); *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010).

70. *Doe*, 734 F. Supp. 2d 882. “People who are convicted of crimes, even felony crimes related to children, do not forfeit their First Amendment right to speak by accessing the Internet.” *Id.* at 911.

sex offenders no longer on probation or parole.<sup>71</sup> After denying summary judgment on the Free Speech issue, the court tried the case on its merits to determine whether the statute was unconstitutional under the Free Speech Clause of the First Amendment.<sup>72</sup> The court in *Doe* asserted that even sex offenders who have committed crimes against children retain their Free Speech rights over the Internet.<sup>73</sup> The court cited the Eighth Circuit's assertion in *United States v. Crume*<sup>74</sup> that Internet access is a vital medium for communication, business, and learning and that any restrictions on that right must be narrowly tailored.<sup>75</sup> The court also gave examples of situations to which the law would be applied and to which it might not be narrowly tailored, such the situation where a sex offenders would be banned from language-learning websites and blogs discussing political and legal issues.<sup>76</sup>

### C. Louisiana Revised Statutes Section 14:91.5

From the day that it went into effect, Louisiana Revised Statutes section 14:91.5 has been a subject of contention.<sup>77</sup> The Louisiana statute criminalizes the “using or accessing of social networking websites, chat rooms, and peer-to-peer networks by a person who is required to register as a sex offender” and who was convicted of certain offenses.<sup>78</sup> Those offenses include indecent behavior with

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71. *Id.* at 901. The court stated that the Free Speech issue could not be resolved with summary judgment. *Id.* at 911–13. It also determined that the statute may violate the Ex Post Facto Clause, *id.* at 913–21, and the Fourteenth Amendment's Due Process Clause, *id.* at 922, while rejecting challenges based on double jeopardy and cruel and unusual punishment, *id.* at 921–22.

72. *Id.* at 908–09. *Doe v. Nebraska*, Nos. 8:09CV456, 4:10CV2366, 4:10CV3005, 2012 WL 4923131 (D. Neb. Oct 17, 2012), is the most recent version of the case. It declares Nebraska Revised Statutes section 28-322.05 unconstitutional, finding the Internet restrictions and disclosure requirements not narrowly tailored, the entire statute to be overbroad, and the criminalization of internet use too vague under the Due Process Clause.

73. *Id.* at 911. *See also, e.g., United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (holding that complete Internet ban was a greater deprivation than necessary for the charge of receiving child pornography).

74. *Crume*, 422 F.3d 728.

75. *Doe*, 734 F. Supp. 2d at 911 (quoting *Crume*, 422 F.3d at 733).

76. *Id.* at 912.

77. The Louisiana ACLU filed suit against the statute on the day after it went into effect. *Doe v. Jindal*, 853 F. Supp. 2d 596 (M.D. La. 2012). Although as of publication *Doe v. Jindal* is being appealed, in the case, the United States District Court for the Middle District of Louisiana determined Louisiana Revised Statutes section 14:91.5 to be facially overbroad due to infringement of Free Speech and void for vagueness. *Id.* at 603–06. Furthermore, it stated that the limiting instruction that probation officers may oversee the Internet limits does not cure the vagueness issues because it does not have instructions for petitioners under supervision in other states. *Id.* at 606–07.

78. LA. REV. STAT. ANN. § 14:91.5 (2011).

juveniles,<sup>79</sup> pornography involving juveniles,<sup>80</sup> computer-aided solicitation of a minor,<sup>81</sup> video voyeurism,<sup>82</sup> or any other sex offense in which the victim was a minor.<sup>83</sup> However, Louisiana Revised Statutes section 14:91.5 goes further than other states' statutes in its definitions and in the restrictions that those definitions impose on everyday Internet use.<sup>84</sup> The statute's definition of *social networking website* is much broader than the definition in most other comparable statutes;<sup>85</sup> it denies access to any website that "allows users to create web pages or profiles about themselves that are available to the general public or to any other users" or "offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging."<sup>86</sup> Almost all websites are moving towards increasing interactivity, especially political and activist sites, and, as a result, the statute bans the vast majority of the Internet.<sup>87</sup> Some of the websites that appear to be banned under this broad definition include: CNN, ESPN, BBC, National Geographic, USAJOBS.gov, Monster.com, eBay, and Amazon.<sup>88</sup> Louisiana Revised Statutes section 14:91.5 also bans sex offenders

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79. LA. REV. STAT. ANN. § 14:81 (2011).

80. LA. REV. STAT. ANN. § 14:81.1 (2011).

81. LA. REV. STAT. ANN. § 14:81.3 (2011).

82. *Video voyeurism* is defined as:

The use of any camera, videotape, photo-optical, photo-electric, or any other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping a person where that person has not consented to the observing, viewing, photographing, filming, or videotaping and it is for a lewd or lascivious purpose; or [t]he transfer of [such] an image . . . by live or recorded telephone message, electronic mail, the Internet, or a commercial online service.

LA. REV. STAT. ANN. § 14:283(A)(1)–(2) (2011).

83. LA. REV. STAT. ANN. § 14:91.5 (2011).

84. *See infra* Part II.

85. *See infra* Part II.

86. LA. REV. STAT. ANN. § 14:91.5 (2011). *See also infra* Part II.

87. *Doe v. Nebraska*, 734 F. Supp. 2d 882, 912 (D. Neb. 2010). An almost complete Internet ban will have major consequences. Those affected will be unable to search for jobs over the Internet, which has quickly become to easiest way to find work, or they may even lose their jobs.

88. Complaint at 4–5, *Doe v. Jindal*, 853 F. Supp. 2d 596 (M.D. La. 2012) (No. 11-559), available at [https://laaclu.org/PDF\\_documents/Doe\\_v\\_Jindal\\_081511.pdf](https://laaclu.org/PDF_documents/Doe_v_Jindal_081511.pdf). Other sites that would be blocked include: NOLA.com (website run by *The Times Picayune* and an important source of local news), FoxNews.com, Reuters, NYTimes.com, Politico.com, Newsweek, The Economist, The New Republic, YouTube, getagameplan.org (Louisiana's official hurricane-preparedness website), Twitter, Gmail, Hotmail, Comcast, AOL, Hotjobs.com, Careerbuilder.com, LinkedIn, Indeed.com, Craigslist, eBay, Amazon, Zagat, Urbanspoon, Yelp, Consumerist, and "any other website that allows user reviews of products, restaurants, movies, books, or music." *Id.*

from almost all political candidates' websites, including the official sites of Barack Obama,<sup>89</sup> Mitt Romney,<sup>90</sup> and Bobby Jindal.<sup>91</sup> Those affected by the statute would be banned from renting movies from Netflix<sup>92</sup> and from receiving almost any news via the Internet.<sup>93</sup> Even basic informational or educational websites often include the creator of the site's email address, possibly a method of communication.<sup>94</sup> Although Louisiana Revised Statutes section 14:91.5's stated purpose is to keep sex offenders off of social networking sites such as Facebook, MySpace, and Twitter,<sup>95</sup> in practice it bans the affected registrants from most of the Internet.<sup>96</sup> In light of the increasing importance of the Internet, this statute would ban sex offenders from a vast amount of political activity, from career opportunities, and from the extensive knowledge base located online.<sup>97</sup> It is necessary to examine the new statute in light of constitutional jurisprudence<sup>98</sup> to ensure both that children are safe and that sex offenders' constitutional rights are not

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89. BARACK OBAMA, <https://login.barackobama.com/account/new> (last visited Mar. 18, 2013) (allows for the creation of accounts and communication in the form of comments).

90. MITT ROMNEY, <http://www.mittromney.com/> (last visited Mar. 18, 2013) (allows for the creation of accounts).

91. GOVERNOR BOBBY JINDAL, <http://www.bobbyjindal.com/> (last visited Oct. 20, 2011) (allows for the creation of accounts and hosts a blog with comments).

92. NETFLIX, <http://www.netflix.com> (last visited Oct. 21, 2011) (allows for comments to be left regarding movies and TV shows).

93. Virtually every mainstream news website allows comments to be left about articles, and many also facilitate the creation of accounts. *See* Complaint, *supra* note 88, at 4–5.

94. LA. REV. STAT. ANN. § 14:91.5 (2011).

95. LA. S. JOURNAL, Reg. Sess., No. 27, at 550 (2011).

96. According to the Executive Director of the Louisiana ACLU, Marjorie Esman, "banning access to all sorts of online information, without any connection to a crime or access to children, is using a bulldozer where a trowel would do." *ACLU Seeks to Block New Louisiana Sex Offender Law*, CNN.COM, Oct. 12, 2011, [http://articles.cnn.com/2011-08-16/justice/louisiana.sex.offender.law\\_1\\_internet-access-offender-law-aclu?\\_s=PM:CRIME](http://articles.cnn.com/2011-08-16/justice/louisiana.sex.offender.law_1_internet-access-offender-law-aclu?_s=PM:CRIME).

97. *Id.* The extent to which this would inhibit sex offenders from finding jobs, joining support groups, and learning new information is especially concerning. It is particularly important to ensure that sex offenders, as a group, are reintegrated into society to avoid recidivism.

98. This statute will be analyzed under the First Amendment of the United States Constitution. The Free Speech section of the Louisiana Constitution is parallel to the First Amendment and should be interpreted in the same manner, so it will not be addressed. LA. CONST. art. I, § 7. *Delcarpio v. St. Tammany Parish Sch. Bd.*, 865 F. Supp. 350, 362–63 (E.D. La. 1994), *rev'd on other grounds sub nom.* *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995).

compromised solely because they are members of an unpopular class.<sup>99</sup>

## II. CONSTITUTIONALITY OF POST-RELEASE RESTRICTIONS ON SEX OFFENDERS

### *A. Background*

A North Carolina senator said, “When a person takes advantage of a child, I don’t worry about their constitutional rights.”<sup>100</sup> That is a common attitude in American society.<sup>101</sup> Few are as maligned as those who abuse children, and other registered sex offenders are often grouped with them.<sup>102</sup> Politicians loathe to be labeled as lax on sex crimes, especially those against children, and face mounting pressure from constituents to pass laws protecting minors.<sup>103</sup> Most exhibit little concern over whether those laws violate the constitutional rights of convicted sex criminals.<sup>104</sup> However, the goals of protecting children from sexual offenders online and of upholding the constitutional rights of convicted sex offenders are not mutually exclusive.<sup>105</sup>

One of the foundational concepts of the American system is the idea of fundamental rights.<sup>106</sup> Although no rights are absolute, the

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99. The ACLU lawsuit addresses the issue by stating that “[t]he statute will ban affected registrants from likely targets Facebook and MySpace. However, it will also make it a felony for registrants to browse the rest of the Internet, severely curtailing their First Amendment freedoms in ways that bear no relation to the state’s legitimate pursuit of public safety.” Complaint, *supra* note 88, at 4.

100. LiVecchi, *supra* note 17, at 55 (citation omitted) (quoting North Carolina Senator David Hoyle).

101. *Id.*

102. Rachel J. Rodriguez, *The Sex Offender Under the Bridge: Has Megan’s Law Run Amok?*, 62 RUTGERS L. REV. 1023, 1035 (2010).

103. LiVecchi, *supra* note 17, at 55.

104. *ACLU Seeks to Block New Louisiana Sex Offender Law*, *supra* note 96. When asked about Louisiana Revised Statute section 14:91.5, Louisiana Governor Bobby Jindal said that “[i]f these people want to search the Internet for new victims they can do it somewhere else. It is frankly insulting for the ACLU to claim it is a convicted sex offender’s ‘First Amendment right’ to use Facebook, MySpace, and Craigslist.” *Id.*

105. Jan Moller, *ACLU Challenging New State Law Banning Sex Offenders from Using Social Networking Sites*, NOLA.COM (Aug. 25, 2011, 4:25 PM), [http://www.nola.com/politics/index.ssf/2011/08/aclu\\_challenging\\_new\\_state\\_law.html](http://www.nola.com/politics/index.ssf/2011/08/aclu_challenging_new_state_law.html). Marjorie Esman of the Louisiana ACLU has stated about Louisiana Revised Statutes section 14:91.5 that “[k]eeping children safe is obviously very important to everybody. This is about the state essentially banning access to anything on the internet at all.” *Id.*

106. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49–51 (1961) (holding that the California bar could refuse admission to petitioner for refusing to

government must always have an adequate justification to strip a person of his or her rights.<sup>107</sup> To impose restrictions on sex offenders—whether a registration mandate, a residency requirement, or an Internet limitation or ban—the government must show that society’s interest outweighs the offender’s rights.<sup>108</sup> It is vital to the continuation of the unique American system of law that public pressure does not outweigh the rights of those targeted and that society does not allow a collective distaste of sex offenders to marginalize the body of law addressing the core constitutional issues at stake.<sup>109</sup>

However, the state can always restrict the rights of certain classes when it can demonstrate an adequate reason.<sup>110</sup> Prisoners’ rights can be narrowly restricted<sup>111</sup> because conviction and incarceration strip prisoners of rights that are “incompatible with the objectives of incarceration.”<sup>112</sup> Probationers’ and parolees’ rights are also subject to limitation, although to a lesser degree.<sup>113</sup> Conditions of probation or parole may infringe on fundamental constitutional rights but only when those rights are reasonably related to the punishment and when the restriction is reasonably necessary for the purpose of discouraging recidivism.<sup>114</sup>

Whether the constitutional rights of registered sex offenders not on probation or parole can be restricted is a more difficult issue.<sup>115</sup> Generally, criminals who have completed their sentences are viewed as having paid their debts to society.<sup>116</sup> However, some laws do impose continuing penalties on them.<sup>117</sup> For example, the Supreme Court has upheld the disenfranchisement of convicted felons even

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answer questions about Communist Party affiliation because the right to Free Speech is not absolute).

107. See *Richardson v. Ramirez*, 418 U.S. 24, 78 (1974) (stating that individual rights and state interest must be balanced when stripping people of their fundamental rights).

108. See *id.*

109. See *id.*

110. *Thirtieth Annual Review of Criminal Procedure, VI. Prisoners’ Rights*, 89 GEO. L.J. 1897, 1897–98 (2001).

111. See *Hudson v. Palmer*, 468 U.S. 517, 523 (1984).

112. *Id.* (citations omitted).

113. Kenya A. Jenkins, “Shaming” Probation Penalties and the Sexual Offender: A Dangerous Combination, 23 N. ILL. U. L. REV. 81, 86 (2002). Parole or probation restrictions must be “reasonably related to the goals of the sentence and involve only deprivations of liberty that are reasonably necessary to meet these purposes.” *Id.*

114. *Id.*

115. Michelle Pia Jerusalem, *A Framework for Post-Sentence Sex Offender Legislation*, 48 VAND. L. REV. 219, 250 (1995).

116. *Id.*

117. *Id.* at 238 n.195.

after they have completed their sentences.<sup>118</sup> In the recent decision in *District of Columbia v. Heller*, a landmark case that labeled Second Amendment rights as fundamental, the Court specifically stated that the holding should not be construed as overturning prohibitions on felons owning firearms.<sup>119</sup> Furthermore, some courts have ruled that convicted felons are subject to additional restrictions beyond their sentences when there is a “reasonable relationship between the restriction and the need to protect the public from the type of behavior for which the felon was convicted.”<sup>120</sup> Statutory restrictions on convicted felons include laws that ban certain felons from working in federal financial institutions,<sup>121</sup> from holding union office,<sup>122</sup> or from serving on juries.<sup>123</sup> Restricting sex offenders from the Internet raises similar issues, and the necessary question is whether such a broad ban on Internet usage is reasonably related to the offense.<sup>124</sup>

The next question is whether sex offenders can be subject to even more extensive regulations than other categories of felons.<sup>125</sup> Almost all courts have recognized some lowered level of constitutional protection linked to sex-offender status, as evidenced by registration, notification, and residency requirements.<sup>126</sup> The Supreme Court has held that registration and notification requirements are constitutional for registered sex offenders who have completed their sentences.<sup>127</sup> The state has a legitimate and

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118. *Richardson v. Ramirez*, 418 U.S. 24 (1974) (stating that disenfranchisement of convicted felons was not a denial of equal protection).

119. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (holding that the Second Amendment right to bear arms is fundamental guarantee to keep guns in the home). This case is a clear indication that felons can be stripped of fundamental rights due to their status as felons, even after they have served their sentences.

120. *McCurdy*, *supra* note 30, at 1581–82 (citing *Hobbs v. Cnty. of Westchester*, No. 00Civ.8170(JSM)(LMS), 2002 WL 31873462, at \*11 (S.D.N.Y. Dec 23, 2002)).

121. *Hudson v. United States*, 522 U.S. 93 (1997) (holding occupational debarment of bank officers for misapplication of bank funds constitutional).

122. 29 U.S.C. § 504 (2006); *De Veau v. Braisted*, 363 U.S. 144 (1960) (holding ban on felons serving as union officers constitutional).

123. 28 U.S.C. § 1865(b)(5) (2006).

124. *McCurdy*, *supra* note 30, at 1581–82.

125. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84 (2003).

126. *Id.*

127. The Supreme Court upheld registration and notification requirements in two cases. The first was *Smith v. Doe*, 538 U.S. 84. The Court stated that the registration and notification law in Alaska survived a challenge under the Ex Post Facto Clause because its objective of protecting the public was nonpunitive and most of its provisions did not involve criminal punishment. *See id.* at 105–06. Additionally, *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), upheld Connecticut’s sex offender registration statute over a due process

nonpunitive interest in imposing restrictions on those determined to be dangerous, especially sex offenders.<sup>128</sup>

However, constitutional analysis always involves a balancing of the government's interest and the individual's rights.<sup>129</sup> The greater the burden imposed on individual rights, the stronger the government interest must be to uphold the restriction.<sup>130</sup> Because registration and notification requirements were addressed and upheld, a number of states have begun to pass residency requirements that impose spatial limits on sex offenders' homes and generally barring sex offenders from areas where children congregate.<sup>131</sup> Those restrictions are vastly more burdensome than registration and notification, and lower courts across the country are split on their constitutionality.<sup>132</sup> The highest court that has addressed the issue of residency requirements is the Eighth Circuit Court of Appeals, which upheld Iowa's residency restriction in *Doe v. Miller*.<sup>133</sup> However, *Doe v. Miller* failed to address the constitutionality of imposing restrictions on registered sex offenders who have completed their sentences, instead treating their authority to pass restrictions over those offenders as an established fact.<sup>134</sup> The court merely examined whether the particular restriction at issue passed the balancing test between citizens' rights and governmental interest.<sup>135</sup>

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challenge. *See id.* at 8. The defendant challenged the Connecticut provisions by claiming that the Connecticut Department of Public Safety did not have a procedure to determine whether those affected were "currently dangerous." The Court determined that the challenge was without merit; Connecticut had intended to register all convicted sex offenders, regardless of their danger to society, and all of those convicted of a sex crime had been given a chance to challenge their conviction at their trials. *Id.* at 6–7. In both cases, the Court held that, although the sex offenders completed their sentences, the government still had a strong enough interest in the restrictions that they did not violate the constitutional rights of those affected.

128. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

129. *Richardson v. Ramirez*, 418 U.S. 24, 78 (1974) (stating that individual rights and state interest must be balanced when stripping people of their fundamental rights).

130. *Id.*

131. *Wynton*, *supra* note 26, at 1882 n.110.

132. *Id.* Some residency statutes have survived due process, ex post facto, and cruel and unusual punishment challenges, while other courts have struck down residency laws based on equal protection and takings grounds.

133. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005). Iowa's statute was upheld over procedural due process, substantive due process, and ex post facto challenges.

134. The only mention of whether the law should impact those sex offenders who have completed their sentences comes in the dissenting opinion. *Id.* at 725 (Melloy, J., dissenting).

135. *Id.* at 709–11 (majority opinion). The State of Iowa made the argument that it was "common sense" that separating children and sex offenders would

Both Internet and residency restrictions impose limitations on the actions of those who have completed their sentences, including probation and parole.<sup>136</sup> Courts around the country, including the United States Supreme Court, have concluded that there are times when it is acceptable to impose restrictions on registered sex offenders who have completed their sentences in the form of registration, notification, and residency statutes.<sup>137</sup> However, not all restrictions on sex offenders are valid.<sup>138</sup> To pass constitutional scrutiny, it is necessary that the restriction be reasonably related to the crime committed and that the governmental interest asserted justifies restricting the constitutional rights of citizens.<sup>139</sup>

*B. Application to Louisiana Revised Statutes Section 14:91.5*

Applying the current jurisprudence to restrictions on sex offenders' Internet access, especially in the context of Louisiana Revised Statutes section 14:91.5, the government can likely single out sex offenders, even those who have completed their sentences, for some restrictions on Internet use.<sup>140</sup> Although sex offenders do not have quantifiably lowered constitutional protection in the way that prisoners, parolees, or probationers do, precedent exists for government restrictions on those who have served their time.<sup>141</sup> Furthermore, precedent has also permitted the government to specifically single out sex offenders for restrictions, such as in registration, notification, and residency requirements.<sup>142</sup> As noted above, as long as the state can show that the restriction reasonably

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lead to a decrease in child abuse caused by recidivism. Because there only needs to be a rational basis for the law to survive scrutiny, that common sense analysis is enough to make the law constitutional. Although residency restrictions are more restrictive than an Internet restriction, *Doe v. Miller* and *Smith v. Doe* are still analogous to the present case and have precedential value. *Id.* at 716.

136. LA. REV. STAT. ANN. § 14:91.5 (2011); *Miller*, 405 F.3d 700.

137. See *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Miller*, 405 F.3d 700; *Smith v. Doe*, 538 U.S. 84 (2003).

138. *E.g.*, *Santos v. State*, 668 S.E.2d. 676 (Ga. 2008) (holding that disallowing "homeless" as an address for registration violated the Due Process Clause).

139. *Miller*, 405 F.3d at 714, 720; *Smith*, 538 U.S. at 86–87.

140. See *infra* Part IV.

141. *Conn. Dep't of Pub. Safety*, 538 U.S. 1; *Miller*, 405 F.3d 700; *Smith*, 538 U.S. 84.

142. *Conn. Dep't of Pub. Safety*, 538 U.S. at 4; *Smith*, 405 F.3d at 95.

relates to the government interest of protecting the public from the crime that the class of felons committed, it should survive.<sup>143</sup>

Restricting sex offenders, who committed their crimes against children, from social networking sites is reasonably related to the crime committed.<sup>144</sup> Keeping child sex offenders from accessing social networking sites will help to keep them from reoffending.<sup>145</sup> However, just because it is legitimate for the government to single out sex offenders does not mean that Louisiana's statute itself is constitutional.<sup>146</sup> It is also necessary to examine whether the statute, as written, survives Free Speech constitutional scrutiny.<sup>147</sup>

### III. FREE SPEECH

#### A. Free Speech and the Internet

The Internet has quickly come to define modern society, and it has vastly and rapidly changed how people around the world interact.<sup>148</sup> The massive amount of information on the Internet and the instantaneous nature of the Internet have revolutionized communication, interaction, and even political activism.<sup>149</sup> Social media has played a large part in those developments.<sup>150</sup> However, the issues applicable to the current matter have rarely been addressed in the context of the Internet.<sup>151</sup> The overbreadth doctrine does not differ substantially in its online and offline application.<sup>152</sup> On the other hand, Free Speech protection may differ at least marginally in cyberspace, but it has not been nearly as well-defined online as it has offline.<sup>153</sup> In *Reno v. ACLU*, the

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143. McCurdy, *supra* note 30, at 1581–82 (citing *Hobbs v. Cnty. of Westchester*, No. 00Civ.8170(JSM)(LMS), 2002 WL 31873462, at \*11 (S.D.N.Y. Dec 23, 2002)).

144. *See infra* Part IV.

145. *Miller*, 405 F.3d 700.

146. *See infra* Part IV.

147. *See infra* Part IV.

148. *See generally* Irina Shklovski, Sarah Kiesler & Robert Kraut, *The Internet and Social Interaction: A Meta-analysis and Critique of Studies, 1995-2003*, CARNEGIE MELLON UNIV., [http://www.academia.edu/852624/The\\_Internet\\_and\\_social\\_interaction](http://www.academia.edu/852624/The_Internet_and_social_interaction).

149. Important examples are the 2010 Egyptian Revolution and the London Riots in 2011. Community Team, *Telling the London Riot Story on Social Media*, CBCNEWS (Aug. 9, 2011, 1:55 PM), <http://www.cbc.ca/news/yourcommunity/2011/08/telling-the-london-riot-story-on-social-media.html>; *Social Media, Cellphone Video Fuel Arab Protests*, THE INDEPENDENT (Feb. 27, 2011), <http://www.independent.co.uk/life-style/gadgets-and-tech/social-media-cellphone-video-fuel-arab-protests-2227088.html>.

150. *See* Community Team, *supra* note 149; *Social Media*, *supra* note 149.

151. *See infra* Part III.C.

152. *See infra* Part III.B.

153. *See infra* Part III.C.

Supreme Court held that expression on the Internet, like that in print media, receives full First Amendment protection.<sup>154</sup> The Court concluded that there was no legitimate reason to restrict Free Speech on the Internet as it had previously done with television and radio.<sup>155</sup> Since the Supreme Court has rarely dealt with the issue and has done so only on a case-by-case basis, it is necessary to analogize from offline cases that deal with similar issues.<sup>156</sup>

### *B. Overbreadth*

Under the First Amendment overbreadth doctrine established by the Supreme Court, a statute that bans a substantial amount of protected speech is void.<sup>157</sup> As applied to Free Speech, the overbreadth doctrine protects the core ideals of the First Amendment by defending lawful speech, especially speech that either resembles unlawful speech or is suppressed in the government's effort to ban unlawful speech.<sup>158</sup> The overbreadth doctrine has been characterized as a balancing test that must be analyzed in light of relevant competing social interests.<sup>159</sup> In Free Speech cases especially, ensuring that laws are not overbroad and that they do not ban protected speech is paramount.<sup>160</sup> A law that

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154. 521 U.S. 844, 870 (1997) (holding that a ban on transmission of obscene material to minors over the Internet was content based and thus received strict scrutiny and also that it was overbroad).

155. *Id.* (stating that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium” because people seek out content on the Internet themselves, instead of turning it on and possibly being surprised by obscene content, as could happen with a television or radio).

156. *Id.* See also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (addressing public and private forums in an offline context that can easily be analogized to Free Speech issues on the Internet).

157. *United States v. Williams*, 553 U.S. 285, 292 (2008) (holding a law criminalizing anything sold as child pornography, whether it actually was child pornography, to be constitutional because it did not criminalize a substantial amount of protected expression).

158. The core ideal behind the overbreadth doctrine as it applies to Free Speech is that “[t]he Government may not suppress lawful speech as the means to suppress unlawful speech” because “[p]rotected speech does not become unprotected merely because it resembles the latter.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (holding that a ban on images that were neither obscene nor produced using actual children, such as drawings or computer simulated pornography, was overbroad and unconstitutional).

159. *Id.*

160. “[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . .” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Overbroad laws and the threat of their enforcement “deters people from engaging

bans protected speech is also likely to deter citizens from exercising their Free Speech rights out of fear of prosecution.<sup>161</sup>

On the other hand, when society has deemed conduct so disruptive as to be criminal and a statute does have legitimate applications, it may be an overreaction to strike it down merely due to a belief that it may chill a small amount of protected speech.<sup>162</sup> In an effort to balance those competing interests and to ensure that both are respected, the Supreme Court has insisted that a statute must be “substantially overbroad” to be stricken down.<sup>163</sup> Just because a statute could be impermissible in some hypothetical situations is not enough to render it unconstitutional.<sup>164</sup>

The overbreadth analysis has two steps.<sup>165</sup> First, the court must construe the law to clarify what the statute covers.<sup>166</sup> Second, the court turns to whether the statute criminalizes a substantial amount of protected speech,<sup>167</sup> which is the vital question in determining overbreadth.<sup>168</sup>

### *C. Time, Place, and Manner Restriction*

In public forums, the state’s right to limit speech and expression is severely constrained.<sup>169</sup> Traditional public forums are areas like streets, parks, and city squares that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>170</sup> The government’s power to curtail speech in public forums is severely restricted because such forums are areas where people have an increased right to express themselves.<sup>171</sup>

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in constitutionally protected speech” and inhibits “the free exchange of ideas.” *Williams*, 553 U.S. at 292.

161. *Broadrick*, 413 U.S. at 612; *Williams*, 553 U.S. at 292.

162. *Broadrick*, 413 U.S. at 632.

163. *Williams*, 553 U.S. at 303.

164. The “mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Williams*, 553 U.S. at 303 (citing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)).

165. *Id.* at 293–97.

166. *Id.*

167. *Id.* at 297. Furthermore, one must analyze a statute not only absolutely but also in terms of the context and situation in which it was passed. *Id.* at 292.

168. “[A] statute is facially invalid if it prohibits a substantial amount of protected speech.” *Id.* at 292.

169. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

170. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

171. *Id.*; *Perry Educ. Ass’n*, 460 U.S. at 45.

Courts have only twice addressed the question of whether the Internet is a public forum, but this inquiry is the first step in determining the level of scrutiny applicable to a restriction on protected speech.<sup>172</sup> In *Sutcliffe v. Epping School District*, the First Circuit definitively rejected the characterization of the Internet as a traditional public forum because of its recent creation but failed to elaborate any other reasons for its stance.<sup>173</sup> In *Putnam Pit, Inc. v. City of Cookeville, Tennessee*, the Sixth Circuit took a more conciliatory tone regarding the issue, but it failed to entirely address the issue.<sup>174</sup> Instead, the court merely concluded that one particular government website was not a public forum because it did not allow for communication, while also recognizing that the public forum doctrine would quickly become obsolete if not expanded “in times of fast-changing technology.”<sup>175</sup> The only time that the Supreme Court came close to addressing the issue was in 1997 when it commented on the Internet’s unique nature and potential for communicative activity.<sup>176</sup> However, it has never addressed the issue directly.<sup>177</sup> Considering the growth of the

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172. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985). The two cases in which public forums have been addressed in an Internet context are *Sutcliffe v. Epping School District*, 584 F.3d 314, 333 (1st Cir. 2009), and *Putnam Pit, Inc. v. City of Cookeville, Tennessee*, 221 F.3d 834, 843 (6th Cir. 2000).

173. The court in *Sutcliffe v. Epping School District* stated that [t]he Town’s website is obviously not a traditional public forum. Given that the Internet itself is a “resource[,] . . . which did not exist until quite recently,” the Town’s website “has not ‘immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions.’” 584 F.3d at 333 (citations omitted).

174. *Putnam Pit, Inc.*, 221 F.3d at 843 (stating that the governmental website in question was not a traditional public forum because it did “not allow for open communication or the free exchange of ideas between members of the public”). However, the case also recognized that the Internet as a whole possesses a “communicative potential” reminiscent of traditional public forums. Nevertheless, the court is hindered in that analysis by the recent development of the Internet. *Id.* at 843.

175. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 697–98 (1992) (Kennedy, J., concurring), *quoted in Putnam Pit*, 221 F.3d at 843.

176. *Reno v. ACLU*, 521 U.S. 844, 869 (1997). “[T]hrough 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.” *Id.* at 870.

177. The Supreme Court has only addressed the issue indirectly in a dissent: Minds are not changed in the streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.

Internet in the years since that decision, the best course of action would be to reevaluate traditional public forums and the Internet.<sup>178</sup>

Despite the government's restricted power to legislate expressive activity in public forums, the government can impose reasonable time, place, and manner restrictions.<sup>179</sup> Free Speech is a fundamental right, but the Constitution does not guarantee a right to speak about all subjects, in all places, at all times.<sup>180</sup> The Supreme Court has established a three-part test to analyze time, place, and manner restrictions.<sup>181</sup> To be valid, such restrictions must be justified by the legislature for reasons other than content, be "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information."<sup>182</sup>

The first inquiry is whether the restriction is content based or content neutral.<sup>183</sup> Content-neutral restrictions are those that do not

The extent of public entitlement to participate in those means of communication may need to be changed as technologies change . . . .  
*Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Commc'ns Comm'n*, 518 U.S. 727, 802–03 (1996) (Kennedy, J., dissenting) (citation omitted).

178. Only by defining the Internet as a public forum can it gain full Free Speech protection, which is vital in the modern world where the Internet is one of the most important forms of information, education, and communication. One Comment examines Justice Kennedy's dissent, explaining why the Internet, as it has developed in the modern world, should be treated as a public forum:

However, the gap between Kennedy's observation and the structural landscape of the Internet is that there are no "parks" or "streets" in cyberspace—there are no thoroughfares, no town centers, no places where you can stumble by and see the labor union passing out their leaflets or organizing the unorganized. The Internet is self-driven, self-Googleed, self-determined, and although this is part of the value of cyberspace, it effectively isolates each of us. Hopefully, Kennedy's words will serve as the spark that will later protect spaces that sustain our democracy in the form of virtual public spaces.

Stacey D. Schesser, Comment, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CAL. L. REV. 1791, 1808 (2006).

179. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (holding that although reasonable restrictions can be enforced, Louisiana's restrictions on civil rights protests were unconstitutional).

180. *Id.* The Court explained the reasons for that restriction as being "[t]he constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Id.*

181. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that concert restrictions in a public park were constitutional time, place, and manner restrictions because they were content neutral, were narrowly tailored for a significant governmental interest, and left open ample alternative channels of communication).

182. *Id.*

183. *Id.*

attempt to suppress a particular message but instead have a justification other than referencing the content of the regulated speech.<sup>184</sup> On the other hand, content-based restrictions prohibit or limit speech based on its content.<sup>185</sup> The Supreme Court has upheld restrictions on noise in certain neighborhoods,<sup>186</sup> bans on camping in certain areas that interfered with a demonstration to call attention to the plight of the homeless,<sup>187</sup> buffer zones for protesters around abortion clinics,<sup>188</sup> and regulations that limited the number of adult-themed businesses in a single building<sup>189</sup> as content-neutral. Although these laws resulted in some type of speech restriction, none sought to ban or regulate certain messages but only the time, place, and manner of the speech.<sup>190</sup>

However, determining whether a restriction is content neutral does not end the inquiry.<sup>191</sup> The second question is whether the regulation is also “narrowly tailored to serve a significant governmental interest.”<sup>192</sup> That test consists of two components: that the statute serves a significant government interest and that it is narrowly tailored.<sup>193</sup> Although a restriction need not be the least intrusive manner to be narrowly tailored, it still must not be substantially broader than necessary to accomplish the government’s goals.<sup>194</sup> When the government’s goal “would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest,” a statute is narrowly tailored.<sup>195</sup>

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184. *Id.* (citation omitted).

185. *Id.* (citations omitted).

186. In *Ward v. Rock Against Racism*, the justification was to control noise levels to retain the character of the area in question, a goal that had nothing to do with the actual content of Rock Against Racism’s events. *Id.* at 793.

187. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

188. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997).

189. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

190. *See supra* Part I.C.

191. *Ward*, 491 U.S. at 796.

192. *Id.* (citation omitted).

193. *See id.*

194. *Id.* at 797–99. The Court has also stated that “[a] complete ban can be narrowly tailored but only if each activity within the proscription’s scope is an appropriately targeted evil.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1989), *quoted in Ward*, 491 U.S. at 799–80.

195. *Ward*, 491 U.S. at 782–83. The Court stated that the regulation that technicians operate the sound board for all concerts was narrowly tailored because it was a “direct and effective” way for the city to control the volume of the concert. *Id.* at 783. It was not substantially broader than necessary because there was no evidence that the guideline had a “substantial deleterious effect on the ability of performers to achieve the quality of sound they desired.” *Id.* at 801.

The question then becomes: When does a restriction cross the line between broader than necessary and substantially broader than necessary?<sup>196</sup> Courts have been reluctant to lay down concrete rules regarding the issue, but some precedent exists.<sup>197</sup> A regulation does not have to be the least intrusive way of achieving the interests of the government to be narrowly tailored, as strict scrutiny would require, but “the existence of numerous obvious and less-burdensome alternatives is relevant to the regulation’s ‘fit.’”<sup>198</sup> Two cases that illustrate the difference between a narrowly tailored statute and one that is not narrowly tailored are *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*<sup>199</sup> and *Schneider v. New Jersey*.<sup>200</sup> In *Vincent*, the Supreme Court upheld a ban on street signs enacted for esthetic reasons over a challenge by those who wished to put up political advertisements, but the Court distinguished the previous *Schneider* decision banning the distribution of handbills.<sup>201</sup> The law in *Vincent* was narrowly tailored because the law banning political signs was a direct response to the problem that the city was attempting to resolve.<sup>202</sup> On the other hand, the rule in *Schneider* was not narrowly tailored because the city could protect its interests by enforcing already existing littering statutes without abridging protected speech.<sup>203</sup>

Federal supervised release cases are some of the only cases to address narrow tailoring in the context of the Internet and sex offenders.<sup>204</sup> Although federal supervised release differs from Louisiana Revised Statutes section 14:91.5 because it is individually imposed, the cases do reveal when courts have held

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196. See *id.* at 801.

197. See, e.g., *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Schneider v. New Jersey* (Town of Irvington), 308 U.S. 147 (1939).

198. *United Bhd. of Carpenters & Joiners of Am. Local 586 v. Nat’l Labor Relations Bd.*, 540 F.3d 957, 968 (9th Cir 2008) (citation omitted) (holding that a ban on all signs in a private mall was not narrowly tailored because it was overbroad and its safety interest could be just as well served by less speech-restrictive limits on sign sizes, shapes, or materials). The court used the factors from *Ward v. Rock Against Racism*. See *Ward*, 491 U.S. at 790.

199. *Taxpayers for Vincent*, 466 U.S. 789.

200. *Schneider*, 308 U.S. 147.

201. *Id.*; *Taxpayers for Vincent*, 466 U.S. 789.

202. *Taxpayers for Vincent*, 466 U.S. at 810. “[T]he ordinance in this case responds precisely to the substantive problem which legitimately concerns the City.” *Id.*

203. *Id.* at 809–10. The Court stated “that cities could adequately protect the esthetic interest in avoiding litter without abridging protected expression merely by penalizing those who actually litter” because “there is no constitutional impediment to ‘the punishment of those who actually throw papers on the streets.’” *Id.* at 808–09 (citations omitted).

204. Wynton, *supra* note 26, at 1863. Federal supervised release is very similar to probation or parole. The specifics are outside the scope of this Comment.

Internet bans to be narrowly tailored.<sup>205</sup> Circuits have almost always upheld Internet bans in the context of crimes in which the offenders had sought direct contact with a minor over the Internet.<sup>206</sup> Furthermore, they often consider the extent to which a ban would help reduce recidivism rates as one of the most important, if not the most important, criteria.<sup>207</sup>

The third factor in a time, place, and manner restriction is that the statute must leave open ample alternative channels of communication.<sup>208</sup> That standard is met if a statute or regulation does not try to proscribe a specific manner or type of speech at a given time or place.<sup>209</sup> The statute must leave open effective and affordable channels of communication.<sup>210</sup> Furthermore, a statute may restrict an individual's favored method of speaking,<sup>211</sup> but it cannot ban an entire medium of speech<sup>212</sup> or prohibit the speaker from reaching his or her intended audience.<sup>213</sup> Other considerations that the Court often lists as important factors for an alternative channel analysis are whether the location of the expressive activity is important, whether spontaneity (especially for political speech) is possible, and the cost and convenience of alternatives.<sup>214</sup>

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205. Wynton, *supra* note 26, at 1863.

206. *Id.*

207. *See* United States v. Crume, 422 F.3d 728 (8th Cir. 2005). The Eighth Circuit stated that a complete Internet ban was not narrowly tailored for any crime other than the direct solicitation of minors. *Id.* at 733. In *United States v. Thielemann*, 575 F.3d 265 (3rd Cir. 2009), the Third Circuit upheld an Internet ban for a man who had paid another man to molest an 8-year-old girl while he watched over a webcam. One commentator has stated that “[u]ltimately, these [supervised release] cases recognize that some regulation of sex offenders’ activities is reasonable based on their past actions, but restrictions should not be any more excessive than necessary to prevent recidivism.” Jennifer Ekblaw, *Not in My Library: An Examination of State and Local Bans of Sex Offenders from Public Libraries*, 44 IND. L. REV. 919, 945 (2011).

208. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989).

209. *Id.* (citations omitted). The Court stated that the statute requiring all outside concerts to use a government-supplied sound mixer left open alternative channels. *Id.*

210. *United Bhd. of Carpenters & Joiners of Am. Local 586 v. Nat’l Labor Relations Bd.*, 540 F.3d 957 (9th Cir. 2008) (holding that banning all signage failed to leave open ample alternative channels of communication).

211. *Id.* at 969 (citations omitted).

212. *Id.* at 969 (“[A] regulation that forecloses an entire medium of public expression across the landscape of a particular community or setting fails to leave open ample alternatives.” (citation omitted)).

213. *See, e.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (2008).

214. *See id.*; *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (ban on adult theaters within 1,000 feet of residential dwellings, churches, parks, or schools left open alternative channels because almost 5% of the city remained

## IV. ANALYSIS OF LOUISIANA REVISED STATUTES SECTION 14:91.5

A. *Overbreadth*

Louisiana's Unlawful Use Statute is overbroad.<sup>215</sup> Construing the language and determining exactly what is banned is the first step when applying the overbreadth doctrine to Louisiana Revised Statutes section 14:91.5.<sup>216</sup> The statute does not ban solely the use of social networking websites but, rather, the "using or accessing" of any social networking website, chat room, or peer-to-peer network—terms which are defined very broadly.<sup>217</sup> The most overbroad part of the statute is Louisiana Revised Statutes section 14:91.5(C)(4)(b), providing part of the definition of *social networking website*, which bans the use or access of any website that "offers a mechanism for communication among users."<sup>218</sup> The definition of *chat room* is also overbroad; it bans websites that provide the "ability to communicate via text" where those messages can be viewed by other users.<sup>219</sup> Louisiana Revised Statutes section 14:91.5 has no exceptions for job use, job searches, family communication, or other important functions that the Internet serves in many individuals' everyday lives.<sup>220</sup> Due to the nature of the Internet, this communication restriction is only one small step below a full Internet ban.<sup>221</sup>

The second factor in the inquiry is whether the statute, as construed, criminalizes a substantial amount of protected activity.<sup>222</sup> Speech over the Internet receives full First Amendment protection.<sup>223</sup> Because Louisiana Revised Statutes section 14:91.5 bans communication over the Internet, and that communication has full

for use by adult theaters); *City of Ladue v. Gilleo*, 512 U.S. 43, 55–56 (1994) (ban on residential signs did not leave open ample alternative channels because even if it is content neutral, the danger of "foreclos[ing] an entire medium" is that "by eliminating a common means of speaking, such measures can suppress too much speech"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) (holding that a complete ban on commercial live entertainment within the borough's limits did not leave open alternative channels because it suppressed too much lawful speech); *Schneck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 370 (1997) (buffer zone around abortion clinics left open ample alternative channels by leaving open the ability of protesters to "picket, carry signs, pray, sing or chant in full view of people going into the clinics" (citation omitted)).

215. See *supra* Part III.

216. See *supra* Part I.C.

217. See *supra* Part I.C.

218. LA. REV. STAT. ANN. §14:91.5(C)(4)(b) (2011).

219. LA. REV. STAT. ANN. §14:91.5(C)(1) (2011).

220. See *supra* Part I.C.

221. See *supra* Part I.C.

222. See *supra* Part III.A.

223. *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

constitutional protection, the statute bans protected expression.<sup>224</sup> However, the important inquiry is not whether the statute bans only protected speech but instead whether it bans a substantial amount.<sup>225</sup> Louisiana Revised Statutes section 14:91.5 bans all communication over the Internet.<sup>226</sup> That is not only a substantial amount of protected speech—it is all protected speech.<sup>227</sup> Banning all speech is overbroad, even when the statute is examined in the context of the governmental interest it protects.<sup>228</sup> Given that the purpose of Louisiana Revised Statutes section 14:91.5 is to keep dangerous sex offenders off of social networking sites that also permit use by minors, a statute that operates essentially as a full Internet ban with no exceptions for email, family contact, or job related activities is substantially overbroad and should be struck down as unconstitutional.<sup>229</sup>

### *B. Time, Place, and Manner Violation*

The existing case law on the Internet's designation as a public forum is minimal.<sup>230</sup> Two cases have addressed whether the Internet should be considered a public forum, and both punted the issue with a textual analysis that failed to examine the Supreme Court's true intent.<sup>231</sup> The minimal case law uses history as a crutch to avoid a true analysis, refusing to expand traditional public forums beyond the physical world and into the new realms that technology has opened.<sup>232</sup> However, the Internet has exploded in popularity in a way that those who formulated the traditional public forum doctrine could never have anticipated.<sup>233</sup> The failure

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224. Sanjiv N. Singh, *Cyberspace: A New Frontier for Fighting Words*, 25 RUTGERS COMPUTER & TECH. L.J. 283, 308–09 (1999). Not all speech over the Internet is protected. Obscene speech, fighting words, and defamation are only some examples of speech that is not always covered by the First Amendment and therefore would not be protected over the Internet in the same way that it is not protected in real life. *Id.* However, the vast majority of normal communication over the Internet would be protected, and, therefore, a ban on that communication would proscribe protected speech. *See supra* Part I.C.

225. *See supra* Part III.B.

226. *See supra* Part I.C.

227. *See supra* Part III.C. Although some unprotected speech may also be banned (obscenity, fighting words, defamation, sedition, or some commercial speech), that is irrelevant. The important thing to note is that a ban on communication proscribes all of the protected speech as well.

228. *See supra* Part III.B.

229. *See supra* Part III.B.

230. *Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834 (6th Cir. 2000); *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314 (1st Cir. 2009).

231. *See supra* Part III.C.

232. *See supra* Part III.C.

233. *See supra* Part III.C.

of modern courts to apply traditional public forum analysis to the Internet leaves vast amounts of speech that should be protected open to unconstitutional government prohibition.<sup>234</sup>

The government should be prohibited from banning protected speech across the Internet in the same way that it is prohibited from banning free speech offline.<sup>235</sup> Although MySpace and Facebook, as private entities, can suppress almost any speech they choose, the government lacks the same power to restrict expression.<sup>236</sup> The state of Free Speech protection online is a clear example of how jurisprudence is a lagging indicator of the reality on the ground.<sup>237</sup> The Internet has become one of the most important modes, if not the premier mechanism, for everyday people to express their views, political and nonpolitical.<sup>238</sup> Whereas parks and street corners formerly served as the primary location for people to speak, much of that expression has migrated to the Internet.<sup>239</sup> People now communicate and gather on the Internet, perhaps even more than offline, and the definition of public forum should evolve with the changing times.<sup>240</sup> To allow so much suppression of speech merely because it occurs via a recently developed medium ignores the intent behind the traditional-public-forum doctrine and the First Amendment itself.<sup>241</sup> Traditional public forums allow people to express themselves cheaply and to a large audience. The Internet accomplishes both of those goals just as well as, if not better than, a park or a sidewalk.<sup>242</sup> Furthermore, the Internet is a recent innovation, and its continued growth at staggering rates should not

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234. See *supra* Part III.C.

235. See *supra* Part III.C.

236. Marlon A. Walker, *MySpace Removes 90,000 Sex Offenders*, NBCNEWS.COM (Feb. 3, 2009, 10:02 PM), [http://www.nbcnews.com/id/28999365/ns/technology\\_and\\_science-security/t/myspace-removes-sex-offenders](http://www.nbcnews.com/id/28999365/ns/technology_and_science-security/t/myspace-removes-sex-offenders). In the past, MySpace has purged sex offenders from its website upon finding out about offenders' criminal records. Private websites have full authority to control who can access its sites and what users can say. However, the government does not have the same kind of authority to limit speech as the owner of the website does.

237. See *supra* Part III.C.

238. See INTERNET FREE EXPRESSION ALLIANCE, <http://ifea.net/> (last visited Nov. 3, 2011).

239. *Id.* See also INTERNET FREEDOM OF SPEECH, [http://www.livinginternet.com/i/ip\\_speech.htm](http://www.livinginternet.com/i/ip_speech.htm) (last visited Mar. 10, 2013). Even speech that does have a real-life component is often also expressed on the Internet, too. John Boudreau, *Occupy Wall Street, Brought to You by Social Media*, POPMATTERS (Nov. 4, 2011), <http://www.popmatters.com/pm/article/150872-occupy-wall-street-brought-to-you-by-social-media/>. The Occupy Wall Street movement is a perfect example of such speech.

240. Boudreau, *supra* note 239.

241. See *supra* Part III.C.

242. INTERNET FREEDOM OF SPEECH, *supra* note 239.

diminish the protection that it receives.<sup>243</sup> Instead, the law should embrace the potential of the Internet to grow even more influential in the Free Speech sphere, and the courts should recognize the Internet as a traditional public forum for Free Speech analysis.<sup>244</sup>

After determining that the Internet is a traditional public forum, it is necessary to apply the three-step time, place, and manner analysis developed by the Supreme Court.<sup>245</sup> To be constitutional under that analysis, Louisiana Revised Statutes section 14:91.5 must be content neutral and narrowly tailored to a significant governmental interest, and it must leave open ample alternative channels of communication.<sup>246</sup>

The restriction in Louisiana Revised Statutes section 14:91.5 and other similar statutes should be deemed content neutral because it does not discriminate against the content of expression, but, rather, it wholly bans certain persons' speech in certain places.<sup>247</sup> Although the statute targets inappropriate speech against minors, it attempts to reduce or stop online seduction not by banning that inappropriate speech itself.<sup>248</sup> Instead, it completely bans some sex offenders from accessing restricted websites, foreclosing the possibility of any speech in those locations.<sup>249</sup> Some may try to argue that Louisiana Revised Statutes section 14:91.5 is content based because the intention of the Louisiana Legislature in passing the statute was to suppress certain speech (indecent speech towards minors) or because the law is targeted only at those who have previously spoken or acted illegally towards minors.<sup>250</sup> Whatever its intention, the statute accomplishes

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243. *See id.* Internet usage increased from 0.4% of the world's population in 1995 to 34.3% of the world's population in 2012, an increase of 2.39 billion people in fewer than 20 years. *Internet Growth Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited March 10, 2013).

244. *See supra* Part III.C.

245. *See supra* Part III.C.

246. *See supra* Part III.C.

247. LA. REV. STAT. ANN. §14:91.5 (2011).

248. Obscene speech towards minors would be obscene speech. Singh, *supra* note 224, at 309.

249. *See supra* Part I.C.

250. If Louisiana Revised Statutes section 14:91.5 were deemed to be content based, it would be analyzed under much stricter scrutiny than a time, place, and manner restriction. Content-based restrictions can be permissible in a traditional public forum; however, they must serve a compelling state interest and be narrowly drawn to achieve that end. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citation omitted). Content-based restrictions receive strict scrutiny because they are more likely to be an attempt by the government to make a value judgment about what kind of speech is more or less important than other speech or because the weight of the government behind some

its goal in a content-neutral fashion by banning all communication by some registered sex offenders, the only important criteria for the first factor in the time, place, and manner analysis.<sup>251</sup>

The second factor, “narrowly tailored to a significant governmental interest,” presents a more difficult question.<sup>252</sup> The latter part is easily satisfied because few would dispute the assertion that Louisiana Revised Statutes section 14:91.5, which is meant to protect minors from sexual abuse via the Internet, serves a significant and compelling government interest.<sup>253</sup> The far more difficult question is whether Louisiana Revised Statutes section 14:91.5 is narrowly tailored to that interest.<sup>254</sup> Applying jurisprudential standards, Louisiana Revised Statutes section 14:91.5 is not narrowly tailored.<sup>255</sup> The analysis for narrow tailoring is very similar to the overbreadth analysis above.<sup>256</sup>

The Louisiana Legislature’s broad definitions in Louisiana Revised Statutes section 14:91.5 do protect children, and it is understandable why it would define social networking sites so expansively.<sup>257</sup> However, while significant, protecting children is not the only interest at stake.<sup>258</sup> The constitutional rights of sex

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messages is improper. R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 335 (2006). When applying the content-based test to Louisiana Revised Statutes section 14:91.5, the first thing to examine is whether or not there is a compelling governmental interest. Protecting minors from abuse over the Internet is a compelling state interest. *Reno v. ACLU*, 521 U.S. 844, 869 (1997). Because Louisiana Revised Statutes section 14:91.5 seeks to do exactly that, it would be a compelling governmental interest and would pass that part of the test. The second part of the analysis is whether it is narrowly drawn to achieve that end. Louisiana Revised Statutes section 14:91.5 fails that portion of the test. Because Louisiana Revised Statutes section 14:91.5 cannot pass the *narrowly tailored* standard for the time, place, and manner analysis, it would also fail the *narrowly drawn* standard. *See supra* Part IV. Therefore, Louisiana Revised Statutes section 14:91.5 would be unconstitutional if it were content-based as well. *See supra* Part IV.

251. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See also supra* Part I.C.

252. *See supra* Part III.C.

253. *Reno*, 521 U.S. at 869 (establishing that the government has a compelling interest in protecting minors from abuse or trauma, both physical and mental); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 353 (2007) (“Compelling state interests are ‘interests of the highest order.’” (citation omitted)).

254. *See supra* Part I.C.

255. *See supra* Part III.C.

256. *See supra* Part IV.A. Although narrow tailoring is separate from overbreadth, both in the full analysis and the fact that it is one part of a broader time, place, and manner test, parts of the overbreadth analysis above should be incorporated into the analysis of whether a statute is narrowly tailored.

257. *See supra* Part I.C.

258. *See supra* Part III.C.

offenders must also be respected.<sup>259</sup> In the *narrowly tailored* determination, the important issue is whether the limitation is substantially broader than necessary to achieve the government's interest.<sup>260</sup> The restriction in Louisiana Revised Statutes section 14:91.5 is broader than necessary because it bans some websites that have nothing to do with the statute's goal of protecting minors from sexual predators; however, that does not automatically invalidate the law.<sup>261</sup> Instead, the key word in the inquiry is *substantially*.<sup>262</sup> Courts have looked at the availability and ease of other options and the overbreadth of the regulation in comparison with the government's goals.<sup>263</sup> In the current case, there are numerous alternatives that would serve the government's purpose without effectively banning the vast majority of the Internet.<sup>264</sup>

Other states' statutes offer numerous alternative definitions for banned websites, and many of these would likely be constitutional.<sup>265</sup> Although Louisiana Revised Statutes section 14:91.5 seeks to keep sexual predators away from Internet sites where they could find and abuse children, it bans them from such a broad expanse of the Internet that it is overbroad compared to its purpose.<sup>266</sup> Instead, Louisiana could follow the framework delineated in *Vincent* and *Schnieder* and address "the substantive evil without prohibiting expressive activity."<sup>267</sup> There are already both state and federal laws that ban abusive or obscene contact between adults and minors over the Internet.<sup>268</sup> If the state merely elected to enforce those laws more strictly, it would achieve a similar result as an Internet ban without proscribing any protected speech.<sup>269</sup>

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259. See *supra* Part III.C.

260. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The government's interest would be achieved less effectively absent the regulation, but that is not enough to make the statute narrowly tailored.

261. LA. REV. STATE. ANN. § 14:91.5 (2011). See also *supra* Part III.C.

262. See *supra* Part III.C.

263. See *supra* Part III.C.

264. See *supra* Part V.

265. See *supra* Part I.A–B.

266. See *supra* Part III.A.

267. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

268. LA. REV. STAT. ANN. § 14:81 (2012); 18 U.S.C. § 2251 (2006 & Supp. V 2011).

269. Although the existing statutes may be slightly less effective and do not serve the preventative function of Louisiana Revised Statutes section 14:91.5, they infringe on constitutional rights to such a smaller extent that for many websites where the Free Speech potential is high and the risk of abuse low, it would be better to rely on statutes criminalizing unlawful contact with minors instead of criminalizing a sex offender's presence on the website. LA. REV. STAT. ANN. § 14:81 (2012); 18 U.S.C. § 2251.

Therefore, although the statute is not required to make use of the least restrictive alternative, it still must fit the objective of the legislature in some form.<sup>270</sup> Under current precedent, the *narrowly tailored* standard is a balancing test that combines overbreadth, other alternatives, and the fit of the statute and then weighs them against the interest of the state.<sup>271</sup> Louisiana Revised Statutes section 14:91.5 is overbroad and has too many alternatives to be narrowly tailored, as the Supreme Court has previously interpreted the term.<sup>272</sup>

The third factor to consider is whether Louisiana Revised Statutes section 14:91.5 leaves open ample alternative channels of communication.<sup>273</sup> A ban on all Internet communication, or a complete Internet ban, does not leave open ample alternative channels of communication because it forecloses the entire medium of Internet communication and suppresses far too much lawful speech.<sup>274</sup> Only decades ago, the world existed completely without the Internet; people sent letters, read newspapers, and used encyclopedias.<sup>275</sup> Everyone managed to live his or her life sans Internet; however, the world has changed.<sup>276</sup> In modern society, the Internet is the most widespread and one of the cheapest ways for people to express themselves; very few, if any, media can rival it.<sup>277</sup> Furthermore, the popularity of the Internet has made many things obsolete.<sup>278</sup> Few jobs are now possible without email or search engines, and offline methods of political expression have waned due to Internet access by the masses.<sup>279</sup>

A ban cannot foreclose all “effective and economical” methods of communication.<sup>280</sup> Banning an entire medium of speech is impermissible, and Louisiana Revised Statutes section 14:91.5

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270. See *supra* Part III.C.

271. See *supra* Part III.C.

272. See *supra* Part III.C.

273. See *supra* Part III.C.

274. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75–76 (1981); *United Bhd. of Carpenters & Joiners of Am. Local 586 v. Nat’l Labor Relations Bd.*, 540 F.3d 957, 968 (9th Cir. 2008).

275. The Internet was only made public in 1983, and as recently as 1996 less than 1% of the world population were considered to be Internet users. *Exhibits: Internet History*, COMPUTER HISTORY MUSEUM, [http://www.computerhistory.org/internet\\_history/](http://www.computerhistory.org/internet_history/) (last visited Nov. 3, 2011); *Internet Growth Statistics*, *supra* note 243.

276. *Internet Growth Statistics*, *supra* note 243.

277. See, e.g., *Wynton*, *supra* note 26.

278. *Id.*

279. *Id.* See also *supra* note 87 and accompanying text.

280. *United Bhd of Carpenters & Joiners of Am. Local 586 v. Nat’l Labor Relations Bd.*, 540 F.3d 957, 957 (9th Cir. 2008) (quoting *Edwards v. City of Coeur d’Alene*, 262 F.3d 856, 866 (9th Cir. 2001)) (internal quotation marks omitted).

effectively prohibits all expression over the Internet.<sup>281</sup> Furthermore, it is also necessary to consider whether a restriction keeps a speaker from sharing his message with the intended audience.<sup>282</sup> For protected speech online, the audience is the adults across the Internet who may have an interest in the speech that affected registrants would deliver and those who would also like to speak to those affected.<sup>283</sup> Those sex offenders affected are banned both from speaking and from receiving the speech of others.<sup>284</sup> Louisiana Revised Statutes section 14:91.5 effectively silences an entire class of people from delivering any type of speech over the Internet and suppresses vast amounts of protected speech.<sup>285</sup> Furthermore, laws currently exist that punish those who seduce or abuse children over the Internet and that do not restrict the Free Speech of targeted registered sex offenders.<sup>286</sup> Therefore, Louisiana Revised Statutes section 14:91.5 does not leave open ample alternative channels of communication. Although Louisiana Revised Statutes section 14:91.5 is content neutral and serves a significant governmental interest, it should be struck down as unconstitutional because it is not narrowly tailored to the government's interest and because it fails to leave open ample alternative channels of communication.<sup>287</sup>

#### V. CONSTITUTIONAL ALTERNATIVES

Having reviewed the relevant background information and analyzed Louisiana Revised Statutes section 14:91.5, this Comment proposes a redraft of Louisiana Revised Statutes section 14:91.5(C),

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281. *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994). Although Louisiana Revised Statutes section 14:91.5 is not a complete Internet ban, it is a complete Internet-communication ban.

282. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (2008).

283. The intended audience for protected speech is not the children whom the law seeks to protect. True, the law tries to stop abuse or solicitation of minors, but neither of those things are protected. The speech at issue here is the other speech that is banned as a result of the law, not the speech targeted. *See supra* Part III.B. Because the audience in this case is everyone on the Internet who would come into contact with those restricted in communication, were they not so restricted, the nature of the Internet makes them a nebulous and hard to define group. However, that does not mean that there is not an audience out there with an interest in a legitimate message or that this law is not keeping them from receiving that message or from delivering their own.

284. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating that the right to Free Speech includes the right to receive speech from others).

285. *See supra* Part I.C.

286. LA. REV. STAT. ANN. §14:81 (2012); 18 U.S.C. § 2251 (2006 & Supp. V 2011).

287. *See supra* Part III.C.

the section of the statute that defines the prohibited websites. Adopting this redraft would make the statute constitutional for Free Speech purposes.<sup>288</sup>

C. For purposes of this Section:<sup>289</sup>

(1) “Chat room” means any Internet website through which users have the ability to communicate *instantaneously* via text and which allows messages to be visible to all other users or to a designated segment of all other users. *This definition does not include a website that provides only one of the following services: photo-sharing, electronic mail, message board platform, or the facilitation of commercial transactions.*<sup>290</sup>

(2) “Minor” means a person under the age of eighteen years.

(3) “Peer-to-peer network” means a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server. *This definition does not apply to peer-to-peer networks used only for employment activities.*<sup>291</sup>

(4) “Social networking website” means an Internet website which has all of the following capabilities:

(a) Facilitates social interaction or introduction between two (2) or more persons for non-commercial purposes;

(b) Allows users to create web pages or profiles about themselves that display names or nicknames, personal information, or photographs;

(c) Are available to the general public or to any other users; and

(d) Offers a mechanism for communication among users. *This definition does not include a website that provides only one of the following services: photo-sharing, electronic mail, message board platform, or the facilitation of commercial transactions.*<sup>292</sup>

288. See *supra* Part IV.

289. LA. REV. STAT. ANN. § 14:91.5 (2011). The following statute is a redraft of Louisiana’s Unlawful Use statute. It preserves certain sections of the original statute while changing others. Changes appear in italics.

290. The original read: “(1) ‘Chat room’ means any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users.” *Id.*

291. The original read: “(3) ‘Peer-to-peer network’ means a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server.” *Id.*

292. The original read:

(4) “Social networking website” means an Internet website that has any of the following capabilities:

(a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users.

In the quest for constitutional alternatives to Louisiana Revised Statutes section 14:91.5, it is first necessary to identify which sections of the current enactment are unconstitutional.<sup>293</sup> Subsections (A),<sup>294</sup> (B),<sup>295</sup> and (D)<sup>296</sup> of Louisiana Revised Statutes section 14:91.5 do not pose any Free Speech constitutional issues and therefore are not included in this proposed redraft of the statute. The fact that Louisiana Revised Statutes section 14:91.5 singles out certain sex offenders in subsection (A) should be deemed constitutional.<sup>297</sup> The drafters of the law tried to apply it narrowly—only to certain sex offenders who had previously used computers or targeted children in their crimes.<sup>298</sup>

The definitions in Louisiana Revised Statutes section 14:91.5(C) pose a problem under a Free Speech analysis.<sup>299</sup> Considering the current jurisprudence, the banned websites are overbroad and thus an unconstitutional infringement on Free Speech.<sup>300</sup> The language employed by similar statutes in other states is the best place to begin analyzing the wording of Louisiana Revised Statutes section 14:91.5.<sup>301</sup> By using concepts from other

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(b) Offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging.

*Id.*

293. *See supra* Part IV.

294. LA. REV. STAT. ANN. § 14:91.5(A) (2011). This section discusses to whom the statute applies.

295. LA. REV. STAT. ANN. § 14:91.5(B) (2011). This section provides for a probation officer exception. While there are possible Due Process Clause issues with this section, those are beyond the scope of this Comment.

296. LA. REV. STAT. ANN. § 14:91.5(D) (2011). This section discusses penalties for violations of the statute.

297. *See supra* Part II.B.

298. LA. S. JOURNAL, Reg. Sess., No. 27, at 550 (2011). *See also supra* Part II.B. Targeting offenders who have completed their sentences, especially when the restriction is closely related to the crime of which the felon was previously convicted, is not necessarily unconstitutional.

299. *See supra* Part IV.

300. *See supra* Part IV.

301. *See supra* Part I.A. Some statutes have definitions that are narrow enough that they do not infringe on sex offenders' rights any more than necessary to protect children from abuse. Those laws focus not on the communication possible via the targeted website but instead create multifactor tests incorporating more than one aspect of social networking websites, like registration and profiles, making communication only one factor. Those factors often include basic qualities of social networking sites like a password and log-on information, a profile with personal information, and the ability for strangers to view others' profiles. Other states have also included specific lists and descriptions of sites excepted from the ban. Among the most important of those

states, as well as narrowing the definitions in Louisiana Revised Statutes section 14:91.5, a redrafted statute would reflect only those sites that the Louisiana Legislature actually intended the statute to target (the traditional social networking sites) and would be much more likely to withstand constitutional scrutiny.<sup>302</sup>

This Comment proposes changes to three definitions in Louisiana Revised Statutes section 14:91.5(C). The first is the definition of *chat room* in Louisiana Revised Statutes section 14:91.5(C)(1). Under this redraft, it differs from the current definition in two minor ways.<sup>303</sup> The previous definition covered every website with the possibility of communication by text that others could see; most of the Internet meets that definition.<sup>304</sup> By adding the word *instantaneously*, the legislature would eliminate more standard websites, such as message boards, political websites, and news sites, while still preserving the ban on traditional chat rooms. The proposed legislation also has a second sentence at the end providing an exception for certain websites. By allowing sex offenders to still use chat rooms for low-risk but important websites, such as those used for email or commercial transactions, they would tailor the statute much more closely to those sites where children are most in danger from recidivists.<sup>305</sup> Those two changes would narrow the definition to cover much less of the Internet while still banning traditional chat rooms—often considered locations on the Internet where predators find new child victims.<sup>306</sup>

The definition of *social networking website* should also be revised for the statute to pass constitutional scrutiny.<sup>307</sup> This Comment's proposal creates a four-factor test, and for a website to be restricted it must meet all four factors, not just one. Such a test with multiple mandatory factors focuses on social networking sites while still preserving access to other important sites.<sup>308</sup> Furthermore, those factors add a purpose clause and restrict the types of profiles that are targeted. Websites that are not actually designed for people to connect or meet others socially would not be covered, and neither would sites whose "pages or profiles" do not meet certain standards or are not available to people beyond the consumer. The proposed

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include email, message forums, job search sites, and sites that facilitate commercial transactions between members, such as craigslist.

302. See *supra* Part IV.

303. See *supra* Part I.C.

304. See *supra* Part I.C.

305. See *supra* Part III.C.

306. See *supra* Part III.C.

307. See *supra* Part III.C.

308. See *supra* Part I.A. Statutes from some other states have taken a similar approach.

change also includes an exception clause for websites that should not be covered by the statute for the same reason that the definition of *chat room* contains an exception: The sites' potential for abuse is reduced, and the sites are especially important for people to function in modern society.

Finally, the proposal adds an exception to the definition of *peer-to-peer network*. The primary situation in which peer-to-peer networks hold legitimate importance in modern life is the employment context.<sup>309</sup> Many offices maintain networks to facilitate information and file sharing.<sup>310</sup> Because job access to an employer's network is also one area where there is little potential for abuse of children, the exception is important to maintain the rights of those affected by the statute while giving up very little in the protection of children.<sup>311</sup>

Further additions could also benefit the law.<sup>312</sup> More exceptions for work or job search related Internet activity would be greatly beneficial.<sup>313</sup> The statute could also contain an exemption for websites that ban minors because there is minimal potential for the abuse of minors on a site where they are absent.<sup>314</sup> Communication with family members over social networking websites could also be protected; however, it may be difficult for the state to confirm that an offender is truly only communicating with family members.<sup>315</sup> Making the changes proposed in this Comment would allow the Louisiana Legislature to demonstrate that Revised Statutes section 14:91.5 is not meant to ostracize or punish sex offenders but instead is purely for the protection of children.

#### CONCLUSION

As it stands today, Louisiana's Unlawful Use of the Internet Statute is unconstitutional. However, that is a result of the overbroad wording of the definitions in the statute and not the

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309. *Definition: Peer to Peer*, SEARCHNETWORKING, <http://searchnetworking.techtarget.com/definition/peer-to-peer> (last visited Nov. 3, 2011).

310. *Id.*

311. *Id.* See also *supra* Part III.C.

312. These, however, are not as important for constitutionality and would be more at the discretion of the legislature.

313. See *supra* Part IV.B.

314. This raises the problem of what it would mean to say that a website does not allow minors. Many websites may state that they do not permit minors to access their webpage but have no mechanism to confirm the age of those using their services. Very few websites that claim to exclude minors actually extrinsically check the age of their users, partly because doing so on the Internet is very difficult.

315. Wynton, *supra* note 26, at 1900.

legislature's intent. The Louisiana Legislature is certainly entitled to examine methods to keep sex offenders off of social networking sites populated by minors, especially when the statute only targets those offenders who committed their crimes against children. However, it is unconstitutional to ban sex offenders from the Internet completely, or even almost completely, under the guise of a social networking ban.

The government may constitutionally ban sex offenders from social networking sites. Because sex offenders are felons, despite having finished their sentences, they can be legislated against as a group when such an action is reasonably related to the crimes committed. The mere fact that Louisiana Revised Statutes section 14:91.5 applies to sex offenders who have finished their sentences and paid their debts to society does not mean that the law is necessarily unconstitutional. The statute targets only those who committed their crimes against children or with a computer; therefore, it is sufficiently narrow.

However, the problem with Louisiana Revised Statutes section 14:91.5 arises in the extent of its Internet restriction. Although limited situations exist in which complete Internet bans have been approved on a case-by-case basis for probation, parole, or supervised release, a complete Internet ban is overbroad and a violation of Free Speech. Other states have passed laws that are similar to Louisiana Revised Statutes section 14:91.5, but they target a much narrower slice of the Internet. A complete ban of communication over the Internet is unnecessary to protect children from sexual predators. If Louisiana narrowed the scope of its Unlawful Use Statute to cover only traditional social networking sites, the law would pass constitutional muster. Children would still be protected from predators in chat rooms and on social networking websites where they are most vulnerable.

However, a narrower Internet ban would not leave children defenseless across the rest of the Internet. Instead, the state would have to prosecute sex offenders using already-existing prohibitions on the abuse of minors for some websites where the Free Speech potential is higher and the risk of abuse is lower. The solution to sexual abuse of minors over the Internet is not to violate the rights of sex offenders but to protect children and to discourage recidivism as much as possible while remaining true to the Constitution.

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